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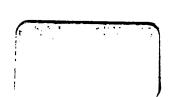
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THE

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SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, COLORADO, WASHINGTON, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING, UTAH, NEW MEXICO, OKLAHOMA, AND COURT OF APPEALS OF COLORADO.

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THE

PACIFIC REPORTER.

VOLUME 37.

STATE V. ANDERSON.

(Supreme Court of Montana. July 9, 1894.) CRIMINAL LAW— NEW TRIAL — PREJUDICE OF JU-ROR—NEW EVIDENCE.

1. A new trial will not be granted on affida-vit of a stranger that a juror told him that he had used improper language in the jury room, as against affidavits of the juror in question, and six other jurors, denying that he had used such language.

2. A juror's expression of opinion after verdict and discharge of the jury is not evidence

of his prejudice in the case.

3. A juror's opinion, ex 3. A juror's opinion, expressed before he was called, that defendant was a "tough citi-zen," would not show that he was prejudiced,

sen," would not show that he was prejudiced, in the face of his voir dire testimony that he had no prejudice, and had formed no opinion as to defendant's guilt or innocence.

4. When a juror, who duly qualified on voir dire, is out of the state, and unattainable for the hearing for new trial, the court is not shown to have abused its discretion in refusing a new trial on an affidavit which, without detailing circumstances, baldly states that the juror, before trial, made the "unqualified" assertion that defendant "ought to be hung."

5. New evidence, which only tends to impeach defendant's own witness, is no ground for new trial.

6. Defendant having been convicted of murder in the first degree, and sentenced to death,

der in the first degree, and sentenced to death, his accomplice, who had turned state's evidence, and had his plea of guilty in the second degree accepted, made an unsworn statement to the judge that he had lied on the trial, and had alone committed the murder. It did not appear here here here the state of the state pear how he would testify in another trial, and his statement was inconsistent with any theory based on the facts otherwise proved. Held. that there was no ground for a new trial.

Appeal from district court, Tark county; Frank Henry, Judge.

Robert A. Anderson, informed against as Robert Field, convicted of murder in the first degree, appeals. Affirmed.

Sidney Fox and M. R. Wilson, for appellant. H. J. Miller, E. C. Day, and Henri J. Haskell, for the State.

DE WITT, J. The defendant was convicted of murder in the first degree. He appeals from the judgment. His motion for a new trial was denied. He now asks us to review the alleged causes for a new trial which he set up on that motion. We will examine them in their order:

v.37P.no.1-1

1. Misconduct by the juror Rich: It is set forth by the affidavit of S. M. Nye that he had a conversation with Juror Rich after the trial, in which said Rich said to him substantially as follows: "When we went out, four of the jury were in favor of acquitting the defendant. I told them that if we were going to acquit the defendant, or have a hung jury, that we had better send up and have our Winchesters brought down to us, and have them loaded to the muzzle; that, if we did not convict, we dare not face the people without our guns." The affidavit of a juror as to his misconduct in the jury room is not to be taken to impeach his verdict. See cases cited in Gordon v. Trevarthan, 13 Mont. —, 34 Pac. 185. If what a juror says on oath, by affidavit, is not to be taken to impeach his verdict, it would seem, a fortiori, that what another person says that the juror said should not be taken for such purpose. But, if the Nye affidavit were to be considered, Rich denied by affidavit that he used such language, and six of his cojurors, by affidavit, deny that he (Rich) had used any such language in the jury room as was attributed to him by the Nye affidavit. Territory v. Burgess, 8 Mont. 57, 19 Pac. 558. The decision of the court, in denying a new trial on this ground, was unquestionably correct.

2. The defendant presented affidavits that recited that, since the trial, Juror Rich had said: "If that man gets a new trial, and is turned loose, he shall never get out of this town alive. I will shoot him down with my own hand, like a dog." Rich, in his affidavit used on the hearing, does not deny that he made use of these expressions, but he says that they were all made since the verdict was rendered, and that his opinion so expressed was formed by hearing the evidence adduced at the trial, and that w'en he was impaneled as a juror he had no bias or prejudice whatever. These expressions are urged as showing prejudice by the juror "Prejudice" means "prejudgment;" Rich. "judgment beforehand." Rich's statements certainly show his opinion or judgment as to defendant's guilt. His verdict also showed that, as it ought. But the expressions do

not show his prejudgment or prejudice. The showing is uncontradicted that this was the juror's afterjudgment,—his opinion after the trial,—and formed upon hearing the evidence. His opinion of the guilt of the defendant, after the trial, and after verdict of guilty, cannot be taken as proof that he held such opinion before the trial, in the absence of any showing that he did hold such opinion, and in the presence of the express showing that he did not hold any such opinion before the trial. This ground for new trial was also properly overruled by the court.

3. Disqualification of the juror Rife, by reason of expression of opinion, showing bias, made before the trial, is the next ground for new trial presented. Rife was a juror called on open venire after the regular panel was exhausted. W. Altimus makes affidavit that he was in the sheriff's office one day after the killing of deceased, and before the trial; that Rife came in, and "when informed that Field, the defendant, was in jail, charged with the murder, he said, You had better watch him pretty close, for he is a tough citizen,' or words to that effect." Rife has had no opportunity to deny the matter set up in this affidavit since it was made. He has been absent from the state, and, in the haste of making this motion for a new trial, he could not be reached. But Rife did testify under oath, on his voir dire examination, and subject to cross-examination as to details, that he had no bias or prejudice against defendant, nor had he formed or expressed any opinion as to the guilt of defendant. district court had before it the oral examination of Rife, and the ex parte affidavit used against him. This expression alleged to be used by Rife does not tend to show bias or prejudice, or an opinion of the guilt or innocence of the defendant. Territory v. Burgess, 8 Mont. 57, 19 Pac. 558. Because a juror may have a general opinion that a defendant is a "tough citizen" is not evidence of the possession by such juror of the opinion that the defendant is guilty of the particular crime with which he stands charged; especially when the juror testifies, under examination and cross-examination, that he knows nothing about what purport to be the facts of the case, and has no opinion as to the guilt or innocence of defendant. Most bad men have a reputation in the community in which they live. A knowledge of such reputation, coupled with ignorance of all the alleged facts of the offense charged against defendant, and an absence of all opinion, bias, or prejudice, is not a disqualification of a juror. Again, as to Juror Rife, we have the affidavit of H. H. Ash, in which he says "that he is personally acquainted with, and well knows, a certain Frank Rife, who was a juror on the trial of the above-entitled action, upon which trial defendant was on the 18th day of May, 1894, convicted of the killing of one Emanuel Fleming, at the city of Livingston, on the 20th day of April, A. D. 1894, and a verdict of murder in the first degree brought in and rendered; that on or about the 10th day of May, 1894, and before said Rife was summoned as a juror in said cause, affiant had a conversation with said Rife, in which conversation said Rife made the unqualified assertion, 'Field ought to be hung." Upon affidavits of this nature, Mr. Justice De Wolfe pertinently remarked in Territory v. Burgess, 8 Mont. 57, 19 Pac. 558, as follows: "In this connection, it is not improper to say that the temptation is strong on the part of a defendant who has been convicted in a criminal case, and particularly on the grave charge of murder, to try and obtain a new trial on the two grounds alleged in this case,-of misconduct of the jury, and incompetency of a juror by reason of having expressed an opinion in the case. These, when the facts clearly establish the misconduct in the one case, or the expression of an opinion by a juror in the other, are plainly sufficient grounds for granting a new trial. But in view of the temptation on the part of the defendant, and also on the part of his friends, to obtain a rehearing in the case of conviction, and in view, also, of the facility with which affidavits for this purpose can be obtained, courts should closely scan affidavits procured for that end, and, unless convinced of their correctness, should not be influenced by them in granting a new trial; and this, we think, has been the action of the district court in the present case." As above noted, there was no opportunity to obtain Rife's statement as to the truth of the Ash affidavit. The motion for new trial was necessarily hurriedly prepared, and heard less than 24 hours before the time set for the execution of the defendant. Rife was out of the state, and could not be reached. Under such circumstances, there would be a great temptation to a friend of the defendant to make such an affidavit as the Ash affidavit. Both the affidavit and the circumstances should be closely scanned. They doubtless received such scrutiny from the learned district judge. He had heard Rife's oral examination on his voir dire, in which he stated that he had not formed or expressed any opinion as to the guilt of defendant. Against that, he had this affidavit, made under the circumstances that it was, and wholly wanting in any details. The affiant does not say where he and Rife were when Rife made the statement, or who, if any one, was present, or whether any one was present. He wholly omits all the context of the conversation in which Rife is alleged to have made the statement. It is not stated what called forth the remark by Rife. Affiant simply says that Rife made the "unqualified assertion." We have no means of knowing what affiant's notion of the word "unqualified" was. If the facts and circumstances, and surroundings of the parties, the context of the conversation, what led to the remark,

and the occasion for it, had been given in the affidavit, a reviewing court would have some grounds upon which to determine whether the statement alleged to have been made by Rife was "unqualified," and whether the district court abused its discretion in discarding this affidavit, as against the oral examination of the juror. It is said in the Burgess Case: "The affidavit was ex parte, while the juror was examined openly in court, and was interrogated by counsel for defendant, as well as by the court. The court had a full opportunity to see the demeanor of the witness, as well as to hear his words, and, from both, was doubtless convinced of the sincerity and truth of his statement; otherwise, the court would not have overruled the motion for new trial. In this we cannot say that any error or abuse of judicial discretion was committed." If such skeleton affidavits are to be entertained by an appellate court, on which to grant a new trial, after the district court (with its near view of all the circumstances, and its personal inspection of the juror upon his examination) has discarded them, then all the murderer's friends need do is to watch for the absence of some juror, on the verge of execution, and make such an affidavit as the one before us. We think this case comes within the doctrine of the Burgess Case. Mont. 57, 19 Pac. 558. In that case, it is true, the alleged offending jurors made a counter showing, under oath, on the motion for a new trial. That element in the Burgess Case is absent from the case at bar. But we are of opinion that this absence is compensated for in the fact that the motion for new trial here was made upon the eve of the execution of defendant, when Rife could not be obtained to make a counter affidavit, and the fact that the district judge had the oral voir dire examination and crossexamination of Rife, and the further fact of the character of the affidavit itself, as shown above. We have thus satisfied ourselves that this ground for a new trial was properly overruled by the district court.

4. Newly-discovered evidence is also set up as a ground for a new trial. William Mortimer testified upon the trial that he and defendant Field together killed the deceased. Mortimer was the only eyewitness of the killing who testified to the fact on the trial. He described it, and the movements of defendant and himself, before and after the killing, in great detail. The murder was committed about 9:30 p. m., in the outskirts of the city of Livingston. Shortly after the assault upon deceased, Field offered himself, and was accepted, as a member of the sheriff's posse. He went out on horseback up the river. He called upon the people at several houses, without arousing them. He awakened one Charles Atkins about three miles from Livingston. Defendant testified to this himself. Defendant called Atkins as a witness. Atkins testified that Field aroused him, at his home, at 1:30 a. m. following the killing of deceased. Atkins testified that Field told him, to some extent, how the The state has taken killing was done. the .position that, according to Atkins' testimony, Field told Atkins more details as to the killing than any one could have known at that time unless he had been a participant in the assault. It seems that this matter told strongly against defendant. On motion for new trial comes George B. Scott, and makes affidavit that on the same night, between 1 and 2 o'clock a. m., he aroused Atkins, and informed him what had occurred, and what was known of how it was done. But he does not state what he knew then, or what he told Atkins, of how the murder was done. Atkins had testified that Field's call was the only notice he had received that night of the murder. Scott's affidavit, as above noted, was presented on the motion for new trial as newly-discovered evidence. It is nothing more than an attempted contradiction of Atkins (Field's own witness) in respect to Atkins' statement that his only information of the murder on that night was from Field. This is not a ground for a new trial, and it was properly so held by the district judge.

5. Other alleged newly-discovered evidence was presented as a ground for granting the motion for a new trial, which we will now consider: As observed above, William Mortimer was the only witness for the state who testified as an eyewitness of the fatal assault upon the deceased, Emanuel Fleming. His testimony was direct, positive, and minutely detailed, as to the killing of Fleming by himself and Field. No one in behalf of defendant has ever contended that the evidence was not sufficient to sustain the verdict. No motion for a new trial was made upon the ground that the verdict was contrary to the evidence. The time to make such motion was allowed to pass. It is appropriate to state here that in our opinion the evidence is amply sufficient; and by this we mean, not only the testimony of Mortimer, the accomplice, but also all the facts and circumstances, and the conduct and admissions of the defendant himself. On May 22d judgment was rendered, sentencing defendant to be executed June 22d. On June 17th the witness Mortimer stated to the Honorable Frank Henry, judge of the district court, that he (Mortimer), alone, murdered Fleming. He made this statement to Judge Henry orally. He also gave to the judge the following writing: "Livingston, Montana, June 17, 1894. I, William Mortimer, hav swor to lies on the stand in the district cort on the trile of Bob Anderson who was on trile for the murder of Emanul Fleming. I was the man that did the dede I was promist by John Hogan that if I wold turn stats evedance that the dores of the county jale wold be throw open and I wold go forth a free man and also promist by County Attor

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ney Miller that not a hair on my head wold be harmed I murdered Fleming unaded and alone Anderson did not now anything about it He is as inocent as a babe unborne. I have had enough of truble about the afair and do not wish to kep my secrit longer. If the govnor will not turn Anderson lose I will call on the people of Park county to do it, as Robert Anderson is as inocent of the crime as the govnor is. I have bin lead to what I did through Hogan and did swere Robert Andersons life away but I have come to my sences I think before it is to late. Willie Mortimer." This writing was given by Judge Henry to defendant's counsel. The writing, and the statement made orally by Mortimer to Judge Henry, are made the basis of a motion for a new trial on the ground of newly-discovered evidence. The argument of defendant is that this "confession," as we will call it for the sake of a name, is newly-discovered evidence that Mortimer lied in a vitally material matter upon the trial. The state replies that it was the contention of defendant on the trial that Mortimer was lying, and therefore this alleged newly-discovered evidence is only cumulative or impeaching, and hence not a ground for a new trial. We think we may pass this contention of counsel, and place our decision upon another ground; that is, that the alleged newly-discovered evidence in this case was not sufficient, under the facts and circumstances developed, to r. verse the decision of the district court, and direct it to grant a new trial, even if it were conceded that such evidence was not simply cumulative or impeaching. If, instead of such a showing as we have in this case, there were presented to a court, on motion for a new trial, a showing whereby it clearly appeared, to the satisfaction of a reasonable judicial mind, that the principal and only eyewitness for the state, upon whose testimony, without corroboration, the conviction depended, had lied in his material testimony, we are not prepared to say that the court hearing such motion should not grant the same. But, as above remarked, passing this matter, we will decide this ground for a new trial upon our opinion that the district court should be sustained by reason of the insufficiency of the alleged newly-discovered evidence, in whatever light it may be viewed. We will state our reasons for this opinion: but first it may be observed, in passing, that the state makes a showing on the motion, by affidavit, that Mortimer's statement, as given in evidence on the trial, was given voluntarily. In Mortimer's written statement of June 17th, he says that he swore to lies on the trial. But the only lie which he claims he was guilty of was his connecting Field with the murder. He still leaves himself in the case as a participant. He still leaves in the case the great mass of details and circumstances, aside from the actual participation by Field in the fatal assault. In fact, by his statement of June 17th, Mortimer simply lifts Field out of the case for the few minutes while the actual striking and shooting took place. These men were intimate. They lived together. They were companions. Mortimer is a boy of 17. Field is 28. They had been living together in a cabin a few miles from Livingston. They came to town this afternoon separately, and each put his horse in the stable belonging to Mortimer's mother. They went down town together, and then returned to the Mortimer house. They were there shortly before the killing. Defendant said he was going to the house of a relative near by. Mortimer invited him to return, and stay all night. After the killing, Mortimer got Field's horse, and rode off to the cabin where they had been living. Field knew that Mortimer had taken the horse, and followed him directly to the cabin. But we do not think it is necessary, in this opinion, to state the great mass of testimony, which covers several hundred pages of the record. Counsel, in an extended and able argument, have presented everything which seemed to them important. We have listened attentively, and have studied this case thoughtfully, as becomes the gravity of the result of an affirmance; and, without writing down the analysis which has brought us to the result, we feel ourselves wholly justified in saying that all the facts, details, circumstances, and the vast minutiae of the case, are entirely consistent with the truth of Mortimer's testimony on the trial,-that he and Field killed Fleming. The more we analyze the case the stronger grows confirmation of this view. On the other hand, the facts, details, circumstances, and minutiae are totally inconsistent with the truth of Mortimer's confession of June 17th. We could not construct a narrative of the case, as we find it in that part of the evidence which is left untouched by the confession of June 17th, which would make a story consistent with Mortimer alone being the murderer. It is thus that the alleged confession appears to us in reading the whole case in cold and unsympathetic print. Judge Henry arrived at the same result as we do, but he had the living witnesses. He even had the confession of Mortimer by word of mouth and personal presence. We do not hesitate to say that we cannot disturb his decision. It may be further observed, as confirming our view that the district court should be sustained, that there is no showing that Mortimer would testify on another trial differently from that which he testified on the first. No one says that he would. The only suggestion that he would is his statement made to Judge Henry, not under oath. It is proper to observe another fact in this case. Field had been convicted and sentenced. Mortimer had pleaded guilty of murder in the second degree. His plea had been accepted. He was awaiting sentence, and Field was within a few days of execution.

Then Mortimer promulgates this statement of June 17th. It looks much as if he considered that he had made himself safe from a sentence for murder in the first degree, and then used one more effort to save his accomplice. If a new trial is to be granted on such showing, there is nothing to prevent Mortimer from playing battledore and shuttlecock with the Field case for all time. The Mortimer confession came to the district court in such questionable shape, and so utterly discredited by everything in the case, that we cannot say that the learned judge of the district court was wrong in discarding it

Finding no error in the case, it is ordered that the judgment be affirmed. It appearing that a respite has been granted by the governor until Friday, July 13, 1894, in order that defendant might present his appeal in this court, it is further ordered that the judgment of the district court be carried into execution as provided in section 377 of the criminal practice act. Remittitur forthwith. Affirmed.

PEMBERTON, C. J., and HARWOOD, J., concur.

KLEINSCHMIDT et al. v. GREISER et al. (Supreme Court of Montana. June 25, 1894.)
IRRIGATION — APPROPRIATION — ABANDONMENT—
SUBSEQUENT APPROPRIATIONS.

1. Where one constantly uses water appropriated for his land, but from time to time diverts it through different ditches, the abandonment of one ditch does not constitute an abandonment of the water right, so long as the water continues to be diverted through another ditch.

2. Where one's appropriation of water is not more than enough for his lands available for irrigation, his appropriation is not cut down, by the subsequent appropriation of another, to an amount sufficient to irrigate the land he had already under cultivation.

Appeal from district court, Lewis and Clarke county; H. R. Buck, Judge.

Action by T. H. Kleinschmidt and another against Gus. Greiser and others. Judgment for plaintiffs. Defendants appeal. Reversed.

Shober & Rasch, for appellants. Toole & Wallace, for respondents.

PER CURIAM. The purpose of this action is to adjudicate and determine a controversy between plaintiffs and defendants regarding their priority of right, by appropriation, to use the waters of Prickly Pear creek and its tributary, Cañon creek, situate in Lewis and Clarke county, for irrigation of agricultural lands adjacent thereto. Plaintiffs allege appropriation about November 11, 1882, of 4,000 inches of water from Cañon creek, a tributary of Prickly Pear creek, diverted by means of a dam and ditch, whereby that quantity of said water is conveyed to the lands of divers persons, who own said

dam and ditch in common; that such appropriation on the part of plaintiffs is prior to defendants' appropriation of the waters of said creek; that defendants have wrongfully interfered with and removed said dam, thereby preventing plaintiffs' diversion of the waters from said creek, and threaten to continue so to do, thus depriving plaintiffs of the use and enjoyment of their alleged prior right to the use of said waters. Wherefore, they seek judgment establishing their alleged right as prior to that of defendants, with permanent injunction forbidding defendants' interference therewith. Defendants, by answer, allege appropriation and diversion of diverse quantities of the waters of Prickly Pear creek by them, respectively, or their predecessors, aggregating 1,900 inches, according to statutory measurement, all of which appropriations on the part of defendants are alleged as of dates several years prior to the appropriation by plaintiffs. Defendants also allege that their several appropriations were and are necessary for the irrigation of the agricultural lands owned by them, respectively. The jury sitting in the trial appear to have returned findings satisfactory to defendants, awarding them, severally, about the amount of water claimed prior to plaintiffs' appropriation; but the court modified the findings of the jury, and supplemented the same by some further findings, whereby the quantity of water found by the jury to have been appropriated by defendants, prior to the appropriation by plaintiffs, was diminished to 320 inches, distributed among them as follows: Greiser, 60 inches by appropriation of 1871; Leedy, 40 inches by appropriation of 1871, and 40 inches by appropriation in 1868; Kenck, Duffy, and Coppler, jointly, 180 inches by ap-Fellowing those propriation March 1, 1882. appropriations, in order of time, the court found plaintiffs appropriated 1,760 inches of water of said creek, necessary for their use in the irrigation of their agricultural lands. There were some further appropriations found in favor of defendants, but of dates subsequent to the appropriation by plaintiffs. Decree was entered accordingly. Defendants appeal, insisting that the court erred in several points specified, all of which have been carefully considered in the light of the record.

The first proposition urged by appellants is that, notwithstanding this case is properly classified as in the nature of an action in equity, the court is bound, by virtue of the peculiar provisions of section 250, Code Civ. Proc., to make its decree in conformity with the verdict of the jury. This proposition has been several times argued to this court, and given due consideration, resulting on each occasion in the conclusion, remarked in Arnold v. Sinclair, 12 Mont. 248, 29 Pac. 1124, that it will not be presumed, from any devious or uncertain language, that the legis-

Inture undertook to prune away one of the most distinctive and important jurisdictional functions of the equity court; and that when a statute is found, clearly expressing that intention, it will be time enough to inquire whether the legislature possessed power to that end.

Passing to a consideration of the points of error specified in relation to the finding of fact, we find that the record, which purports to contain a transcript of all the evidence introduced, does not disclose evidence sufficient to support the finding by the court that defendant Greiser abandoned, in the year 1877, all but 60 inches of his original appropriation of the waters of said creek. According to the evidence shown by the record, defendant Greiser constantly used the waters appropriated for his ranch, but from time to time diverted the same through different ditches. and in 1877 he abandoned an older ditch formerly used for the same purpose. does not constitute abandonment of his water right, or any part thereof, not does any evidence in the record support such finding. Nor is there evidence in the record sufficient to warrant the finding by the court to the effect that defendants Duffy and Coppler did not acquire an interest in the Tierney ditch until May, 1885. The undisputed evidence as disclosed by the record, shows that they acquired an interest in said Tierney ditch in June, 1882, and that testimony is corroborated by the joint notice of appropriation of the waters of said creek by Tierney, Duffy, and Coppler, introduced in evidence, which bears date May 25, 1882, and declares their appropriation as of that date. Nor is there evidence in the record sufficient to warrant the finding that, after Duffy and Coppler acquired interests in said Tierney ditch, they enlarged the same to a capacity sufficient to divert the water by them appropriated. The testimony of witnesses on this point is emphatically to the contrary effect, except that of witness Ford, who, under contract, for the owners, continued the excavation of said ditch after Duffy and Coppler acquired interests therein. In his testimony he describes his work upon said ditch, and says that he enlarged or widened the excavation of a portion of the ditch, where the work of Tierney in the excavation thereof was left off; that Tierney directed Ford to widen the ditch in that part, explaining that the last of his excavation was done in the winter, and was not made of sufficient width at that part. But Ford distinctly testifies that it was only the portion of the excavation towards the end, where Tierney left off, that he enlarged. His testimony, under such explanation, becomes consistent with that of other witnesses on this point, all of which is insufficient to support the finding that the part of said ditch already excavated by Tierney was enlarged after Duffy and Coppler acquired interests therein. The effect of the finding by the court on this point would place the appropriation of Duffy and Coppler as of May, 1883, subsequent to that of plaintiffs.

There is another finding by the court to the effect that only a portion of certain ranches owned by defendants were available for irrigation, and apparently upon that theory the quantity of water allotted to them by the findings of the court was very considerably diminished from the amount appropriated and diverted through their ditches, and claimed to be necessary to irrigate their lands. It is always proper to inquire into the question of the necessity and ability to use the quantity of water appropriated and diverted. If it should appear from proper evidence that a portion of defendants' lands are so situate that the water claimed by such defendants could not be diverted thereto, or that the land is of such character or condition as that crops of grass, grain, or vegetables could not be grown thereon with the aid of irrigation, it would seem proper to take such conditions into consideration, in determining the amount of water to which such defendants were entitled. But the evidence in this case does not warrant the finding that only the portions of the lands owned by defendants, as designated by the court, were "available for irrigation." It does not appear from the evidence that there was contention by the litigants that certain portions of the ranches of defendants were of such character, or so situate, as not to be available for irrigation. There was much evidence introduced on the question as to the quantity of water necessary, per acre, to irrigate certain lands owned by defendants, and how the quantity varied when applied to different characters of soil. There was also considerable evidence introduced on the inquiry as to how much land defendants had under cultivation at the date of plaintiffs' appropriation out of the waters of said creek, in the fall of 1882; and some findings by the court tend to indicate that it proceeded, in determining the quantity of water to which defendants were entitled prior to plaintiffs' appropriation, on the theory that defendants were entitled to hold, prior to plaintiffs' appropriation, only a sufficient quantity to irrigate the lands which defendants actually had under cultivation at the date plaintiffs initiated their appropriation. It is not shown with clearness and certainty that the court proceeded on such theory, but certain findings by the court, stating particularly that the defendants named had under cultivation at the date of plaintiffs' appropriation a stated acreage of land, tend to indicate that the court proceeded on the theory that defendants' appropriation of water prior to plaintiffs should be cut down to a quantity sufficient to irrigate the land of defendants actually cultivated at that time. theory, if followed, is, we think, without doubt, erroneous. Thereby a prior appropriator of water would be cut down to the quantity necessary to irrigate the land he

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actually had under cultivation when the subsequent appropriation was made, although the first appropriator's land was all available for production of crops by aid of irrigation, but, at the time of making the appropriation of water necessary for its irrigation, he had not subdued all of it to the plow. The priority under such rule would depend largely upon the time appropriators brought their lands under cultivation, and not upon the priority of appropriation and diversion of the water necessary to irrigate the land owned by the appropriator, as the law provides.

A further objection urged by appellants is that the decree maintaining the dam against defendants' interference, would in certain seasons, in effect, withhold all the water of said creek from appellants,-even that awarded them by the decree prior to the appropriation of plaintiffs. Respondents answer this objection by admitting that the intention of the decree was to have the dam so constructed and operated as to allow the volume of water awarded defendants, prior to the right of plaintiffs, to pass it at all times, if so much water flowed in the creek, and concede that if the decree is not thus conditioned it may be modified to that effect. Appellants also urge that the decree does not provide at what point they may take the water awarded to them in several amounts. It appears to be agreed that the appropriator of water should have the amount to which he is entitled at the place where his ditch taps the creek, and appellants concede that if the decree in this case does not provide that respondents shall allow sufficient water to flow past their dam to give the appellants, at the points where their several ditches tap said creek, the amount of water awarded them, the decree may be modified to so provide. In our opinion that would be a proper provision, and the decree should be conditioned accordingly.

For the reasons above set forth the judgment entered ought to be reversed, and the case remanded to the trial court for revised findings in conformity with the views herein expressed, upon the evidence already before the court, supplemented by such other evidence as may be necessary to ascertain and determine the respective rights involved. The order of this court will be entered accordingly. Reversed.

HARWOOD and DE WITT, JJ., concur.

(14 Mont. 476)

STATE ex rel. COLEMAN et al. v. DIS-TRICT COURT OF THIRD JUDICIAL DISTRICT IN AND FOR DEER LODGE COUNTY.

(Supreme Court of Montana. June 11, 1894.)
Minime—Roads.

The provisions of Comp. St. § 1495 et seq., for obtaining a road to a mine are not repealed by Const. art. 3. § 15, providing that private roads may be opened in the manner to be

prescribed by law, but the necessity and damages shall be first determined by a jury, such constitutional provision merely modifying the statutes so far as they provided for such determination by commissioners; the enabling act and Const. art. 20, § 1, providing that the territorial laws not inconsistent with the constitution should remain in force till altered or repealed.

State of Montana, on the relation of William Coleman and Thomas McGuire, against the district court of the third judicial district in and for Deer Lodge county.

Geo. B. Winston and W. W. Dixon, for relators. C. P. Connelly, for respondent.

PER CURIAM. Application for writ of mandate to the judge of the district court of the third judicial district within and for Deer Lodge county. It appears that relators filed with the clerk of said court a duly-verified petition, as follows: "In the District Court of the Third Judicial District of the State of Montana in and for the County of Deer Lodge. William Coleman and Thomas McGuire, Plaintiffs, vs. William Lorenz, Defendant. The plaintiffs complain of the defendant, and allege: (1) That, at all the times hereinafter mentioned, the plaintiff William Coleman had declared his intention to become a citizen of the United States, and that the plaintiff Thomas McGuire was, at all the times hereinafter mentioned, a citizen of the United States, and that the plaintiffs were, at all the times hereinafter mentioned, and are now, citizens and residents of the county of Deer Lodge in the state of Montana. (2) That the plaintiffs are, and have been since April 4, 1894, the owners of, and are in the peaceable and quiet possession of, the following described mining claim, situated and lying in the county of Deer Lodge, in the state of Montana, to wit, the Alice Placer claim, which is located about five miles from the city of Anaconda, in said county of Deer Lodge, in a westerly direction, and on Warm Springs creek, and in section number twentyfive, in township number five, north of range twelve west. (3) That the defendant occupies a certain mining claim, located just east of the mining claim of the plaintiffs above described, which is described as follows, to wit: Beginning at a point from which a certain notification stake set upon the premises bears south 62 degrees east, 400 distant (said notification stake is located north 30 degrees 55 minutes west from the quarter section corner, between sections 25 and 36, in township five. north of range twelve west, and is 1,424 feet distant therefrom), thence north 28 degrees east 700 feet, thence south 62 degrees E. 800 feet, thence south 28 degrees W. 1,700 feet, thence N. 62 degrees W. 800 feet, thence N. 28 degrees E. 1,000 feet to the place of beginning, the said claim being situated in the southwest quarter of section 25, in township five, north of range twelve west, in the county of Deer Lodge, in the state of Montana. (4) That the location of the said claims with Digitized by GOOSIC

reference to each other is shown by and on the map hereto attached, marked 'Exhibit A,' and made part hereof, and is hereby referred to for a more particular description of the said claims. (5) That the said mining claim of the plaintiffs is so situated that it cannot be conveniently worked, and in fact cannot be worked at all, without a road thereto, which road must necessarily pass over and across the said mining claim occupied by the defendant, above described, which road must be at least twelve feet in width, and must pass over the said claim occupied by the said defendant, from east to west, the said road being particularly described and marked out on the map hereto attached, marked 'Exhibit A,' and made a part of this petition, the said proposed road being designated on the said map as 'Road No. 1.' (6) That the said plaintiffs heretofore, on the 9th day of April. 1894, at the city of Anaconda, in the county of Deer Lodge, in the state of Montana, requested of the said defendant that he give them, the said plaintiffs, a road and right of way over and across the said mining claim occupied by him, for the purpose of working the claim of the plaintiffs, and on the said day tendered to the said defendant the sum of one hundred and fifty dollars to cover all damages which he, the said defendant, might suffer by reason of the said road passing over and across the said claim occupied by him, but the said defendant refused to accept the said sum, and refused, and still does refuse, to allow the plaintiffs to pass over the said claim occupied by him, and said right of way has not been and cannot be acquired by agreement between the plaintiffs and defendant herein. (7) That unless the plaintiffs are granted a right of way over and across the said claim occupied by the said defendant it will be impossible for them to work the said claim, for the reason that the only accessible route to their said claim is over and across the said claim occupied by the defendant. (8) That the plaintiffs are now working on their said claim, and intend in good faith to work the same. Wherefore, the plaintiffs pray that the court award them a road and right of way over and across the said claim occupied by the defendant, for the purpose of enabling them, the plaintiffs, to work their said claim: that the court appoint three disinterested persons, residents of the said county of Deer Lodge, to assess the damages resulting to the defendant, and the said claim occupied by him, by reason of the said road passing over the said claim, and for such other and further relief as to the court may seem proper. Geo. B. Winston, Attorney for Plaintiffs,"-and thereupon presented the same to and prayed the judge of said court to issue a citation to defendant, and otherwise proceed to determine the necessity for, and the damage occasioned by, and award, the right of way on payment of such damage, according to the prayer of said petition, and pursuant to the provisions of sections 1495 et seq., div. 5, Comp. St. That the judge of said court, on consideration of the petition in connection with the provisions of said statute, and section 15, art. 8, of the state constitution, declined to proceed in the premises, holding that said statute was abrogated by the provisions of the constitution cited; and that, the legislature having since made no provision for opening roads pursuant to the terms of the constitution, the court had no jurisdiction to grant the relief prayed for.

On consideration of this question, somewhat prepared for by consideration of other similar, and as serious, questions presented to this court since the inauguration of the state government under the constitution, we reach the conclusion that the view held by the learned judge of the district court should not be sustained. It clearly appears from the provisions made in that regard that it was the policy of both congress, as manifested in the enabling act, and of the framers of the constitution, to preserve in force the body of the statute law on the various subjects of governmental regulation, enacted through a course of years of territorial existence, as statutes of the state, except in so far as those statutes were "modified or changed" by the enabling act, or by the constitution of the state. See Enabling Act; also, Const.art. We think no fact in the scheme for change from territorial to state government is more plainly manifest than that such was the policy of congress and the constitutional convention. This construction keeps well intact the system of government, and the body of the statutes necessary thereto, until the same are repealed or supplanted by other future enactments; whereas, the other view. would wholly sweep away the statute law on any subject wherein the constitution made a change in any respect, and would leave that subject void of legislation until the necessary statute law was supplied by future enactments. Thus, under that view, the grand jury system provided for by the statute, instead of being merely modified by reading into the statute the constitutional provision of "seven" in place of "sixteen," would have wholly disappeared from the statute until replaced by legislative action. State v. Ah Jim, 9 Mont. 167, 23 Pac. 76; State v. Kenney, 9 Mont. 228, 23 Pac. 733. This would have been destructive of government, and extremely disastrous to the well-being of the people of this jurisdiction. Upon the subject immediately under consideration the constitution provides that the question of necessity for, and amount of damages occasioned by, the opening of such road, shall be determined by a jury, instead of being determined by the judge and commissioners, as provided by statute. Otherwise the statute provides a method of procedure in such cases not inconsistent with the constitution. gives jurisdiction to the court, and prescribes a method of procedure, but the constitution modifies this statute by eliminating the commissioners mentioned, and substituting a jury, with power vested in the jury to determine the necessity of the road, and compensation to be awarded if the right of way is granted. By application of the interpretation above suggested, giving sway to the paramount provisions of the constitution, the statute law remains in force, as modified by the constitution, in obedience to the provisions of the act of congress and the constitution, thus preserving the continuity of a fully developed system of government in passing from territorial existence to statehood. We are clearly of opinion that the court should proceed to administer the law under consideration in conformity with this view. Ordered, that the writ issue, accompanied by a copy of this opinion, with directions to proceed according to the views herein expressed.

(14 Mont. 452)

STATE ex rel. HENDRICKS v. SEVENTH JUDICIAL DISTRICT COURT.

(Supreme Court of Montana. June 4, 1894.) COMMON-LAW NUISANCE - PENALTY-CERTIORARI.

COMMON-LAW NUISANCE — PENALTY—CERTIORARI.

1. A penalty of fine and imprisonment cannot be imposed for maintaining a common-law nuisance, under Cr. Laws, § 278 (Comp. St. p. 583), providing that on conviction of a misdemeanor not provided for in the Criminal Laws punishment may be by fine and imprisonment, since section 162 provides that a person who does certain things, or who shall maintain any other thing, which at common law would be a nuisance, shall be fined.

2. Defendant is not confined to appeal to

2. Defendant is not confined to appeal to ebtain relief from a penalty in excess of that allowed by statute, but may use certiorari as auxiliary to habeas corpus.

Certiorari on the relation of Fannie Hendricks to the seventh judicial district court to review its judgment imposing fine and imprisonment on her for keeping a commonlaw nuisance. Judgment modified.

Middleton & Light, for relator. M. J. Mc-Connell, Henri J. Haskell, and C. H. Loud, for respondent.

PER CURIAM. By a writ of certiorari relator seeks review of the proceedings of the district court of the seventh judicial district within and for Custer county in the case of the state of Montana against Fannie Hendricks, wherein she was indicted and convicted of the offense of maintaining a common-law nuisance; and modification of the judgment rendered by said court upon said conviction, on the ground that the penalty imposed exceeded the jurisdiction of the This review and modification of the judgment is sought in view of seeking discharge from imprisonment by writ of habeas corpus on satisfaction of the fine warranted The crime charged in the informaby law. tion is that of maintaining a common-law nuisance, and upon conviction under that information the court assessed a penalty of \$300 fine and three months' imprisonment. Relator's counsel insist that the imprison-

ment imposed by said judgment is entirely unwarranted by law, and exceeds the jurisdiction of the court in that respect, because the statute (section 162, Cr. Laws; page 546, Comp. St.) provides the penalty upon conviction for said offense to be a fine of "not more than \$1,000." On the other hand, the state's counsel contends that the judgment of imprisonment is warranted by section 278, Cr. Laws of this state, which provides that upon conviction of a misdemeanor at common law, not otherwise provided for in the Criminal Code, the punishment shall be by imprisonment in the county jail for a term not exceeding six months nor less than one month, or by fine not exceeding \$500, or by both such fine and imprisonment. It appears that the court proceeded upon this latter provision of the statute in passing sentence upon relator, but it is very clear that said section does not apply to the offense of maintaining a common-law nuisance, because that offense, and the penalty, are especially provided for in section 162, supra, which provides that every person who shall erect or maintain any other thing which would be a nuisance at common law, every person so offending shall, upon conviction, be fined not more than \$1,000. There is no conflict in these statutes, because section 278 provides the penalty in case of conviction of common-law misdemeanors not otherwise provided for in the Criminal Code. That provision, then, by its own terms, does not apply to the offense of maintaining a common-law nuisance, where the statute otherwise provides the penalty for that particular offense. If, however, section 278 contained no clause excepting the offenses otherwise provided for in the Criminal Code, the application of a simple rule of construction—a rule which is embodied in the Code of Civil Procedure (section 631), that a special provision shall be regarded as paramount to a general provision where the two are conflicting or inconsistent-would have led the court to sentence the prisoner under section 162, supra, because that section especially provides the penalty for maintaining a common-law nul-sance. The judgment should be modified by striking out that part which imposes imprisonment in addition to the fine, and it will be so ordered. The prisoner will be entitled to discharge on satisfaction of the fine imposed. Judgment modified.

PEMBERTON, C. J., and DE WITT, J., concur.

HARWOOD, J. (concurring). Respondent, in addition to the questions treated above, raises the point of practice that this proceeding should not be entertained to review and modify said judgment, if found in excess of the penalty prescribed by statute, because, as respondent's counsel insist, relator might obtain relief by appeal. The review on certiorari as auxiliary to the writ of ha-

beas corpus is proper practice, because, whenever relator satisfies the judgment of fine, she would be entitled to discharge instantly; and ought not to be held imprisoned, even while appealing, to avoid the consequence of the excessive and void condition of the judgment, added to that which the law sanctions. And, if not discharged on satisfaction of the fine, the prisoner would be entitled to discharge on writ of habeas corpus, where it was shown, as appears from this review, that "the jurisdiction of the court had been exceeded" in sentencing the prisoner, or where the "process" requiring imprisonment "had been in a case not allowed by law," or "where the imprisonment is not authorized by any provision of law." These provisions are quoted from the first, fourth, and sixth subdivisions of section 1183, div. 5, Comp. St., relating to the writ of habeas corpus. In such cases the slower process of appeal is not adequate, nor, indeed, any remedy against such unlawful imprisonment as would intervene while appeal was being prosecuted. The writ of certiorari, as auxiliary to the writ of habeas corpus, is a convenient method of bringing under review, properly authenticated, the proceedings on which the judgment is founded, and in such connection we think it is properly used.

(14 Mont. 498)

SWEETSER v. DIEHL et al.

(Supreme Court of Montana. July 2, 1894.) Foreclosure of Mortgage—Fraud—Sufficiency of Answer.

In an action to foreclose a mortgage, and for a deficiency judgment, an answer alleging that defendant purchased the property subject to the mortgage, and that a covenant to assume such mortgage was fraudulently inserted in the deed by his grantor, is sufficient, without tender of a deed back to his grantor.

Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge.

Action by Albert G. Sweetser against George B. Diehl and others to foreclose a mortgage. From a judgment for plaintiff, defendant Lee Mantle appeals. Reversed.

The sole question involved in this appeal is whether the allegations of the separate answer on the part of the defendant Mantle are sufficient to constitute a defense. The object of the action is to enforce payment of a promissory note for \$1.300, and foreclose a mortgage executed by defendant George B. Diehl, and Hannah, his wife, on certain real property in the city of Helena, to secure payment of the same, and for a deficiency judgment against Mantle, the grantee of the mortgaged premises, subsequent to the execution of said mortgage, as well as the other defendants, for any portion of said debt remaining unpaid after application of the proceeds of the sale of said mortgaged property. It appears that, after making said mortgage. Diehl and wife conveyed said

premises to defendant Mantle, and it is alleged by plaintiff that in said conveyance, as one of the conditions of the purchase by Mantle, he assumed and agreed to pay said note; and, by virtue of that assumption, plaintiff demands a deficiency judgment against Mantle for any deficiency remaining after the application of the proceeds arising from the sale of the mortgaged premises. In this action, Diehl and wife are in default. Mantle filed his separate answer, wherein he denies, on several grounds, personal liability for payment of said note, or any part thereof remaining unpaid after application of the proceeds from the sale of the mortgaged premises. Demurrer to his separate answer was sustained by the court, and defendant Mantle appealed. The answer of Mantle, which was rejected on demurrer as insufficient, reads (omitting formal allegations) as follows: "Admits that on or about the 16th day of April, 1890, for a valuable consideration, and by regular deed of conveyance, the said George B. Diehl and wife sold, granted, and conveyed the premises described in plaintiff's complaint to this defendant, subject to plaintiff's mortgage; but defendant denies that he covenanted with and promised the said George B. Diehl, except as hereinafter set forth, as part or for any consideration therefor, that he, the said Mantle, would assume and pay the plaintiff's said mortgage. Admits that the deed executed by the said George B. Diehl and wife to him contained the following clause; to wit: 'Subject to a mortgage of thirteen hundred (1,300) dollars made by the parties of the first part to M. Bolles & Co., of Boston, bearing interest at eight per cent., payable half-yearly, which mortgage, together with the interest thereon, the party of the second part hereby assumes and agrees to pay, according to the tenor thereof,'-but alleges that at the time of the execution of said deed, and the acceptance thereof by him, it was without the knowledge on his part that the said deed contained the said clause, and that he had no knowledge of the fact that the said deed did contain said clause until this action was brought; that, at the time of the execution of the said deed. one Charles Jeffreys was the agent of the said defendant Mantle, and acted for the said Mantle in the purchase of the said property; that the only authority given by the said Mantle to the said Jeffreys for the purchase of the said property was to purchase the said property from the said George B. Diehl, subject to plaintiff's mortgage; that the said agent, Charles Jeffreys, had no authority to bind the said defendant, in assuming and agreeing to pay the said mortgage; and that the said Charles Jeffreys, in accepting a deed containing a clause hereinbefore set forth, acted without authority, and without defendant's knowledge. fendant denies that, in part of any consideration for the conveyance of said property,

he promised the said George B. Diehl, that he, the said Mantle, would assume and pay the plaintiff's said mortgage. Denies that he accepted the deed of conveyance, and denies that at his instance and request the same was recorded on the 19th day of April. 1890, in Book 23 of Deeds, page 342; but, on the contrary thereof, defendant alleges that he has never seen the said deed, or accepted the same, and that the same was received by his said agent, Charles Jeffreys, as hereinbefore set forth, and who recorded the same without the knowledge, consent, or authority of the said defendant. Defendant denies that he is now the owner of the said For further answer, defendant property. alleges that, at the time of the execution of the said deed, it was fully understood and agreed upon by and between the said George B. Diehl and Hannah Diehl and the said Charles Jeffreys, as agent of the defendant, that the same deed should be made subject to the mortgage of thirteen hundred (1,300) dollars existing on said premises, and that the said property should be taken subject to the said mortgage; and defendant alleges that through fraud, imposition, and deceit of said George B. Diehl, a clause was inserted in said deed, as set forth in plaintiff's complaint, the said George B. Diehl thereby fraudulently seeking to bind said defendant to assume and agree to pay the said mortgage, but that the said mortgage was not assented to by the said Charles Jeffreys, as agent of the said defendant, and the said deed was accepted by the said Jeffreys without knowledge of the fact that the said clause existed therein." The statute of frauds was also set up in the answer of Mantle as further defense, but no point is made on this appeal respecting that plea. The demurrer to the answer of Mantle states two grounds of objection to that portion of the answer here under consideration: (1) That the facts therein set forth are not sufficient to constitute a defense; (2) that the answer is uncertain and ambiguous.

Corbett & Wellcome, for appellant. Leslie & Craven, for respondent.

PER CURIAM. The ground upon which it is urged that this answer is insufficient in substance to constitute a defense is that if defendant Mantle sought to avoid the condition obliging him to personally assume and pay said debt inserted in said conveyance, on the ground that such condition was inserted by Diehl "through fraud, imposition, and deceit," and the deed containing the same was received by his agent without authority, then defendant should, on discovery of the alleged fraud, have tendered a deed of the land back to Diehl; that Mantle cannot rescind or cancel part of the transaction whereby he took conveyance of said land-namely, the provision in the conveyance obliging him to personally pay said

mortgage debt-without restoration of the property to Diehl and wife; and that this should have been offered and set up in the answer of Mantle. This court is of opinion that this objection cannot be maintained. Mantle acknowledges that he purchased said land from Diehl and wife subject to said mortgage thereon, but without any agreement to personally assume or pay the mortgage debt. Even if Mantle can avoid the alleged assumption or promise to pay said debt on the ground that he never assumed or authorized any one on his behalf to assame said debt, and that the provision for his assumption thereof was fraudulently inserted in said conveyance, this would not enable him to revoke the entire contract whereby he purchased said land. He would be bound in the transaction for the purchase, and could not throw back the land on the hands of Diehl, and recover the consideration which he paid therefor, from Diehl, because there is no ground for that; but he resists the alleged agreement to personally assume and pay the mortgage debt, for the reasons above stated, and set out in his answer. That part of the transaction whereby Mantle purchased said property, he does not seek to avoid, nor does he allege any cause therefor. But it does not follow that he cannot defend against the imposition of a condition upon him, to which, according to the allegations of his answer, he never agreed, and never authorized any agent to contract on his behalf, but which was fraudulently inserted in the transaction, by repudiating such alleged obligation as soon as discovered. If Mantle ought to tender back the premises to Diehl, then he ought to be allowed to recover the amount paid in the purchase of said property, but he could not recover the same because he authorized the purchase. He admits and appears to be willing to abide by the transaction, so far as he entered into it, or authorized it to be entered into on his behalf; but he seeks to defend against the imposition of the obligation upon him which he never entered into or authorized, according to his pleading. Manifestly, the objection of plaintiff in this respect is based upon a ground in no manner affecting his rights. What does it either advantage or injure plaintiff that Mantle shall or shall not tender conveyance of the mortgaged premises back to Diehl? This point, if tenable at all, would properly be raised or waived by Diehl himself, but he does not appear at all in this action. No doubt, it would be inequitable to put upon Diehl a deficiency judgment for said mortgage debt, or any part thereof, without giving him the right to become purchaser of the mortgaged premises on payment of the mortgage debt, because Mantle took the premises in question "subject to the mortgage;" but the law provides such right in favor of Diehl, without canceling the sale of the premises from Diehl to Mantle, as to which sale there is

no question of fraud or deceit, or want of authority on the part of Mantle's agent, alleged. That there is no force in the proposition that his answer fails to state a substantial defense, because defendant Mantle has neglected to tender back the premises in question to his grantor Diehl, is shown by the situation of these parties to the litigation. The premises in question are beholden for the mortgage debt, and must go to satisfy the same. This is conceded by all. Therefore, if Mantle retains the property which he purchased, and had conveyed to him subject to the mortgage, he would be obliged to pay the mortgage debt in full; and that, of course, would relieve Diehl from the obligation thereof. But, if Mantle does not see fit to relieve the property from the incumbrance by payment of the mortgage debt, the premises will be sold for such price as it will bring; and the deficiency judgment would, if Mantle has not assumed the same, fall upon Diehl alone, and the property would go to whomsoever purchased it. Now, Diehl, in order to make the property pay the incumbrance, and avoid a deficiency judgment against himself, is at liberty to see that the property is sold for sufficient to pay off said debt, and thereby compel Mantle, if he keeps the same, to pay the debt, and relieve Diehl therefrom, or Diehl may become the purchaser, and take the property, if he is compelled to pay the debt, or any part thereof. It is therefore manifest, considering the provisions of the law and the position of the respective parties, that there is no necessity to cancel the sale of said property from Diehl to Mantle, which undoubtedly rests upon other considerations, in order to give the party paying the mortgage debt the right to take the property. The objection that the answer is uncertain and ambiguous, we think, is not well taken. Exceptions sustained. Judgment reversed. Case remanded for further proceedings. Reversed.

HARWOOD and DE WITT, JJ., concur.

(14 Mont. 506)

JOHNSON v. BIELENBERG et al. (Supreme Court of Montana. July 2, 1804.) APPROPRIATION OF WATER—CONFLICTING FIND-INGS.

In a suit to determine the rights to the waters of a stream, findings that plaintiff took adverse possession of 150 inches of the water in 1866, and that one of the defendants has had adverse possession of 100 of these inches since 1867, and also that defendant appropriated the 100 inches from the water of the stream in 1867, are inconsistent, and will not sustain a decree awarding to such defendant the 100 inches

Appeal from district court, Missoula county; D. M. Durfee, Judge.

Suit by Peter Johnson against N. J. Bielenberg and others. Defendant Herman Johnson appeals from the decree. Remanded.

Robinson & Stapleton, for appellant. Cols & Whitehill, for respondent.

PER CURIAM. Peter Johnson commenced this action against 21 defendants, to determine the rights and priorities of himself and said defendants in the waters of Dempsey creek, for the purpose of irrigating agricultural lands. Upon the trial, the court found all of their rights, and classified the same, and entered judgment accordingly. Herman Johnson, a defendant, appeals, being dissatisfied with the disposition of a certain 100 inches of water, as between himself, on the one side. and Peter Johnson and Patrick Quinlan, on the other. The court found that Herman Johnson duly appropriated 150 inches in 1866. There is no complaint of this finding. The court then found that Peter Johnson and Patrick Quinlan had, since 1867, held and used adversely to all the world 100 of these inches; but the court also found that Peter Johnson and Patrick Quinlan had obtained this 100 inches, and owned it by reason of appropriation of the same from the waters of said creek in 1867. With these two findings made, the court, in its judgment, gave this 100 inches to Peter Johnson and Patrick Quinlan. Herman Johnson now complains that the judgment as to this 100 inches is not supported by the findings. The difficulty as to this 100 inches of water is that the findings of the court in respect thereto are apparently wholly inconsistent. The court finds that Johnson and Quinlan appropriated this 100 inches of water from the waters of the creek, and then it finds that they got it from Herman Johnson's water by adverse possession. If they obtained their title by the means described in one finding, they did not obtain it in the manner set out in the other finding. If Johnson and Quinlan had held this water by adverse possession against Herman Johnson for the period of the statute of limitations the judgment is supported by the finding which was made to that effect. If the title of Johnson and Quinlan was by the appropriation in 1867 of this 100 inches, then the judgment is not supported by the finding which was made to that effect, because the court also found that the appropriation by Herman Johnson was a year earlier. It is not for us to determine which finding is true. -whether they got their water by adverse possession against Herman Johnson, or whether they attempted to appropriate it from the waters of the creek. The case is therefore remanded, and the district court is directed to take testimony, make fludings, and render judgment, upon this point only; that is to say, as between Herman Johnson, on the one side, and Peter Johnson and Patrick Quinlan, on the other, let it be determined who is entitled to the 100 inches of water out of the 150 inches appropriated by Herman Johnson in 1866, over and above the 50 inches already found by the court to belong to Herman Johnson, in the sixth class of priorities.

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Appellant also calls attention to the fact that Peter Johnson and Patrick Quinlan are awarded 103 inches each, in the fifth class of priorities, when in fact they claimed in their pleadings only 100 inches. Respondent says that this is a clerical error, and concedes that it should be corrected, as demanded.

Let such modification therefore be made, on

remittitur being filed below. Remanded.

Mont.)

STATE v. OSNES.

(Supreme Court of Montana. July 9, 1894.) JURY-SELECTION-ABSENCE OF JURY COMMISSION-- Homicide - Fining Dependant for Re-FUSAL TO ANSWER QUESTION AS A WITNESS -EFFECT—REBUTTING EVIDENCE.

1. Where the absence of one or two jury commissioners will not prevent a majority from selecting the juries (Laws 16th Sess. p. 168, § 12), the fact that the district clerk, who is one of the five commissioners, did not act with, and as one of, the commissioners who selected a jury in a certain case, does not render such jury illegal

jury illegal.

2. On a murder trial, defendant refused to question on cross-examination, answer a proper question on cross-examination, and the court fined him, and threatened to and the court fined him, and threatened to continue to do so until he answered. The court also admonished him that he might prejudice himself before the jury, and advised him to consult his counsel. After consulting them, he answered the question. The court then admonished the jury not to be prejudiced by what had occurre, and to determine defendant's guilt or innocence solely from the evidence. Held, that defendant was not prejudiced or injured by such occurrence.

3. Such admonition to the jury was not an instruction, and erroneous because oral.

4. Defendant, as a witness, denied that on

instruction, and erroneous because oral.

4. Defendant, as a witness, denied that on Thursday or Friday before the killing, on Saturday night, March 31st he went to one B.'s house with deceased and another; that he then stated to B. that he had two Norwegian boys outside, and that they had money, and he wanted B. to help fix them by putting them to sleep, to get the money. Held, that B. could testify in rebuttal that, four or five days before the killing, defendant came to her house with two men; that defendant came in and told her that he had a good chance to make some monthat he had a good chance to make some mon-ey; that he had two fellows lately from Norway, who had money; that he asked her for a spare room; that he wanted her to fix them, but them to sleep,—and asked her if she didn't know how; and that she refused to have any-thing to do with it, and defendant left.

Appeal from district court, Choteau county; Dudley Du Bose, Judge.

John H. Osnes was convicted of murder in the first degree, and appeals.

T. W. Murphy and Geo. W. Sweet, for appellant. John W. Tatten, B. L. Powers, and Henri J. Haskell, for the State.

PEMBERTON, C. J. On the 21st day of May last, the appellant was convicted of the crime of murder in the first degree, in the district court of the tenth judicial district, in and for Choteau county, and was thereafter sentenced to be hanged. From the judgment, and order of the court overruling appellant's motion for a new trial, this appeal is prosecuted.

The appellant complains that the jury that tried him was not a proper or legal jury, for the reason, as shown by affidavit, that the district clerk did not act with and as one of the jury commissioners that selected the jury in this case, as required by law. While it is true that the clerk of the district court is by law one of the five commissioners whose duty it is to select juries, yet section 12, p. 168, Laws 16th Sess., provides that "the absence of one or two commissioners appointed under the provisions of this act shall not prevent a majority of said commissioners from selecting the juries and doing and performing all other acts directed and required to be done under the provisions of this law." There is no showing or contention that appellant has been in any manner injured on this account. There is no error or irregularity in this assignment of which the appellant can properly complain. The appellant complains that pending the trial, and while he was being examined as a witness, the judge abused his discretion by fining the appellant, and using language calculated to prejudice him with the jury. The circumstances are substantially as follows: Counsel for the state, while the appellant was being cross-examined as a witness in his own behalf, asked the appellant a question,—seemingly a proper question; appellant declined to answer, because, he said, the counsel had abused him; thereupon the court fined the appellant, and threatened to continue to do so until he answered. The court also admonished appellant that his failure to answer might prejudice him with the jury; told appellant that he was fair and impartial in the matter, and advised him to leave the witness stand and consult his counsel, saying that he thought his own counsel would agree with the court that it would be best for appellant to answer the question. After consulting with his counsel, appellant agreed to answer, and did answer, the question propounded to him. Thereupon the court remitted the fine it had imposed upon appellant. Of course, these things all occurred in the presence of the jury. Before the jury retired, the court called their attention to these occurrences, and admonished them that they should not permit themselves to be prejudiced thereby,—that they should determine the question of the guilt or innocence of the appellant solely from the evidence in the case. The appellant contends that this admonition of the court was in effect an oral instruction, and therefore error. We do not think it was in any respect an instruction. It was simply an admonition to the jury not to permit themselves to be prejudiced by a matter that had taken place in their presence. While the court displayed some impatience and irascibility, doubtless provoked by the obstinacy of the appellant, still we are unable to discover anything in the language or conduct of the court to authorize us in holding that the appellant was prejudiced or injured thereby. The appellant

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contends that the court erred in permitting one Blanche Brandt to testify in rebuttal. It is contended that the testimony of this witness was not rebuttal. While the appellant was on the witness stand, he was asked by counsel for the state, in substance, if he had not gone to the house of witness Blanche Brandt on Thursday or Friday before the Saturday night on which the deceased was killed, in company with the deceased and another, and if he did not, at that time and place, state to said witness Blanche Brandt that he had two Norwegian boys outside, who had just come from Illinois; that they had money, and that he wanted her to help him fix them by putting them to sleep, to get the money; and if she, Blanche Brandt, did not refuse to have anything to do with the matter. The appellant denied all these things. The appellant testifies that he was at the house of Blanche Brandt about the first part of the month of March, in company with one Enger and one Johnson, but was never there in company with the deceased. After the close of defendant's evidence, Blanche Brandt testified that she knew the appellant well: that, four or five days before she heard of the killing of the deceased, the appellant came to her house with two other men; that the appellant came in and told her he had a good chance to make some money; that he had two fellows, lately from Norway, who had money,-one \$700 and the \$1,100; that he asked her for a spare room; that he wanted her to fix them,-put them to sleep; that he asked her if she didn't know how; that she told him she knew nothing about it, and would have nothing to do with it; that thereupon appellant left. We think this evidence of Blanche Brandt was clearly rebuttal, and admissible as such. While she does not identify either of the persons with appellant as the deceased, yet her testimony does tend to contradict and rebut the evidence of the appellant that he was at her house only once in March, and that early in the month, in company with Enger and Johnson. The deceased was killed on the 31st of March, as the record shows, and the witness Blanche Brandt testifies that it was four or five days before she heard that the deceased had been killed, and she thinks on Friday that the appellant came to her house with the two men from Norway, and sought her aid in fixing and putting them to sleep, in order to get their money. The court permitted appellant to offer evidence to explain and contradict the evidence of Blanche Brandt. The appellant testified, as above stated, that it was in the early part of March that he was at her house with Enger and Johnson. Enger testified that he was at her house, but did not go in, some time in March (he did not know the time in March), with appellant and Johnson. It may be true that appellant, Enger, and Johnson were at the house of Blanche Brandt in the early part of March, but this does not prove that appellant, with deceased and another, were not there also four or five days before she heard that deceased had been killed on the 31st day of March. But whatever of conflict or contradiction there was in the testimony of these witnesses was a matter to be determined by the jury. We think, from any view, the evidence of the witness Blanche Brandt was properly admitted.

The record in this case is imperfect. instructions of the court are not here. is there any contention that the instructions were not fair to the appellant. There is only a small portion of the evidence in the record. But there is no complaint that the evidence as a whole does not warrant the verdict of the jury in this case. The errors assigned are purely technical, and without substantial merit. We are of the opinion that no error has been assigned, called to our attention, or discoverable in the record, that would justify us in disturbing the result of the trial below, solemn and serious as the result may be to this unfortunate appellant. Judgment and order appealed from are affirmed. And it appearing that the appellant has been granted a respite by the executive of this state until the 13th day of July, 1894, pending the presentation and determination of this appeal, it is therefore ordered that the judgment of the court below be executed on that day, in accordance with the provisions of section 377 of the criminal practice act. Remittitur forthwith. Affirmed.

HARWOOD and DE WITT, JJ., concur.

CITY OF ARGENTINE v. SIMMONS et al. SAME v. DAGGETT et al.

(Supreme Court of Kansas. June 9, 1894.) CITIES — GRADING STREET—VALIDITY OF ASSESSMENT.

The grade of Second street in the city of Argentine was duly established by ordinance. Three-fourths of the owners of property fronting on the street thereafter petitioned for the grading of the street. An ordinance providing for plans, specifications, estimates, and the letting of the contract for such grading was thereupon passed, and a contract therefor afterwards duly let. After such letting, another ordinance was passed materially changing the grade of the street. There was no new plan, estimate, contract, or ordinance relating to such work; but the grading was done in accordance with the grade last established, and the city council, after its completion, passed an ordinance assessing the cost against the abutting lots. Held, that such assessment is invalid.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Actions by Harriet Daggett and others and G. H. Simmons and others against the city of Argentine. Judgments for plaintiffs, and defendant brings error. Affirmed.

Both of the above-entitled cases grow out of the grading of Second street, in Argentine, a city of the second class, and they are argued, briefed, and submitted together.

The defendants in error, who were plaintiffs below, are all owners of property abutting on Second street, against which special assessments were levied by an ordinance passed by the council on the 1st of February, 1892. From the special findings of fact made by the court in both cases, it appears that on the 15th of May, 1890, an ordinance was duly passed establishing the grade of certain streets, that of Second street as follows: "Commencing on the south line of Metropolitan avenue, elevation 95.1 feet; thence on a plane to the north line of Silver avenue, elevation 97 feet; thence level across; thence on a plane to the north line of Ruby avenue, elevation 124 feet; thence on a plane to the north line of Paul street, elevation 212 feet; thence on a plane to the south line of Paul street, elevation 215 feet; thence on a plane to the north line of May avenue, elevation 307 feet; thence on a plane to the south line of May avenue, elevation 315 feet." On the 20th day of July, while said ordinance was still in force, a petition signed by three-fourths of the owners of property fronting on Second street, between Metropolitan avenue and the south limit of the city, was presented to the council, praying that Second street be graded between said points, and that taxes therefor be levied upon the abutting property. On the 3d of August, following, an ordinance was duly passed declaring it necessary to grade said street, and ordering that the work be done, and the cost charged upon the abutting property; also instructing the city engineer to prepare plans, specifications, and estimates for the work, and file the same with the clerk, and directing the clerk to advertise for bids for said work to be done according to said plans and specifications. At the meeting of the council, on the 17th day of August, 1891, bids were received on said work, and the contract awarded at 22.8 cents per cubic yard. Prior to the letting of such contract, an estimate of the cost of said improvement was filed with the city clerk by the engineer, and the contract for said work was let at a less price than the estimate. On the same day the council passed another ordinance changing the grade of Second street, as follows: "Commencing on the south line of Ruby avenue, grade elevation 124 feet; thence south, on a plane, 350 feet, to a point, grade elevation 174 feet; thence on a plane to the north line of Paul street, now Barker avenue, grade elevation 212 feet." The street was thereafter graded in accordance with the grade established by the last-mentioned ordinance, which was passed without the knowledge or consent of the plaintiffs. No plans, specifications, or estimate for said work was ever made, and no ordinance was passed by the council providing therefor after the passage of said ordinance changing the grade. The change in grade was material, and placed the street in a substantially different condition from

that which it would have been in if graded in accordance with the ordinance in force at the time the petition was presented and the engineer's estimate was made. The court granted a perpetual injunction restraining the collection of special assessments for the work.

W. S. Carroll, for plaintiff in error. H. A. Bailey, for defendants in error.

ALLEN, J. (after stating the facts). The main question discussed both in the briefs and on the oral argument is as to the power of the city council to change the grade and bind the property owners after the presentment of a petition for the improvement, it being contended on the part of the city that there is no restriction on the power of the city council to change the grade at any time. and that the petitioners, when they ask that the street be graded, do so with a knowledge that the council has the right to make such changes in the grade already established as they deem proper. On the other hand, it is urged that the petitioners can only be required to pay for the very improvement for which they have asked; that, while the power of the council to change the grade is conceded, the petitioners are only bound by their petition; and that that is to be construed as referring to a grading in accordance with the ordinance then in force. As the petition in this case merely asks that the street be graded at the expense of the property owners, we are inclined to the opinion that the city council had the power, before taking any steps towards a compliance with the petition, to change the grade if they deemed it wise to do so. The record before us, however, presents a stronger objection to the validity of the special assessments. Section 69 of the act to incorporate cities of the second class is as follows: "Sec. 69. Before the city council shall make any contract for building bridges or side walks or for any work on streets, or for any other work or improvement, an estimate of the cost thereof shall be made by the city engineer and submitted to the council, and no contract shall be entered into for any work or improvement for a price exceeding such estimate." It appears from the findings of the court that the only estimate made by the city engineer was made before the change of grade. Can this be held a compliance with the law? If so, plans and estimates for one thing may be made, and a contract let thereunder for another and different thing. fact that this was merely a contract for earth work, at a certain price per yard, coupled with the further fact, admitted in the case, that the contract was let at a less price than the estimate, might seem at first to render the change immaterial; but the trial court has found that the change was material, and that the value of the work to the property owners was materially affected by the change

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of grade. It might well happen, also, that the price of 22.8 per yard for earth work in accordance with the grade last established would be much more profitable to the contractor than work in accordance with the first ordinance at the same price, owing to a change in the character of the earth to be moved, the depth of cuts, and the height of fills.

It appears in this case that the contract was actually let before the ordinance changing the grade took effect, but that the work was completed in accordance with the ordinance last passed. We have, then, a case in which plans, specifications, estimate, and contract all called for a grading in accordance with the ordinance first passed, while the taxes attempted to be collected are to pay for work done in accordance with the last ordinance, materially different from that before contemplated. The ordinance providing for the work was also passed before that providing for the change of grade, and no ordinance was ever passed providing for the grading of the street as it was in fact graded. The tendency of the decisions in this court has been, and we think should be, towards a strict construction of the powers of municipal officers to levy special assessments. Newman v. City of Emporia, 32 Kan. 456, 4 Pac. 815; Barron v. Krebs, 41 Kan. 338, 21 Pac. 235; Sloan v. Beebe, 24 Kan. 343; Hentig v. Gilmore, 33 Kan. 242, 6 Pac. 304. Section 32 of the statute governing cities of the second class provides for bringing streets to grade at the cost of the city; and the cost of grading a street, it would seem, in the absence of any petition by the property owners, would be chargeable to all the taxable property of the city. The trial court having found that there was a substantial departure by the council from the original plan of the work, we are not at liberty to overlook the changes and say that they are unimportant. The judgment must be affirmed. All the justices concurring.

BOYD v. MILLS.

(Supreme Court of Kansas. June 9, 1894.) CONSTITUTIONAL LAW-QUALIFICATIONS OF ELECT-ORS-BALLOTS.

1. That part of section 2 of article 5 of the constitution of this state, as amended in 1867, which reads: "No person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government, except all persons who have been honorably discharged from the military service of the United States since the first day of April A. D. 1861, provided, that they have of April A. D. 1801, provided, that they have served one year or more therein, shall be qualified to vote or hold office in this state until such disability shall be removed by a law passed by a vote of two-thirds of all the members of both branches of the legislature,"—does not conflict with section 10, art. 1, of the constitution of the United States, and is a valid constitutional provision.

2. Where the election officers of a township

were furnished by the county clerk with official ballots printed on white paper, and also with sample ballots printed on colored paper, in a separate package, and where by mistake the sample ballots were used by all the voters of that township, and the official ballots on white paper were all returned unused by the judges of election, and the election in such township was conducted regularly in every other respect, and the ballots used by the electors of all political parties were of the same color, held, that such ballots were rightly counted.

(Svilshus by the Court) were furnished by the county clerk with official

(Syllabus by the Court.)

Quo warranto by O. C. Boyd against O. Mills. Motion to strike out parties of the petition. Sustained in part and overruled in part

C. I. Long and E. Sample, for plaintiff. Frank Doster and Martin & McNeal, for defendant.

ALLEN, J. This is an original proceeding instituted in this court by O. C. Boyd, as plaintiff, to try the right to the office of sheriff of Barber county. The petition shows that at the election held on the 7th day of November, 1893, according to the official canvass of the votes cast, the plaintiff received 508 and the defendant 516 votes. The plaintiff alleges that many illegal votes were cast and counted for the defendant, and that the plaintiff received a majority of the legal votes. The questions now presented arise on a motion by the defendant to strike out two portions of the petition, which it is claimed are irrelevant. The first is as follows: "That the following named persons voted at the general election, held on the 7th day of November, 1893, for the defendant, O. Mills, for sheriff, in the townships set opposite their respective names, they not being qualified electors at said election, by reason of section 2, art. 5, of the constitution of the state of Kansas, each and all of them having voluntarily borne arms against the government of the United States, and voluntarily aided and abetted in the attempted overthrow of said government, and their disabilities have not been removed by a law passed by two-thirds of all the members of both branches of the legislature of the state of Kansas," with a list of names and residences of persons claimed to be disqualified. Counsel for the defendant challenges the validity of that clause of the state constitution which deprives persons who have voluntarily borne arms against the government of the United States of the right to vote. The section in which this provision occurs is section 2 of article 5. The section originally read as follows: "Section 2. No person under guardianship, non compos mentis, or insane, shall be qualified to vote, nor any person convicted of treason or felony unless restored to civil rights." In 1867 the section was amended, and now reads as follows: "Section 2. No person under guardianship, non compos mentis, or insane; no proson convicted of felony unless restored to civil rights; no person who has been dis-

honorably discharged from the service of the United States unless reinstated; no person guilty of defrauding the government of the United States, or any of the states thereof; no person guilty of giving or receiving a bribe, or offering to give or receive a bribe, and no person who has ever voluntarily borne arms against the government of the United States, or in any manner voluntarily aided or abetted in the attempted overthrow of said government, except all persons who have been honorably discharged from the military service of the United States since the first day of April A. D. 1861, provided that they have served one year or more therein, shall be qualified to vote, or hold office in this state until such disabilities shall be removed by a law passed by a vote of twothirds of all the members of both branches of the legislature." It is contended that this section of the constitution, having been passed after the close of the war, is in the nature of a bill of attainder, imposing the penalty of disfranchisement without a trial, and is ex post facto in its operation. The leading cases cited as supporting this contention are Cummings v. Missouri, 4 Wall. 277, and Ex parte Garland, Id. 333. The question presented in those cases was not identical with the one in this. The constitution of Missouri, as revised and amended in 1865, provided a test oath by which a person was required to swear that he had never been guilty of any manner of disloyalty to the government of the United States, and that, after the expiration of 60 days after the taking effect of the constitution, no person should be permitted to practice as an attorney or counselor at law, or be competent, as a bishop, priest, deacon, minister, elder, or other clergyman of any religious persuasion, to teach or preach, unless such person should have taken and subscribed the prescribed oath. Cummings was a Roman Catholic priest, and was prosecuted for teaching and preaching without having taken the a quired oath. The supreme court of the United States held the provisions of the Missouri constitution invalid. A similar question was presented under an act of congress in the Garland Case, which was decided at the same time. The question in the latter case arose under an act of congress prohibiting any person from being admitted to the bar of the courts of the United States without taking a similar oath. The court held in both these cases that the requirements were invalid, and were in the nature of bills of attainder; that they operated to deprive these men of the right to earn a livelihood by pursuing the callings for which they had been educated; that the requirement of such oaths in effect required them to condemn themselves, and that the constitution of Missouri and the act of congress, in effect, condemned all persons as guilty, and prohibited them from following their callings until they should establish their innocence by expurgatory oaths.

The following cases also are cited: Green v. Shumway, 39 N. Y. 418; Huber v. Reily, 53 Pa. St. 112; Dent v. West Virginia, 129 U. S. 115, 9 Sup. Ct. 231; Rison v. Farr, 24 Ark. 161. It is ably and earnestly argued in this case that to deprive a person of the right to vote is a punishment; that the right to vote and hold those offices which can only be filled by persons having the qualifications of electors is a valuable right, and that any law, whether in the form of legislative enactment or constitutional provision, which is retroactive in its operation, and takes away this right, is in its nature a bill of attainder. inflicting penalties, and that it must be declared void under the federal constitution. It is answered, however, that the right to vote and hold office is not a natural right; that suffrage is nowhere universal, but always restricted by age, sex, and other incidents: that of necessity the organic law must prescribe the qualifications of electors, and that in doing so the framers are subject to absolutely no restrictions, but may confer or withhold the right at pleasure. The question appears to the writer not free from difficulty. The privileges of citizenship are certainly esteemed as of great value. deprived of them is to suffer the infliction of an injury, yet to say that the people in their organic law may not determine who shall participate in the government is to deny a power universally and necessarily exercised by the framers of every constitution. For the courts to assume the function of sitting in judgment, not merely under the constitution, but upon the constitution itself, and according to their own views declare what provisions are valid and what invalid, is a most serious undertaking; yet, of course, provisions of the constitution of the state, if framed in violation of an expressed prohibition by the federal constitution, must be held moperative. In determining who shall exercise the right of suffrage, may not the people exclude classes who have shown themselves unfaithful to a public trust, or who have engaged in hostilities against either the state or federal government? Counsel argues that the offense which is made the ground of disfranchisement is an offense against the sovereignty of the United States, not against that of the state of Kansas at all, and that only that sovereignty against which the offense has been committed can punish for the crime. This question, however, is immaterial until it be determined that the provision in the constitution is in the nature of a punishment for crime. If it be so, the provision would be invalid, no matter whether the offense be against the state or the United States, for it would be ex post facto in its operation. It will be observed that the original section of the constitution disqualifled persons for offenses only after conviction, while the amended section disqualifies persons convicted of felony, and also those guilty of defrauding the government or any

of the states thereof, of giving or receiving a bribe, as well as those who have voluntarily borne arms against the government. In view of the fact that this provision has remained in the constitution for 26 years, and that at nearly every session of the legislature acts have been passed removing the disqualifications of voters; that the validity of the provision has remained unchallenged, and has been accepted as the organic law of the state by the people generally, the court certainly should hesitate to overturn that which has been so long established, and so universally recognized. The weight of authority, if not of reason, also seems to sustain the validity of the constitutional provision. Anderson v. Baker, 23 Md. 531; Shepherd v. Grimmett (Idaho) 31 Pac. 793; U. S. v. Cruikshank, 92 U.S. 542; Ex parte Yarbrough, 110 U. S. 651, 4 Sup. Ct. 152; Minor v. Happersett, 21 Wall. 162; Stone v. Smith (Mass.) 34 N. E. 521; McCrary, Elect. § 3. The only constitutional question we now have to decide is whether the people of the state of Kansas had the right to incorporate this provision in their organic law, and this question is answered in the affirmative. A conviction for treason under the constitution as it stood before the amendment would carry with it the loss of citizenship. The amendment adds nothing to the punishment for the offense. We have here no requirement of test oaths to consider. The character of evidence required to establish the disqualification of a voter under this provision is not now presented, nor do we express any opinion upon the subject.

2. Defendant also moves to strike out the following portion of the petition: "That on the 3d day of November, 1893, F. A. Lewis, as clerk of Barber county, Kansas, issued and gave to S. Y. Carr, judge of the election of Deerhead precinct, 100 official ballots; that on the 8th day of November, 1893, 100 official ballots, unused, from Deerhead precinct, were returned by John Renfrew; that on the said 8th day of November, 1893, as shown by the records in the office of the county clerk of said Barber county, there were voted in said Deerhead township 20 colored ballots; that a true and correct copy of the record of official ballots issued for the election held on the 7th day of November. 1893, for Deerhead township, as the same appears in the office of the county clerk of Barber county, Kansas, is made a part of this petition, here referred to, hereto attached. and marked 'Exhibit A;' that on the 4th day of November, 1893, the county clerk of Barber county, Kansas, took a receipt from S. Y. Carr, judge of election of Deerhead precinct, for 100 official ballots, a true and correct copy of which is attached to this petition, made a part hereof, and here referred to, and marked 'Exhibit B;' that on the 8th day of November, 1893, the county clerk of Barber county, Kansas, took a receipt from John Renfrew, of Deerhead voting precinct.

for 100 ballots, unused, and for 20 colored ballots, voted, which said receipt, as it appears in the stub-book of the county clerk of Barber county, Kansas, is in the words and figures set forth in Exhibit C, which said exhibit is hereto attached, here referred to, and made a part of this petition. The said plaintiff further says that the returns of the election on file in the office of the county clerk of Barber county, Kansas, on the 10th day of November, 1893, show that no official ballots had been voted in Deerhead precinct, and that ballots other than white had been voted in said Deerhead precinct, and that ballots having distinguishing colors and marks thereon had been voted in said Deerhead precinct; that no legal or official bailots were cast in Deerhead precinct for any candidate for the office of sheriff, or other office, at the general election held on said 7th day of November, 1893; that the five votes cast for O. C. Boyd, and the fourteen votes cast for O. Mills, shown by the returns to have been cast in Deerhead precinct, were illegal and void, and should not be counted, for the reasons above set forth." Section 14. c. 78. of the Laws of 1893, known as the Australian ballot law, contains the provision that "the ballots shall be on plain white paper through which the printing or writing cannot be read." Section 15 provides that "ballots shall be printed and in the possession of the officers charged with their distribution at least five days before the election accompanied by exact copies of said ballots printed on paper of any color, other than white, for the inspection of candidates and their agents." It appears from the petition that in Deerhead township the election officers used the sample ballots, printed on colored paper, and returned all the official ballots, which were printed on white paper. It is conceded that all of the ballots used in Deerhead township were of the same color, and the sole question with reference to their legality arises from the color of the paper. It is contended on behalf of the plaintiff that the statute is mandatory, and that no ballot can be counted unless it conforms strictly to the requirements of the law; that the court is not at liberty by construction to do away with any of its requirements. In this contention we think counsel for the plaintiff is in the main correct, and that the wholesome provisions of the law are neither to be disregarded nor construed away. Section 25 contains the following provision: "If a voter marks more names than there are persons to be elected to an office, or fails to mark the ballot as required by other sections of this act, or if for any reason it is impossible to determine the voter's choice for an office to be filled, his ballot shall not be counted for such office. No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted." That the bal-

lots in fact used were printed and furnished by the county clerk, and were in all respects the same as the official ballot, excepting the color of the paper, is conceded, and it is also conceded that the ballots used in the one township were uniform in color. Does this fact operate to render the election at that voting precinct a nullity? In considering the statute, we are to keep steadily in mind the evident purpose of the legislature in its enactment. It is plain that among the most prominent ends sought to be attained was that of absolute secrecy. Any mark or distinguishing feature on the ballots, which would enable a person other than the voter himself to identify the ballot, and find out how the elector had voted, was intended to be strictly prohibited. The case of People v. Board of Canvassers of Onondaga Co., 129 N. Y. 395, 29 N. E. 327, is relied on. The statute of New York differs materially from our own. The law requires that "on the back of each ballot shall be printed in type known as great primer, Roman condensed capitals, the endorsement, 'Official ballot for,' and after the word 'for' shall follow the designation of the polling place for which the ballot is prepared, the date of the election and a fac simile of the signature of the county clerk: the ballot shall contain no caption, or other endorsement except as in this section provided." In distributing the ballots. those printed for the Republican party were transposed, so that the votes indorsed with the number of the first district in certain towns were sent to the second, and those with the second to the first, and such transpositions occurred in four towns, and at nine election precincts. The 29th section of the New York act provided: "No inspector of election shall deposit in the ballot box on election day any ballot which is not properly endorsed and numbered, except in the cases provided for in section 21 of this act, nor shall any inspector of election deposit in the ballot box, or permit any other person to deposit therein on election day any ballot that is torn, or that has any other distinguishing mark on the outside thereof." It seems that separate tickets are printed there for each political party, instead of printing all the names on one ballot. In deciding the case, the court lays much stress on the fact that the Republican ballots, being indorsed with the wrong number, had distinguishing marks by which they could be identified, and that the secrecy of the ballot was thereby destroyed, and also on the positive requirements of the law that no ballot should be deposited unless properly indorsed and numbered. In the case of State v. McKinnon, 8 Or. 493, a ballot was rejected, written on colored paper, the law requiring it to be on plain white paper. We should have no hesitancy in saying that a single ballot printed on colored paper, where the official ballots printed on white paper were being used by other electors, could not be counted. In that \

case it would be plain that the object of the law was contravened.

We have examined the numerous cases cited by counsel for the plaintiff, and from them deduce two rules, which seem to be steadily adhered to by the courts: (1) That under laws similar to our own, designed to preserve the secrecy of the ballot, any mark or distinguishing feature apparent on the ballot renders it void. (2) Where the law is explicit in prohibiting the counting of any ballot which does not conform to the requirements of the statute, that the courts will enforce the law as it reads, without interposing their own judgment as to the reasonableness or unreasonableness of the requirements. It will be observed that the law nowhere explicitly provides that a ballot printed on paper of a color other than white shall not be counted. The only clause which could be held to imply such a provision is that "none but ballots provided in accordance with the provisions of this act shall be counted." Among the requirements of the act, which are very minute, is one that the official ballots shall be put up in separate lots, packages of 50 ballots each, with certain marks on the outside. Will it be contended that an error in counting the ballots within any package, or in marking or addressing the package intended for any person, would vitiate the election? The departure from the law in matters which the legislature has not declared of vital importance must be substantial in order to vitiate the ballots. This appears to be the general current of all the authorities. In Bowers v. Smith, 111 Mo. 61, 20 S. W. 101, it is said: "If the law itself declares a specified irregularity to be fatal, the courts will follow that command, irrespective of their views of the importance of the requirement. In the absence of such declarations, the judiciary endeavor as best they may to discern whether the deviation from the prescribed forms of law had or had not so vital an influence as to prevent a full and free expression of the popular will. If it had, the irregularity is held to vitiate the entire return; otherwise, it is considered immaterial." In State v. Russel (Neb.) 51 N. W. 465, it was held: "The provisions in section 20 of the Code, approved March 4, 1891, known as the Australian ballot law, for the marking of ballots with ink, is directory only, for ballots in other respects regular will, in the absence of fraud, be counted, although marked with a pencil." the Indiana election law of 1889, the poll clerks were required to write their initials in ink in the lower left-hand corner on the back of each ballot. In one precinct, clerks, by an honest mistake, put the indorsement in the lower right-hand corner on all the ballots. and it was held in the case of Parvin v. Wimberg (Ind. Sup.) 30 N. E. 790, that the bailots were properly counted. We have not overlooked the case of Talcott v. Philbrick, 59 Conn. 472, 20 Atl. 436, cited by plaintiff's counsel, with the reasoning in which we are

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not satisfied. 'A distinction also was made by the supreme court of Michigan in the case of Lindstrom v. Board (Mich.) 54 N. W. 280, between those errors or mistakes of officials which would have the effect to disfranchise a class of voters and a disregard of the provisions of the law by the electors themselves. Without proceeding to review at greater length the authorities cited by counsel on both sides of the question, we conclude that the mere fact that the paper on which all of the ballots used in one election district was of a color other than white, where the ballots were not only printed by the authorities designated by law, and by them furnished to the judges of election, but were furnished by the judges to the voters, and were the only ballots furnished to or used by any voter at tha woting place, is not sufficient to prevent the counting of the votes. The secrecy of the ballot has been in no wise impaired; the voters themselves have manifested no disposition to disregard the law, and it may be fairly inferred that the use of the colored ballots was an honest mistake on the part of the judges of the election. Had a part of the ballots been white, and a part colored, so as to afford some grounds for identification of the votes cast by the individual electors, a different question would be presented. We reach the conclusion that the law has not been substantially infringed because we are unable to see how the purposes of the act can have been impaired in any degree by the mistake made in using the colored ballots. this decision we do not intend to say that any of the provisions of the law may be disregarded, or that any officer may escape liability to punishment for violating any of its provisions. The first part of the motion will be overruled, and the last part will be sustained. All the justices concurring.

RATHBURN v. HAMILTON.

Supreme Court of Kansas. June 9, 1894.) ELECTIONS—FILING NOTICE OF NOMINATIONS—In-SUFFICIENCY OF CERTIFICATE.

1. Where a political party assembled in convention places in nomination a candidate for a county office, and the president and secretary of such convention execute and verify a proper nomination certificate, which is presented to the county clerk in due time to be filed, and is left with him for that purpose, it will be deemed to be filed within the meaning of the Australian ballot law, although no indorsement of filing is written thereon, and although it is afterwards mislaid or lost through the inadvertence or negligence of such officer.

2. Where a nomination certificate is found to be insufficient or inoperative, the defect may be corrected by the political party or persons making the original nomination, or by the executive or central committee of such party or persons, in the manner pointed out by section 9 of that law, at any time before election day.

(Syllabus by the Court.)

Quo warranto by A. D. Rathburn against H. H. Hamilton. Demurrer to answer over-ruled.

W. J. Sturgis, I. D. Young, and F. J. Knight, for plaintiff. A. W. Hicks, Co. Atty., and A. H. Ellis, for defendant.

JOHNSTON, J. This action was brought to determine who was entitled to the office of county commissioner for the first district of Mitchell county. A. D. Rathburn and H. H. Hamilton were rival candidates for that office at the general election held on November 7, 1893. The total number of votes cast for the office was 799, and according to the canvassed returns Hamilton received 445 votes, while Rathburn received 354 votes. Hamilton was declared elected to the office. of which he has taken possession, and is now discharging the duties and receiving the emoluments thereof. In his petition, the plaintiff alleges that he was eligible to be elected to the office of county commissioner. and that he received a majority of the legal votes cast in the district for that office; and it is further alleged that Hamilton was not legally nominated, but that the county clerk, without authority, and to the injury of the plaintiff's rights, caused Hamilton's name to be printed upon the official ballots for the district as the candidate of the People's party; that the official ballots, with defendant's name printed thereon, were voted by the electors of the district, and, although unauthorized and illegal, they were counted and canvassed as lawful and regular ballots; upon a return of the votes so cast, Hamilton was declared elected, and a certificate of election was unlawfully issued to him by the county clerk; that thereafter Hamilton filed an oath of office and a bond, and entered upon and is now exercising the duties of the office.

In his answer, Hamilton alleged that on September 16, 1893, at a convention of the People's party, he was duly nominated as the candidate of that party for the office of county commissioner, which nomination was ratified and confirmed by the unanimous vote of all the delegates present in the convention. C. W. Culp, one of the delegates, was made chairman of the convention, and H. S. Chapel, another of the delegates, was made secretary, and these parties were afterwards respectively chosen by the delegates as the chairman and secretary of the committee of the People's party for that commissioner district, and they were also named as the executive committee of that party for that district. On September 16, 1893, it is alleged that the president and secretary of the convention made and executed a certificate of nomination, setting forth that Hamilton was duly nominated for the office of commissioner, which certificate was duly sworn to by both said Culp and Chapel before an officer qualified to administer oaths. And it is further alleged: "That, on the same day that said certificate was prepared as aforesaid, the same was taken by said Culp and said Chapel to the office of the county clerk of

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said Mitchell county for the purpose of being filed with said clerk, and, as defendant is informed and believes, said certificate was then and there left with said clerk to be filed; but that, without any intention of wrong or neglect on the part of said county clerk, the said certificate was, after being left with him for filing, inadvertently mislaid and lost, and has not since been found, and, although diligent search has been made therefor, the said certificate cannot be found." It is then alleged that neither Culp, Chapel, nor the defendant had any knowledge that the certificate had not been in fact filed by the clerk until October 31, 1893, when they prepared and verified a certificate of nomination in due form, and filed the same with the county clerk, but that officer declared the paper to be insufficient and inoperative because it had not been filed in his office within 20 days previous to the election had November 7, 1893. Afterwards, and upon October 31, 1893, Culp and Chapel, as chairman and secretary of the executive committee of the People's party for the first district, properly executed a nomination paper which recited the nomination of Hamilton on September 16, 1893, the fact that the county clerk had declared the nomination ineffectual and inoperative because the certificate of nomination had not been filed in due time. and then it proceeded as follows: "We hereby nominate as candidate for the People's party for commissioner of the first commissioner district H. H. Hamilton, of Plum Creek township, Mitchell county, Kansas, as provided in section 9, chapter 78, Session Laws of the State of Kansas, 1893." This nomination paper was verified by the officers making it, and was filed with the county clerk on October 31, 1893. Objection being made to the sufficiency of this nomination paper by W. J. Sturgis, a citizen and elector of Mitchell county, the interested parties appeared before the county attorney, clerk of the district court, and county clerk on November 2, 1893, when the objection was heard and the facts connected with the nomination were considered, whereupon it was found that Hamilton was the legal nominee of the People's party, and it was decided that the objection filed was without merit. There is a further averment in the answer that plaintiff, being a minority candidate, has no interest in the office now held by the defendant, and no legal capacity to sue or maintain an action against the defendant. The plaintiff filed a demurrer to the answer of the defendant, alleging that it did not state facts sufficient to constitute a defense to the action, and upon the pleadings the cause is submitted to the court.

On these facts the contention is that the nomination certificates and papers are insufficient; that they did not authorize the placing of Hamilton's name on the official ballot, and therefore that the votes cast for him were illegal and should have been discarded by the

officers who canvassed and declared the result. It appears that Hamilton was duly nominated by the convention of his party, his name was placed upon the official ballot, and a considerable majority of the votes cast were in his favor. Was there such a departure from the legislative requirements in reference to nomination as to defeat the expressed will of the electors? It is averred that the presiding officer and secretary of the convention executed a certificate of nomination, which appears to have been substantially in the form required by the statute. It stated the name of the candidate, the office to which he was nominated, and the party which he represented, and added thereto was the name of the township in which he resided. It is alleged that this certificate was signed by the officers of the convention, and that to each signature was added the place of residence of such officer. The certificate thus prepared is alleged to have been duly sworn to by the officers, and the oath duly annexed to the certificate, when it was taken by them to the office of the county clerk for the purpose of being filed by the clerk, and was left with him for that purpose. It thus appears that Hamilton was duly nominated, and, if the facts are as alleged, a proper certificate of nomination was executed, presented to the county clerk for filing, and left in his custody, to be kept on file among the papers of his office. In our view, this constituted a filing within the meaning of the statute. The convention officers had done all that the law required of them. A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file. Wilkinson v. Elliott, 43 Kan. 595, 23 Pac. 614. The mere indorsement upon the paper of the time of filing it by the county clerk is not an essential act of filing. It is a mere memorandum of the time of filing, and not the filing itself. As the answer points out in detail what was done with the certificate, and since those acts are deemed to constitute a filing, the averment that it was not in fact filed by the clerk is interpreted to mean that the filing was not indorsed thereon. The nomination certificate is not rendered nugatory by the inadvertence or neglect of the filing officer. It is generally held that the duties imposed upon a filing officer of indorsing and recording a paper do not constitute any part of the filing, so far as the party delivering the paper is concerned, and that the rights of interested parties should not be prejudiced by the inadvertence or neglect of the officer to indorse the evidence of filing upon the paper. Wilkinson v. Elliott, supra; Implement Co. v. Parlin & Orendorff Co., 51 Kan. 576, 33 Pac. 360; 7 Am. & Eng. Enc. Law. 962. It is alleged that the certificate was inadvertently mislaid and lost, but if the nomination was made, and if a sufficient certificate of that fact was made and filed, the loss might be supplied or proof of its contents made, as in case of other lost papers.

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however, the certificate was insufficient, or for any cause became inoperative by reason of being mislaid or lost, the statute provides a method for making a nomination and certificate that will be deemed sufficient. In section 9 of the Australian ballot law it is provided that in case a candidate who has been nominated dies before election day, or declines the nomination, or should any certificate of nomination be held insufficient or inoperative, the vacancy or defect may be filled or corrected by the political party or persons making the original nomination; or, if the time is insufficient therefor, it may be done in the way provided for by the convention, primary meeting, or caucus which had previously made the nomination; or, where no such provision is made, then by the executive or central committee of the party or persons which held such convention, primary meeting, or caucus. As will be seen, the limitations of time have no application to the filling of such vacancies or the supplying of nomination papers that have been held insufficient or inoperative. It may be done at any time before election day; and other provisions of the statute show that after the vacancy is filled or the defect corrected new ballots should be printed, if it is practicable to do so, but if this cannot be done the new names may be placed on the ballots by affixing a paster or by writing or printing the names upon the ballots already printed. Laws 1893, c. 78, §§ 9-12. This provision prevents the frustration of the purposes of a party or of a section of electors who desire to have the name of a candidate upon the official ballot. Neither the death nor the declination of a nominee deprives them from having a candidate to vote for. It prevents the accomplishment of a wrong through an inadvertent mistake or the willful action of an officer or committee, or by the withdrawal of a nominee at a late day, made in the interest of an opposing party, or for any other reason. In this case, it appears that the county clerk held the nomination certificates which were filed to be insufficient and inoperative, and on October 31, seven days before the election, nominating papers were filed which seem to comply with the provisions of section 9. Upon a hearing of objections to these papers. the officers whose duty it was to consider them decided that the papers were sufficient, and section 10 of the act provides that their decision as to the objections is final. If, for any reason, the certificate first filed should be found insufficient, or that it had become inoperative, the subsequent steps taken appear to warrant the placing of Hamilton's name on the official ballot. This action and decision was taken prior to the printing of the ballots, his name was placed thereon, and under the circumstances it cannot be held that the votes cast for him were void. An elaborate and well-reasoned argument is made to sustain the proposition that the pro-

regarded as mandatory, and strong reasons are given to sustain the view that at least every essential provision should be so treated. The view which we have taken, however, in regard to the sufficiency of the certificate, makes it unnecessary to enter upon a discussion of that question or some other questions that are raised in the briefs of counsel.

We are of opinion that the facts stated in the answer constitute a complete defense to the action begun, and that the plaintiff's demurrer thereto should be overruled. All the justices concurring.

GILA COUNTY v. THOMPSON, Sheriff. (Supreme Court of Arizona. Jan. 17, 1894.) SHERIFF'S FEES—ESTOPPEL—CLAIM AGAINST COUNTY.

Where a sheriff files his account for fees for a certain service, and accepts the amount allowed by the board of supervisors, he cannot afterwards recover additional fees for the same service which he omitted to claim in his first account; as when, in making an arrest, he was allowed fees only for the distance in going to the place of arrest, instead of for both going and returning with the prisoner. Hawkins, J., dissenting.

Appeal from district court, Gila county; before Owen T. Rouse, Justice.

Action by J. H. Thompson against Gila county. There was a judgment for plaintiff, and defendant appeals. Reversed.

Cox & Street, for appellant. E. J. Edwards and Pierce Evans, for appellee.

SLOAN, J. This suit was brought in the district court of Gila county, by J. H. Thompson, sheriff of said county, against said county, to recover upon an account for services as sheriff rendered in certain criminal cases, which account had been previously presented to the board of supervisors of said county, and by said board disallowed. Judgment was rendered in the court below for the plaintiff in the suit, from which judgment the county appeals.

The items of the account which were allowed by the court, and for which judgment was given, are, with one exception, similæ in form and pertain to the same kind of service. Just what kind of service, under the "Fee Act," these items were intended to include, is somewhat difficult of ascertainment. The first item appearing in the account is as follows: "May 3. Territory vs. Zack Booth et als. To mileage, 150, for prisoner, from Phoenix, place of arrest, to Globe, @ 30 cts., \$45." This item of the account appears upon its face to be an attempt to charge mileage against the county for the prisoner, the distance the latter traveled, presumptively, while in charge of the plaintiff, under a warrant of arrest, in going from Phoenix, the place of arrest, to Globe, the latter place presumably the place visions of the Australian ballot law should be | from whence the warrant was issued. There

is nothing in the fee and salary act authorizing any charge to be made for mileage for a prisoner while in charge of an officer under a warrant of arrest. The officer is allowed mileage "for removing a prisoner;" but as was held by this court in Yavapai Co. v. O'Neil, 29 Pac. 430, "removing a prisoner" cannot be construed as meaning the taking of a prisoner after arrest to the place named in the warrant. It cannot, therefore, be, nor has it been, contended that the charge is made under the latter provision of the statute. It was evidently assumed in the court below that the charge was one for mileage for the sheriff in executing a warrant of arrest. It is impossible, without doing violence to the language used, to give such a construction to the account. We will assume, however, this to be the meaning and effect of the account, so far as it relates to the item above set forth. An officer is allowed "for each mile he may be compelled to travel in executing criminal process, * * * to be charged one way only, 30c." As was said by this court in the O'Neil Case, "to execute criminal process * * * is to do what is in the writ commanded. A warrant of arrest in the form prescribed by our Penal Code not only commands the arrest, but also the bringing of the prisoner to the place of holding the court whence the warrant issued. To execute, therefore, a warrant, the officer must not only arrest, but remove the prisoner from the place of arrest to the court whence the writ issued." Logically, therefore, the officer is entitled to mileage not merely to the place of effecting the arrest, but, in addition, actual mileage, until he has completely executed the writ; that is, brought his prisoner to the court or place named in the writ. The plaintiff, however, may not in this action recover under the latter provision of the statute. It was admitted upon the trial of the case that plaintiff had, before suit, been by the board of supervisors allowed and paid mileage inexecuting the warrant of arrest for the defendant Zack Booth for the distance of 150 miles, counting from the county seat of Gila county to Phoenix, the place of arrest. It does not appear whether the plaintiff presented a claim to the board for more than the 150 miles or not. It is immaterial so far as his right to recover in this action. A claim for mileage for executing any writ constitutes but a single demand against the county. The officer, in presenting it to the board for allowance, has no right to separate it into bits. If, therefore, the plaintiff made out his claim and presented it in the first instance for a less amount than he was entitled to receive, which was allowed him by the board and accepted by him, he ought not, nor can he, under the statute, make a subsequent demand for an additional allowance upon the same demand. Rev. St. par. 414. If, however, he had in the first instance made out a claim for the full amount

of mileage which he was entitled to receive, but was allowed by the board only a part of his demand, his acceptance of such part precluded him, under said statute, from bringing any action for the balance. Yavapai Co. v. O'Nell, supra.

What we have said of the one item above set forth applies equally to the other items of the account allowed by the court below, with but one exception. There is a charge made in the account reading as follows: "Feb. 2d. To transportation for Benbrook, special guard, San Carlos to Globe, \$5." Inasmuch as this item is of the same date and appears in the account in connection with the charge made for mileage of a prisoner from San Carlos, place of arrest, to Globe, we infer that the expense of this special guard was incurred by the plaintiff in taking the prisoner from the place of his arrest to Globe. The facts, as admitted upon the trial, show that the sheriff was allowed by the board and paid for the expenses of transporting this prisoner, including a per diem and transportation of the guard. It is clear, therefore, that this is another attempt to sue for a part of a claim disallowed by the board after accepting payment for the amount of the claim which was allowed. As we have before said, this cannot be permitted under the statute.

Upon no possible construction of plaintiff's account against the county, as the same is made out and sued upon, nor of the statute pertaining to fees to be paid the sheriff in executing criminal process, is the plaintiff entitled to recover, under the facts of this case, upon any of the items of the account allowed by the court below in the judgment. The judgment of the court below is therefore reversed, and judgment will be entered in this court for the appellant for costs.

BAKER, C. J. I agree that the judgment of the lower court be reversed. I put it upon the ground that the sheriff ought not to recover upon any theory of the case. He cannot recover mileage for the prisoner, because no possible reading of the fee bill will authorize any allowance to the sheriff on account of that. This is conceded. If the item sued upon is to be understood as a charge for mileage for the sheriff, he should not recover, because the statute allows him mileage one way only in serving criminal process, and this, the record shows, has already been paid him. He has been paid for going to the place of arrest.

I dissent from so much of the opinion as approves of the case quoted,—Yavapai Co. v. O'Neil (Ariz.) 29 Pac. 430. That case should be expressly overruled. It holds that a sheriff is entitled to mileage for going to the place of arrest as well as for mileage in returning with the prisoner to court; and the reason given is that to execute a warrant of arrest is to do what it commands,—return the prisoner to court. Thus, the sheriff is

paid mileage two ways,—going and coming. The fee bill for sheriffs is as follows: "For removing a prisoner, for each mile necessarily traveled, to be charged one way only, 30c, and for each guard the same. Insane persons are prisoners within the meaning of this act. For each mile he may be compelled to travel in executing criminal process, summoning or attaching witnesses, to be charged one way only, 30c." Rev. St. par. 1972, subd. 7. The legislature had in view but a single object in passing this law, and that was to fix a rate of compensation to the sheriff for executing criminal process, and not to define what should or should not constitute a complete execution of that process. In its interpretation, the legislative purpose should be kept steadily in view. It is true that, in one sense, a warrant of arrest is not fully executed until the prisoner is arrested and brought into court, but it is not a necessary consequence that the measure for the sheriff's pay be fixed at both ways; that is, for going to the place of arrest, and returning with the pris .. For instance, suppose it be determined to allow him pay at the rate of 15 cents per mile for the whole distance traveled; is not the same result accomplished when he is allowed 30 cents per mile for one way only? This is just what the lawmaker intended in this particular subdivision. There is, indeed, in this law, an idea that the sheriff, in executing the process, will travel two ways,—that is, he will go to the place of arrest, and return with the prisoner.—but, that idea is found in the very expression which limits the pay of the sheriff to one way only. In the sense of compensation, the warrant is fully executed when the prisoner is arrested. It seems to me as if this conclusion is firmly established when we come to look at the law as it stood prior to the passage of the subdivision. The law governing sheriffs' fees for executing criminal process then stood as follows: 'For making an arrest, \$2.00.' For each mile necessarily traveled, counted both ways from the court house of the county, for each mile, 20 cents." Laws 1883, p. 225. The legislature was in full view of this act when the present law was passed; and it is apparent that the intent was to reduce the price or charge per mile for the travel, and to change the method of counting the mileage; that is, instead of counting both ways traveled, and allowing 20 cents per mile therefor, as the old law plainly provided, the new law allows 30 cents per mile, counting one way traveled only. I think the above interpretation (it is a question of interpretation, and not of construction) is the true one. In Yavapai Co. v. O'Neil, supra, the court, in construing the subdivision, erroneously forced extraneous matter into the text; that is, what is required to constitute a complete execution of criminal process. This violates the well-known rule of construction that we are confined to the elements stated in the

text. Lieb. Herm. (Hammond's Ed.) 44, 137. For these reasons, I dissent in the particular above stated, and think Yavapai Co. v. O'Neil, supra, ought to be reversed.

HAWKINS, J. I dissent. I am of the opinion that the sheriff, if the bill had been properly made out, would be entitled to mileage for himself until the service of the writ was complete. The case seemed to me to have been tried on that theory, and that, while the account read "for prisoner," it really meant "for the sheriff for taking the prisoner" from the place arrested to the place of trial. And, that appearing to me to do no violence to construction of the manner the account was worded, the judgment ought to stand against the appellant.

EAMAN v. BASHFORD et al. HEWITT v. SAME.

(Supreme Court of Arizona. Jan. 23, 1894.)

Lien on Mine—Supplies Furnished Owner's
Agent—Possession under Contract
of Sale.

Defendant made a contract with M., by which M. was to operate defendant's mine for a certain time, and make certain improvements thereon, with the privilege of buying it. A certain per cent. of the proceeds of the ore was to be paid to defendant, which would be credited to M. on the price, in case he bought the mine, but if M. did not buy the mine all the payments and improvements were to be forfeited. M. made improvements were to be forfeited. M. made improvements on the mine, for which he did not pay, failed to buy the mine, and turned it over to defendant, with the improvements. Rev. St. pars. 2276, 2278, gives laborers and material men a lien on mines for labor or material furnished to the owner or agent. Paragraph 2280 provides that the word "agent" shall be construed to include all contractors, subcontractors, builders, or persons having charge or control of a mine. Held, that M. was the agent of defendant under the contract to operate the mine, and that it was subject to a lien for supplies and materials furnished at his request.

Appeal from district court, Yavapai county; before Justice Owen T. Rouse.

Action by Bashford & Burmister against Thomas J. Eaman to enforce a mechanic's lien. Action by the same plaintiffs against Abram S. Hewitt. Judgment for plaintiffs in each action, and defendants appeal. Affirmed.

J. F. Wilson, for appellants. Herndon & Norris, for appellees.

BAKER, C. J. These two cases were tried and decided below upon the same state of facts,—the facts being stipulated by the parties,—and they came here upon the same grounds. We therefore write the opinion in the first case, only, viz. "Eaman v. Bashford & Burnister.

This suit was brought to enforce a lien for supplies and material furnished and used in repairing and operating the Tuscumbia quartz mill. One S. C. Mott went into pos-

session of the mill and the Black Warrior, Tuscumbia, and Tuscora mining claims under a written instrument from appellant, which, though in form a lease, was evidently intended to enable the appellant to sell, and the said Mott to buy, the premises, by extracting and reducing the ore, and crediting the proceeds upon the purchase price. its terms, Mott was to mine and reduce the ore, and the appellant was to receive the entire net proceeds thereof for the first six months after June 1, 1890. The cost of extracting and milling was first to be deducted out of the ores. After December, 1890, the appellant was to take 25 per cent. of the gross product of the claims. The purchase price of the property was to be \$6,000, and all money received by appellant for the sale of ore was to be credited upon the purchase price; and, in the event of a failure to purchase the property by Mott, all payments should become forfeited, and become the money of the appellant. If Mott did not become the purchaser, the property, with all the improvements, was to revert to the appellant. The mines were to be securely timbered, and Mott was to do the assessment work for the year 1890 upon the Tuscumbia claim. The bullion was to be shipped in the name of appellant, and the returns received by him, and applied, in the first instance, to the payment of the expenses of extracting and reducing the same. The quartz upon the dump, and the tailings and concentrates left at the mill, were to revert to appellant, if Mott did not become the purchaser. The mill was apparently operated for several months, and finally delivered to appellant, with all the improvements. The court below held that Mott was the agent of appellant in procuring the supplies, and that the property was liable for the value thereof, in the way of a lien.

Rev. St. par. 2276: "All miners, laborers, and others who may labor, and all persons who may furnish material of any kind, designed or used, in or upon any mine or mining claim, and to whom more wages are due for such labor or material, shall have a lien upon the same for such sums as are unpaid." Paragraph 2278: "All foundry-men, boilermakers, and all persons who labor or furnish machinery, boilers, castings or other materials for the construction, alteration, repairs, or carrying on of any mill, manufactory or hoisting works at the request of the owner thereof or his agent, shall have a lien upon the same for the amount due him or them therefor." Paragraph 2280: "The word agent as used in this act, shall be construed to include all contractors, subcontractors, architects, builders, and persons who have the charge or control of any mine, mining claim, canal, water-ditch, flume, aqueduct, reservoir, fence, bridge, mill, manufactory, hoisting works, or other property or thing upon

which labor has been performed or material furnished." This is a remedial statute, and ought to be construed so as to promote and advance natural justice. The giving of workmen and material men a lien upon property created, improved, or benefited by their labor or material is founded upon natural justice. The statute is designed to accomplish that result. It is based upon the same principle recognized by the civil law, which gave to workmen and material men a similar right of compensation, called a "privilege," which took precedence over prior mortgages against property which they had improved. It is clear that the mining and reduction of the ore, the timbering of the mines, and repairing the mill were directly contemplated by the parties at the time of the execution of the instrument. The appellant was to be benefited in either event, for if Mott became the purchaser the proceeds of the ore, less cost of extraction and reduction, were to be credited upon the purchase price; thus he would effect a sale of his property: and if Mott failed to become the purchaser all payments were to be forfeited and become the property of appellant, who was really more interested in the work than Mott. A large portion of the supplies were furnished to Mott during the period when appellant was to take all the net pro-It seems just that his property be held for the payment of these supplies, especially when it was stipulated that the ore should first pay the costs of its extraction and reduction. The bullion was to be shipped in the name of appellant, and returns made to him; and he was required to apply such proceeds to the payment of costs of the work in advance of all other claims. Thus was he fully protected against the incumbering of his property by the said Mott. It will be observed that the said Mott had the "charge and control" of the mill and mines, and that the instrument was never recorded. The appellees did not have notice of its terms, or, if they did, the record fails to disclose the fact. Under such circumstances, we may easily apply the familiar principle that, when one of two innocent parties must suffer a loss by reason of the fault of a third, the loss should be borne by him who gave the third person power to commit the fault. Mott did the assessment work upon the Tuscumbia mine for 1890. There was sinking, stoping, drifting, and timbering done in the mines, and the mill was repaired. If any payments were made towards the purchase price, they were forfeited. The appellant received all such benefits. The facts of the case take it out of the general rule that one having a mere contract to purchase, or a lessee, cannot incumber the property with liens. There is a clause in the instrument which provides that the work shall be done at the cost of the said Mott. This is

binding, as between the parties to the contract, but will not be suffered to defeat the lien. Moore v. Jackson, 49 Cal. 109. The judgment is affirmed.

SLOAN and ROUSE, JJ., concur.

HAWKINS, J. Having been of counsel in the court below, I did not sit in these cases, or take any part in the consideration of the foregoing opinion.

ROBERTS v. WASHINGTON NAT. BANK. (Supreme Court of Washington. May 24, 1894.)

REVIEW ON APPEAL-APPOINTMENT OF RECEIVER.

1. On appeal from an order appointing a receiver, the court is not limited to the question of the jurisdiction of the court appointing him, but must determine whether the order appealed from was authorized by the law and facts.

2. On an application for the receiver of notes claimed by petitioner, and alleged to be fraudulently held by defendant, where the proofs of the fraud were entirely hearsay, and the fraud was denied by the uncontradicted testimony of one having personal knowledge of the circumstances, and there is no proof of defendant's insolvency, a receiver should not be appointed. Dunbar, C. J., and Scott, J., dissenting.

Appeal from superior court, Spokane county; Jesse Arthur, Judge.

Bill by William B. Roberts, as receiver of the Washington Savings Bank, against the Washington National Bank. From an order granting an injunction, and appointing a receiver of certain notes in controversy, the defendant appeals. The paragraph in the complaint relating to the subject of the receiver and the injunction is as follows: "That the plaintiff has reason to believe, and does believe, and on information and belief alleges, that the defendant corporation, if it make restitution to the Washington Savings Bank of the moneys and properties of the latter fraudulently obtained and now held by it, will be insolvent, and unable to pay its indebtedness in full."

R. B. Blake and Frank T. Post, for appellant. Turner, Graves & McKinstry, for respondent.

HOYT, J. This is an appeal from an order appointing a receiver to take possession of certain notes alleged to be in the possession of the defendant. The first question to be determined is as to the scope of the inquiry in this court upon appeals from orders of this kind. It is contended on the part of the respondent that such inquiry must be confined within narrow limits, and authorities have been cited to sustain his contention in that behalf. The convenience of this court would surely—and public policy, probably—be subserved by the sustaining of the

contention of the respondent in this regard. We are, however, unable to so hold. As we interpret the statute, it requires that we should entertain such appeals, and give the appellant the benefit of our determination as to whether or not the order appealed from was authorized by the law and facts. It does not follow from this construction of the statute that no weight should be given to the decision of the question in the court be-The making of such orders is committed, under our system, to the sound discretion of the judge before whom the proceeding is pending; and his decision of the question must stand, unless the appellate court, upon an examination of the law and facts of the case, shall affirmatively determine that his action was not warranted, and in determining this question the decision of questions of fact will not be reversed, if there is a substantial conflict in the proofs in regard thereto. But the appellate court must examine such proofs for the purpose of determining whether or not there is such a clear preponderance against the determination of the lower court. In other words, we will treat its determination of the facts somewhat as we would the verdict of a jury or the findings of a court in a law case.

Examining the proofs offered in this case with these limitations in view, and applying thereto the law of the case as we understand it, there is practically but a single question of fact as to which there could be any doubt whatever, and that is as to whether or not the notes in question came into possession of the defendant fraudulently. The proof offered tending to show that the defendant was insolvent was of such an unsatisfactory character, and was so fully explained and overthrown by testimony on the part of the defendant, that it could furnish no reason for the appointment of a receiver. In determining the question as to whether or not the notes were fraudulently obtained by the defendant, we feel compelled to accept the statements in the affidavit of F. E. Goodall, offered on the part of the defendant, as to the circumstances under which these notes were passed from the bank represented by the plaintiff to the defendant. The proofs as to these circumstances, tendered on the part of the plaintiff, were almost entirely hearsay; and while, under the circumstances disclosed, such proofs were probably competent and sufficient to prima facie establish the allegations thereof as facts upon which the court could properly found its action, yet, when they were met and explained by the uncontradicted testimony of one having actual personal knowledge of all the circumstances, they could no longer be properly considered as facts in the determination of the questions involved. The circumstances under which these notes were obtained by the defendant, as disclosed by this affidavit, were that they were given as collateral to notes given to the defendant for money borrowed by the plaintiff's bank for the purpose of paying its depositors; that the money for which these notes were given was actually paid over in currency or coin; and that the notes in question were transferred as collateral thereto, as a part of the transaction. The circumstances concerning this single transaction, as shown by this evidence, were such that it could not be avoided by reason of the fact that the same person was assuming to act for the two corporations. On the contrary, it appeared therefrom that the transaction was had between the two banks, each represented by its own officers. It must follow that the transaction by which these notes passed to the defendant was in itself a bona fide one, and in no sense fraudulent. Was it so affected by the other transactions set up in plaintiff's complaint as to take from it its bona fide character? In our opinion, it was not. In coming to this conclusion, we have not overlooked the position of the respondent as to the invalidity of transactions, as between two corporations, when conducted by the same person as agent. But, even if we should agree with his contention that the prior transactions between the banks could be avoided and set aside by either, we are not satisfied that this transaction would be rendered fraudulent on account of the illegal character of prior ones. But if we are to take the proof offered on the part of the defendant, which is uncontradicted by any one having any knowledge, there are disclosed sufficient facts to authorize the court to find that the prior transactions set up in the complaint were not fraudulent. If it were true that the paper of the Custer Mining Company, described in the complaint as having been transferred by the defendant to the plaintiff's bank, was so transferred in pursuance of a prior agreement entered into by the banks, the fact that such agreement was consummated by an agent acting for both would not render invalid the prior agreement, and would not, in equity, authorize a court to adjust the rights of the two banks, excepting in the light of such prior agreement. As to the character of these prior transactions, as shown by the proof offered on the part of the defendant, they were of such a nature that except in an emergency growing out of absolute insolvency, or something of that kind, they should not be determined adversely to the rights of the one in possession of the fruits thereof, upon an application for a receiver, but should be left for determination upon the hearing of the cause upon its merits.

The right to appoint receivers, vested in the courts, should only be exercised when it is clearly shown to be necessary to prevent the defeat of justice. There has been a tendency in recent years, among courts, to appoint receivers, almost as a matter of course, if the case, as made by the plaintiff's complaint, seems to warrant such action. This tendency has advanced at least as far as the proper administration of justice will allow, and in our opinion it is the duty of the courts rather to restrict than extend this growing tendency. The order appointing the receiver must be reversed.

ANDERS and STILES, JJ., concur.

DUNBAR, C. J. (dissenting). I think, from a perusal of the testimony, that the action of the court in appointing the receiver was justified, and I therefore dissent.

SCOTT, J., concura.

(29 Colo. 199)

HALEY V. ELLIOTT.

(Supreme Court of Colorado. July 2, 1894.)

Joinder in Error — Limitations—Writ of Error.

1. The entry of a general appearance and the filing of a printed brief and argument by defendant in error, according to the usual practice in this court, held equivalent to a common joinder of error upon the merits.

2. The statute of limitations, to be available as a bar to the prosecution of a writ of error in this court, must be specially interposed at a preliminary stage of the proceeding, and before issue joined upon the merits. If the protection of the statute be not thus invoked by the party entitled to it, it will be deemed waived. The statute does not operate of its own force to divest the court of jurisdiction. Appeals and writs of error distinguished.

(Syllabus by the Court.)

Error to Larimer county court.

Action in replevin by Ora Haley against Frederick Elliott. From a judgment for defendant, plaintiff brings error. Heard on motion to dismiss. Denied.

W. T. Hughes and G. Q. Richmond, for plaintiff in error. H. B. Johnson, D. E. Parks, and J. M. Breeze, for defendant in error.

ELLIOTT, J. Judgment was rendered in this case in the county court on June 18, 1887. An appeal was taken to this court under the appeals act then in force; but, as the abstract of the record was not sufficient for a review of the case upon the merits, the appeal was dismissed "without prejudice" at the January term, 1891. See Haley v. Elliott, 16 Colo. 159-162, 26 Pac. 559. The cause was brought here again by writ of error; and on January 7, 1892, counsel for plaintiff in error filed his assignment of errors and brief upon the merits. Defendant in error, by his counsel, entered a general appearance, and on May 2, 1892, filed his brief upon the merits, and the cause was thus submitted. The cause, having been reached for final hearing in this court, was placed upon the calendar for oral argument; and thereafter, and on June 2, 1894, the defendant in error filed his motion to dismiss the writ of error, stating

the following reasons: "(1) That the judgment herein was rendered on June 18, 1887, and the writ of error was not issued until June 18, 1891,—a period of four years. (2) Because this court has no jurisdiction over said judgment, under said writ of error." In support of his motion, counsel relies upon the following provision of the Code: "Sec. 401. A writ of error shall not be brought after the expiration of three years from the rendition of the judgment complained of; but when a person thinking himself aggrieved by any judgment or decree that may be reviewed in the supreme court, shall be an infant, non compos mentis, or imprisoned when the same was rendered, the time of such disability shall be excluded from the computation of the said three years." In behalf of plaintiff in error, it is insisted that the motion to dismiss the writ of error must be denied. The argument is that the statute of limitations can only be made available by plea, but that, even if available by motion, the motion comes too late after joinder in error; that the limitation of time is a privilege that may be waived; that it does not affect the jurisdiction of the court. Though there was no formal joinder in error in this case, yet we think the entry of a general appearance, and the filing of a printed brief and argument, by defendant in error, according to the usual practice, must be held equivalent to a common joinder of error upon the merits. By our present rules, it is provided, "No formal joinder in error shall be required." See rule 12, adopted Jan. term, 1893. The bar of the statute of limitations may be taken advantage of by motion in this court, subject to being controverted by showing that the case is within the exceptions of the statute. But, to be available as a defense, the statute must be specially interposed in some appropriate form, and in apt time; that is, it must be interposed at a preliminary stage of the proceeding, and before issue joined upon the merits. And the protection of the statute must be thus invoked by the party entitled to it, or it wili be deemed waived. The statute does not operate, of its own force, to divest the court of jurisdiction. Ang. Lim. § 285; Wood, Lim. Act. § 7; Elliott, App. Proc. § 406; Clayton v. Cheeley, 5 Colo. 337; Chivington v. Colorado Springs Co., 9 Colo. 597, 14 Pac. 212. In Brooks v. Norris, 11 How. 208, Chief Justice Taney, speaking of the statute of limitations applicable to writs of error, said: "According to the English practice, the defendant in error must avail himself of this defense by plea. He cannot take advantage of it by motion, nor can the court judicially take notice of it, as the limitation of time is not an objection to the Jurisdiction of the court. It is a defense which the defendant in error may or may not rely upon, as he himself thinks proper. But, according to the established practice of this court, he need not plead it, but may take advantage of it by motion." The Brooks-Norris

decision refers to an act of congress not unlike our statute. It was as follows: "Writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, feme covert, non compos mentis, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability." 1 Stat. 85. In Burnap v. Wight, 14 Ill. 303, it was held: "A defense of the statute of limitations cannot be interposed by a motion to dismiss. It must be relied on by plea, so that the plaintiff may reply that the case is within the exceptions in the statute." The decisions of this court are to the effect that statutes of limitation must be specially pleaded, either by demurrer or answered, in order to be available in ordinary civil actions. Though the language of our limitation statutes is that the action shall be brought or commenced within a certain time, "and not afterwards" (see Gen. St. §§ 2163-2166, 2168, 2170), yet it has never been held in this state that the bar of the statute could be availed of under the general issue in civil actions, except in the single instance of an action for a penalty. Railroad Co. v. Tanner, 19 Colo. —, 36 Pac. 541.

It is true, our decisions are uniform to the effect that an appeal must be prayed within the time prescribed by statute, or it cannot be maintained. The doctrine is based upon the ground that an appeal is a creature of the statute; that the statute is mandatory, and must be strictly pursued; and that, when it appears that the statute providing for and governing appeals has not been complied with. the court does not acquire jurisdiction by ap-See decisions from Peabody v. Thatcher, 3 Colo. 275, to Harvey v. Insurance Co., 18 Colo. 354, 32 Pac. 935. But there is a manifest distinction between an appeal and a writ of error. An appeal is a statutory proceeding. It was unknown to the common law. Being the creature of the statute, there is force in the argument that the conditions upon which an appeal is granted must be complied with, or its foundation fails. A writ of error is a writ of right, though subject to regulation by statute. It is the commencement of a new suit, and not the continuation of an old one. A new suit being brought in an appellate court by writ of error, there seems to be no reason for giving the statute of limitations applicable to such writ a construction or effect different from like statutes applicable to ordinary civil actions commenced in the nisi prius courts.

The majority opinion in the case of Stark v. Jenkins, 1 Wash. T. 421, cited by counsel for defendant in error, seems to be contrary to the views we have expressed. It is certainly contrary to the current and weight of authority upon statutes of limitation like ours. The other authorities cited do not necessarily conflict with the conclusion at which we have arrived. The motion to dismiss the writ of error will be denied.

CARICO v. FIDELITY INVESTMENT CO. (Court of Appeals of Colorado. May 28, 1894.)

BAILMENT-MONEY COLLECTED BY OFFICER OF CORPORATION-LIABILITY-EVIDENCE.

In an action by a corporation against its secretary—whose duty it was to receive money, and pay it to the treasurer—for money received, the defense was that defendant's services were gratuitous, and the money had been stolen from his safe. The evidence showed a changing, mixing, and confusion of such money with defendant's, and failed to show either that, in the performance of his duties, it was necessary for him to hold the money for a time, as alleged by him, or that the loss did not occur through his negligent way of keeping it, or failure to pay it over. No reason was given by him why money was retained four months after several demands were made by the treasurer. Held, that the court properly directed a verdict for plaintiff.

Appeal from district court, Arapahoe county.

Action by the Fidelity Investment Company against James M. Carico for money received by defendant as plaintiff's secretary. From a judgment entered on the verdict of a jury directed by the court in favor of plaintiff, defendant appeals. Affirmed.

W. T. Rogers, for appellant. Chas. M. Bice, for appellee.

REED, J. Appellant was secretary to appellee, and, as such officer, it was his duty to collect, receipt for the money due the company, and pay it over to the treasurer. It is alleged in the complaint, and admitted, that from August to early in December, 1889, appellant received, of the money of the company, various sums, aggregating, on the 8th day of December, \$528.15, which he neglected or refused to pay over to the treasurer. The special defenses interposed were: First. "That, in the performance of his duties as secretary, it sometimes became necessary for him to hold the money of the plaintiff for a time, before paying it to the treasurer; that he kept it in his private safe until such time as he could pay it to the treasurer; that he gave the money the same care and attention as he did his own," etc. Second. That the 8th of December the safe was broken open, and the money of the company, and some of his own, was stolen. Third. "That he received no compensation for his services." The case was tried to a jury, and at the close of the testimony the court instructed the jury to find for the plaintiff the claimed, \$528.15, and interest, amount \$106.83, making \$634.98.

This case was once before decided by this court (see Investment Co. v. Carico, 1 Colo. App. 202, 28 Pac. 1131), when the testimony upon the trial was fully and carefully reviewed, and the law of the case fully stated. The judgment was reversed, cause remanded, and second trial had, which is the one under review. A careful examination of the

evidence shows it the same as that of the former trial,-only varying from it in some unimportant particulars. The defenses were no better established than upon the former. The following paragraph appears in the former decision (page 296, 1 Colo. App., and page 1131, 28 Pac.): "To exonerate defendant, it must be shown: First. That the funds of the company were kept separate and distinct from his own. Treating moneys received as his own, and his liability as that of a debtor for the amounts received, would be a conversion, and the loss his own. Second. That the loss did not occur through his negligence and failure to pay the money over, or through his negligence in the manner of keeping it. Disregarding his official duty, and regarding it only as an unpaid or gratuitous bailment, the amount of care required is that which a prudent man would give to his own property. To show that he gave it the same care that he did his own is not sufficient, if the testimony shows gross negligence in his own affairs. See Schouler, Bailm. 44, 47; Story, Bailm. §§ 64, 183." See, also, authorities there cited in support of the declarations. The defendant's evidence failed to establish either of the propositions there declared necessary to exonerate him, nor did it show, as alleged in the answer, "that, in the performance of his official duties, it became necessary for him to hold the money for a time." No reason is given, even by himself, why money was retained from August to December, after several demands had been made by the treasurer. His own and other evidence showed a changing, mixing, and confusion of the money with his own, which amounted to a conversion. Hence, at the time of the alleged robbery, he was not a bailee, but the debtor of the company for the amount received by him. Such being the case, the court was warranted in taking the case from the jury. There were no questions of fact for the jury to determine. The judgment of the district court will be affirmed. Affirmed.

WALKER v. PEOPLE.

(Court of Appeals of Colorado. May 28, 1894.)

Intoxicating Liquor — Sale to Females — Information—Suppliciency of Evidence.

1. Under Laws 1891, p. 315, forbidding the sale of liquor to females in any wine room kept in connection with a saleon, evidence of such sale in a room used as a dining room or restaurant, for lodgers in the upper part of the saleon building, to female servants in charge of such rooms, is insufficient to sustain a conviction.

2. Under Laws 1891, p. 315, prohibiting the keeping of a wine room in connection with a saloon, into which females are permitted to enter from the outside, or from the saloon, and be supplied with liquor, an information failing to allege that the females came from the outside, or from the saloon, charges no offense.

Error to district court, Arapahoe county.

J. P. Walker was convicted of keeping a wine room where women were permitted to enter, and be supplied with liquor, and brings error. Reversed.

Osborne & Taylor, for plaintiff in error. Eugene Engley, Atty. Gen. (H. T. Sale, of counsel), for defendant in error.

THOMSON, J. The following is the Information upon which the defendant was tried: "The People of the State of Colorado against Joseph Walker. Robert W. Steele, district attorney within and for the second judicial district of the state of Colorado, in the county of Arapahoe, in the state aforesaid, in the name and by the authority of the people of the state of Colorado, informs the court that Joseph Walker, on, to wit, the eighth day of October, in the year of our Lord one thousand eight hundred and ninetytwo, at the county of Arapahoe aforesaid, being the keeper and proprietor of a certain saloon there situate, did then and there unlawfully have and keep in connection with and as a part of said saloon a wine room, and did then and there permit Annie Mc-Cloud and Julia Manaclan to enter into the said wine room, and then and there, in the said wine room, did supply the said Annie McCloud and Julia Manaclan with certain liquors from the said saloon, the kind and quantity whereof are to the said Robert W. Steele unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of Colorado." The law upon which the prosecution was based is as fol-"That no saloon, tippling house or dram shop shall have or keep in connection with or as a part of such saloon, tippling house or dram shop, any wine room or other place either with or without doors, curtain or curtains, or screen of any kind, into which any temale person shall be permitted to enter from the outside or from such saloon, tippling house or dram shop, and there be supplied with any kind of liquor whatsoever. If any person shall be convicted of a violation of any of the provisions of this section, such person shall be fined in a sum not less than fifty dollars, nor more than two hundred and fifty dollars, or by imprisonment in the county jail not less than two months or more than twelve months or by both such fine and imprisonment at the discretion of the court." Sess. Laws 1891, p. 315.

The arrest was made by two police officers, whose testimony was the only evidence in behalf of the people. They testified that in a room of a building occupied by defendant's saloon, and connected with the saloon by a hallway, they found the two women named in the information, and a man, drinking beer. Mrs. Walker, the wife of the defendant, testified that the room in question, and certain others adjacent, were the living

rooms of the family, and that this particular room was used as an eating room or restaurant; that the upper story of the building was divided into rooms, which were in her charge, and were let to lodgers, and from which entrance was had to this room by a stairway; that meals were served in it for these lodgers, and for the servants and others; that the two women lived in the house, and were in her employ,-one as a chambermaid, to take care of the rooms up stairs, and the other to assist her in other matters; that on the occasion of the arrest, these women having finished their work, she asked them if they would like a glass of beer and a lunch, and, upon their answering affirmatively, she brought two glasses of beer, and set them on the table, and went to the ice box to get some cheese. While she was absent the officers had come, and when she returned the women had gone. As to the use of the rooms in the building, and the relation sustained by the women to her, she was corroborated by her husband, the defendant, but he knew nothing about the beer and lunch she was serving to them. He also testified that the man who was in the room when the officers entered lodged in the house. There is nothing in the evidence to show that there was any connection between his presence in the room and that of the women. The evidence for the defendant was uncontradicted, but he was convicted.

If the information charges an offense, we do not think the evidence sufficient to sustain a conviction. The room described by the witnesses was not a wine room, within the meaning of the law. To make it a wine room, it must have been kept in connection with, or as a part of, the saloon. The legislature evidently intended to designate a place which patrons of a saloon might use for private tippling purposes, instead of drinking at the bar, and in which a portion of the business of the saloon should be carried on. But it was not shown that any liquor had ever been supplied to any person in this room, except in this solitary instance, nor does it appear that it was connected with the saloon, or a part of it. It belonged to other portions of the house, used for entirely different purposes. The keeping of a wine room, without more, is not a violation of the law. It is the keeping of the wine room, and permitting female persons to enter it from the outside, or from the saloon, and there supplying them with liquor, which together constitute the offense. The prohibition does not extend to females indiscriminately. It is confined to those who come from without, gaining access either through an independent entrance, or from the saloon. From the qualifying words used in the statute, we think it plain that the persons meant, to whom it is unlawful to supply liquor, in a wine room, are those from the outside, whose only business in the room is to patronize the saloon. This information does not

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charge an offense, under the statute, because it fails to state that the females who were supplied with liquor in the room in question belonged to the prohibited class. The evidence fails to show that it was a wine room, and it was clearly proven that the women mentioned were servants employed and living in the house, taking their meals in this room, and were there, upon the occasion specified, by the invitation of their mistress. The law was not intended for a case of this kind, and there was nothing in the facts proven which constituted an offense, either within its letter or its spirit. The court, in instructing the jury, followed the information, and not the law. The proceeding, from its inception to the final judgment, was The information was bad, the erroneous. instructions were bad, and upon the proof the defendant should have been acquitted. The judgment is reversed. Reversed.

McCORD-BRAGDON GROCER CO. v. GAR-RISON et al. (McNAMARA DRY GOODS CO. et al., Interveners).

(Court of Appeals of Colorado. May 28, 1894.)
CHATTEL MORTGAGE—WHAT CONSTITUTES—EXECUTION BY INSOLVENT—EFFECT AS ASSIGNMENT.

- 1. An insolvent debtor may mortgage his property to secure a legitimate debt, without bringing himself within the general assignment
- 2. Where an insolvent debtor executes a chattel mortgage to certain creditors, with power of sale, and conditioned that any surplus over their claims shall be returned to the grantor, such instrument will be considered a mortgage, and not a general assignment.

Appeal from district court, Rio Grande county.

Action by the McCord-Bragdon Grocer Company against William Garrison and others, and the McNamara Dry Goods Company and others intervene. There was a judgment for interveners, and plaintiff appeals. Affirmed.

Waldron & Devine, for appellant. C. M. Corlett. Z. T. Brown, C. A. Johnson, Butler & McKinley, and Rogers, Cuthbert & Ellis, for appellees.

BISSELL, P. J. In January, 1892, Garrison & Howard were doing a general merchandise business in Garrison, Colo. They had become indebted to many houses, and at that date were probably entirely insolvent. Their creditors were pressing them for payment, and on the 30th of that month they executed demand notes to the order of some of the individuals and firms to whom they were indebted, and secured the payment of the paper by the execution of divers chattel mortgages upon their entire stock of merchandise and other assets. The notes and securities were delivered and recorded, and the mortgagees took possession. The present appellant, the McCord-Bragdon Grocer Company, filed its complaint on the day of the execution of these mortgages, and sued out a writ of attachment in aid of the suit. The securities were delivered on Saturday, but the writ of attachment was not levied until the following Monday, at about 2 o'clock in the afternoon, when the sheriff seized the goods under his process, and took possession of the entire property. The mortgagees intervened, and asserted their title, which was ultimately adjudged to be valid as against the attaching creditors.

The only question raised or argued on this appeal concerns the legal effect to be given the transaction and the legal construction to be put on the instruments which the firm executed. The contention is that the instruments are to be construed as a general assignment for the benefit of creditors, which would make the property or its proceeds one common fund, to be equitably and ratably distributed among them. The argument rests for its support upon the decision in Martin v. Hausman, 14 Fed. 160, and the cases which accept the doctrine therein announced. Most of those decisions were rendered by nisi prius tribunals, although there are a few states with peculiar statutes which accept this rule; but, in the absence of some specific legislation warranting it, it may very safely be said that the doctrine is not accepted by the courts generally, and, so far as the federal decisions are regarded, they have been expressly overturned by the supreme court of the United States. Union Bank of Chicago v. Kansas City Bank, 136 U.S. 223, 10 Sup. Ct. 1013. While the circumstances of the case were not identical with the one under consideration, this court, in a very recent decision, speaking by Thomson, J., followed the later cases on the subject, and declared them to express the true rule in cases of this description. Kellogg v. Thropp (April term, 1894) 36 Pac. 447. That case refers with approval to May v. Tenney, 148 U.S. 60, 13 Sup. Ct. 491, and Campbell v. Iron Co., 9 Colo. 60, 10 Pac. 248. Those cases undoubtedly declare the law to be that any debtor, whether solvent or insolvent, has the legal right to dispose of his property by way of sale, transfer, or incumbrance, for the purposes of paying or securing any legitimate debt, without bringing himself necessarily within the terms of the act which gives him the right to make a general assignment for the benefit of his creditors. According to the tenor of those cases, no instrument of transfer or incumbrance will be adjudged to be a deed of assignment unless its terms necessarily compel that construction, or unless there be something in the transaction on which the court would have the right to conclude that the parties intended to make such disposition of their The cases agree that this intenproperty. tion is derivable either from the language of the instrument or from the acts of the

parties. Hunter v. Ferguson, 3 Colo. App. 287, 33 Pac. 82; Hargadine v. Henderson, 97 Mo. 375, 11 S. W. 218; Bank v. Crittenden, 66 Iowa, 237, 23 N. W. 646; Fecheimer v. Robertson, 53 Ark. 101, 13 S. W. 423: Schroeder v. Walsh, 120 Ill. 403, 11 N. E. 70; Muchmore v. Budd, 53 N. J. Law, 369, 22 Atl. 518. In the present case the intention to make a general assignment for the benefit of creditors is expressly negatived both by the instruments themselves and by the circumstances of the transaction. The transfers were by chattel mortgages in the usual form, simply transferring the title of the property to the creditors themselves with a power of sale, and on condition that any surplus should be returned to the grantors. The conditions of the transfer broadly preserve the real distinction between a mortgage and an assignment,—the retention of an interest in the mortgagor, which is called his "equity of redemption." An assignment is always an absolute transfer of title in payment of the debts, while the mortgage is executed as a security. course, there is a resemblance between the two, in that they are both executed for the same purpose, to wit, to secure the satisfaction of the debtor's obligations. In the one case, however, he has the right of redemption, and in the other his title is absolutely gone. The authorities are in harmony that in a case of this sort the transfer must be construed to be a mortgage, and not an assignment. There is nothing in the circumstances of the case which necessitates a different construction. On the other hand, the evidence which the company produced clearly tends in the same direction. There was testimony offered which tended to show that at the time of the execution of the mortgages the parties discussed the propriety of making a general assignment for the benefit of their creditors, and went so far in that direction as to direct papers to be prepared looking to that result. The deed of assignment, however, was neither finished nor executed, the purpose was abandoned, and the parties ultimately executed the instruments contained in the record. This circumstance very conclusively shows that the parties had no intention to exercise the right given them by the assignment act, but ultimately concluded to secure the intervening creditors by mortgaging to them the stock which they had. That the result is to prefer some creditors neither permits nor requires the court to conclude that the securities must be turned into deeds of assignment which would be operative to pay a part of the debt owed to the appellant. Unless the state or the general government shall pass some bankruptcy law of a general character which will affix such legal consequences to the acts of the parties, courts have no right to give to executed instruments a legal construction other than that warranted by the general prin-

ciples of law which govern such transactions

A point is attempted to be made on the action of the court with reference to the taxation of costs, whereby the sheriff was allowed a very considerable sum for custodian's fees and other services rendered in and about the suit. If we were inclined to disturb the ruling of the court in respect of this matter, there is no basis on which we can rest our action. The testimony which was introduced to show the character of the fees, the nature of the services, and the excessive amount of the sum charged has not been preserved by such a bill of exceptions as authorizes us to review or consider it. It is therefore left wholly undetermined. The decision of the court below is in harmony with the law as herein declared, and it will accordingly be affirmed. Affirmed.

BEIFELD et al. v. MARTIN.

(Court of Appeals of Colorado. May 28, 1804.)
Assignment for Benefit of Creditors — Walver By Creditor of Rights — Objections to Claim.

1. A creditor having, after assignment, levied upon, sold, and retained the proceeds of a part of the assigned assets, cannot thereafter participate in the assignment.

2. A statement by an assignee, in his report, that a creditor has waived his claim against the estate by prosecuting an attachment of a part of the assigned assets to judgment, is an exception to such claim, within Laws 1885, p. 45, providing that claims shall be allowed, unless excepted to by an interested party.

3. An assignee may except to a claim on behalf of the creditors, though not a creditor himself.

Error to district court, Pueblo county.

Petition by Joseph Beifeld & Co. to be allowed to participate in the assignment of Frank C. Taft to Edmund H. Martin. To a judgment for the assignee, petitioners bring error. Affirmed.

D. McCaskill and Rogers, Cuthbert & Ellis, for plaintiffs in error. Dixon & Dixon, for defendant in error.

THOMSON, J. The plaintiffs in error, Beifeld & Co., presented their petition to the district court of Pueblo county, alleging a general assignment by Frank C. Taft for the benefit of all his creditors; the taking possession under the assignment by Edmund H. Martin, the assignee, of all the property assigned; the filing by Beifeld & Co., with the assignee, of a certified copy of a judgment obtained by them against Taft in the district court of Arapahoe county for about \$2,100 and costs, to which, as a claim against the estate, no objection was made by any person: the filing of a report by the assignee, and the making and payment of dividends; the failure and refusal of the assignee to recognize the petitioners as creditors; the possession of money by the assignee which could

be applied upon their judgment,—and praying an order upon the assignee for the payment to them, out of the moneys in his hands, of the proportion to which they were entitled as creditors. The assignee answered, denying that all the property assigned to him came into his possession, and averring that, after the assignment, Beifeld & Co. caused a large quantity of the assigned property to be levied upon by attachment against the assignor, prosecuted their attachment suit to judgment (which is the same judgment mentioned in the petition), caused the property attached to be sold, and received the proceeds of the sale, and that by reason of the premises the petitioners were precluded from claiming any interest in the assigned estate in the hands of the assignor. The record contains what purports to be a copy of the assignee's report, made after the filing with him of Beifeld & Co.'s judgment, and before any dividend was ordered by the court, which sets forth the service upon the assignee of a copy of the judgment; the attachment by the petitioners, after the assignment, of a portion of the goods assigned, to satisfy their claim; and the sale of the property by virtue of an order in their behalt made in the cause by the court,-and asserts that, as the assignee is advised, they waived their claim against the estate by prosecuting their attachment to judgment. Upon a hearing the court denied the prayer of the petitioners, and they have brought the case here for review. The judgment is assigned for error.

The contention of the petitioners is that no objection was made to the claim filed by the assignee, as required by the assignment law, and that, therefore, the duty of the court to order the payment to them of their distributory share was mandatory. The act regulating assignments provides that any person interested may appear, before a dividend shall be made, and file with the clerk any exceptions to the claim or demand of any creditor, whereupon the claim shall be adjudicated by the court, and if no exception be made to a claim filed, or if it has been favorably adjudicated, the court shall order the assignee to make, from time to time, fair and equal dividends among the Sess. Laws 1885, p. 45. creditors. think the report of the assignee, as it is shown by the record, contained an exception to the claim which fully satisfied the requirements of the law. It is true that the word "exception" or "objection" was not used; but the facts stated constitute an objection, and that the assignee intended the statement as such is shown by his suggestion that the petitioners, by their acts, had waived their While the assignee may not have been himself a creditor, he represented the creditors. It was in their behalf that the objection was made, and it was not improper

that, as the representative of those interested, he should make it. By the terms of the act the assent of creditors to an assignment for their benefit is presumed, and such, also, is the law independent of statutory enactment, but the presumption is not conclusive. It is not compulsory upon a creditor to assent to an assignment made for his benefit in common with other creditors, but his right to a proportionate share of the assets depends upon such assent. It is not permitted to him to blow hot and cold. cannot repudiate an assignment, and at the same time participate in its benefits. A seizure and sale by one creditor, under summary process, of a portion of the assets, diminishes to that extent the general fund out of which the debts are to be paid. The petitioners, as is alleged, attached a considerable quantity of the property assigned to satisfy their individual claim; and, having so prevented the assignee from administering the whole estate for the benefit of all interested, it would be manifestly unjust to the other creditors to permit the petitioners to share with them the avails of the residue. And it is immaterial whether the attempt of the petitioners, by their attachment proceedings, to secure a preference for themselves, results in ultimate success or failure. success they will have appropriated to themselves assets which should have been administered for the equal benefit of all the creditors; and a failure does not restore property which has been sold, and the value of which it may require a considerable out lay of expense and costs on the part of the estate to recover from the petitioners.

What we have said is merely the expression of an opinion upon the questions discussed by counsel, and upon the facts as we assume them to have been. What showing was actually made, upon which the court based its judgment, is not indicated in the record. An issue of fact was made by the pleadings, but whether it was determined upon evidence introduced, or upon an agreed statement of counsel, we are not advised. At the time of the rendition of the judgment the petitioners were granted 90 days within which to file their bill of exceptions, but there is no bill of exceptions in the record. An exception to the final judgment was essential to its review upon the facts, and such exception could be preserved only in a bill of exceptions. Burnell v. Wachtel (Colo. App.; April term, 1894) 36 Pac. 887. We have expressed our opinion upon a hypothetical case made by the arguments of the respective counsel; but without any facts before us, and with a judgment unexcepted to, it is manifest that it is beyond our power to pass upon the actual case, and we are compelled to assume the correctness of the decision of the court below. The judgment is affirmed.

HOLDEN v. PIPER.

(Court of Appeals of Colorado. June 11, 1894.) TRUSTS—FOLLOWING MISAPPLIED FUNDS — CONFU-SION.

When a banker, appointed administrator of an estate, has charged the funds collected into his general deposit account, and thereafter assigned for the benefit of creditors, the administrator d. b. n. cannot follow the funds into the hands of the banker's assignee, nor be decreed a preference in respect thereof.

Error to district court, Pueblo county.

In the matter of the petition of D. L. Holden, administrator d. b. n. of the estate of John T. Sullivan, deceased, against C. J. Piper, assignee of the estate of Frederick Rohrer. Judgment for petitioner for amount in hands of assignee. Error and cross error assigned. Reversed.

Betts & Vates and B. F. McDaniel, for plaintiff in error. D. McCaskill, for defendant in error.

BISSELL, P. J. For some years, Frederick Rohrer was doing business in the city of Pueblo as a banker, under the name of the Bank of Pueblo. In 1890 he was appointed administrator of the estate of John T. Sullivan, and as such representative collected about \$4,600. Of this sum, he disbursed, in the course of his administration, a little upwards of \$1,200, leaving \$3,364.58 unaccounted for. On the last day of May, 1802, he made a statutory general assignment for the benefit of his creditors; and at the date of the present litigation the defendant in error, Piper, was the assignee of the estate. Rohrer turned over \$551.80 to the assignee. There was probably other property belonging to the assignor which passed by the transfer, but to what extent, and of what it consisted, the record is silent. In the September following, Holden, the present plaintiff in error, filed a petition in the matter, and prayed a decree that the assignee be directed to pay him the unpaid balance of \$3,364.58, and that Sullivan's estate be given a preference over all the other of Rohrer's creditors. When the petition was filed the assignee took issue, and the case was heard upon an agreed statement of facts. proof established the facts above stated, and further that, during a period of about two years subsequent to the date of his appointment, Rohrer had, from time to time, received the moneys which went to make up the total sum belonging to the Sullivan estate. The petition is silent as to the exact dates of the payments, and simply recites that within a period named all the money had been received. This period antedates the assignment by some two or more weeks. Rohrer used the money which he received in his general business, mingled it indiscriminately with his other funds, and treated it as personal assets in the transaction of his business and in the payment of his debts. Aside from this general statement, there is no showing as to the time when the last money was collected, nor whether any of it went into other property which passed to the assignee.

On this state of facts the petitioner claimed that the fund which Rohrer had appropriated was a trust fund, and whatever property he transferred to the assignee was impressed with a lien in favor of the estate, which the present administrator had a right to assert against Rohrer's general creditors. Measurably accepting this claim as well founded, the court decreed that the cash on hand at the time of the assignment should be paid to the administrator, and dismissed the petition as to the residue. The judgment entered cannot stand. The assignee assigns cross error as to the judgment for \$551.80, and his error is well laid. The administrator is entitled to no decree giving him a preference over Rohrer's general creditors. There has been considerable conflict of opinion among the courts as to the limitations which restrict the doctrine that trust funds may be followed into the hands of third parties, and either the funds themselves, or the property into which they have gone, be subjected to a liability resulting from their original trust character. The supreme court, in Bank v. Hummel, 14 Colo. 259, 23 Pac. 986, accepted the rule of the more modern cases,-that funds might be pursued, and impressed with their trust character, even though the trust property itself consisted of money, which was without the earmarks formerly held essential to the application of the doctrine. This case undoubtedly went to the uttermost limit in the assertion of the rule that, so long as trust property could be traced and followed, it should remain subject to the trust, and wherever trust funds were mingled with another's assets the whole would be treated as trust property, except in so far as the defaulting trustee might be able to distinguish his own property from the trust estate. This case, however, as stated in that opinion, and as reconsidered on a subsequent appeal in 2 Colo. App. 571, 32 Pac. 72, must be viewed in the light of the facts which constituted that particular controversy. The contest there was between the administrator of Everett and the First National Bank. bank, at the time of the assignment, had on deposit some \$6,000. The fund in controversy was adjudged to be a part of this deposit. In other words, it was there holden that the evidence established that Heatlev's money, to the extent of the amount of the draft, was directly traceable to the general fund which passed to the administrator, as part of the assets of Everett's estate, at the date of his death. The transaction which was regarded as a payment of money into the bank by Heatley occurred on the 17th of April, which was the day of Everett's death, and consequently the day, legally, of Hummell's succession to his interest. For these

reasons it must not be assumed that either of those cases has decided that there is no necessity to trace the trust funds into the property which passes to the assignee, or to the representative, but the rule is to be taken as subject to that limitation. That this is true is very completely demonstrated by the very able and perspicacious opinion of Mr. Justice Goddard in a recent case in the supreme court. McClure v. Board, 34 Pac. 763. The court there recognizes the rule that, wherever property held in trust has been misapplied, it may be followed, but upon condition that the property can be traced, in which event, whether in the old or the new form, it may be subjected to the use of the cestui que trust. The court apparently had some difficulty in escaping the force of the case of McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214, and, for the purposes of announcing the rule to be followed, quotes from the dissenting opinion of Judge Cassoday, who said: "An equitable lien exists only when the trust money is directly or indirectly traceable to the fund sought to be charged.' This circumstance very clearly discloses the trend of the opinion. The doctrine stated is in very complete harmony with the bestconsidered cases, and very accurately enunciates the law. The case in Wisconsin has since been overruled in the Nonotuck Silk Co. Case, hereafter cited. In the latter case it was clearly settled that, to entitle a trust creditor to a preference, it must be satisfactorily established that the property of the insolvent, remaining for distribution, includes the proceeds of the trust estate. Nonotuck Silk Co. v. Flanders (Wis.) 58 N. W. 383; Cavin v. Gleason, 105 N. Y. 257, 11 N. E. 504; Elevator Co. v. Clark (N. D.) 53 N. W. 175; Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005; Bank v. Goetz, 138 Ill. 127, 27 N. E. 907; Ellison v. Moses, 95 Ala. 221, 11 South. 347; Sherwood v. Bank, 94 Mich. 78, 53 N. W. 923. A consideration of the facts stated at the outset of this opinion very readily satisfies us that the case, as laid, does not come within the limits essential to the application of the doctrine. All the case shows is that Rohrer, as administrator, received funds, and misappropriated them, ultimately became insolvent, and transferred his estate to an assignee. What of the trust funds, if any, passed to the assignee,-whether in the shape of the original moneys received by Rohrer, or of other funds into which it had been transmuted,-or what property passed by the assignment into which trust funds had gone, the record does not disclose. Under these circumstances, it is manifest, the court was powerless to decree any preference to the administrator.

It was seriously contended in the argument that, because the plaintiff in error was an administrator de bonis non, he could in no event maintain his petition, since his only rights and remedies concerned the unadministered portion of the estate. This was

doubtless the ancient rule, and it still prevails in some states, though the more modern doctrine has enlarged the powers of such an administrator with reference to the decedent's property. It is useless to investigate this question in Colorado, since our statutes (Gen. St. § 3548; Mill's Ann. St. § 4720) entirely dispose of this question. By these statutes there is preserved to such an administrator full authority to resort to such remedies as may be essential to preserve or recover the estate of his decedent, whether from strangers or from former representatives.

The court erred in decreeing the administrator entitled to a preference as to \$551.80, and the judgment is accordingly reversed and remanded. Reversed.

POUNDSTONE et al. v. HOLT.

(Court of Appeals of Colorado. June 11, 1894.) Mortgager's Equity—Attachment—Remedy of Mortgagee—Defect of Parties — How Ques-TION RAISED.

1. When a mortgagee has possession, through her agent, of specific mortgaged property, she may sue persons taking the same under an attachment against the mortgagor.

2. A creditor cannot reach a mortgagor's equity of redemption in a chattel by attaching the chattel.

the chattel.

3. A defect of parties can only be taken advantage of by demurrer or by answer.

Appeal from district court, Rio Grande

Action by Clara E. Holt against John J. Poundstone and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Ira J. Bloomfield, for appellants. C. M. Corlett, for appellee.

BISSELL, P. J. This suit is the outgrowth of the litigation which sprung up between the different creditors of Garrison & Howard. Part were secured by sundry mortgages which the firm executed at the time of their failure, and the remainder were omitted from the preferred list. Some facts which are not properly before the court in this particular case will be suggested, in order to make the controversy and decision perfectly intelligible. The principal question raised has just been disposed of in an opinion announced by the court in the case of Grocer Co. v. Garrison (decided at the present term of the court) 37 Pac. 31. A motion was filed in the present case for leave to file the printed abstract in that one for the purpose of bringing before the court, to aid the determination of this suit, the evidence taken therein. At the time of the trial the parties stipulated that the evidence in that case, in so far as it was material and relevant, might be used on the trial of the issue presented by the parties Presumably, that evidence was considhere. ered by the court below, but the parties

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failed to preserve it in the present record in such a way that it is legitimately before the court for consideration. It is also true that the bill of exceptions, as filed in this case, is authenticated in a manner which prevents us from considering any matters of fact suggested in the briefs. The certificate fails to state that the bill of exceptions contains all the evidence introduced, and in fact, by express statement, excludes exhibits which were probably offered. A copy of the bill of exceptions in the McCord-Bragdon Case was likewise not made a part of the present record, so that in these respects the court is very considerably hampered in the statement of its conclusions. In general, it may be said that in January, 1892, Garrison & Howard were merchants doing business in Garrison. In the latter part of the month they executed divers notes and mortgages, and delivered them to sundry of their creditors, who immediately took possession of their stock of merchandise, and of whatever other property the firm owned. The appellee, Holt, was one of the number, and she evidently received a mortgage upon certain personal property, of the value of about \$350. The property need not be specified. The security named the articles mortgaged, and, according to the judgment, possession was delivered to the mortgagee. Subsequently, the present appellants seized the property under a writ of attachment issued in a suit brought by Miles against the firm to recover a debt owed by the copartnership. The constable attempted to levy his process upon this particular property, took it into possession, and ultimately sold it, and the present action was brought to recover its value.

A good many questions are discussed by counsel, but the resolution of a few of them will serve to adjudicate the rights of the parties. The appellants contend that, according to the testimony in the record, the various mortgagees to whom Garrison & Howard had transferred their property turned their possession over to one Shotwell, as their agent, who held the property for the benefit of the various parties. Upon this simple circumstance an argument is made that the mortgagees were jointly in possession, and therefore without right, individually, to maintain actions for any interference with their possession. We are not required to solve the problem as to the effect of the appointment of a joint agent upon the individual rights of the mortgagees. If it be true, as we must assume for the purposes of this decision, that the mortgage to the appellee, Holt, was of this specific property, her rights, as mortgagee, were not at all affected by the circumstance that the property was holden for her by Shotwell, who was likewise the agent of other mortgagees, and in possession of other parts of the property mortgaged. But in the present case this matter does not seem to be involved. The mortgage covered specific property, which was taken by the constable; and the right of action at once accrued to the mortgagee, by reason of this interference with her possession. Whatever the facts may be in regard to the matter, or whatever the record may show, the question of parties is not before the court. It is well settled, under our Code, that, where there is a defect of parties, it is the duty of the complaining defendant to raise this question elther by demurrer or by answer, and he is not permitted to rely upon the proof to support his attack. Not having pleaded it, he cannot now question the right of the appellee to maintain her suit. The status of the appellants, as party plaintiff, and officer taking the property, has been entirely settled by the supreme court. Metzler v. James, 12 Colo. 322, 19 Pac. 885; Stevenson v. Lord, 15 Colo. 131, 25 Pac. 313. The remedy of the attachment or execution creditor in relation to property covered by a mortgage is well settled by those adjudications. The officer was without the right to take the property from the mortgagee, nor can he reach any surplus which may be coming to the mortgagor by such a seizure. If the attaching creditor imagines that the equity is of some value, the statute determines the course which he must pursue to make that surplus available for the payment of his debt. Failing in this remedy, he may not preserve his rights by a seizure of the property.

It is seriously contended by the appellants that those decisions are inapplicable, and indecisive of the present suit, because of the invalidity of the security in the present case. It is seriously urged that the mortgage is invalid because it, with the other securities, amounted to a transfer of all the debtors' property, and therefore became a general assignment under the statute, whereby all the creditors were entitled to share ratably in the distribution of the assets of the insolvent firm. If the testimony which had been taken in the other case had been preserved by a proper bill of exceptions in this, whereby all the facts necessary to a decision were properly before the court, this contention must have been determined against the appellants. The result would have been unchanged, even under those circumstances. We held in the Case of McCord-Bragdon Grocer Company, heretofore referred to, that the principle was inapplicable; that the transfers did not amount to an assignment, but that the mortgagees took their property freed from any consequences which would attach in a case of a general assignment under the statute. It would be a matter of supererogation to restate the reasons of the rule, or to reframe the argument by which it was supported. The situation of the present case does not require it, and no good purpose would be subserved by a reargument of the proposition. It is enough to say that there is nothing in the present record which compels us to reverse the case, and it will accordingly be affirmed. Affirmed.

POUNDSTONE v. MABEN.

(Court of Appeals of Colorado. June 11, 1894.)

Appeal from district court, Rio Grande coun-

ty. Action by Jay D. Maben against John J. Poundstone. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Ira J. Bloomfield, for appellant. C. M. Corlett, for appellee.

PER CURIAM. This case was brought up react Curiam. This case was brought up with the preceding one, of Poundstone v. Holt, 37 Pac. 35: and while, of necessity, two records were filed, both cases were treated and argued as one, though separate judgments must be entered. If the record in the present case may be treated as containing all the matters exhibited by that filed in the preceding cause, the same judgment must consequently be entered. For the reasons expressed for the affirmtered. For the reasons expressed for the affirmance of the judgment in the preceding cause, this will be affirmed. Affirmed.

FLICK v. GRAHAM.

(Court of Appeals of Colorado. June 11, 1894.)

SALE OF CROPS—CHANGE OF POSSESSION.

Assertion of ownership and control of crops, accompanied by possession until they are harvested and secured, and the vendor's recognition, are sufficient evidence of title in the purchaser to warrant a verdict in favor of his mortgagee under a mortgage executed while he was so in possession, as against a subsequent purchaser from the vendor.

Error to district court, Arapahoe county. Replevin by John H. Graham against William Flick. Judgment for plaintiff. Defendant brings error. Affirmed.

James A. Kilton, for plaintiff in error. Whitford & Lindsley, for defendant in error.

REED, J. It appears that Mary J. and J. B. Emory, being the owners of a farm in Jefferson county, rented it to Jacob Ely for the year 1892, who occupied it with his family, planted and cared for the crops, and conducted the farm until some time in the month of July, when he sold and delivered the growing crops to one George McKay, who entered into the possession, irrigated, harvested, and stacked the crops of grain and hay. After the transfer to McKay, the family of Ely still occupied the house, and McKay stayed with them when at the farm. Ely himself had found other employment, and was away during the week, but came home to spend the Sabbath. His two boys were employed by McKay. As to how Mc-Kay became the purchaser of the growing crop and other personal property, the evidence is meager and unsatisfactory. he had possession and control is established beyond controversy. While so in the possession and control, he executed a chattel mortgage of the growing crop and other personal property to defendant in error to secure advances made. After harvesting and securing the crop, McKay went to the mountains, and was gone some eight days, Ely and family still occupying the house upon the farm. During the absence of McKay, Ely, claiming to be the owner, sold the grain and hay in the stack, and other personal property, to Flick, the plaintiff, put him in possession of the house, etc., and left the country. Flick claiming to be the owner in possession of the house and property, defendant brought this suit in replevin to get possession of the property. A trial was had to a jury, who found for the plaintiff (defendant in error). From such verdict, and the judgment following, the appeal is prosecuted to this court.

There was no question to be determined by the jury but that of ownership and possession. Both parties claimed title from the same source, originating at different dates,that of McKay in July, and that of Flick in September. The principal argument of plaintiff is to the effect that there was no legal testimony to establish the possession and ownership of McKay. We cannot adopt this contention. The fact of his assertion of ownership and control until the crops were secured in stack and Ely's recognition are fully established. That Flick afterwards bought the same property, and paid for it, is also fully established. The question of title of the respective claimants seems to have been fairly submitted to the jury, and found by it, as a question of fact, in favor of Mc-Kay, and through him, by virtue of the chattel mortgage, in defendant. According to the well-settled rule of this court, such finding is conclusive.

The third, fourth, and fifth assignments of error, relied upon in argument, are that the court erred in refusing certain evidence offered. As above stated, the only issue to be tried was the title to the property. The evidence offered was not pertinent, and, if admitted, would in no manner have enlightened the jury, being only of circumstances from which an inference might be drawn. The court did not err in rejecting it. The judgment of the court below will be affirmed. Affirmed.

COE et al. v. BRITTON et al. (Court of Appeals of Colorado, June 11, 1894.) APPEAL FROM COUNTY COURT -NOTICE - MOTION TO DISMISS.

Sess. Laws 1885, p. 150, § 4, provides that, if an appeal from the county to the district court is not taken on the day judgment is rendered, appellant shall serve a notice of appeal on appellee within five days after the appeal is taken, and if such notice be not given the appealer may at any time before such votice. the appellee may at any time before such notice is actually served, and after the time when it should have been served, have the judgment of the county court affirmed, or the appeal dismissed. Held, that a motion to dismiss an appeal for failure to give notice of the appeal should be denied if such notice is given at any time before written notice of the motion to dismiss is served. dismiss is served.

Error to district court, Chaffee county.

Action by Britton, Smith & Co. against one Reeve. Defendant's goods were seized under a writ of attachment, and Charles A. Coe & Co. intervened, claiming the property under a chattel mortgage executed to them by Reeve. Interveners' petition was dismissed, and they bring error. Reversed.

McCoy & McCoy, for plaintiffs in error. G. K. Hartenstein, for defendants in error.

THOMSON, J. The appellees brought suit in the county court of Chaffee county against B. F. Reeve. A writ of attachment was sued out, by virtue of which certain goods of the defendant were seized. The appellants intervened, claiming the property under a chattel mortgage executed to them by Reeve. The cause was tried, and the plaintiffs had judgment against Reeve; but the claim of the interveners was disallowed, and the petition of intervention dismissed. They prayed an appeal to the district court, which was allowed; the appeal bond to be filed within 10 days. On the 26th day of March, 1892, and within the time fixed, the bond was duly filed, and on the 28th the record was filed with the clerk of the district court. No notice that the appeal was taken having been served upon the plaintiffs or their counsel, on the 22d day of June, 1892, they filed their motion to dismiss the appeal for that reason. No notice of the motion was ever given. On the 1st day of August, 1892, written notice of the appeal, in due legal form, was served upon the attorney of record of the plaintiffs, who on that day indorsed upon it his acceptance of service. On the 2d of August, 1892, the cause was heard upon the motion of plaintiffs to dismiss the appeal, and the motion was sustained.

The statutory provisions concerning appeals from county to district courts, upon which the judgment of dismissal was based, are as follows: "Sec. 4. If the appeal be not taken on the same day on which the judgment is rendered, the appellant shall serve the appellee, or his attorney of record, within five days after the appeal is taken, with a notice, in writing, stating that an appeal has been taken from the judgment therein specified, which notice shall be served by delivering a copy thereof to such appellee, or his attorney of record. If the appellant fail to give notice of his appeal when such notice is required, the appellee, may, at any time before such notice is actually served, and after the time when it should have been served, have the judgment of the county court affirmed or the appeal dismissed, at his option." Sess. Laws 1885, p. 159. Where notice that an appeal has been taken is not given within five days after it is taken, it is the absolute right of the appellee to have it dismissed, or the judgment affirmed. Webber v. Brieger, 1 Colo. App. 92, 27 Pac. 871; Law v. Nelson, 14 Colo. 409, 24 Pac. 2. But this is a right of which he may avail

himself, or not, as he may see fit. If he should go to trial without raising the objection, the right to do so would be forever gone. Mackey v. Briggs, 16 Colo. 143, 26 Pac. 131. To procure the disposition of an appeal which the statute authorizes, some direct action on the part of the appellee is necessary. He must make application to the court for the purpose, and, if the application be not made till after service of notice of the appeal, it will be too late. Service of notice of appeal must be made within five days after the appeal is taken, but if there is a default in this particular the appeal will still be saved, if the notice is served before the adverse party has asserted his right to a dismissal or an affirmance. This is clear from the language of the statute. In this case the motion to dismiss was filed on the 22d day of June, and the notice of appeal was not served until the 1st day of August; but on the last-named day no notice of the motion had been given, nor was it ever given. Written notice of motions is required in all cases except those made during the progress of a trial, and the notice must be served upon the opposing party or his attorney within the time, and in the manner, which the law has prescribed. Civ. Code, §§ 372-378. We have held that without such notice, unless it is waived, the court has no jurisdiction to pass upon a motion. Taylor v. Derry (Colo. App.) 35 Pac. 60. Until notice is served there is no motion which the court has any power to consider. An application for an order is not regarded as having been made until the time of the service of the notice; so that, when the plaintiffs received notice of the appeal, there was, in effect, no motion pending to dismiss it. Straat v. Blanchard, 14 Colo. 445, 448, 24 Pac. 561. It is contended, however, that this notice was waived by the appearance of counsel at the hearing. The record recites a special appearance only of the attorneys for the interveners, but at the time of the appearance it was not material whether it was special or general. The appearance to the motion could have no effect, except from the time at which it was made. The hearing was August 2d, and the notice of appeal was served August 1st. At the time of the hearing, everything necessary to make the appeal perfect and complete had already been done. The interveners were then legally in court, and entitled to a trial de novo of their case; and this fact furnished the very reason why the motion should have been resisted, and was the very ground upon which it should have been denied. There is an affidavit in the transcript which recites that after the motion was filed, and before the notice of appeal was given, the motion was called in open court, set for hearing, and continued on several occasions, in the presence of counsel for the interveners, who participated in some discussion which arose in connection with the motion. What the na-

ture of the discussion was, is not stated. There is nothing in this upon which a general appearance to the motion could be predicated. Hayes v. James, 1 Colo. App. 130, 27 Pac. 894. The judgment was erroneous, and must be reversed. Reversed.

COLORADO LAND & WATER CO. v. ADAMS.

(Court of Appeals of Colorado. June 11, 1894.) SPECIFIC PERFORMANCE — PART EXECUTION OF CONTRACT—FURNISHING WATER FOR IRRIGATION -CORPORATE CONTRACT-RATIFICATION.

1. The specific performance of a contract

1. The specific performance of a contract by an irrigation company to furnish a certain quantity of water will be enforced where the other party has constructed a lateral drain to the canal, several miles in length, for the purpose of conveying the water to his farm.

2. In an action against an irrigation company to compel specific performance of a contract to furnish water, it appeared that the promoter of the company employed an agent to solicit subscriptions. After the corporation was formed, the promoter, who was then president of the company, wrote to the agent, acknowlformed, the promoter, who was then president of the company, wrote to the agent, acknowledging that the contracts entered into by him before the corporation was formed were binding upon it, but ordered him to make future contracts for water on a different basis. *Held*, that the corporation had adopted the contracts, as as a be bound thereby and could not affer. so as to be bound thereby, and could not afterwards change their terms.

Bissell, P. J., dissenting.

Appeal from district court, Otero county. Action by R. L. Adams against the Colorado Land & Water Company. There was a judgment for plaintiff, and defendant ap-Affirmed. peals.

Hartzell & Patterson, for appellant. Gerry & Rittenhouse, for appellee.

REED, J. This was a suit brought for the specific performance of a contract. On the 28th day of January, 1890, appellant contemplated and intended to construct an extensive canal for irrigating purposes; the water to be disposed of by the sale of perpetual water rights, each for 80 acres of land. Appellee-being the owner of land which would be under the ditch, and desirous to secure water-on the date mentioned entered into a contract with appellant for the purchase of a right; taking the agreement, in parol, of appellant, to execute and deliver a deed at some future time, and executing and delivering a promissory note, of the following is a copy: "\$800. Rocky Ford, Colo., Jan. 28th, 1890. April 1st, after date, for value received, I promise to pay to the order of the Colorado Land & Canal Company eight hundred dollars, with interest at the rate of 10 per cent. per annum from date until paid. And having deposited with said canal company, as collateral security, one water right, I hereby authorize the said canal company or assigns, upon the nonpayment of this note, to sell said collateral at public or private sale, at its option, and without demand or notice. R. L. Adams." The canal had not been constructed, nor was appellant in a condition, or prepared, at the time, to make conveyances. The canal was not completed until July, 1801, although 55 miles was constructed by November, 1890. For a history of the canal, and the change in the name of the corporation, etc., see Colorado Land & Water Co. v. Rocky Ford, etc., Co. (Colo. App.) 34 Pac. 580. The water right to be deposited as collateral security, mentioned in the note, was shown and conceded to be the one purchased and to be received from the appellant. The contract of appellant, as established by the evidence of its agent, Ament, who made it. was for a perpetual water right, of 1.44 cubic feet of water per second, from the 15th of April to the 1st of November of each year. The note was not paid at maturity, nor was any demand made for payment, nor any deed of the water right tendered. The land of appellee was some six miles from the line of the canal, and he, with others in the same vicinity, similarly situated, and under contracts with appellant, constructed a lateral ditch from the canal to their lands. shown by Mr. Ament (appellant's agent), in the fall of 1890 appellee tendered to him the money in payment of his note, and demanded a deed for the water right. He said: "He came to me to settle up for the water, and get his water deed and contract." "He tendered the money to me, but I preferred to have it deposited in the bank." And anpellee and he went to the bank, made the deposit, and instructed the cashier to pay it to appellant when it delivered to the bank a deed of the form and character conceded by the agent to be the conveyance agreed upon. A deed was sent by the company, which was rejected by appellee, and shown by all the evidence to have differed materially from the one contracted for. The quantity of water conveyed was 1.08 cubic feet per second. instead of 1.44 (reducing it by about onefourth), and the time the water was to be furnished in each season was reduced nearly one-half. It does not appear that the company at any time rescinded or denied the validity of the contracts, at all times expressing a willingness to take the agreed price. In a letter written by the president to Mr. Ament, his agent, on November 12, 1890, he said: "Regarding parties of whom you wrote, as having long since contracted for water at the old price, \$800, I will say this company raised the price to \$1,000 on or about Oct. 15th; but this did not apply to any previous obligations, and parties who had previously contracted with you at \$800 will be entitled to water at that price, if closed for at once." On December 23, 1890, Mr. Clarke, the general manager, wrote the agent: "I have to advise you that the price of water from the canal of this company has been placed at \$800, for each full-paid perpetual water right

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for eighty acres, consisting of the continuous flow, during one hundred days of the irrigating season, of 1.08 cubic feet per second." There was no important controversy in regard to the facts. Appellant 'nsisted on its right to deliver deeds modified as to time and quantity. Appellee insisted upon a compliance with the contract, brought this suit to compel specific performance, and for damages in the loss of crops for the failure to deliver the water. The question of damage was tried to a jury, that found for the appellee in the sum of \$240.

The court found and decreed: (1) That appellant became the owner of the note. Not being in a situation to comply with its contract for the delivery of water, it waived the payment of the note at maturity, and such waiver extended to the time it could deliver the water. (2) That appellant contracted to furnish a perpetual water right, 1.44 cubic feet per second, and that it was to be furnished each year from the 15th of April until the 1st of November. (3) That appellee, on December 12, 1890, made a proper tender of the amount due, and a legal demand for the conveyance. (4) That the only deed tendered was for only 1.08 cubic feet per second, and for 100 days in each year. Decreeing appellee entitled to specific performance; the deed to be made according to the contract, as to quantity and time; the appellee to pay the \$800 and interest. Judgment was entered for the sum as found by the jury, for damages. The facts, as found by the court. are fully warranted by the evidence. Such facts being established, there can be no question of appellee's right to recover such damages for breach of the contract as he was shown to have sustained, and the finding of the jury of the amount is conclusive. The errors assigned are far more general than specific. They are, in effect, that the court erred, and that the decree should have been for the other party. Only one legal question is necessary to be determined,—whether this is one of that class of cases where specific performance of a contract should be decreed.

In this case we are relieved of the necessity of examining the character of the interest contracted to be conveyed by appellant,-whether real or personal, or partaking of the nature of both. The old rule, that the remedy must pertain to an interest in realty, has been relaxed, and modern decisions decree the performance where the subject-matter is purely personal. See 1 Story, Eq. Jur. §§ 724, 717. In Frue v. Houghton, 6 Colo. 318, the rule as to jurisdiction in equity is clearly stated to be: "The ground of the jurisdiction, when assumed, is that the party seeking equitable relief cannot be fully compensated by an award of damages at law. When, therefore, an award of damages would not put the plaintiff in a situation as beneficial as if the agreement were specifically performed, or where compensation in damages would fall short of the re-

dress to which he is entitled, a specific performance may be decreed." See Fry. Spec. Perf. § 10, and note; Pom. Spec. Perf. §§ 7, 8; 3 Pom. Eq. Jur. § 1402, and cases cited. The necessity of water for the purpose of making land available for agricultural purposes is a fact which cannot be disputed. Without the water, the land is valueless. Hence, to secure an adequate supply of water is of the utmost and of vital importance. Land and water combined create a valuable estate, and the value of the estate depends upon the quantity and facilities for the use of water. Appellee, having contracted, by a valid contract, for a certain adequate quantity of water, and having, at great expense (with others), constructed a ditch several miles in length, to apply it, and fitted his land for the reception and use of it, was entitled to have the contract enforced. Compensation in damages was inadequate, and the amount not ascertainable. The reduction of the quantity by one-fourth, and the time of service by one-half, were important elements, gravely affecting the value of the estate. The offer to perform, upon the part of the appellee, at or before the appellant was in condition to comply with the contract, was sufficient. In equity, where the contract is mutual, an offer of performance, or tender, is regarded as a performance. As to the nature of the action for specific performance, generally, and where it should be enforced, see Sullivan v. Leer, 2 Colo. App. 141, 29 Pac. 817, and Rust v. Strickland, 1 Colo. App. 215, 28 Pac. 141. Yet each case must depend upon its own circumstances and merits, in the application of the remedy. In Colorado Land & Water Co. v. Rocky Ford, etc., Co., this court held that the Colorado Canal Company, under which appellant claimed, as successor, to have acquired rights, had at the time of the transfer no constitutional and statutory right of priority to the water in the stream. This case is clearly distinguishable from that, in that the issue was the question of priority between the respective canals. This is purely a question of contract between one of the canals and a patron.

Counsel for appellant contend earnestly, in argument, that the contract having been made with the predecessor, the canal company, and there having been no assignment or transfer of the contract to appellant, the evidence failed to make a case, and that the court erred in holding it responsible. It is shown by all the evidence that the original canal company was in no way connected with the transaction in this case. T. C. Henry, the first president of appellant, was the promoter. No ditch had been built. The ditch was to be constructed if the scheme was found satisfactory, and sufficient inducement was offered, in the way of subscription for water rights. The original company had claimed the right to construct, but no construction had been undertaken. C. Henry succeeded to such canal company,

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and, by a purchase, whatever rights the original company had, if any, passed to him. At any rate, the scheme of building by the original company was abandoned, if it had ever contemplated building. As early as the 18th of December, 1889, we find him in the control. On that date he wrote Mr. Ament (afterwards his agent, and the man who made the contract), saying: "Dear Sir: If you will come to Denver, I would like to discuss with you the project of having you solicit subscriptions for water on the north side, under the Bob Creek scheme. I wish you would bring with you such data as will enable us to determine about what can be done. I want to keep this strictly confidential at present." On the 31st of December, 1889, he wrote as follows: "To Whom it may Concern: Mr. C. G. Ament is hereby authorized to solicit subscriptions for the purchase of water rights to be supplied from the proposed canal, popularly known as the 'Bob Creek Line,' which canal I and my associates propose to construct, at least to Horse creek, within the next ninety days. We shall charge \$800 for each water right of eighty acres." And on January 4, 1890, as follows: "Dear Sir: I send you by this mail a book of blank notes suitable for taking collateral. Now, I would suggest that you make the notes mature when the parties are ready to receive water and complete the transaction. For instance, suppose that a man subscribes, and says he cannot prove up on the first day of April; then his note may be given for the amount due at that time, and, if it is for one water right, then you will say, one water right. You may use the corporation name that we shall probably build the ditch under, which will be the Colorado Land & Canal Company, and you may say, one water right as collateral from the canal of that company." Mr. Ament testified that T. C. Henry succeeded to all the interests of the former company as early as March or April. 1890, and that he was engaged as agent in the sale of land and water rights, first by Henry, as promoter, and next for the company he organized, and of which he was the first president. The evidence fully establishes the fact that appellant, long subsequent to its change of corporate name, recognized those early contracts as valid and obligatory,-ratified and adopted them as the corporate contracts of the appellant. In a letter of W. C. Bradbury, president, to his agent, Mr. Ament, dated November 12, 1890, he said, after speaking of the change in price of water rights on October 15th of that year: "But this did not apply to any previous obligations, and parties who had previously contracted with you at \$800 will be entitled to water at that price, if closed for at once." And in several other letters, and all of the acts of the agent, the obligation of those contracts is recognized, and the payments required,-particularly so in the contract under discussion. It is a well-settled rule of law

that a party cannot ratify a contract in part, and repudiate and rescind in part. Hence, the appellee was entitled, as consideration for his money, to demand and have from appellant his right, to the full extent of the contract, regardless of rules, regulations, or modifications subsequently adopted in dealing with others. It follows that the decree and judgment of the district court should be affirmed. Affirmed.

THOMSON, J. I entirely acquiesce in the decision reached in this case by my Brother REED; but in arriving at this conclusion I have been influenced, in part at least, by reasons which are not expressed in his opinion. To render the views which I entertain intelligible, a history of the case, somewhat fuller than appears in that opinion, is necessary.

Prior to December, 1889, a corporation had been organized for the purpose of constructing a canal through Otero and other counties, for irrigating purposes, under the name of the Colorado Land & Canal Company. Some time in that month, one T. C. Henry conceived the idea of constructing an irrigating ditch or canal, and, for the purpose of accomplishing his object, proposed either to acquire the control of this company, or to organize a new company, which should purchase the franchise and property of the other, and succeed to its rights. It appears that he was at first undetermined as to which method he should adopt for the carrying out of his design. On the 31st of December, 1889, he appointed one C. G. Ament as his agent to solicit subscriptions for the purchase of water rights to be supplied from his proposed ditch, fixing the charge for each water right of 80 acres at \$800, and directing that the quantity of water, and the terms and conditions of its supply, should be the same as those contained in the contracts of consumers of water from a canal known as the "Las Animas Canal." On January 4, 1890, Mr. Henry sent to Mr. Ament, by mail, a book of blank notes to be used in the sale of rights; each subscriber to sign a note for the amount to be paid by him. The letter accompanying the book contained the following direction: "You may use the corporation name that we shall probably build the ditch under, which will be the Colorado Land & Canal Company." It does not appear that Mr. Henry was the agent of that company, or had any authority to bind it. The only apparent reason for the use of its name is that he then contemplated the performance of the work by that organization. On January 28, 1890, the plaintiff, R. L. Adams, was, and for some time had been, the owner of 80 acres of land lying under the proposed canal; and on that day Mr. Ament, as agent for Mr. Henry, sold him a water right, stipulating with him that the deed for the right should be the same as those given to the patrons of the Las Animas canal, and took his note for \$800,

the price of the right, of which note the following is a copy: "Rocky Ford, Colo., Jan. 28, 1890. April 1st, after date, for value received, I promise to pay to the order of the Colorado Land and Canal Company \$800, with interest at the rate of 10 per cent. per annum from date until paid. And having deposited with said canal company, as collateral security, one water right, I hereby authorize said canal company or assigns, upon the nonpayment of this note, to sell said collateral at public or private sale, at its option, and without demand or notice. R. L. Adams. No. ——. Due – -." A very short time after this-it is not certain when. but probably in the very last of Januarythe defendant, the Colorado Land & Water Company, was incorporated, and purchased from the canal company its property, franchise, and rights of way. Mr. Henry at once became its president, and so continued until August, 1890, when he was succeeded by W. C. Bradbury. What work was done by the canal company in forwarding the objects of its organization was not shown. The new company constructed and completed the ditch projected by Henry. It continued Mr. Ament in the agency to which he had been appointed by Mr. Henry, and adopted Mr. Henry's terms of subscription and sale of water rights. It caused to be prepared and sent to Mr. Ament blank forms of contract and deed to carry out the agreements which he had made with subscribers. By these instruments the right was granted to the use of water flowing through the canal, each water right to represent 1.44 cubic feet of water flowing over a weir per second, which amount was to be furnished during the entire irrigating season; commencing, as was expressly stated, on the 1st of April, and continuing until the 1st of November of each year. It was admitted that this contract and deed was the same in all respects as that used for the Las Animas canal. The company, almost immediately after its organization, was notified by Mr. Ament of the contracts which he had made, and, among others, of the one with the plaintiff. These contracts, including the one with the plaintiff, were all expressly recognized by the company as valid and binding upon it, in letters from its president and general manager to Mr. Ament. The note was retained by Mr. Ament and remained in his possession. The plaintiff, relying upon the delivery to him of the water for which he had contracted, constructed a lateral, some six or seven miles in length, from the line of the projected canal to his farm, for the purpose of conveying water upon his land when the ditch should be completed. Some time in October, 1890, the water company changed the terms upon which water contracts should be made. The price to be paid for a water right of 80 acres, under the new arrangement, was \$1,000, instead of \$800; and the right was made to consist of a continuous flow, during 100 days

of the irrigating season, of 1.08 cubic feet per second instead of 1.44 cubic feet per second during the entire season. The company informed its agent, Mr. Ament, of this change by letter dated November 12, 1890, written to him by its then president, W. C. Bradbury. This letter concluded as follows: "Parties who had previously contracted with you at \$800 will be entitled to water at that price, if closed for at once, but it cannot be considered as a perpetual option. Yours, truly, W. C. Bradbury, Pres." Some time in December, 1890, after having received the foregoing letter, Mr. Ament informed the plaintiff that the water company was ready to complete the transaction and deliver the water. The plaintiff thereupon tendered to him the money due upon the note, and demanded his deed; but Mr. Ament instructed him that the proper way was to deposit the amount in the Rocky Ford Bank, with directions to the cashier to pay it to the company upon the delivery at the bank of the deed to him, executed in pursuance of his contract. The plaintiff accordingly deposited the money in the bank as directed. Mr. Ament then notified the company of the deposit and of the demand for a deed; and it responded to the notification by sending to the bank a deed of a water right to the plaintiff, which conveyed to him only 1.08 cubic feet per second, and provided for a delivery of water for only 100 days of the season. Upon examining this deed the plaintiff refused to accept it, withdrew his money, and instituted this proceeding for the specific performance of the contract. The decree was that the defendant should execute and deliver to the plaintiff a deed of conveyance of the water for which he had originally contracted, and that upon its delivery the plaintiff should pay to the defendant \$800, with interest from the date of the note. The defendant appealed to this court.

To my mind the case made by the foregoing facts is not involved in any serious difficulty. Mr. Henry had no authority to act for the canal company, and the note of the plaintiff, although taken in that company's name, was not its note, nor was the contract which was made its contract; and no interest, either in note or contract, passed in the transfer of its rights and property to the water company. The reason why the note was so taken is easily explained. It was contemplated by Mr. Henry, at the time, that the proposed work might be done in the name of the canal company. Whatever design he may have had in this direction was. however, abandoned. A new company was organized, which, by purchase, succeeded to the rights of the other. In the transaction. Mr. Henry was not the agent of the new company. It was not in existence, and could have no agent. He was a promoter, simply; and, notwithstanding the new company was afterwards organized through his instrumentality, none of his prior acts

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were binding upon it, except as it adopted them. When the contract was made with the plaintiff, Mr. Henry was not in fact the agent of any outside party. He was acting for himself. The note, at the time it was taken, was his note, and the contract was his contract. It is immaterial that the note was not taken in his name. He, and not the nominal payee, was the party in interest. He could have been personally held to the performance of the contract, and, upon its performance, could have enforced payment of the note, and if no other party had assumed his obligation the only recourse of the plaintiff would have been against Mr. Henry. But the evidence tends strongly to show that the defendant, immediately after its organization, adopted his acts as connected with this contract. It thus made the transaction its own, and in this manner the preceding rights and obligations of Mr. Henry accrued to it. It therefore became the owner of the note, and bound to the performance of the contract, not by virtue of any transfer or assignment from the canal company, but by virtue of its adoption of the precedent acts of its promoter. When the money was tendered and the deed demanded, the plaintiff was entitled to a conveyance in accordance with the terms of the contract. and the sending of a different deed in response to the demand amounted to a refusal of performance by the company, and authorized the institution of this suit.

A considerable portion of defendant's argument is devoted to an attack upon the evidence, because it fails to support the complaint. It is true that the allegation that the contract was made with the canal company, and passed to the defendant by purchase, was not proven; but, when the note was given and the contract made, Mr. Ament, under the instruction of Mr. Henry, was, to all appearances, the agent of the canal company. Indeed, as is shown by a letter from Henry to Ament, dated December, 18, 1889, the latter was directed to keep Mr. Henry's plans strictly confidential. The note was taken to the canal company. There was nothing to indicate to the plaintiff that he was dealing with any other party, and the real facts were concealed from him. It was evidently his belief, when the complaint was drawn, that the original contract was between himself and the canal company. Notwithstanding this company was wholly disconnected from the transaction, and acquired no rights, and incurred no responsibility by reason of it, yet, as between Mr. Henry and the plaintiff, the former was estopped from availing himself of any error of fact into which he had knowingly misled the latter. He would not be permitted to say that the facts were other than as he had represented them, and the defendant, by its assumption of the contract, assumed the estoppel with it. The proof related to the exact contract attempted to be set forth in the | and to cheat and defraud them thereof, false-

complaint. The claim against the defendant is based upon its assumption of the contract and its agreement to carry it out; and while it would have been well, when the real facts came to light, to amend the complaint so as to conform to the proof, yet, in view of the fact that the plaintiff was misled into this statement of his case by a person for whose acts the defendant became responsible, I do not think that it is in a position to question the comformity of the proof to the allegations. But, notwithstanding the inaccuracy of the statement, the allegation of the assumption of the contract by the defendant advised it of the ground of the plaintiff's claim to relief against it; and I think the complaint, in its present form, sufficient to sustain the judgment. It is my opinion that the judgment should be affirmed. Affirmed.

BISSELL, P. J., dissents.

SCHAYER v. PEOPLE.

(Court of Appeals of Colorado. June 11, 1894.) FALSE REPORT TO COMMERCIAL AGENCY — INDICT-MENT—EVIDENCE—VARIANCE.

Section 884, Gen. St. 1883, provides that any person who shall cause others to report falsely of his honesty, wealth, or mercantile character, and thereby fraudulently get into possession of goods, shall be deemed a swindler, possession of goods, shall be deemed a swinder, and fined not to exceed \$1,000, and imprisoned in the county jail not more than six months. Held, that where the indictment charged that defendant, intending to cause Dun & Co. to report falsely his wealth and commercial characport faisely his wealth and commercial character to B., and to thereby defraud him, made to Dun & Co. a false report, which was communicated to B., whereby defendant fraudulently obtained certain goods, and the evidence showed that when defendant made the representations to Dun & Co. he did not know B., there was a fatal wariance. Reed I disconting fatal variance. Reed, J., dissenting.

Error to district court, Arapahoe county. Ismar Schayer was convicted of fraudulently obtaining possession of goods, and brings error. Reversed.

D. J. Haynes and Coe & Carpenter, for plaintiff in error. Eugene Engley, Atty. Gen. (H. T. Sale, of counsel), for the People.

THOMSON, J. The plaintiff in error was convicted of fraudulently obtaining possession of goods, wares, and merchandise of P. L. Bockfinger & Co. by means of a false report of his wealth and mercantile character, which he caused to be made by the mercantile agency of R. G. Dun & Co. to Bockfinger & Co. The indictment charges that on the 8th day of September, 1890, Ismar Schayer, devising and intending to cause and procure the mercantile agency of R. G. Dun & Co. to report falsely his wealth and mercantile character to Bockfinger & Co., and thereby to impose upon them, and to obtain a credit from them, and by means of such credit to get into his possession goods. wares, and merchandise belonging to them.

ly represented his wealth and standing to Dun & Co., and procured Dun & Co. to make the false report to Bockfinger & Co., and that, by means of the false report which the defendant so caused and procured to be made to Bockfinger & Co., he obtained a credit from that firm, and fraudulently obtained possession of certain goods, wares, and merchandise belonging to them. The law upon which the prosecution is based reads as follows: "If any person shall cause or procure others to report falsely of his honesty, wealth or mercantile character, and by thus imposing on any person or persons, obtain credit, and thereby fraudulently get into possession of goods, wares, merchandise or any valuable thing, every such offender shall be deemed a swindler, and on conviction shall be sentenced to return the property so fraudulently obtained, if it can be done, and shall be fined not exceeding \$1,000, and imprisoned in the county jail not exceeding six months." Gen. St. 1883, p. 343, \$ 884. The uncontradicted evidence was that, at the time Schayer made the statement to Dun & Co., he had no knowledge of the firm of Bockfinger & Co.; so that the statement could not have been made for the purpose of being communicated to Bockfinger & Co., or with any intent, special or general, of defrauding them. The proof therefore disagreed with the allegations, and the question to be determined is whether the variance was of such a character as to render it fatal. To constitute the offense defined by the statute, it is not necessary that an intention to defraud any particular person or persons should exist. If the false report which has been procured results in defrauding any person of his property, the offense is complete, whether the offender had such person in his mind or not; and an indictment setting forth that the person charged caused others to report falsely of his honesty, wealth, or mercantile character, and that by means of the report some person or persons (naming them) were imposed upon so that they extended credit to the offender, and he thereby fraudulently obtained possession of their property, would contain substantially all the facts necessary to constitute the offense under the statute. But in this indictment the obtaining of Bockfinger & Co.'s goods is inseparably connected with a design to defraud these particular individuals. It alleges that the defendant procured Dun & Co. to report falsely,-not generally, or to the public,-but specially to them; that in procuring the report he devised and intended to impose upon them, and obtain a credit from them, and, in pursuance of the credit, to get into possession of their property fraudulently; and that by means of that report, procured in that manner and for that purpose, he did fraudulently obtain possession of their goods. If the averments were true, the defendant's sole purpose in procuring the report was to enable him to defraud Bockfinger & Co.

This alleged original design of the defendant pervades the whole indictment, and, if everything that relates to it should be stricken out, there would be no offense charged. It is well settled that where the identity of a charge in an indictment is dependent upon an allegation which is unnecessary, or where an indispensable allegation is made needlessly specific, the unnecessary matter cannot be rejected as surplusage, but must be proven as averred, or the prosecution must fall. Clark v. Com., 16 B. Mon. 206; Com. v. Magowan, 1 Metc. (Ky.) 368; State v. Jackson, 30 Me. 29; U. S. v. Brown, 3 Mc-Lean, 233, Fed. Cas. No. 14,666. In Com. v. Harley, 7 Metc. (Mass.) 506, it was held that a charge in an indictment of a conspiracy to defraud a particular individual was not supported by evidence of a conspiracy to cheat the public generally, although it did in fact operate to defraud the individual named, and that the variance between the allegations and the proof was fatal to the prosecution. See, also, Com. v. Kellogg, 7 Cush. 473. An allegation in this indictment of a purpose on the part of the defendant to defraud the public generally, or such person as the act committed might operate to defraud, and that, by means of the act, Bockfinger & Co. were in fact defrauded, would have been sufficient; but the charge of intention was specific, and the proof not only failed to support it, but established a state of facts inconsistent with it. The defendant requested instructions to the effect that to convict the defendant, under the indictment, it must be shown that he procured the false report to be made to Bockfinger & Co., and did so with the intention of defrauding them; but the instructions were refused, and others given at the instance of the people, which directed a conviction if the jury should believe that the defendant caused Dun & Co. to make a false report of his standing, and that, by reason of the report, Bockfinger & Co. extended credit to the defendant, and were thereby defrauded of their goods. The instructions refused should have been given, and those given refused. The judgment should be reversed.

BISSELL, P. J., concurs.

REED, J. (dissenting). I regret that I cannot concur in the conclusion reached by the majority of this court. Were the question less important, I should content myself with entering a dissent, without giving my reasons for differing; but, being of grave importance to the commercial interests of the state, I shall briefly state my objections.

The plaintiff was indicted under section 884, Gen. St.: "If any person, by false representations in writing of his own responsibility, wealth or mercantile correspondence and connection, shall obtain a credit thereby, defraud any person or persons of money, goods, chattels or any valuable thing, or if

any person shall cause or procure others to report falsely of his honesty, wealth or mercantile character, and by thus imposing on any person or persons, obtain credit, and thereby fraudulently get into possession of goods, wares, merchandise or any valuable thing, every such offender shall be deemed a swindler, and on conviction shall be sentenced to return the property so fraudulently obtained, if it can be done, and shall be fined not exceeding one thousand dollars, and imprisoned in the county jail not exceeding six months." It is charged in the indictment that plaintiff made to the mercantile agency of R. G. Dun & Co. a false statement of his means, finances, and responsibility as a merchant; that P. L. Bockfinger & Co., wholesale dealers, were subscribers to or patrons of the Dun Mercantile Agency; that the false statement made to the agency was by it communicated to Bockfinger & Co., by means of which plaintiff obtained a credit with the firm, and goods to the value of \$500, fraudulently, and with the intention of cheating and defrauding Bockfinger & Co. It appears that on September 8, 1890, an agent of Dun & Co. went to plaintiff's place of business to obtain information in regard to his financial standing; that plaintiff went to the office of the company, or to that of the agent, and there made the following statements, which were reduced to writing: "I am worth about \$1,500, net. My means consist of three notes, each due in a few days, stock of goods worth \$200 or \$300, and cash. Have no liabilities." It is shown by the evidence that, four or five months afterwards, plaintiff failed for several thousand dollars, and made an assignment. No losses of importance were shown to have occurred. Plaintiff was examined in regard to his assignment before a special commissioner appointed by the court, and also testified in his own behalf upon the trial. The testimony given upon the two occasions was not only variant and conflicting, but by both, as well as that of one of his own witnesses, the statement made to Dun & Co. was shown to have been false in very important particulars. In the statement to Dun & Co., his assets were given to make up the \$1,500,stock of goods, \$200 or \$300, cash, and the bulk in three notes shortly to become due. By his evidence and that of his witness, it was shown the three notes, aggregating \$480. were traded for the stock, and it was not shown that he subsequently had any other notes, or cash to any amount. In his own testimony he attempts to establish the correctness of his statement to Dun & Co. that he was worth \$1,500 by showing that he had bought the stock of goods for \$300 or \$400, and had reported it to Dun & Co. as of the value of \$200 or \$300; it was really worth \$800 or \$1,000,—clearly establishing the falsity of the statement made to Dun & Co., not only of the value of his assets, but their character. It is held in the opinion that, to warrant a conviction, an intention to deceive the

particular firm of Bockfinger & Co. must have been shown, and that in this respect the evidence was fatally defective, and the conviction unwarranted. I do not so understand the statute. The character and business of mercantile agencies, and the relation they bear to their patrons and the mercantile community, are so well understood that no man attempting to do a mercantile business is unfamiliar with them. The plaintiff in his testimony attempts to claim ignorance of the concern and its purposes, yet shows that, when called upon, he went to its office. and gave the required information. Had he not fully understood the purpose for which the inquiries were made, he could only have resented the interference as an unwarranted impertinence in his private affairs, and refused all information. The statute appears to have been drawn with direct reference to mercantile agencies, or institutions of that kind. It is not necessary that the statement should be made to the defrauded party. or to any particular individual or firm. The language is "or if any person shall cause or procure others to report falsely of his honesty, wealth or mercantile character, and by thus imposing on any person or persons, obtain credit, and thereby fraudulently get into possession," etc. The person who, intentionally and knowingly, falsely represents his financial ability to any agency or person, for the purpose of establishing credit in a community, and by such means succeeds in his fraud, is made amenable to the law, and held to have contemplated the fraud afterwards perpetrated, even if at the time he had no knowledge of, or intention to defraud, the particular person; and this is in harmony with the well-known principle of law that every person is supposed to contemplate the natural result of any particular line of conduct. That the information given Dun & Co.'s agency was false, that it was communicated to Bockfinger & Co., and was the basis upon which the goods were fraudulently obtained, are facts clearly established by the evidence, and appear, under the statute, to be all the facts necessary to conviction. and are conclusive of the case. Though not alleged in the indictment, the evidence establishes the fact that, subsequent to the statement made to Dun & Co., the defendant reiterated it, when interviewed, to the firm of Bockfinger & Co., through its representative, which, if not conclusive, would go far to establish the original intention to defraud that firm, if proof of an intention to defraud a particular person or firm was necessary, which I do not believe.

An attack is made upon the indictment. It is ably and elaborately urged in argument that it is defective in substance, and fails to set out all the elements necessary to constitute the offense. A careful examination fails to sustain the contention. The offense is statutory. The statute appears to have been closely followed, and each element

necessary to complete the offense clearly and carefully stated, and in the language of the statute. This is all that is required.

The other supposed errors, or some of them, are not discussed in the majority opinion; and I do not find it necessary to discuss them, as they appear to be more technical than substantial.

A brief examination of the authorities cited in support of the main opinion will show that not one of them was based upon a statute like, or similar to, the one under consideration. In Clark v. Com., 16 B. Mon. 206, the defendant was indicted, under a statute of Kentucky, "for having unlawfully in his possession, on the 1st day of December, 1852, 20 counterfeit notes of the Farmers' Bank of Kentucky." The proof failed to show the possession of any of the notes described, but counterfeits of the banks of other states. The conviction was held bad. An examination will show that the decision was based entirely upon old common-law authorities. and no statute involved. In Com. v. Mc-Gowan, 1 Metc. (Ky.) 368, for "betting on an election," the case is decided on Clark v. Com. The same authorities are relied upon. State v. Jackson, 30 Me. 29, was an indictment for larceny; and it was said: "When an indictment for larceny contains any particular description of the property stolen, though not necessary to be inserted, they must be proved on the trial." The authorities were all old common-law decisions. No authorities were needed. The rule is as old as proceedings by indictment, but how it could be applicable in this statutory proceeding, or assist in the construction of the statute, I cannot see. U. S. v. Brown, 3 Mc-Lean, 233, Fed. Cas. No. 14,666, is a reiteration of the same general principle stated in the foregoing cases. Com. v. Harley, 7 Metc. (Mass.) 506, was not a statutory proceeding. It was an indictment for conspiracy, at common law, to defraud certain persons. It was there held that "an averment in an indictment for conspiracy that the defendants conspired to defraud A. is not supported by proof that they conspired to defraud the public generally, or any individual whom they might meet and be able to defraud." only authority cited was 1 Chit. Cr. Law, 169,536. Exactly the same is applicable to the case of Com. v. Kellogg, 7 Cush. 473. The decision is based on Com. v. Harley, supra, and it is said: "That case seems decisive of the present case." All other authorities cited and relied upon are old commonlaw authorities. I am at a loss to know how any of those cases can be made applicable to the case under consideration. Had the case been at common law, instead of statutory, there would be no question of their applicability or correctness. Had the common-law remedies been considered adequate to correct the growing evil, and protect mercantile men from this class of experimentalists, the statute would not have been

passed. The necessity of a more broad and comprehensive remedy, with greater facilities for conviction, became necessary, hence the act. After taking the offense out of the category of common-law offenses, and making it statutory, to construe the law by the precedents of the common law relegates it to its former position, and defeats the legislative intention.

The remaining questions presented pertain to the instructions. It is insisted that the court erred in refusing six instructions asked by the defendant. Number 5, as asked, was, in substance and legal effect, given by the court, in an instruction of the same number. In my view of the statute, the remaining instructions were properly refused. Through them all runs the theory that, although the statement made to Dun & Co. was false, and known to be, there could be no conviction unless plaintiff procured Dun & Co. to communicate it to Bockfinger & Co. for the purpose of enabling him to obtain the goods from that firm; or, to state it, perhaps, more clearly, that to warrant conviction the evidence must clearly show the scheme or intention to have been to defraud that particular firm. We do not so construe the statute. To give it such construction would be, in effect, to abrogate it. It is a well-settled principle of law that every person of sound mind is presumed to intend the reasonable and natural consequences of his own acts, and if, by a false statement made by any mercantile agency, and through it tothe mercantile community, a foundation is laid, whereby any person or firm may be defrauded, and it is shown that a certain firm was victimized by reason of such false statement, the offense is complete, and the law imputes the intention to the act. It is not necessary, as contemplated in the instructions asked, that plaintiff should have conspired with Dun & Co., and employed it to transmit the statement to Bockfinger & Co., with the intention of defrauding that particular firm. The instructions given by the court are in harmony with my construction of the statute, and fully and fairly state all the law applicable to the statutory offense. The facts of the case were fairly presented to the jury, and were found against the defendant. I can find no error which, in my view of the case, would warrant a reversal; and I think the construction of the statute unwarranted, and that the judgment and conviction should have been Judgment reversed.

THOMPSON v. REEVES.

(Supreme Court of Oregon. June 28, 1894.)
Assignment for Benefit of Creditors — Creditor's Right of Action.

A voluntary assignment by a debtor of all his property for the benefit of all of his creditors, under the assignment law of 1878, does

not bar the right of a creditor to maintain an action against him to recover a personal judgment.

Appeal from circuit court, Union county; Morton D. Clifford, Judge.

Action by R. G. Thompson, administrator, etc., against S. R. Reeves, on two promissory notes. From a judgment for plaintiff, defendant appeals. Affirmed.

J. H. Slater & Sons, for appellant. Cox, Teal & Minor, for respondent.

BEAN, J. This is an appeal from a judgment in favor of the plaintiff in an action commenced in August, 1891, on two promissory notes in favor of his intestate, dated October 9, 1884, and November 1, 1884, respectively, executed by the defendant. complaint is in the usual form. The answer avers, in substance, as a plea in abatement, that on May 22, 1886, the defendant, being insolvent, duly made an assignment of his property for the benefit of all his creditors to one S. P. Florence, who immediately qualified, and entered upon the discharge of his duties; that he published a notice to creditors, as required by law, but that plaintiff's intestate failed and neglected to present his claim under the two notes in suit to the assignee within the time required by law, or at all; and that said assignment is still pending. To this answer a demurrer was sustained by the court below, and, defendant refusing to plead or appear further, judgment was rendered against him, from which this appeal

The only question for our consideration, therefore, is whether the voluntary assignment of a debtor, of all his property, for the benefit of his creditors, in conformity with the provisions of the assignment law of 1878 (2 Hill's Ann. Laws, c. 28), suspends or stays the right of a creditor to maintain an action for the recovery of a personal judgment against his debtor during the pendency of the assignment. It is conceded that the question thus presented must be determined under the assignment law as it stood prior to the amendment of 1885, providing for the discharge of a debtor when his estate is made to realize at least 50 per cent. of his indebtedness over and above all expenses of the assignment. Under the law an assignment is a voluntary act of the debtor for the benefit of his creditors, and not for his own benefit. By it his property is to be distributed pro rata among all his creditors, and to such a disposition of the property they are held to have assented. But the statute nowhere provides for or requires the suspension of a creditor's right to maintain an action and recover a personal judgment against his debtor. Indeed, the fair implication is that such action may be maintained; for by section 1 of the act it is provided that the assignment shall have the effect to dissolve or discharge all attachments in actions where judgments have not been rendered at the date of the assignment, but suffers the action itself to proceed to judgment, and makes the costs and disbursements thereof, and attorney's fees allowed by law, preferred claims against the estate. The object of the law is to provide for the equal distribution of the estate of an insolvent debtor among his creditors, and not to protect him against the payment of his debts, or to suspend or interfere with the right of a creditor to proceed in the proper court to establish his claim by action. The effect of an assignment, it is true, is to vest the estate in the assignee, so that it cannot be seized by process against the assignor, but must be distributed under the orders of the court having jurisdiction of the assignment. But there is nothing in the statute to prevent a creditor from suing his debtor and litigating his claim, if he so desires. It only prohibits him from seizing the assigned property under process issued on any judgment that he might obtain. This is the construction of similar statutes in other states (Lawrence v. McVeagh, 106 Ind. 210, 6 N. E. 327; Parsons v. Clark, 59 Mich. 414, 26 N. W. 656), and seems to have been recognized as the correct construction of our statute by this court in Dawson v. Coffey, 12 Or. 513, 8 Pac. 838, in which it was held that a creditor must establish his claim by a judgment, or in some way obtain a lien upon the property, before he can resort to a suit in equity to set aside an assignment for fraud. It follows from these views that the judgment of the court below must be affirmed.

ABILENE NAT. BANK v. NODINE et al. (Supreme Court of Oregon. June 28, 1894.)

SALE-BREACH OF WARRANTY.

Where a breach of warranty in the sale of a chattel is set up as a defense, it is necessary to allege that the purchaser relied upon the warranty, and was thereby deceived.

Appeal from circuit court, Union county; Morton D. Clifford, Judge.

Action by the Abilene National Bank against John Nodine and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

C. H. Finn, for appellant. T. H. Crawford, for respondents.

BEAN, J. This is an appeal from the judgment in favor of the defendants in an action on a promissory note made by them to Thisler & Spilman, and alleged to have been sold and assigned before maturity, for value, to the plaintiff. The making of the note is not in issue, but as a defense to the action it is averred "that on or about the 16th day of April, 1891, the said O. L. Thisler, payee of said note, was the owner of a certain stallion then in Union county, Oregon, which he bargained and sold to the defendants, John Nodine and George Blacker, for the sum of

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eighteen hundred dollars, of which sum he received eight hundred dollars, and the promissory note described in the complaint was given for the balance of the purchase price of said stallion; that, at the time of said sale to said Blacker and Nodine, Thisler warranted the stallion to be perfectly sound in every respect, and for the purpose for which they, as stockraisers, had use for a stallion, or could use the same; that Fred Nodine, one of the joint makers of the note, was merely a surety thereon, without any consideration moving to him from said Thisler; that said note was transferred by said payees to plaintiff, if at all, long after the same became due and payable; that said stallion was not sound, was not perfect in body or in other respect, and was and is perfectly worthless, and by reason thereof the consideration of the note sued upon had wholly and entirely failed."

The first assignment of error in the notice of appeal is the action of the trial court in overruling plaintiff's demurrer to the new matter in the answer. The argument is that the answer is insufficient to constitute a defense because it does not aver that defendants relied upon the alleged warranty in making the purchase of the horse. To constitute an express warranty, such as is attempted to be alleged in the answer, there must be, as part of the contract of the sale, either an express undertaking to that effect, or some affirmation or representation as to the quality or condition of the thing sold, made at the time of the sale, for the purpose of inducing the buyer to make the contract, and in either case the buyer must have relied upon the agreement or representation in making the purchase. It is elementary law that unless the purchaser of personal property relied and acted upon the statement or representation of the seller as to the quality or condition of the thing sold, and was thereby induced to make the purchase, he cannot maintain an action for a breach of warranty; and hence it is sometimes held that a general warranty does not apply to obvious defects known to the purchaser, because, in the very nature of things, one cannot rely upon the truth of that which he knows to be untrue. It is therefore essential, in an action for a breach of warranty, for the purchaser to allege that he relied upon the warranty, and was thereby deceived. 1 Estee, Pl. & Pr. 1592, 1593; Holman v. Dord, 12 Barb. 336; Torkelson v. Jorgenson, 28 Minn. 383, 10 N. W. 416; Zimmerman v. Morrow, 28 Minn. 367, 10 N. W. 139; Watson v. Roode (Neb.) 46 N. W. 491; Reed v. Hastings, 61 Ill. 266. The answer herein. failing to comply with this rule, does not state facts sufficient to constitute a defense, and for this reason is fatally defective.

The other assignments of error arise out of the ruling of the court in the admission and exclusion of testimony, and instructions given and refused. But the bill of exceptions is so imperfect that we consider it best not to attempt to pass upon any of the questions thus suggested. The judgment of the court below will therefore be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

LA GRANDE NAT. BANK v. BLUM et al. (Supreme Court of Oregon. June 28, 1804.)
Action on Note-Defenses.

In an action on a note, defendant pleaded that, at the time of its execution and delivery, plaintiff delivered to defendant two notes for collection, under an agreement to pay over the proceeds if collected, or return the notes if not collected, and that the note sued on was given to secure the performance of that agreement, and that the agreement had been performed. Heid, that evidence of such agreement was not inadmissible, as varying a written contract by parol evidence.

Appeal from circuit court, Union county; Morton D. Clifford, Judge.

Action by the La Grande National Bank against Blum & Grandy. Judgement for plaintiff, and defendants appeal. Reversed.

Baker & Baker and Starr & Thomas, for appellants. C. H. Finn and C. H. Carey, for respondent.

BEAN, J. This is an action on a promissory note for \$1,346.66, executed and delivered to the plaintiff by defendants on February 12, 1892, payable three months after date. The complaint is in the usual form. The answer admits the execution and delivery of the note, but as a defense avers, in substance, that, at the time of such execution and delivery, plaintiff was the owner and in possession of two certain promissory notes, for \$600 each, on one O. N. Ramsay, which it delivered to defendant Blum for collection, under an agreement that he would pay over the proceeds to plaintiff if collected, or, if unable to collect the notes, or any part thereof, he would return them; that the note in question was given to secure the performance of such agreement on Blum's part; and that he had performed the same. The reply denies the allegations of the answer, and a trial was had upon the issues thus made. The bill of exceptions discloses that, after plaintiff had given evidence tending to support the allegations of its complaint, "the defendants introduced evidence tending to support the allegations in their further and separate answer," and rested, whereupon the plaintiff moved the court "to strike all the evidence offered by defendants in support of the separate answer and defense, and to instruct the jury to bring in a verdict as prayed for in the complaint, on the ground that all the evidence offered is immaterial and incompetent, and the facts pleaded in the answer constitute no defense in this action." This motion was allowed, the evidence given by the defendants withdrawn, and the jury instructed not to consider it; and, the trial

resulting in a verdict and judgment in favor of the plaintiff, the defendants appeal, assigning as error the ruling of the court in sustaining the motion above referred to.

The contention for the plaintiff is that the allegations of the answer, and the evidence tending to support it, violated the well-settled rule of law that a written contract cannot be contradicted or varied by parol evidence. This rule is not questioned. But the answer and evidence excluded did not contradict the terms of the promissory note sued on, but tended to show that it was delivered to take effect as an unconditional, binding obligation upon the defendants only in the event of Blum's failure to comply with his agreement to account for the Ramsay notes, or their proceeds. In other words, according to the answer and the evidence excluded, the promissory note sued on was not intended, except in case of Blum's default, to become a binding obligation on the part of the defendants to pay plaintiff the sum of money named therein. Evidence of such an agreement, and Blum's compliance therewith, would show a want of consideration of the note, and would in no sense be in contradiction of its terms. The terms of the note are that defendants will pay plaintiff the sum of money named at a time fixed, with interest, while the answer alleges a distinct and independent agreement, constituting the consideration for the promise, which in no sense changes or adds to the terms of the writing, and was not intended to do so. It is a common business transaction for one contract to be the consideration for another, and it has never been supposed that proof of the contract which is the consideration adds to or varies the terms of the other. Daniel, Neg. Inst. § 81a; Burke v. Dulaney, 14 Sup. Ct. 816; Howard v. Stratton, 64 Cal. 487, 2 Pac. 263; Dicken v. Morgan (Iowa) 7 N. W. 145; Hazzard v. Duke. 64 Ind. 220. If the note was given to secure the performance of Blum's contract to collect and pay over to the plaintiff the proceeds of the Ramsay notes, or to return them if not collected, and Blum has performed his agreement, such performance would manifestly operate as a failure of consideration, and payment of the note ought not to be enforced; and as was said by Mr. Justice Cooley in Maltz v. Fletcher, 52 Mich. 486, 18 N. W. 228, "no rule or policy of the law is violated by allowing proof to be made of the purpose for which negotiable paper was given, or that the purpose does not require that payment should be enforced." There is nothing in the record to show that the contract referred to in the answer was made with the cashier of the plaintiff, and hence the question argued in the brief, as to his authority to make such a contract, is not presented by this record, or considered. It follows that the judgment of the court below must be reversed, and a new trial ordered.

WILLIAMS et al. v. ISLAND CITY MER-CANTILE & MILLING CO.

(Supreme Court of Oregon. June 28, 1894.)

Damages—Breach of Contract—Loss of Time.

1. When a machinist has failed in his contract to put in mill machinery of a certain capacity by a certain date, the miller, having an established business, can show his past average profits, and so fix the value of the use of the mill while the machinist's default kept it idle (the change of process, as contracted for, being considered); but his damage should not be reckoned on an estimate of profits he might have realized, had the mill worked to its guarantied capacity, at the net profit of so much per barrel of flour, regardless of his experience of the real value of the use of the mill.

2. If the machinist has failed to fulfill his contract as to capacity, and has abandoned it, but the mill has not thereupon been shut down, and adjusted to such capacity, he is not liable for the time that would reasonably have been required for that purpose, nor for the time actually consumed, more than two years after, for repairs and rebuilding not made to conform to his contract.

Appeal from circuit court, Union county; James A. Fee, Judge.

Action by Williams & Groat against the Island City Mercantile & Milling Company for the value of goods furnished and labor performed. Judgment for defendant. Plaintiffs appeal. Reversed.

Johnson & Idleman and T. H. Crawford, for appellants. Cox, Teal & Minor and R. Eakin, for respondent.

BEAN, J. This is an action to recover the sum of \$2,572.35,—an alleged balance due on account for materials, machinery, and appliances furnished, and work and labor performed, by the plaintiffs for the defendant. The complaint alleges that between the 1st day of May, 1886, and the 1st day of January, 1887, the plaintiffs, at the special instance and request of defendant, and for its use and benefit, furnished a large amount of material and machinery for the rebuilding, construction, and repair of a certain flouring mill of the defendant, and, between said dates, performed a large amount of work and labor for the defendant in the rebuilding, construction, and repair of said mill and its attachments; that the material and machinery so furnished, and labor performed, were and are of the reasonable worth and value of \$8,134.25; that the sum of \$5,-631.10 has been paid thereon, and no more,-and prays judgment for the balance of \$2,503.15, with interest thereon from January 1, 1887. The answer denies the allegations of the complaint and alleges, in substance, that on June 5, 1886, the plaintiffs and defendant entered into a contract in writing, by the terms of which plaintiffs were to furnish the material, machinery, and appliances, and perform the work and labor, necessary in reconstructing and remodeling the defendant's flouring mill as in the complaint mentioned, and in changing the ma-

chinery so as to manufacture flour by the roller process, for which they were to be paid the sum of \$8,134.25 at certain specified times, and that \$5,631.10 has been paid thereon; that the work was to be fully completed by the 10th day of September, 1886, and the plaintiffs guarantied that the mill, when completed according to their contract, would have a capacity of 60 barrels of flour in 24 hours, and make as much and as good flour from a bushel of wheat as any other mill in eastern Oregon, when grinding the same kind of wheat; that in pursuance of said contract the plaintiffs undertook to refit said mill as therein provided, but have failed and neglected to comply with their contract, in this: that said mill was not finished and turned over to said defendant at the time agreed on, nor until 10 days thereafter, to wit, on the 20th day of September, 1886, and that when completed it did not have a capacity of 60 barrels of flour in 24 hours, or any greater capacity than 45 barrels, and would and could not make as much flour from a bushel of wheat "as any mill in eastern Oregon, when grinding the same kind of wheat;" that, by reason of the delay in the completion of the work, it is damaged in the sum of \$405; that, after the mill was turned over to the defendant, it failed to do the work guarantied by the contract, and the plaintiffs made divers attempts between September 20th and December 20th to make it comply with the contract, and in so doing required it to be shut down from time to time, aggregating in all about 10 days, during which time the use of the mill was lost to the defendant, to its damage in the sum of \$450; that by the difference in the actual capacity of the mill, as turned over, and the guarantied output, it was further damaged in the sum of \$8,482.50, and for the failure to make as much flour from a bushel of wheat as other mills in eastern Oregon, when grinding the same kind of wheat, it claims \$4,241.25 as damages; that on the 20th day of September, 1886, the contract was voluntarily abandoned by plaintiffs, and defendant thereupon took possession of the mill, and operated the same to the best advantage until the 10th day of February, 1889, when it employed other persons to repair said mill, which necessitated a suspension of operations for the period of 90 days, during which time it wholly lost the use of the mill, to its damage in the sum of \$4,050. The defendant therefore claims to recoup in this action the damages sustained by it in the loss of the use of the mill from the 10th day of September, when the contract should have been completed, to the 20th of the same month, when it took possession; for the loss of its use during the 10 days it was shut down after the 20th of September, at plaintiffs' request, while they were attempting to comply with their contract; for the loss occasioned by the difference between the actual and the guarantied

capacity of the mill, and in the amount of wheat necessary to make a barrel of flour, in excess of that required by other mills in eastern Oregon, when grinding the same kind of wheat; and also the loss of the use of the mill during the time it would have been necessary to shut it down in order to enable the defendant to make the repairs and additions necessary to bring it up to the required capacity. By direction of the court the jury made special findings, from which it appears that they allowed plaintiffs \$1,-342.06 as the value of the material furnished and work performed by them over and above the admitted payments, and \$739.13 as interest thereon, and allowed the defendant, as damages for the loss of the use of the mill from September 10th to September 20th, \$200; for the loss of the use of the mill while stopped for repairs by plaintiffs after September 20th, \$200.25; for the difference between the actual and the guarantied capacity of the mill, \$720; for the excess in the amount of wheat required to produce a barrel of flour, in comparison with the Union mill, \$108; and for the loss of the use of the mill during the time it would have been necessary to have shut it down in order to perform the work necessary to make it comply with plaintiffs' contract, \$1,225; and for a general verdict in favor of defendant for

The record contains numerous assignments of error, based upon the rulings of the court in the admission of testimony, and the giving and refusal of instructions; but, as they all present the same question, they need not be set out in detail. The question thus presented is the right of the defendant to recover. as the measure of damages for the breach of the contract, the anticipated or expected profits which it might have realized from the operation of its mill, had the contract been complied with. The evidence tended to show that, at the time the contract was made, defendant's mill had been in operation for several years, and had a capacity of 75 barrels of flour in 24 hours; that defendant had an established business, and a ready sale for all the flour it could manufacture, at an average profit of 75 cents per barrel; that, at the time the contract was to have been completed, it was ready to operate the mill, and had on hand, or within easy reach, sufficient wheat for the purpose; that its trade extended throughout eastern Oregon and Idaho, its sales being usually made on 60 days' time; that the profits of the business depended to some extent upon the solvency and promptness of its customers; that plaintiffs' representative and agent, through whom the contract was made, went through the mill, and saw the business it was doing. before the contract was entered into. And the evidence further tends to show that there was no established rental value of the mill. which could be made the measure of damages for the loss sustained while it was idle:

that plaintiffs claimed to have completed their contract on or about the 20th of September, 1886, at which time defendant took possession of the mill, but soon discovered that its work fell short of the guaranty, in that its actual capacity was only about 45 barrels of flour in 24 hours, and it required more wheat to make a barrel of flour than required by other mills in eastern Oregon, whereupon the plaintiffs, from that time until some time in December following, endeavored to comply with their contract, by making further improvements and repairs, but, failing in the effort, wholly abandoned the performance of their contract on or about the 20th of that month; that the defendant then took possession, and continued to operate the mill until some time in February. 1889, when a new contract was entered into with other parties, to reconstruct it so as to enlarge its capacity to 75 barrels in 24 hours; and that, in order to make these repairs, it was necessary to shut the mill down for about three months. Upon this testimony the court charged the jury that if plaintiffs constructed the mill mainly according to their contract, and furnished the material and performed the work and labor in good faith. with intent to comply therewith, and did not willfully abandon the performance of the contract, they were entitled to recover from the defendant the reasonable value of such work, material, and machinery, not exceeding the contract price, less all payments made thereon, and what it would cost to remedy the defects in the mill, and make it as designed by the contracting parties, together with such further damages as the defendant may have sustained by the failure of the plaintiffs to comply with the terms of their agreement; that, after plaintiffs had ceased all efforts to comply with their contract, it was the duty of defendant to have, within a reasonable time, not extending beyond February 1, 1887, made the changes and improvements necessary to put the mill in the condition contemplated by plaintiffs' guaranty, and to have charged the plaintiffs with the expense thereof, together with the value of the loss of the use of the mill for the time necessary to make such changes and improvements, and not to have continued to operate it at a loss; and that it could not recover damages for any loss sustained in the operation of the mill, caused by defective construction, after the time the same might have been repaired by the defendant, but that it was entitled to recover the value of the use of the mill for the 10 days from September 10th to the 20th; for the time after that date, aggregating 10 days, during which it was so stopped at the instance of plaintiff; and for such reasonable length of time after their abandonment of the contract as would have enabled the defendant to make the change necessary to bring the mill up to the desired standard,-and that it was also entitled to-damages on account of the loss occasioned by the difference between its actual and guarantied capacity during the time plaintiffs were so endeavoring to remedy the defects therein, and for a reasonable time thereafter, not extending beyond February 1, 1887, and also for the loss suffered during the same time because the mill required a greater quantity of wheat to make a barrel of flour than other mills in eastern Oregon, while grinding the same wheat; that while the measure of damages for the total stoppage of the mill during the time for which they were allowed would be primarily its rental value, if the jury found there was a rental value, but, if there was no evidence of such rental value as could be relied upon with any reasonable degree of certainty. then they might allow the defendant, as damages, the amount of net profits which would have been realized by it, if they could determine from the evidence, with reasonable satisfaction and certainty, what profits would have resulted to the defendant from the operation of the mill during the time it was so suspended. And by the term "net profits" the jury was given to understand is meant the difference between the selling price of a product and the cost of its production and sale; and the measure of damages for the loss occasioned by the difference between the actual and guarantied capacity of the mill, and by the excess of wheat required to make a barrel of flour, over that stipulated in the contract, was also the loss of profits occasioned thereby.

One of the most vexed and difficult questions of the law is to determine when the right exists to recover expected or anticipated profits in an action for a breach of a contract, and we shall not attempt to enter upon any extended discussion of the question at this time, but shall rather content ourselves with indicating the conclusions to which we have arrived in the case, after due and careful consideration, materially aided, as we have been, by the exhaustive and comprehensive briefs, as well as the able and learned arguments, of counsel on either side. The object of damages is, primarily, compensation to an injured party for a loss sustained; and the rule is, primarily, that only such damages can be recovered as are the natural and proximate result of a breach, and that the damages which are purely speculative or conjectural are not recoverable. But the application of this rule varies as much as the facts of the adjudged cases in which it has been applied. There is nothing in the term "profits" which of itself excludes their being given in evidence, and used as the measure of damages; but, when excluded, it is because they are either unnatural or remote, or there is no criterion by which to estimate them with that certainty which the law requires. Indeed, in many cases, profits are the only certain or reliable measure of damages; but as a general rule the expected or anticipated profits of a busi-

ness enterprise cannot be proven with any degree of certainty, and therefore cannot be recovered. They can only be computed or ascertained by guess or speculation, because they depend on so many contingencies, such as competition in business, supply and demand, the condition of the money market, availability of labor, and like uncertain conditions. There may be future profits in any business, or there may be losses. "Hence, in such cases, the measure of damages is," says Mr. Sedgwick, "not expected profits, but the average value of the use of the business; and, to ascertain this, evidence of actual past profits must be admissible." 1 Sedg. Dam. § 174. There is in the books a wellgrounded distinction between the interruption of an established business and the prevention of the establishment of a new busi-In the latter case the rule of damages is necessarily kept within prescribed limits, because there is nothing by which the anticipated value of the proposed business can be proven. But, as said by Mr. Sedgwick, "when it clearly appears that the defendant has interrupted an established business, from which plaintiff expected to realize profits, the plaintiff should recover compensation for whatever profits he makes it reasonably certain he would have received." Id. \$ 182. But such loss of profits is not to be estimated by expected or anticipated specific profits, because the earning of such profits is but conjectural, and depends upon too many contingencies, but should be based upon the value of the use of the business to the plain. tiff, as ascertained and determined from ac-Id. §§ 174, 189; 1 tual past experience. Suth. Dam. § 70; Goebel v. Hough, 26 Minn. 252, 2 N. W. 847; Crawford v. Parsons, 63 N. H. 438; White v. Moseley, 8 Pick. 356; Simmons v. Brown, 5 R. I. 299; City of Terre Haute v. Hudnut, 112 Ind. 542, 13 N. E. 686; Gibson v. Fischer, 68 Iowa, 29, 25 N. W. 914; Allison v. Chandler, 11 Mich. 542; Woodin v. Wentworth, 57 Mich. 278, 23 N. W. 813; Cincinnati v. Evans, 5 Ohio St. 594. And this, we think, is the proper measure of damages in this case. The defendant had been operating its mill for several years before the breach of plaintiffs' contract, and it can show what its average profits had actually been, and so ascertain with reasonable certainty what the value of the use of the mill would have been to it during the time it was prevented from operating it on account of plaintiffs' breach of the contract; the effect of the change from the burr to the roller process, as contracted for, being of course taken into account. For this purpose, proof of past profits, if any, was admissible in evidence. While it is true the evidence showed, or tended to show, that the mill had no rental value, within the sense that a business house in a populous city has a rental value, yet its actual value to the defendant could have been ascertained with reasonable

certainty by reference to the business whick it had previously done. By the rule adopted by the trial court, however, the damages were to be determined on an estimate of the future profits the defendant might have realized from a sale of the mill products, had the mill been operated to its full guarantied capacity, basing the same upon a net profit of 75 cents per barrel of flour, without regard to what the past experience of the defendant had shown the actual value of the use of the property to be, and it was, we think, therefore, too speculative and uncertain to form a basis for estimating damages, when other and more certain data were at hand. 1 Suth. Dam. § 60; Pennypacker v. Jones, 106 Pa. St. 237; Allis v. McLean, 48 Mich. 428, 12 N. W. 640; Anderson v. Sloane, 72 Wis. 566, 40 N. W. 214; Brigham v. Carlisle 78 Ala. 243; Frazer v. Smith, 60 Ill. 145; Manufacturing Co. v. Rogers, 19 Ga. 417; Lot Co. v. Leonard, 30 Ga. 560; Jones v. Nathrop, 7 Colo. 1, 1 Pac. 435; Shank v. Shoemaker, 18 N. Y. 489. We are aware the authorities are not uniform on this question, but it seems to us the rule we have indicated is more likely to do justice between the parties to this record than the one adopted by the trial court. The anticipated or expected profits from the operation of a flouring mill are proverbially uncertain and contingent. and to allow them, as such, to be recovered as damages in an action for a breach of contract to furnish machinery and appliances for such mill is to allow the jury to enter into the realm of speculation and uncertainty. As said by Mr. Justice Cooley in Allis v. McLean, supra,—a case similar to the one at bar: "Estimates of profits seldom take all contingencies into the account, and are therefore seldom realized; and, if damages for breach of contract were to be determined on estimates of probable profits, no man could know in advance the extent of his responsibility. It is therefore very properly held, in cases like the present, that the party complaining of a breach of contract must point out elements of damage more certain, and more directly traceable to the injury, than prospective profits can be;" citing Fleming v. Beck, 48 Pa. St. 309; Coal Co. v. Foster, 59 Pa. St. 365; Strawn v. Cogswell, 28 III. 457; Frazer v. Smith, 60 III. 145; Machine Co. v. Bryson, 44 Iowa, 159.

We are of the opinion, therefore, that the true measure of damages for the failure to complete the contract within the time stipulated, and for the loss of time occasioned by the attempts of the plaintiffs, after September 20th, to comply with the terms of their contract, is the reasonable value of the use of the mill during such time, as ascertained from the past experience of the defendant. But, for the time it would have been necessary to have shut the mill down, after plaintiffs abandoned their contract, in order to make the repairs and additions necessary



to bring it up to plaintiffs' contract, we think the defendant is not entitled to recover damages, for the very good and sufficient reason that the mill was never so shut down, and such repairs and additions were never made, and consequently there was no loss on that account. It is true, some two on three years afterwards, defendant awarded a contract to some other parties to remodel and reconstruct the mill, but not for the purpose of making it conform to the terms of plaintiffs' contract. For the loss of time in making such repairs, plaintiffs are clearly not The defendant was given, on the trial, the benefit of what it would have cos: to remedy the defect in the mill, and make it what it should be under the contract; but it cannot recover damages for the loss of the use of the mill during the time necessary to make such repairs, when no such time was lost or damage sustained. The ruling announced by the court as to the measure of damages for the difference between the actual and guarantied capacity of the mill was, we think, correct, because it was based upon past transactions; and it is a mere matter of mathematical calculation to determine the difference between the actual output of a 45 barrel capacity mill and what the output would have been during the same time, had the mill been up to the guarantied capacity. But it seems to us such loss should have been confined to the time plaintiffs were engaged in endeavoring to comply with their contract, and not extended to a reasonable time thereafter, in which to enable defendant to secure the services of some person to complete plaintiffs' contract, for the reason suggested,-that no such time was lost, or repairs made. It follows that the judgment of the court below must be reversed, and this cause remanded for a new trial.

STATE v. TARTER.

(Supreme Court of Oregon. June 28, 1894.) ·Homicide—Threats—Self Defense —Defending PROPERTY.

1. Defendant and two others (eye witnesses) testified that deceased was the aggressor. and had a pistol; that he swore he would kill defendant, and was drawing his pistol to do so when defendant fired. The state's evidence went to show that deceased was unarmed, and went to snow that deceased was unarmed, and not the assailant; that he made no hostile move against defendant; and that the shooting was deliberate. Held, that it was competent to prove deceased's previous threats against defendant, though not communicated to

2. The fact that the threats were made indirectly, or by innuendo, does not make proof of them irrelevant.

3. A charge that self-defense cannot be set up unless to kill was defendant's only rea-sonable resort to save his own life, or his person from great bodily harm, is not objectionable, in connection with a following charge on "reasonable and honest belief."

4. It is not error to instruct that the jury is to weigh defendant's testimony like that of

others, except that they may consider his inter-

est in the case.
5. To contend for the possession of an animal, as belonging to one's wife, shows no such intention to commit a felony on property in another's possession (Hill's Code, § 1730) as to justify a homicide in defense of the possession.

Appeal from circuit court, Union county; Morton D. Clifford, Judge.

Daniel Tarter, convicted of manslaughter, appeals. Reversed.

T. H. Crawford and T. C. Hyde, for appellant. Chas. F. Hyde and J. L. Rand, for the State.

LORD, C. J. The defendant was indicted for the crime of murder in the first degree, and, upon being tried before a jury, was found guilty of the crime of manslaughter, and sentenced to the penitentiary for the period of 12 years. From this judgment the defendant has appealed to this court, assigning numerous errors committed by the court below in admitting testimony, in giving certain instructions to the jury, and in refusing to give certain other instructions asked by him. The materiality of several of the alleged errors is not disclosed, and as a consequence they will not be considered. The assignments of error from 16 to 23, inclusive, relate to the refusal of the court to allow proof of threats made by the deceased against the defendant, but which threats were not communicated to him. The record discloses that a witness for the defendant, by the name of Lee, testified on direct examination that the deceased, "something like a month before the shooting, and after he had purchased the pistol found in his room, talked to him about his purpose in getting such pistol." The witness was then asked, "Did you ever hear Bob Tarter make any threats against Dan Tarter?" to which he answered, "Not directly; no, sir." Then follow several questions aiming to show that the deceased proposed to the witness to go with him, raise a posse, and hang the defendant and some others, which questions were objected to, when the court, addressing counsel, said, "If he ever heard the deceased make any threats against the defendant, directly or indirectly, that he would kill him, let him answer." The counsel then said to the witness, "State if you ever heard him make any threats indirectly;" and, upon objection being made, the court said to the witness: "Anything you ever heard him Did you ever tell Daniel Tarter about sav. it?" The witness answered: "No, sir." By the court: "And you never heard him make any direct threats?" To which the witness answered, "No, sir; I cannot say it was a direct threat." Thereupon, the court sustained the objection. He was then asked, "State whether or not you ever heard Robert Tarter say anything in the nature of a threat against the life of Daniel Tarter;" and again, "State whether or not you ever heard Robert Tarter make any statements Digitized by showing that he had ill will or malice towards Daniel Tarter." Upon objection, both questions were excluded. Counsel for the defendant then asked the court for permission to ask the witness a leading question, which it refused to grant. The record shows that after the witness testified that he had talked to Robert Tarter, the deceased, a good many times shortly before the shooting, and just after the difficulty of the Tarters with Holstine, he was asked, "Did you have a conversation with him, in which he stated what he had got that pistol for, with reference to Dan Tarter?" and again, "Did you ever have a conversation with him (the deceased), in which he told you what he was carrying that pistol for?" To both of which questions objection was made, and sustained by the court. At this juncture a colloquy was had between counsel and court, but there is nothing therein, that we can see, requiring attention.

There seems to have been an impression with the trial court, as to the admissibility of evidence of threats, that there is a difference between threats directly and those indirectly made against life. Threats are regarded as indicative of intention, and evidence of them is not to be rejected, in proper cases, because they are couched in innuendo, vague boast, or obscure language. But we think it is clear that the trial court excluded what was said in these conversations, wherein it was proposed to show that the deceased had indirectly threatened the life of the defendant, on the ground that, if any such threats were made, they were not communicated to the defendant prior to the shooting; and this is the ground upon which the state's attorney mainly rested his argument. But threats are admissible, though they have not been communicated to the defendant, when the evidence leaves the question in doubt as to whether the defendant or the deceased was the aggressor at the time of the encounter. It is true there is some conflict of judicial opinion upon this subject, but the rule, as now established by the later authorities, is thus stated by Mr. Wharton: "When the question is as to what was deceased's attitude at the time of a fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant." Whart. Cr. Law, 1027. Where the circumstances raise a question of self-defense, evidence of uncommunicated threats, recently made, are admissible for the purpose of showing the motive of the deceased, and the nature and character of the assault. So, also, proof of threats not communicated is often admitted for the purpose of corroborating evidence of those communicated; and likewise, where it is doubtful from the evidence which party commenced the affray. communicated threats are admissible to show who was probably the first assailant. Kerr, Hom. 396; Wiggins v. People, 93 U. S. 467. The testimony of defendant, and also of his

sister and William Barnard, who were eyewitnesses to the shooting, was to the effect that the deceased was the aggressor, and that he was armed with a pistol; that he swore he would kill the defendant, and at the same time was reaching for his pistol; and that he was in the act of drawing it, to carry such threat into execution, when the defendant drew his pistol and fired. On the other hand, the testimony for the state tended to show that the deceased was unarmed, and not the assailant when the affray began; that he made no hostile demonstration towards the defendant, and committed no overt act, but that the shooting was deliberate and premeditated. In view of this conflict in the testimony, we think the court erred in excluding the evidence of these conversations, the purpose of which was to show that the deceased, shortly before the shooting, indirectly or by innuendo, threatened the life of the defendant. The evidence so excluded would have tended to shed light upon the transaction, by showing the motive of the deceased, and the nature and character of the assault which it is claimed he made upon the defendant, and in resisting which he was killed. It would have tended also to corroborate the defendant and his witnesses, who testified that the deceased commenced the affray, and was the aggressor.

The next assignment of error relates to the instruction given by the court upon the doctrine of self-defense, and the portion of the charge objected to is as follows: "I charge you that the law regards human life as the most sacred of all interests committed to its care and protection, and there can be no successful setting up of self-defense unless the necessity for taking life is actual, present, urgent, and unless, in a word, the taking of his adversary's life is the only reasonable resort of the party to save his own life, or his person from great bodily harm." But this is not all of the charge on that subject. The court further instructed the jury that: "The law gives to every man the right of self-defense. This means that a man may defend his life, and may defend his person from great bodily harm. He may repel force by force, and he may resort to such force as, under the circumstances surrounding him. may reasonably seem necessary to repel the attack upon him; and in his defense he may even go to the extent of taking the life of his adversary. The right of self-defense, in cases of this kind, is founded upon the law of nature, and is not, nor can be, superseded by the law of society. Hence, if the jury find from the evidence in this case that the defendant, at the time he fired the shot and wounded the deceased, had reasonable ground to believe that his life was in imminent danger, or that he was in danger of great bodily harm, at the hands of the deceased, and, so honestly believing, he fired the fatal shot, he was justified under the law in so doing, and you should find the defendant not guilty. If the jury believe from the evidence that the defendant had no reason to believe that the deceased intended to take his life, or to inflict upon him great bodily harm. and the defendant shot the deceased in revenge, or in a reckless spirit, then and in that event the defendant is not entitled to claim exemption from punishment on the ground that the killing was in self-defense." This must be read in connection with the portion objected to, and, when taken as a whole, is proper, and comes fairly within the doctrine approved by this court in State v. Morey, 25 Or. —, 36 Pac. 573. And, so considered, it obviates the objection raised against it, and therefore cannot be considered error upon this record.

Another assignment of error questions the propriety of the following instructions: "Under the statutes of this state, since 1880, the defendant has the right to come upon the witness stand, and testify in his own behalf; and, when he does so testify, you are to weigh his testimony under the same rules as you do that of other witnesses, excepting the further fact that you have the right to take into consideration the interest he has in the termination of the case." The interest of a witness in the result of litigation, whether in civil or criminal cases, is a proper matter to be considered by the jury, and it is not error for the court to so instruct.

The other assignment of error which we shall consider is the refusal of the court to give the following instructions: "I further instruct you that if you find from the evidence that June (the filly which deceased and defendant were contending over) was bequeathed to May Lloyd by her mother, and that the defendant was acting at the request of her mother in delivering the filly to May Lloyd, then the defendant had the right to the possession of said property, as against deceased, and had the right to maintain that possession, as against deceased. The killing of a human being is justifiable to prevent the commission of a felony upon the property of such person, or upon property in his possession; and if the jury find from the evidence in this case that the defendant was in the possession of a mare or filly intrusted to him by his mother to deliver to his sister, May Lloyd, and the deceased, at the time, was attempting to take said property from him by force, with intent to convert the same to his own use, feloniously, then the defendant had the right to defend his possession of said property, and to use all the force necessary to retain the possession thereof, even to the taking of the life of the deceased. Every man has the right to care for and look after his own property, and the property of those intrusted to his care, and, to that end, to go upon the public highways and commons with such property, and carry, lead, and drive the same from one locality to another; and if, while so engaged, an attempt is made to take such property from him by force, he may oppose such attempt by such force as seems reasonable, under the circumstances, and necessary to retain the possession of the property; and if, while so doing, his assailant makes a felonious assault upon him, from which he reasonably apprehends death, or great bodily harm to himself, unless he kills his assailant, and he, so honestly believing, kills his adversary, such killing is justifiable." The evidence does not tend to show that deceased intended to commit a felony against the property of defendant, but rather that he was contending for the possession of the filly as the property of his wife. The felony contemplated by the statute, which justifies the killing of a human being, is robbery, larceny, or the like. Hill's Code, § 1730. The refusal, therefore, to so charge the jury, was not error. The fact is that much of these instructions, as others asked and refused, are based on evidence not disclosed by the bill of exceptions. There is in the record what purports to be the testimony in the case, but it is not made a part of the record; hence, cannot be considered by us in passing upon such instructions. There is no doubt that some of the instructions asked are good law, but, in view of the state of the record, we cannot consider them. For the reasons, however, already stated, we must reverse the judgment, and order a new trial.

MANAUDAS v. MANN et al.

(Supreme Court of Oregon. June 28, 1894.)

JUDGMENT AGAINST VENDOR — EFFECT ON PURCHASER WITH NOTICE OF RIGH18.

Plaintiff, having obtained a judgment against H. for land which defendant had bought of H. with knowledge of plaintiff's rights therein, and without his consent, is entitled to judgment therefor against defendant.

Appeal from circuit court, Baker county; Morton D. Clifford, Judge.

Action by Joseph Manaudas against P. A. Mann and another. Judgment for defendants. Plaintiff appeals. Reversed.

J. L. Rand, fer appellant. T. H. Crawford and F. L. Moore, for respondents.

BEAN, J. This is a suit to have the defendant Mann declared a trustee of the south 20 feet of lot No. 2, block No. 2, in Fisher's addition to Baker City, to compel him to convey the same to plaintiff, and to account for the rents and profits. The facts That December 31, 1877, Mann, being the owner of said lot No. 2, sold, and by a bond for a deed agreed to convey, the same to the plaintiff upon the payment of \$300, the balance of the purchase price, within three months from the date of the bond. That thereafter, and on the 26th of March. 1878, the plaintiff, being largely indebted to the defendant Heilner and one Cohn. conveyed to them, as security for said indebtedness, and for the balance due Mann, which they agreed to assume, a large amount of property, and directed the defendant Mann to convey to them the lot so bonded, which was accordingly done by a deed absolute in form, but which was understood and agreed between plaintiff and Heilner and Cohn to be a mortgage. That on December 19, 1879, and before the time for redemption had expired, Heilner and Cohn sold and conveyed to Mann the property in dispute in this suit for the sum of \$675, ever since which time Mann has been in the possession of the some, and receiving the rents and profits thereof. The plaintiff, being unable to arrive at a satisfactory settlement of his affairs with Heilner and Cohn, on the 12th of September, 1881, commenced a suit against them for an accounting, and to compel them to reconvey to him all the property which had theretofore been conveyed to them as security for his indebtedness, and thereafter such proceedings were had that on June 11, 1885, a final decree was entered in said suit, in which it was adjudged and decreed that all of said indebtedness to Heilner and Cohn had been fully paid, and it was further decreed that Heilner and Cohn should reconvey to plaintiff the whole of lot 2 in block 2, upon the payment to them of the sum of \$675, the amount received by them from Mann. Manaudas v. Heilner, 12 Or. 835, 7 Pac. 347. As soon as the decree of this court was filed in the court below, the plaintiff, in compliance therewith, paid to Heilner and Cohn the sum of \$675, and received from them the deed to the whole of lot 2, and immediately demanded possession from Mann, which being refused, he began an action to recover such possession. This action was pending in the courts for some considerable time, but was finally dismissed upon plaintiff's motion, and this suit commenced against Mann and Heilner (Cohn having in the meantime died) to compel a conveyance of the property in dispute. A demurrer to the complaint being sustained in the court below, on appeal to this court the decree was reversed, and the cause remanded with permission to the defendants to apply for leave to answer, on condition that they deposit with the clerk the sum of \$675, and interest from the time it was paid to Heilner and Cohn by the plaintiff, in pursuance of the decree made in June, 1885. Manaudas v. Mann, 22 Or. 525, 30 Pac. 422. The defendants, having complled with the order of the court, and made the necessary deposit, were permitted to answer, and denied some of the allegations of the complaint, and the defendant Mann, for a further defense, averred that the purchase by him from Heilner and Cohn was made in good faith, supposing them to be the owners of the property, and without knowledge of plaintiff's claim thereto, or that it was held only as security, and, further, that the sale was made by the consent and direction of the plaintiff. The defendant Heilner admitted that he received from plaintiff the sum of \$675 in pursuance of the decree of this court, but averred that he did not convey, or intend to convey, to him the property in question, and also that Mann purchased the same in good faith. The cause, being at issue, was referred to W. F. Butcher, Esq., to report the facts and the law. After hearing the testimony, the referee found that the sale to Mann by Heilner and Cohn was made with the knowledge, and by the direction, of the plaintiff; that Mann was a purchaser in good faith and for value,-and recommended that the complaint be dismissed as to him, but that plaintiff have a decree against Heilner for the \$675 paid to Heilner: and Cohn on November 14, 1885, and interest, and that the money on deposit be applied on said decree. The court below affirmed the report as to Mann, and decreed accordingly, but set it aside as to Heilner. dismissed the complaint, and directed the clerk to pay the money on deposit to Heilner, and from this decree the plaintiff appeals.

There are but two questions presented by this record, and they are: (1) Was the sale by Heilner and Cohn to Mann made by the direction and consent of the plaintiff? and (2) if not, was Mann a bona fide purchaser for value without notice? Both of these are pure questions of fact, and, while the findings of the referee and court below are in favor of the defendants, we have reached the conclusion, after a careful examination. that such findings are not sustained by the testimony. The defense that the sale was authorized by the plaintiff is made in this case for the first time, although this controversy, in one form or another, has been in the courts for more than 10 years, and the circumstances by which the witnesses fixed the time when the alleged consent was given show clearly that it was long after the sale had been made. Hence, in view of these circumstances, and the fact that plaintiff unqualifiedly denied in his testimony that he ever authorized or was consulted about the sale, or knew anything about it until long afterwards, we are impelled to the conclusion that it was made without his authority or consent. The defendants claim, and so testify, that Mann purchased the property in good faith, without any knowledge of the character in which Heilner and Cohn held it, or plaintiff's claim thereto; but in this they are contradicted, not only by the entire circumstances of the case, but the positive testimony of disinterested witnesses, who testified unqualifiedly that Mann was informed of the condition of the title and of plaintiff's rights, and advised not to buy; that he said he did not care anything about plaintiff, as Heilner was good to him for any money he might pay for the property. Without recapitulating the testimony, it is sufficient to say that in our opinion, from the overwhelming weight of the evidence, the defendant Mann took the deed from Heilner and Cohn with knowledge of the facts and circumstances



under which they held the premises, and therefore took the title as a trustee for the plaintiff, and cannot claim the protection due to a bona fide purchaser. He stands in the shoes of Heilner and Cohn, and, the plaintiff having established his right to the property as against them by the decree of this court (12 Or. 335, 7 Pac. 347), it necessarily follows that he must prevail in this suit. The decree of the court below is therefore reversed, and a decree will be entered here that the defendant Mann, within 60 days after the entry of the decree of this court in the court below, execute and deliver to the plaintiff a good and sufficient deed to the property in controversy, free from all liens or incumbrances placed thereon, or suffered to be placed thereon, by him, and, in case of a failure so to do, the decree shall stand for such conveyance; and that plaintiff have judgment against him for the rental value of the said premises from November 14, 1885, at \$15 per month, amounting, in the aggregate, to the sum of \$1,555.50, and against both defendants for his costs and disbursements in this suit.

McBROOM v. THOMPSON et al. (Supreme Court of Oregon. June 28, 1894.)

PAROL LICENSE-REVOCATION-ESTOPPEL.

1. A parol license to divert part of the water of a stream cannot be revoked after the licensee has expended money and labor in pursuance of the license.

2. Where, for eight years, riparian owners and their grantors have acquiesced in the diversion, by a person who is not a riparian owner, of a part of the stream, and such person has yearly aided in keeping the channel of the stream open, and expended money on his farm, which would be worthless without the water, a court of equity will not enjoin a further diversion of the water at the suit of such riparian owners.

Appeal from circuit court, Umatilla county; Morton D. Clifford, Judge.

Suit by P. G. McBroom against James Thompson and others. There was a decree for plaintiff, and defendants appeal. Reversed.

This is a suit to enjoin the defendants from diverting the waters of a branch of the Walla Walla river, in Umatilla county, Or. The evidence shows that on December 13, 1882, Henry Nichols obtained a patent from the United States for the S. W. 1/4 of section 26, in township 6 N. of range 35 E. of the Willamette meridian, and on June 18, 1883, he and his wife conveyed a 151/4 acre tract from the northwest corner thereof to R. B. Crego, who on October 10, 1887, conveyed it to the plaintiff; that the Walla Walla river flows in a northerly direction to a point near the town of Milton, where it divides into two branches, the eastern being known as the Tum-a-lum, and the western as the Little Walla Walla, which flows through plaintiff's land, situated about two miles below the fork; that the defendant Thompson, being the owner of the land above plaintiff's, through which the Little Walla Walla flows, on February 28, 1884, granted to his codefendants the right to divert the water of said stream, and conduct it in a ditch across his premises, to be used in irrigating theirs: that the defendants, having obtained Crego's consent thereto, dug a ditch about 21/2 miles in length from a point on the Little Walla Walla river, just below the said fork, and have since 1884 diverted and appropriated water to irrigate their lands, no part of which is returned to said stream; that the Tum-a-lum has a greater fall and swifter current than the Little Walla Walla, and the winter freshets fill up the head of the latter stream with rock, gravel, and other material, seriously obstructing the flow of the Walla Walla into it, and causing the greater quantity of water to flow into the Tum-a-lum; that the persons owning lands on the banks of the Little Walla Walla river, together with the defendants, whose lands are irrigated by water from said ditch, have by common consent and understanding, each year, removed by their own labor the obstructions from the channel of the Little Walla Walla river, and built dams in the Tum-a-lum, by which about one-half of the volume of water has been made to flow in each stream, for which service the defendants were to have the privilege of withdrawing water to irrigate their lands; that the plaintiff, prior to his purchase of the land from Crego, saw the said ditch, and knew that the defendants were diverting water from the stream running through the tract he intended to purchase; that he aided the defendants and others in removing such obstructions, and placing the dams aforesaid, with knowledge of said understanding, and of the facts that the defendants were laboring and expending their means in improving and cultivating their lands, which would be valueless without irrigation, and never made any objection to the use of said water by them till this suit was commenced. plaintiff alleges in his complaint that he is a riparian proprietor on the Little Walla Walla river, and entitled to the flow of said stream in its natural channel; that the defendants are not riparian proprietors on said stream, and have no right to divert the waters thereof, which he needs for irrigation and domestic purposes. The defendants, after denying the material allegations of the complaint, allege the foregoing facts as an equitable estoppel. After the issues were completed the cause was referred to R. M. Turner to take testimony, which having been done, the court, at the hearing thereof, decreed a perpetual injunction against the diversion and the use of the water of said stream, and awarded plaintiff his costs and disbursements, from which decree the defendants appeal.

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Cox, Cotton, Teal & Minor, for appellants. Leasure & Stillman, for respondents.

MOORE, J. (after stating the facts). The defendants contend that the ditch was constructed under a parol license from R. B. Crego, plaintiff's grantor, and that after its construction the license became irrevocable. The defendant W. S. Powell testified that after securing the deed from the defendant Thompson the construction of the ditch was commenced, with Crego's consent, but that Henry Nichols then owned the tract of land now owned by the plaintiff. In this the witness is in error, as the record evidence conclusively shows that Crego had obtained his deed from Nichols more than eight months prior to the date of Thompson's deed; and, while Nichols may have objected to the diversion of the water, he then had no right to speak as a riparian proprietor of the premises now owned by the plaintiff.

The ditch having been constructed under a parol license from Crego, the question is presented whether such license is revocable after labor and money have been expended in pursuance thereof. "An executed license," says Lord, J., in Curtis v. Water Co., 20 Or. 34, 23 Pac. 808, and 25 Pac. 378, "is treated like a parol agreement, in equity. It will not allow the statute to be used as a cover for fraud. It will not permit advantage to be taken of the form of the consent, although not within the statute of frauds, after large expenditures of money or labor have been invested in permanent improvements upon the land, in good faith, upon the reliance reposed in such consent. To allow one to revoke his consent when it was given or had the effect to influence the conduct of another. and cause him to make large investments, would operate as a fraud, and warrant the interference of equity to prevent it, under the doctrine of equitable estoppel." In Coffman v. Robbins, 8 Or. 278, it was held that a parol agreement to divide the waters of a stream, that had been acted upon by the parties for several years, under which ditches had been dug and possession given, would be enforced in equity. So, too, in Combs v. Slayton, 19 Or. 99, 26 Pac. 66, it was held that where the riparian proprietor had not claimed the exclusive right to the water of a stream, but had permitted the defendant to dig a ditch, and appropriate a part thereof, such acts evinced a tacit agreement that each should be entitled to appropriate a just proportion of the water for the purpose of irrigation, and that such agreement should be carried into effect. While it is claimed that the better rule, in view of the statute of frauds, appears to be that, so far as the question of further enjoyment is concerned, the licensor may revoke the parol license after an outlay under it (Bigelow, Estop. 666), the contrary doctrine has, by the foregoing decisions, been firmly established in this state. The reason for the estoppel in such cases rests upon the principle that the licensee, after the expenditure of money and labor on the faith of the parol license, cannot be placed in statu quo upon its revocation. 2 Herm. Estop. § 982. The defendants having expended their money and labor in digging the ditch upon the faith of Crego's parol license, it follows that he could not revoke it after such expenditure; and the plaintiff, having acquired the titte to his premises with notice of the diversion, could obtain no greater interest therein than his grantor possessed, and hence he cannot now revoke the license. Curtis v. Water Co., supra.

The evidence shows that the defendants have each year, since the ditch was constructed, aided the riparian proprietors, including Crego and plaintiff, in removing obstructions from the Little Walla Walla river, and in building dams in the Tum-a-lum, under a common understanding that in consideration of such aid the defendants were to have the right to divert sufficient water for the irrigation of their lands; that the plaintiff and his grantor have for eight years, with knowledge of the diversion and use of the water, seen and acquiesced in the defendants' improvement of their farms by means thereof under a reasonable expectation that the diversion and use would be continued. And from these circumstances it is contended that the plaintiff is estopped from discontinuing the diversion and use of the water for irrigation. Such acquiescence, if voluntary, and continued for a considerable length of time, constitutes a quasi equitable estoppel, that does not cut off the party's title or legal remedy, but bars his right to equitable relief, and leaves him to his legal action alone. 2 Pom. Eq. Jur. § 817. The case of Dalton v. Rentaria. (Ariz.) 15 Pac. 37, illustrates this doctrine. That was a suit to restrain the defendants from preventing the waters of Santa Cruz river, in Arizona, from flowing in certain acequias, from which plaintiffs' land was supplied with water for irrigation. The plaintiffs had contributed their proportion of labor and expense in maintaining all of said acequias for irrigating purposes equally with the defendants. The defendants, in their answer, admitted that the greater part of plaintiffs' lands, which were arid, and would raise no crops without irrigation, had been cultivated for 16 years. The court, in passing upon the question, said: "These admissions on the record are significant, and evoke a serious reflection. If the greater part of the plaintiffs' lands has been cultivated for the last sixteen years, it was done with or without defendants' consent. If without their consent, have they not been guilty of laches, unreasonable delay, and inexcusable neglect. in waiting sixteen years without taking any steps to restrain the wrongful acts of plaintiffs? If the defendants were fairly put upon their guard; if they had actual knowledge

that plaintiffs were diverting waters that belonged to defendants by virtue of prior appropriation; if they stood by for sixteen years or more, and saw the plaintiffs build their houses, open out their lands, and put them in cultivation, expend their money in the improvements of these homes, pay their proportion of the expenses, and bear their proportion of the labor in building and repairing the acequias, and otherwise do and perform such acts as indicated that plaintiffs believed they had equal rights with defendants to the waters of the Santa Cruz river,-do not all these circumstances serve to imply that defendants waived or abandoned any exclusive prior right to said waters? At least, was there not such unreasonable delay as that they are now precluded from complaining? Will parties be permitted to stand by for sixteen years or more, and see new fields put in cultivation,-irrigated, forsooth, with water to which they have an exclusive prior right, -see large sums expended in erecting new homes, and witness new and important interest intervene, and then be heard to complain? A fortiori, defendants will not be heard to complain if these things were done with their consent. Indeed, our opinion is, in this case, that acquiescence-nonaction-on the part of defendants, for so long a time, gave consent. They could not consent till title vested, and then dissent.' So that it is really immaterial whether the irrigation was done with or without the defendants' consent, if they stood passively by. See Smith v. Hamilton, 20 Mich. 433; Park v. Kilham, 8 Cal. 78; Joyce v. Williams, 26 Mich. 332." In Slocumb v. Railway Co., 57 Iowa, 675, 11 N. W. 641, the facts showed that a small creek touching a corner of plaintiff's land was crossed by defendant's railroad upon bridges at two places. The defendant filled the bed of the creek at the two crossings, and turned the channel along the side of the railway, so that the bridges were dispensed with, and the creek did not touch plaintiff's prem-The plaintiff stood by, and saw the work of diversion progressing; and it was not until after it was fully completed, at a cost of more than \$5,000, that any objection was made. It was there held, upon those facts, that the trial court did not err in refusing to grant a mandatory injunction for the restoration of the stream. In the case at bar there has been more than a mere voluntary acquiescence, or standing passively by, while the defendants were digging their ditch The plaintiff and and improving their lands his grantor, for eight years, without any objection whatever, aided the defendants in repairing the damages caused by the winter freshets, with knowledge of their appropriation, and of the common understanding that in consideration of such aid the defendants were to enjoy the right of diverting the water for the irrigation of their lands. The defendants thus encouraged by the plaintiff's voluntary acquiescence and participation in a common purpose, laid out their money and expended their labor in making homes for their families, under an obvious expectation that no obstacle would afterwards be interposed to prevent their enjoyment. The plaintiff's objection, in view of the unreasonable delay, and of all the circumstances of the case, now comes too late; and, under the maxim that "he who is silent when he ought to speak shall not be heard to speak when he ought to keep silent," he can have no standing in a court of equity to enjoin a diversion and use of the waters of a stream that he and his grantor have tacitly encouraged.

It appears from the evidence that the defendants have been diverting about 240 inches of water from the Little Walla Walla river, without pressure, and that this quantity is necessary for their use, and that fully as much flows in the channel of said stream through plaintiff's land, which, if diverted, would be sufficient for its irrigation. Plaintiff's cause of suit is not based upon a division of the water in proportion to the equitable rights of the parties, but to enjoin the defendants from preventing the water of the stream from flowing through his land in the natural channel, undiminished in quantity; and since it appears that there are other riparian proprietors on said stream, who are interested in the diversion, but are not parties to this suit, no decree could settle their respective rights by a division of the water, and hence it would be useless to remand the cause for that purpose. The decree will therefore be reversed, and the complaint dismissed.

HYDE, District Attorney, v. CROSS et al. (Supreme Court of Oregon. June 28, 1894.)

BAIL BOND—CONTINUING LIABILITY—DISMISSAL OF INDICTMENT—EFFECT.

Sections 1317, 1328, Hill's Ann. Code, provide that, when the original indictment is set aside on motion of defendant, the court may order that the case be resubmitted to the grand jury, and in such case the bail remains answerable for the appearance of defendant to answer the new indictment, if one be found. Defendant was indicted, and admitted to bail. On motion of the state the court ordered that the matter be resubmitted to the grand jury, and that defendant be held on the same bail bond. A new indictment was returned, but defendant did not appear. Held, that there could be no recovery on the bond, as the first indictment was not set aside on motion of defendant, or with his consent.

Appeal from circuit court, Grant county; Morton D. Clifford, Judge.

Action by Charles F. Hyde, as district attorney, against S. L. Cross and J. W. Greenwell, on a bail bond. Judgment for plaintiff, and defendants appeal. Reversed.

E. H. Peery, for appellants. Geo. E. Chamberlain, Atty. Gen., and Chas. F. Hyde, for respondent.

BEAN, J. This is an action on an undertaking of bail for the appearance of one Lester Greenwell to answer a criminal charge. The cause was tried before the court without the intervention of a jury; and from the pleadings, and its findings of fact, it appears that on the 24th of April, 1888, Greenwell was duly indicted by the grand jury of Grant county for the crime of larceny "by stealing a gelding," and admitted to bail in the sum of \$1,000. On the 24th of October, 1889, he gave bail for his appearance to answer the indictment, with the defendants as sureties, conditioned that he would appear and answer the indictment. in whatever court it might be prosecuted. and that at all times he would render himself amenable to the orders and process of the court, and, if convicted, would appear for judgment, and render himself in execution thereof, and, if he failed so to do or perform any of the conditions of the undertaking, the defendants would pay to the state of Oregon the sum of \$1,000, and that, by reason of the execution and delivery of this bond, Greenwell was released and discharged from custody. The cause was continued until the 4th day of March, 1890, at which time the court, on motion of the district attorney, and against Greenwell's protest, directed the matter to be resubmitted to the grand jury, and at the same time ordered that he be still held on the bond above mentioned. A few days afterwards the grand jury returned another indictment, charging him with the crime of larceny "by stealing a horse" from the same party at the same time and place, and of the same value as the gelding mentioned and described in the former indictment. Upon the failure of Greenwell, at the subsequent term of the court, to appear and answer to the second indictment, the undertaking was declared forfeited, and this action subsequently prosecuted to collect the penalty, which resulted in a judgment in favor of the plaintiff, from which the defendants appeal.

The judgment appealed from rests upon the power of a court, on motion of the state, to set aside a valid indictment, upon which the defendant has been admitted to bail, resubmit the case to the grand jury, and hold the bail liable for the appearance of defendant to answer a new indictment, if one be found. The only provision of law making bail liable for the appearance of a defendant to answer a new indictment is to be found in sections 1317 and 1328 of Hill's Annotated Code, which provide that when the original indictment is set aside on motion of the defendant, for any of the reasons specified in section 1314, or a demurrer thereto is sustained, the court may order that the case be resubmitted to the same or another grand jury, and in such case the bail remains answerable for the appearance of the defendant to answer a new indictment, if one be found. But in this case no motion or demurrer was interposed by the defendant. The indictment was set aside by the court on motion of the district attorney. Indeed, the record does not show that there was any defect in the indictment which could have been taken advantage of by a motion or demurrer on the part of the defendant, or that it was resubmitted to the grand jury for the purpose of correcting some formal defect; but, presumably, it was resubmitted so that the state might change a material allegation, and thereby relieve itself from some possible embarrassment, in being compelled to prove that the animal stolen was a gelding, as charged in the first indictment. The act of the court, in thus resubmitting the matter to the grand jury at the instance of the state, in our opinion, amounted to a dismissal of the indictment specified in the bail bond, and clearly operated as a discharge of the sureties. By their undertaking the sureties covenanted with the state that the defendant should appear and answer an indictment therein stated; and when he did appear in fulfillment of that undertaking, and the indictment was set aside or dismissed on motion of the district attorney, it was in effect a discharge of the recognizance. and the exoneration of his bail. The agreement or contract of the sureties was that the defendant should answer a particular charge, as specified in the indictment then pending against him, and the condition that the defendant would appear to answer said indictment; "and at all times render himself amenable to the orders and processes of the court," was fulfilled and satisfied by an appearance, and a dismissal of the particular indictment mentioned and described in the undertaking, and cannot be construed into an obligation that the accused should appear and answer some other indictment which might be found against him. the rule may be in the case of an undertaking for the appearance of a defendant before indictment, or when the indictment is resubmitted to a grand jury for the purpose of correcting some formal defect therein, it will be time enough for us to consider when the question is presented, but no such question is made on this record. It follows from what has been said that upon the findings of fact the court below was in error in its conclusions of law, and the judgment must be reversed, and the cause remanded, with directions to enter judgment in favor of the defendants.

It was suggested that the judgment had been executed, and therefore we should direct that restitution be made defendants, but this suggestion is wholly outside of the record, and hence presents no question for our consideration. The record before us does not disclose that the judgment of the court below has been executed, or that any steps have been taken looking for its enforcement. The cause will therefore be remanded to the court below for such further proceedings as may be necessary and proper, not inconsistent with this opinion.



PARSONS v. HARTMAN et al. (Supreme Court of Oregon. June 28, 1894.) INJUNCTION-EXEMPT PROPERTY-RESTRAINING EXECUTION SALE.

EXECUTION SALE.

Hill's Code, § 380, provides that the protection of a private right shall be obtained by a suit in equity in all cases where there is no adequate remedy at law; sections 132–143 furnish such a remedy at law for the recovery of personal property; and section 214 authorizes a jury to award damages for an unlawful seizure of such property. Held, that an injunction will not lie to restrain an execution sale of exempt property, where the complaint does not allege that the property has a special and unique value, the loss of which cannot be compensated by damages.

Appeal from circuit court, Umatilla county; Morton D. Clifford, Judge.

Action by William Parsons to enjoin G. A. Hartman and another from selling exempt personal property upon execution. A demurrer to the complaint having been overruled, defendants appeal. Reversed.

Bailey & Balleray, for appellants. William Parsons, in pro. per.

MOORE, J. This is a suit to restrain the defendants from selling exempt personal property upon execution. The plaintiff, in substance, alleges that the defendant George A. Hartman, having obtained a judgment against him in the circuit court of Umatilla county, Or., caused an execution to be issued thereon, and delivered to the defendant William J. Furnish, the sheriff of said county, who, in pursuance of the direction of his codefendant, levied upon necessary wearing apparel of the plaintiff and his family, and upon the household goods, furniture, utensils, books, library, tools, implements, and apparatus necessary to enable him to carry on his profession of attorney at law, by which he earns a living: that at the time of said levy he was a householder of said county, and as such selected, and reserved as exempt from execution and sale under said writ, all of said personal property, and delivered to said sheriff a schedule thereof, with the reasonable value of each article set opposite thereto, amounting in the aggregate to \$550.30, but that said sheriff, acting under the direction of his codefendant, advertised and was threatening to sell all of said property, to his irreparable injury; that he had no plain, complete, or adequate remedy at law for the injury threatened,-and prayed an injunction restraining said sale. The defendants demurred to the complaint, alleging that it did not state facts sufficient to constitute a cause of suit, and that the court had no jurisdiction of the subject-matter thereof; and, the demurrer having been overruled, they refused to further plead, whereupon the court, by decree, made the temporary injunction (which had been granted) perpetual, and awarded the plaintiff his costs and disbursements, from which decree the defendants appeal. Their counsel contend one great and special, leading to lasting mis-

that the plaintiff has a plain, speedy, and adequate remedy at law, and that equity will not entertain jurisdiction to enjoin the sale upon execution of personal property that is exempt therefrom.

There is a conflict of authority upon the right of a judgment debtor to enjoin the sale of his personal property under execution upon the ground that it is exempt by law from sale under judicial process. It has been held in Texas that a sale of personal property which is exempt from execution may be restrained at the suit of the judgment debtor. Nichols v. Claiborne, 39 Tex. 363; Alexander v. Holt, 59 Tex. 205; Stein v. Frieberg, 64 Tex. 271. But Mr. Freeman, in his work on Executions (volume 2, p. 439, 2d Ed.), in commenting upon the rule established in Nichols v. Claiborne, supra, says: "No reason for the decision was given, and we doubt whether any sufficient reason can be found. The remedy at law, where exempt personal property is seized, is, in most-and perhaps in all-cases, adequate for the protection of the interests of the claimant." The rule announced in Texas has been adopted in Nebraska (Cunningham v. Conway, 25 Neb. 615, 41 N. W. 452), where the court gives the following statement and reason for its decision: "The plaintiff alleges in his petition that he possesses neither lands. town lots, nor houses subject to exemption as a homestead, and that he filed an inventory of all his property with the officer, who refused to call appraisers to appraise the same. If these statements are true, the debtor might have compelled the officer to call appraisers, or have brought an action against him for the failure to perform his duty. Yet he is not restricted to these remedies. The property being exempt, the debtor is entitled to the peaceable possession of the same; and the officer may be enjoined from wrongfully depriving him of his property, as the officer is proceeding illegally under a claim of right. Johnson v. Hahn, 4 Neb. 149; Railroad Co. v. Artcher, 6 Paige, 83; Belknap v. Belknap, 2 Johns. Ch. 463." In Johnson v. Hahn, supra, an injunction was granted to restrain the sale of real estate for delinquent taxes, which could only result in a conveyance creating a cloud upon title. In Railroad Co. v. Artcher, supra, the defendant sought to dissolve an injunction which restrained him from opening a private way across plaintiff's real property. The court continued the injunction for the reason that the act complained of was not a mere trespass, but an attempt to exercise a continued right of passing across and through the complainant's premises, to the permanent injury of the property. The case of Belknap v. Belknap, supra, was a suit to enjoin the defendant from lowering the outlet which furnished water to operate plaintiff's mill. The court found that it was not a case of ordinary trespass impending, but chief and the destruction of the estate, and tending to provoke a multiplicity of suits, and perpetually enjoined the threatened injury. It will thus be seen that each case cited in support of the rule adopted in Cunningham v. Conway, supra, related to injunctions granted to restrain the creation of clouds upon title, or to prevent trespasses upon real property. In Baxter v. Baxter, 77 N. C. 118, it was held that injunction was not the proper remedy of the judgment debtor to determine the title to exempt personal property seized under execution. principle," says Mr. High, in his work on Injunctions (122), in discussing the right of the judgment debtor to enjoin the sale of exempt personal property under execution, it is difficult to perceive any satisfactory .eason for interfering by injunction in such eases, since adequate relief may usually be nad by an action at law." Section 380, Hill's Code, provides that "the enforcement or proection of a private right, or the protection of or redress for an injury thereto, shall be obtained by a suit in equity in all cases where here is not a plain, adequate and complete emedy at law." Sections 132-143 furnish such a remedy at law for the recovery of personal property, and section 214 authorizes a jury to award damages for an unlawful s azure of such property. The owner of a enattel having a complete remedy at law for 'ts unlawful seizure or detention, equity will not entertain jurisdiction, at his suit to recover possession of it, except where it has a certain, special, extraordinary, and unique value, impossible to be compensated for by lamages. 1 Pom. Eq. Jur. 177. And if it appeared from the complaint, in the case at par, that any article of personal property levied upon by the defendants possessed a special value to the plaintiff alone, such as a keepsake or memento of any kind, the loss of which could not be compensated in damages, equity would interfere to prevent its sale. Where an unlawful and oppressive seizure of exempt property has been made upon execution, the claimant, under ordinary circumstances, may safely risk his cause to the keen sense of justice inherent in mankind, and feel assured that a jury will, by its verdict, award him damages for the injury sustained. The plaintiff having, under the statute, a complete remedy at law for his injury, and nothing appearing in the record to entitle him to invoke the interposition of a court of equity, the decree of the court below is reversed, the demurrer sustained, and the complaint dismissed.

JENKINS v. HALL et al.

(Supreme Court of Oregon. June 28, 1894.)
HUSBAND AND WIFE—CONTRACTS AND CONVEYANCES—SEPARATION.

1. Though, under Hill's Code, \$ 2869, providing that, when property is owned by either

husband or wife, the other has no interest therein which can be the subject of contract between them, a contract by a husband with his wife, releasing his curtesy in her property, is void, still, under section 2871, providing that a conveyance by husband or wife to the other shall be valid to the same extent as between other persons, a husband may, by deed conveying his property to his wife, exclude himself from all rights therein, including that of inheritance and curtesy.

2. A deed from husband to wife cannot be said to be made on an agreement for separation, and therefore void as against public policy, where it appears only that he had determined to abandon and desert her, and that she had joined in deeds of other lands which he owned.

Appeal from circuit court, Union county; Morton D. Clifford, Judge.

Action by John Jenkins against G. F. Hall and others. Judgment for plaintiff. Defendants appeal. Reversed.

R. Eakin, for appellants. C. A. Johns and J. L. Rand, for respondent.

LORD, C. J. This is an action to recover the possession of a certain tract of land in Union county, Or., particularly described in the complaint. Briefly, the facts are: That on the 21st day of January, 1882, the plaintiff and Rebecca Jenkins were husband and wife. That such relation existed between them for a long time prior thereto, and continued until the death of the wife. That on - day of —, 1891, the said Rebecca died intestate in the state of Missouri, leaving no lineal descendants, but left surviving her, as next of kin, the plaintiff, her said husband, and one brother and three sisters, named, respectively, John and Jessie McLean, Margaret McLennon, and Anna Matheson. That at the time of her death she was the owner in fee simple, and in the actual possession, of said land. That in due time letters of administration were duly issued by the county court of said county. That her estate was in all things and respects settled, the residue distributed, and on the 6th day of January, 1893, the administrator was duly discharged; and that the said brother and sisters took possession of said lands, to the exclusion of the plaintiff. That on the said 21st day of January, 1882, the plaintiff, being about to abandon and desert his said wife, Rebecca, and in view thereof, and in the further consideration that she then and there joined with the plaintiff in conveying other real estate belonging to him, conveyed the said land to her by deed, the title to which at that time being in the plaintiff. That said deed was duly acknowledged and recorded as by law provided, and, among other things, contained the following clause: "This deed is made by the party of the first part, and accepted by the said party of the second part, in compliance with a mutual contract for the separation and segregation of the lands, properties, and effects of and belonging to the said parties, or either of them, so that the same may be hereafter held in severalty by each, with-

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out any claim thereon by the other; and the said party of the first part hereby covenants with said second party, her heirs and assigns, that neither he nor his heirs, executors, or administrators shall or will, at any time in the future, make or claim any right, title, or interest of, in, or to the said lands or premises hereby conveyed, or any part thereof." That defendants are in possession of said lands as lessees of John McLean and others, claiming to be the heirs of Rebecca Jenkins; and that since the said 21st day of January, 1882, plaintiff and his wife, Rebecca Jenkins, have lived separate and apart from each other, and were so living at the time of her death, etc.

Upon this state of facts the inquiry is, who nherits the land of the intestate, Rebecca Jenkins,-the plaintiff, who was her husband at the time of her death, or her said brothers and sisters? Our Code provides: "If the intestate shall leave no lineal descendants such real property shall descend to his wife, or, if the intestate be a married woman, and leave no lineal descendants, then such property shall descend to her husband." Hill's 'ode, § 3098, subd. 2. It also provides that "when any man and his wife shall be seised in her right of any estate of inheritance in lands, the husband shall, on the death of his wife, hold the lands for his life, as tenant thereof by the curtesy, although such husband and wife may not have had issue born alive." Hill's Code, § 2983. Under these provisions, upon the admitted facts, the plaintiff is heir of his wife to the land in question, and tenant thereof by the curtesy, unless he has relinquished his rights as such by the force of the said clause in the deed to his wife. Whether the deed has such effect depends upon other provisions of the Code, to which we must refer. Section 2869 provides that "when property is owned by either husband or wife, the other has no interest therein which can be the subject of contract between them." etc.; and section 2871, Hill's Code, provides that "a conveyance, transfer or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons." These provisions of our Code are identical with sections 2203 and 2204 of the Iowa Code, from which they were taken. It is a familiar rule that, when a statute of another state is adopted, the decisions of that state are authority for its construction. Trabant v. Rummell, 14 Or. 17, 12 Pac. 56. In construing section 2203, supra, Beck, J., said: "These provisions relate to the interest which a husband or wife holds in the lands owned by his or her spouse, which arises under the marriage relation. It does not refer to a property interest that may be based upon contract, or may be derived from sources other than the marriage relation. The section evidently contemplates and includes in its language the dower estate. Upon the marriage relation this estate is based." And, referring to section 2204, supra, which is the same as our section 2871, supra, he further said that "this provision relates to property owned absolutely by the husband and wife in their own right, and not to the interest one may have in lands of the other." Linton v. Crosby, 54 Iowa, 478, 6 N. W. 726. Prior to the enactment of section 2203, the supreme court of that state had held that, under an agreement to separate, a husband and wife could relinquish to each other dower held by each in the property of the other (Robertson v. Robertson, 25 Iowa, 350; McKee v. Reynolds, 26 Iowa, 578); but after its enactment the court held, in Linton v. Crosby, supra, that section 2203 was intended to change this rule, so that a contract between a husband and wife, by which each relinquishes the right of dower in the lands of the other, is void under that section. In House v. Fowle, 20 Or. 167, 25 Pac. 376, where the wife released, by deed, her dower to her husband, this construction was adopted and applied to section 2869, Hill's Code, the court holding that such con veyance was a nullity. Strahan, C. J., said. "This construction excludes estates or interests growing out of the marriage relation from the classes of property concerning which a husband and wife may contract with each other. They include dower and estates by curtesy. The reason of the distinction is These estates have their origin in obvious. public policy. They tend to strengthen the marriage relation, and to some extent they preserve to the survivor valuable property interests which may enable him or her to enjoy some of the fruits of their joint lives, and in a measure render them independent of the vicissitudes of fortune."

As the husband is heir to his wife's estate under section 2983, supra, where she died intestate, and leaves no lineal descendants, his right to such estate grows out of the marriage relation, and, within the principle of construction applied to section 2869, supra. is excluded from the classes of property in respect to which a husband and wife may contract with each other. Conveyances between husband and wife, intended to cut off or relinquish estates growing out of the marriage relation, are void, and convey no title. Now, the facts do not show that the plaintiff or his wife made a conveyance in respect to any estate, owned by the other, which arises out of the marriage relation, or that either of them undertook by deed to release any land, owned by the other, from any estate growing out of the marriage relation. The plaintiff owned the land in question in his own right, and conveyed it to his wife. It is true, as part of the consideration of the same, she had joined with the plaintiff in conveying to third parties other property owned by him. But, as the land in question was owned by him, he had a right, under section 2871, supra, to convey it to his wife, and such conveyance, when made, is valid to the same. extent as between other persons; that is to say, a conveyance between husband and wife, when it concerns property owned by one or the other in their own right, is valid to the same extent as a conveyance between persons that are not husband and wife, though the grantor and grantee may or may not be married persons. As "between other persons," a conveyance may be validly executed, whereby the grantor conveys to a married woman an estate which excludes her husband from any participation or interest in the estate granted. This being so, the plaintiff had a right to convey the land in question to his wife as absolutely free from any right or interest of his own therein as land could be conveyed "between other persons." If he so intended, and so expressed it in his deed, he could relinquish his entire estate to his wife, so that neither himself nor any future husband should have any estate in the land, by curtesy or otherwise. As to the intention of the plaintiff by his conveyance, we think it is so plainly expressed in the clause of the deed referred to as to place it beyond controversy. By its language he has clearly manifested his intention to exclude himself, as her husband, from any interest or participation in the estate granted. His covenant is that neither he nor his heirs, executors, or administrators shall or will at any time make or claim any right, title, or interest in or to the premises conveyed. As there were no children of the marriage, in view of the facts, only collateral heirs could have been intended by the words "her heirs" in the deed when executed. In fact, the intention of the plaintiff, as manifested by the language of his deed, and the facts stipulated, afford little ground for controversy. It was argued, however, that the deed was in the nature of a postnuptial agreement, and was executed in contemplation of a separation resolved upon between the parties, and therefore was void as contravening the policy of the law. But the facts stipulated do not show any agreement, to which Rebecca Jenkins was a party, for separation. On the contrary, they show that the plaintiff had resolved to abandon and desert his wife, that she had joined with him in making deeds of other lands which he owned, and that, in view of this and other circumstances, he executed the deed conveying the land in question, whereby he intended to bar out all his interest, present or prospective, in the estate granted. There was no agreement for a separation. The plaintiff had determined to leave the state and desert his wife. He owned the property, and, in view of various circumstances, made a deed to her of the land in question; and neither law nor equity ought to allow him, after her death, to set up any interest in the land. The judgment is reversed, and the cause remanded to the court below for such further proceedings as may be proper, not inconsistent with this opinion.

HEIDENREICH et al. v. AETNA INS. CO. (Supreme Court of Oregon. June 28, 1894.)
FIRE INSURANCE—WAIVER OI BURNING.

1. By failing to object to the proofs of loss, and by pleading, in abatement of an action on the policy, that said action was brought within less than 60 days after due notice and proof had been received, the insurer waives any right to plead in bar the defects in the proof.

2. A conspiracy or willful burning of the property cannot be shown, unless specially

pleaded

3. The fact that one who threatened to burn the property, and behaved in some ways suspiciously, is the husband of one of the assured owners, is not, by itself, evidence to connect them with the burning.

Appeal from circuit court, Union county; Morton D. Clifford, Judge.

Action by K. and P. Heidenreich against the Aetna Insurance Company on a fire policy. Judgment for plaintiffs. Defendant appeals. Affirmed.

Chas. H. Carey and C. H. Finn, for appellant. Baker & Baker and J. H. Slater & Sons, for respondents.

LORD, C. J. This is an action to recover the sum of \$800 upon a policy of insurance issued to the plaintiffs upon a certain building described in the complaint, which was destroyed by fire. The complaint alleges, inter alia, that the plaintiffs were joint owners of the property; its insurance by the defendant, and its destruction by fire; that the plaintiffs gave due notice and proof of loss more than 60 days before the commencement of the action, and that they have otherwise performed all the terms and conditions of the policy to be performed on their part; and that the defendant has not paid the loss, etc. The defendant answered by way of plea in abatement, setting forth that by the terms of the policy the loss, if any, was to be paid 60 days after due notice and proof of loss should be made by the plaintiffs, and received by the defendant, etc.; that the period of 60 days did not elapse after the plaintiffs gave notice of said loss, or after proof of loss was made by the plaintiffs, or received by the defendant at its office; and that no cause of action accrued to them, under said policy, at the time of the commencement of this action. The plaintiffs, by their reply, put in issue the matter alleged in abatement, whereupon a trial was had, which resulted in a verdict and judgment in favor of plaintiffs. The defendant thereupon answered to the merits, in which it denies the joint ownership of the plaintiffs in the property, as alleged, both at the date of the policy and of the fire; admits the insurance of the house, and its destruction by fire, but denies that its destruction was without the fault of the plaintiffs; denies the amount of the loss; denies that plaintiffs furnished any notice or proof of loss in form or substance as required by the terms and conditions of

the policy; and denies that they have otherwise or at all performed all or any of the conditions of said policy on their part; and, for a further answer, set up that no notice or proof of loss had been given as required by the terms of the policy. Upon motion of the plaintiffs the denials of receiving notice and proof of loss, as well as the separate answer, were stricken out. The trial resulted in a verdict and judgment in favor of the plaintiffs, from which this appeal is taken.

The record discloses that at the trial the defendant moved to reinstate that portion of its answer so stricken out, and also offered evidence in support of it; that the court overruled the motion, and refused to receive such evidence, and charged the jury that "it is admitted in this case that the company did receive notice of this loss, and that it was in due form as required by the policy." The correctness of this instruction, and of the ruling upon the excluded evidence, is not questioned, if the portion of the answer referred to was properly stricken out. Our first inquiry, then, is whether the ruling of the trial court in striking out the said denials, and the further defense that no notice or proof of loss had been given at any time as required by the terms of the policy, was error. The theory of the ruling was that the defendant, by its plea in abatement, admitted receiving due notice and proof of loss, and thereby waived any defect of form and substance in the same, and hence it was precluded from denying the allegation of notice and proof of loss, or affirmatively setting up that such notice or proof had not been given as required by the terms of the policy. The contention for the defendant is that a breach of the conditions of the policy, prescribing what the notice should be, and what the proof of loss should embrace, was a defense in bar of the action, and could not be disposed of by the plea in abatement, the object of which was to show that the action was prematurely brought. It is no doubt true that the condition in the policy regarding notice and proof of loss is wholly for the benefit of the insurer. The insured contracts to perform it, and until he does so he has no cause of action against the insurer. But, such condition being for the advantage of the insurer, it is in its option to waive any deficiency on the part of the insured in this respect. If there are any defects in the notice or proof of loss, to which the insurer objects, he should point them out, so that the insured shall have an opportunity to remove them, and perfect his Good faith and fair dealing require proof. that this should be done, and, if not so pointed out, that the insurer should be deemed to have waived such defects, or be estopped from setting them up as a defense. law," as Brown, J., said, "requires of the company entire good faith and fair dealing in its transactions with the assured in reference to the proofs; and hence it is bound to point out any defects of a formal charac-

ter therein, that the assured may have an opportunity to correct them, and, if it accepts those served within the time named in the policy, it will be deemed to have waived defects, and to receive them in the performance of the condition of the contract." Armstrong v. Insurance Co., 130 N. Y. 566, 29 N. E. 991. This rule is just and reasonable. It aims to prevent insurance companies from lulling their patrons, as Stone, C. J., said, "into false security, by which they may lose the means and opportunity of remedying defects in their preliminary proof." Insurance Co. v. Felrath, 77 Ala. 201. Hence, in view of this duty of the insurer to the insured. any conduct or act of the company which may be taken as acceptance of notice and proof of loss will be regarded as a waiver of its right to object thereto on account of defects therein. In the case at bar the defendant, by its plea in abatement, sought to show that the action was prematurely brought, by alleging that it was begun before the 60 days had elapsed after due notice and proof had been received by the company. By its express wording the plea admits that due notice and proof of loss had been given and received, and the only issue was as to the lapse of time after the receipt of the same. This issue was decided adversely to the defendant, whereupon it sought to defeat the action by its denials of notice and proof of loss, and alleging affirmatively that such notice and proof were defective in form and substance, and did not comply with the terms of the policy. It was the duty of the company, if it intended to insist upon notice and proof free from defects or deficiencies, to apprise the assured of their existence, and afford the plaintiffs an opportunity to eliminate them. Certainly, if the company had done what in good faith it was required to do, and the plaintiffs had refused to amend the defective notice and proof, it is hardly probable that it would have simply sought to abate the action, when it had a defense in bar of it. Nor does the answer, including the portion stricken out, state that the notice and proof of loss were given, and that the defendant had pointed out the objections to them, thus showing that the plaintiffs had an opportunity of remedying the defects. Yet the company availed itself of the benefit of a plea in abatement, admitted the notice and proof of loss were given and received, and by so pleading must be considered to have accepted them, and thereby waived any and all objections to their sufficiency. We do not think, therefore, that there was any error in the ruling of the court in the particular under consideration.

The next assignment of error seeks to review the decision of the court in sustaining the objection to a question asked of K. Heidenreich. The question was whether or not her husband had a power of attorney to act for her in managing her property. She had already testified that he had acted for

The statement as to what was expected to be proven by the question shows that the answer would have been immaterial and irrelevant, for the reason, if there was a conspiracy or a willful burning of the property by the plaintiffs, or any one by their consent or connivance, the facts should have been alleged, which was not done. Matters in defense cannot be proven, unless they are pleaded. As to the question asked J. D. Heidenreich, we are not satisfied that it comes within the rule laid down in article 12, Steph. Dig.; and, like counsel, we have been unable to find any authority showing there was error in the ruling of the trial court.

The next objection is to the following instructions: "I instruct you that there was no evidence in this case tending to connect the plaintiffs with any acts of John or J. D. Heidenreich, in regard to the fire in question." The record discloses that there was some evidence offered on behalf of the company to the effect that the husband of one of the plaintiffs had threatened to set fire to the barn above mentioned, and to get rid of it; and some suspicious circumstances were shown, respecting his conduct, with a view to showing that the fire was willfully set by him in the barn. But there is no evidence tending to show that either of the plaintiffs had any knowledge of the same, or of any statement or act of J. D. and John Heidenreich, or either of them, which connected the plaintiffs with the fire. There being no error, it results that the judgment must be affirmed.

WELCH v. CITY OF ASTORIA et al. (Supreme Court of Oregon. July 5, 1894.)

ENJOINING COLLECTION OF TAX—TENDER.

A bill to enjoin the collection of taxes will be dismissed when no tender is made of the

amount of taxes admitted to be legally due.

Appeal from circuit court, Clatsop county;
T. A. McBride, Judge.

Bill by Nancy Welch against the city of Astoria and others to restrain the collection of taxes. Complaint dismissed. Plaintiff appeals. Affirmed.

George Noland, for appellant. F. D. Winton, for respondents.

LORD, C. J. This is a suit to restrain he collection of city taxes on certain real property owned by the plaintiff. The comblaint is made up largely of averments which are intended to show that the defendant city, through its agents, purposely and fraudulently omitted and refused to assess mortgages on real estate representing a large sum, and that, by reason thereof, plaintiff's axes are greatly increased, in the sum of dollars. It also alleges that the sum of \$537 is a reasonable tax upon the property of plaintiff, the same being based upon the

valuation put by the assessor and county court of Clatsop county upon the same property listed on the assessment roll of said county for the year 1892; that said plaintiff tendered said amount in full payment of all taxes, which tender was refused by the tax collector, who threatens to-and will, unless restrained by order of the court-proceed to sell said lands, and thereby create a cloud upon plaintiff's title therein, etc. A temporary injunction was granted, whereupon the defendants answered, specifically denying the allegations of the complaint, and setting up new matter as an estoppel, to which plaintiff demurred. Upon the issues thus joined the defendants filed a motion to "dissolve the temporary injunction for the reason that each and every material allegation of the complaint is denied by the answer filed, and that the complaint sets forth no equitable ground for an injunction," which motion was allowed, and a decree rendered dismissing the complaint, from which decree this appeal is prosecuted.

Our Code provides that "a mortgage, deed of trust, contract or other obligation whereby land or real property situated in no more than one county in this state is made security for the payment of a debt, shall, for the purpose of assessment and taxation, be deemed and treated as land or real property." Hill's Code, § 2730. It also provides that "all property, real and personal, within this state, not expressly exempt therefrom. shall be subject to taxation in the manner provided by law." Id. § 2729. The charter of Astoria provides that "the assessment of property must be made in the manner prescribed by law for assessing property for state and county purposes." City Charter, § 53. From these provisions, it is clear that mortgages are subject to assessment and taxation for municipal purposes. Balfour v. City of Portland, 12 Sawy. 122, 28 Fed. To fraudulently omit them from the assessment roll is a willful violation of law, and a fraud upon the rights of taxpayers which entitles them to be relieved in equity of the tax in excess of that which is just and legal, upon the payment of what is due; and we do not understand that the court below held otherwise, but that it dismissed the complaint because the allegation of tender does not show that it was kept good by depositing the money in court, ready to be paid to the defendant. The allegation is "that said plaintiff tendered said amount (\$537) in full payment of all taxes, and which tender was made both in money and in writing, the whole of which was refused by said chief of police." An allegation of tender is usually to the effect that the defendant has always been ready to pay the admitted debt, and before the commencement of the action tendered it to the plaintiff, and now brings it into court, ready to be paid to him. In other words, the plea of tender must be accompanied by the actual payment of the

amount into court, such payment being in fact set out in the allegation. As the allegation only shows that the plaintiff tendered the sum specified, as her just proportion of the tax assessed, to the chief of police, who refused to receive it in payment of her taxes, the court below was of the opinion that, as the plaintiff should be required to do equity as a condition of relief, the allegation ought also to show that the tender was kept good by a deposit in court. A court of equity will not extend aid to a party who is himself at fault. The rule is that he who seeks equity at the hands of the court must first do equity. Where a party comes into a court of equity, asking to be relieved of the payment of taxes on the ground of their being excessive or illegal, he must do equity, by offering to pay the amount justly due from 'im, and upon this condition alone will relief be granted. "It is not sufficient," says Mr. Justice Miller, "to say in the bill that they are ready and willing to pay whatever may be found due. They must first pay what is conceded to be due, or what can be seen to be due on the face of the bill, or be shown by affidavits, whether conceded or not, before the preliminary injunction should be granted. The state is not to be thus tied up, as to that of which there is no contest, by lumping it with that which is really contested. If the proper officer refuses to receive a part of the tax, it must be tendered, and tendered without the condition annexed of a receipt in full for all the taxes assessed." State Railroad Tax Cases, 92 U. S. As we understand it, adopting the language of Mr. Justice Sawyer, "the court distinctly holds that some tax, according to some rule of taxation, ought to be paid on all taxable property, and that the bill which does not allege a payment of so much of the tax as the party concedes, or, if not conceded, may be seen from the bill, or shown by affidavits, ought to be assessed and paid. does not present any equity to justify an injunction." Here the amount of the tax conceded to be due is \$537, but the complaint nowhere alleges payment or tender of such The allegation is that the plaintiff tendered such sum to the tax collector, and that he refused to receive it. But, if such was the fact, it did not relieve the plaintiff from liability for her taxes. She is asking the interference of equity in tax proceedings. and as a condition of relief she is required to do equity; that is, she must first pay what is admitted to be due, before she can ask to be relieved from the balance. To entitle her to such relief the complaint must show that she has paid so much on the tax as is conceded to be due, before she presents any equity to justify an injunction. complaint must aver payment or a tender of the amount of the tax that is admitted to be due and legal. But the plea of tender, being defective, for the reasons suggested, the plaintiff has not shown herself entitled

to the aid of equity to enjoin the collection of such tax. But in view of the fact that the complaint states ground for equitable relief, if the tender was kept good, and so alleged, the decree of the court below will be affirmed, except that the complaint is dismissed without prejudice.

CURTIS v. SESTANOVICH et al. (Supreme Court of Oregon. July 5, 1894.) MECHANIC'S LIEN—SUFFICIENCY OF STATEMENT OF CLAIM.

1. Under Hill's Code, § 3673, requiring the claimant to state the name of the owner of a building sought to be charged, a statement that claimants furnished materials to be used in a building for H. on land owned by him is sufficient.

sufficient.

2. Under Hill's Code, § 3673, requiring the claimant to state the name of the person to whom he furnished the materials, the statement that claimants furnished brick, and that the materials were furnished to S., the contractor and were used in the building is sufficient.

or, and were used in the building, is sufficient.

3. A notice that defendant and others were the original contractors, and had a contract to construct a building for H., sufficiently states that the contract was made with H.

4. Under Hill's Code, § 3073, it is not nec-

4. Under Hill's Code, § 3673, it is not necessary that the claim should contain an itemized statement of the domain.

ized statement of the demand.

5. The date of the completion of the building need not be stated when it appears that the claim was filed within the required time.

6. Where a building was not completed until June 21st, a notice filed on July 20th was in time.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Action by E. D. Curtis against A. M. Sestanovich and others. Judgment for plaintiff. Defendants appeal. Affirmed.

This is a suit to foreclose a mechanic's lien. The Pacific Builders' Supply Company, a corporation, furnished materials to the contractors, to be used, and which were used, in the construction of a brick building at Salem, Or., for John Hughes; and, not having received full payment therefor, filed with the proper county clerk, on the 20th day of July, 1892, a duly-verified claim of lien, of which the following is a copy: "Know all men by these presents that the Pacific Builders' Supply Company, a corporation under the laws of the state of Oregon, has, by virtue of a contract heretofore made with Sestanovich & Childs, George Ham, Joseph Nickum, and Wm. J. Kelly, of the firm of Ham, Nickum & Co., of Portland, Oregon, performed labor upon and furnished materials to be used in, and which were used in, the construction, alteration, repair, and completion of a brick building at Salem, Oregon, upon the premises hereinafter described, for John Hughes. the said Sestanovich & Childs, and George Ham, Joseph M. Nickum, Wm. J. Kelly, of the firm of Ham, Nickum & Co., being the original contractors, and having a contract for the erection, repair, alteration, and completion of said building upon said property belonging to said John Hughes. That the

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materials so furnished to said Sestanovich & Childs, George Ham, Joseph M. Nickum, and Wm. J. Kelly, of the firm of Ham, Nickum & Co., and used in said building, and the labor performed upon said building, consisted of pressed brick and terra cotta, which said materials and labor are more fully set out and described in the bill of particulars hereto annexed, and marked 'Exhibit A,' and made a part hereof, and being of the reasonable value of (\$725.43) seven hundred and twenty-five and 43-100 dollars. The land upon which said buildings are constructed was, at the time said contract was made with said Sestanovitch & Childs, George Ham, Joseph M. Nickum, and Wm. J. Kelly, of the firm of Ham, Nickum & Co., and still is, owned by the said John Hughes, and said land is known and particularly described as follows: * * *. That the contract and reasonable price of said materials furnished and labor performed by the said Pacific Builders' Supply Company to be used in, and which were used in, the construction, repair, and furnishing of said buildings, was and is the sum of seven hundred and twenty-five and 43-100 dollars, upon which there has been paid the sum of one hundred dollars, and no more, leaving a balance due of six hundred and twenty-five and 43-100 dollars, after deducting all just credits and offsets; the whole of which is past due. That said bill of particulars hereto annexed and marked 'Exhibit A' shows the amount and kind of materials furnished and labor performed, all of which was furnished and performed as aforesaid, the price of which and the time when the same were furnished and performed, giving the credits for all payments thereon, and deducting all that ought to be deducted therefrom, and exhibits the balance justly due to the said Pacific Builders' Supply Company, and contains a true statement of their demand after deducting the just credits and offsets. That it is the intention of the said Pacific Builders' Supply Company to claim the benefit of an act of the legislative assembly of the state of Oregon, entitled 'An act for securing liens for mechanics, laborers, material men and others, and prescribing the manner of their enforcement,' approved February 11, 1885, and amendments thereto, and to secure and hold a lien upon the premises hereinafter described, and upon the buildings before mentioned and described, with the land upon which the same are erected, together with convenient space around the said building and about the same, or so much as may be required for a convenient use and occupation thereof. That thirty (30) days have not elapsed since the said Pacific Builders' Supply Company has ceased to furnish the materials for and perform the labor aforesaid upon said building, nor have thirty (30) days elapsed since the completion of said building. [Signed] The Pacific Builders' Supply Company, by C. H. Richards, Agent,"—and on the

3d day of August, 1892, commenced this suit to foreclose the alleged lien; but, the said corporation having thereafter made a general assignment to E. D. Curtis, he was, by order of the court, substituted therefor. The court, at the hearing, held the lien valid, and decreed a sale of the property to pay the amount claimed, with costs and disbursements, \$100 attorney's fees, and \$3 for preparing and recording the notice of lien, from which decree all the defendants, except John Hughes, appeal.

A. H. Tanner, for appellants. John H. Hall, for respondent Curtis. B. F. Bonham, for respondent Hughes.

MOORE, J. (after stating the facts). Several objections are here urged to the sufficiency of the notice or claim. It is contended that it fails to give or state in direct, clear, and positive terms (1) the name of the owner of the building for which the materials were furnished; (2) to whom the materials were furnished: (3) the relations existing between the owner and the persons to whom such materials were furnished; (4) a true statement of the demand, with debits, credits, and dates; (5) the date of the completion of the building, or when the materials were furnished; and (6) it is further contended that it appears from the record that the claim was not filed within 30 days after the materials were furnished, or within that time after the completion of the building. We shall consider these objections in the order in which they have been presented.

1. The statute (section 8673, Hill's Code) requires the claimant, in his notice of lien, to state the name of the owner of the building sought to be charged with the lien. authorities are unanimous in support of the doctrine that what the statute requires in order to perfect the lien is a condition precedent, and must be complied with before the lien can attach to any property. begins with the commencement of the construction of the building, grows with its growth, and ripens with its completion; but, however equitable the claim may be, it does not attach to the building unless the claimant, within the time prescribed by law, prepares and files a notice thereof, containing all the statutory requirements. When the lien once attaches to the building, it by relation also attaches to whatever interest the owner of the building has in the soil that supports it, if it appears from the notice that the owner of the building has some interest therein. "It is," says Strahan, C. J., in Kezartee v. Marks, 15 Or. 535, 16 Pac. 407, "the owner of 'such building or other improvements' whose name must be specified in the notice, and not the owner of the land where the same is erected." In Gordon v. Deal, 23 Or. 154, 31 Pac. 287, Bean, J., in discussing this question, says: "It is not sufficient

that the name of the owner appears in the lien incidentally, or as part of the description of the property, but that he is the owner of the building sought to be charged must appear on the face of the lien as an independent matter, either directly or by necessary inference." The statute of California (section 1187, Code Civ. Proc.) requires the lien claimant to state in his notice the name of the owner or reputed owner, if known. In Mill Co. v. Garrettson, 87 Cal. 589, 25 Pac. 747, the lien claimant had stated in his notice that Garrettson was the owner of a lot, giving its description, and that he entered into a written contract with Wanberg & Nelson, by which they agreed to erect and finish for him a building on said lot. It was contended that the claim of lien was defective, in that it did not state the name of the owner of the building. The court in that case, in answer to the objection, say: "The above seems to be a sufficient statement that Garrettson was the owner of the building which was erected for him on his land, and that the materials were furnished to Wanberg & Nelson, his contractors. To say that the name of the owner of the building, and the names of the persons to whom the materials were furnished, are matters of mere inference, since it does not necessarily follow that the owner of the land is the owner of the building, and the materials might have been furnished to a subcontractor or other persons, seems to us to be not even a plausible argument." The notice in the case at bar distinctly states that the building was erected for John Hughes upon real property owned by him. If it had stated that it was erected for some other person on Hughes' land, there then might be some question as to the ownership of the building. A house is presumed to be attached to the land upon which it is erected (Northrup v. Trask, 39 Wis. 515); and, had Hughes conveyed said real property, there can be no doubt from the statement contained in the notice that the brick building erected thereon would have passed to the grantee under the deed. We think that, while it is not stated in positive and direct terms that Hughes was the owner of the building, it is necessarily implied from the notice of lien that he was such owner. The statement that the claimant furnished materials to be used, and which were used, in erecting a building for John Hughes upon real property owned by him, is equivalent to saying that John Hughes owned the building.

2. The statute (section 3673, supra) also requires the lien claimant to state in his notice the name of the person to whom he furnished the materials. This is one of the essential requisites of the notice, and must be complied with before the lien can attach. Rankin v. Malarkey, 23 Or. 593, 32 Pac. 620, and 34 Pac. 816; Dillon v. Hart (Or.) 34 Pac. 817. It is averred in the notice that the claimant furnished materials to be used

in the construction of a brick building, etc., and in a subsequent clause that the materials so furnished to said Sestanovich and others, and used in said building, consisted of pressed brick and terra cotta. The notice might have stated the fact in more direct terms, but it is quite evident from an inspection of the instrument that the materials were delivered to Sestanovich and others. No other possible conclusion is deducible from the statement, and hence it complies with the statutory requirement.

3. The contractual relation existing between the owner of the building and the person having charge of the construction thereof should be stated in the notice when the labor has been done or the materials have been furnished at the instance of any other person than the owner. 2 Jones, Liens, § 1392; Rankin v. Malarkey, supra; Warren v. Juade (Wash.) 29 Pac. 827; Heald v. Hodder (Wash.) 32 Pac. 728. It is by virtue of this relation that the agent has authority to bind the property of his principal for labor done and material furnished in the construction, alteration, or repair of buildings. Hill's Code, \$ 3669. And, since the notice should show a prima facie right to the lien, it is essential to its validity that the relation existing between the parties should appear on the face of the instrument, either directly or by necessary inference. The notice in the case at bar states that Sestanovich and others were the original contractors, and had a contract for the construction of a building for John Hughes. It is not averred in the notice that said contract was made with Hughes, but we think it is reasonably inferred therefrom. If Sestanovich and others had alleged that they were subcontractors, it would not have followed that the contract had been made with him; but, having alleged that they were original contractors for the erection of a building for John Hughes, they must necessarily have made a contract with him, and hence the relation of the parties is necessarily inferred from the instrument.

4. Our attention has been particularly called to the fact that the notice does not contain an itemized statement of the demand, including the dates when said material was furnished. The statute (section 3673, supra) requires the claimant to file with the county clerk a claim containing a true statement of his demand after deducting all just credits and offsets. In Ainslee v. Kohn, 16 Or. 363, 19 Pac. 97, it was held that the words, "a claim containing a true statement of his demand," did not imply that it should be an itemized statement. In Willamette Falls Co. v. Smith, 1 Or. 181, it was held that a complaint in a suit to foreclose a mechanic's lien should show the dates when the materials were furnished. In the case at bar it is alleged in the complaint that by virtue of a contract entered into between the Pacific Builders' Supply Company and Sestanovich and others, on or about June 8, 1892, the said corporation furnished pressed brick and terra cotta, to be used in the construction of said building; thus bringing the pleading within the rule announced in the preceding case.

5. In Pilz v. Killingsworth, 20 Or. 432, 26 Pac. 305, Bean, J., in discussing the necessary allegations of a complaint to foreclose a mechanic's lien, says: "It must affirmatively appear from the complaint that the notice filed contained all the essential provisions required by statute; that it was proper in form, verified as required, and filed within the time prescribed;" and from this it is contended that the notice should affirmatively show when the building was completed. In Gault v. Soldani, 34 Mo. 150,-one of the cases cited in support of the abovequoted doctrine,-the complaint alleged that within 30 days after the materials were furnished and the work was done the claimant filed in the recorder's office his mechanic's lien. It was there held that it was not only necessary that the complaint should aver the filing of the account in the proper office, but also the time when filed. This being deemed a material, issuable fact, the court reversed the decree, and remanded the cause, with leave to amend the complaint so as to show the date of filing the lien, But in Slight v. Patton, 96 Cal. 384, 31 Pac. 248, it was held that the statute did not require that the notice should state the date of the completion of the building, and that, if the lien notice was in fact filed within 30 days after the completion of the building, it was sufficient. And, inasmuch as our statute is like that of California, we are inclined to the construction there adopted, and hold that the date of the completion of the building need not be stated when it appears that the claim was in fact filed within the required time.

6. The bill of materials annexed to and made part of the notice was dated June 8, 1892. The lien was verified June 29th, but was not filed with the county clerk until the 20th of the next month. In Ainslee v. Kohn, supra, Thayer, J., in speaking of the time within which the notice should be filed, says: "Whether, then, the claims were filed within thirty days after the work and material were furnished is unimportant, provided it was done within thirty days after the house was completed." It is alleged in the complaint that the building was completed June 23, 1892, and the architect testifies that on said day he gave his certificate that the building was completed, but that it might have been finished the preceding day. The defendant Hughes testifies that in his judgment it was completed on June 23d, but it might have been completed a few days earlier. The defendants, in their original answer, alleged that, in consequence of the delay caused by the Pacific Builders' Supply Company in furnishing said material, they were unable to complete the building until June 23, 1892. Their amended answer, however, does not give the date of the completion of the building. At the trial the original answer was, without objection, offered in evidence. We think it clearly appears from this that the building was not completed until June 23d, and the notice, having been filed on July 20, 1892, was filed within 30 days from the completion of said building, and hence filed in proper time. There being no error in the record, it follows that the decree of the court below is affirmed.

BALL v. DOUD.

(Supreme Court of Oregon. June 26, 1894.)
BUILDING CONTRACT—CHANGES—AGREEMENT TO
ARBITRATE.

1. A building contract stipulated that if alterations were ordered, and their value disputed, they should be valued by two competent persons, and these might choose an umpire, whose decision should be final. *Held*, that the builder could not sue for extras without an atternate to exhibit the second of the se

tempt to arbitrate.

2. Since the contract provided for alterations which might reduce the contract price, the last installment of said price, which was to be retained by the owner till 35 days after the work was completed, to cover liens and damages, would be subject to reduction, and could not be recovered until its amount was fixed by the arbitration provided for.

3. A complaint on contract, which sets out a copy of the contract, and fails to allege plaintiff's performance of the conditions, fails to state a cause of action, which is not waived, though objected to for the first time on appeal. Hill's Code, § 71.

Appeal from circuit court, Multnomah county; L. B. Stearns, Judge.

Action by J. W. Ball, administrator of the copartnership estate of Ball & Babcock. against D. A. Doud, executrix of the will of E. O. Doud, deceased. Judgment for plaintiff. Defendant appeals. Reversed.

Newton McCoy and W. W. Thayer, for appellant. C. M. Idleman, for respondent.

MOORE, J. This is a suit to foreclose a mechanic's lieu. The facts show: That the firm of Ball & Babcock, on June 5, 1890, entered into a written contract with E. O. Doud, whereby they, in consideration of \$5,-000, agreed to furnish the materials and erect a dwelling house for him upon lot 10 of block 6 in Mt. Tabor town site, according to the plans, specifications, and general and detail drawings therefor, in a good and workmanlike manner, to the satisfaction and under the direction of E. O. Doud, owner and architect, and to complete the same on or before the 15th day of October of that year, unless an extension of the time for its completion became necessary in making alterations, or in case of a general strike, fire, or unusual action of the elements; and, if the building was not completed within the time agreed upon, they were to forfeit \$10 per day as liquidated damages. That 75 per cent. of

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the contract price was to be paid in four installments, as the work progressed, and the remainder within 85 days from the satisfactory completion and acceptance of the building, which sum was to be withheld as security for the faithful performance of the contract, to be applied, under the direction of the said Doud, in discharging liens upon the property, if any, and in liquidation of damages. Said contract also contained the following provision: "It is further agreed that said party of the second part may make all alterations, by adding, omitting, or deviating from the aforesaid plans, drawings, and specifications, or either of them, which he shall deem proper, and the said architect shall advise, without impairing the validity of this contract; and in all such cases the said architect shall value or appraise such alterations, and add to or deduct from the amount herein agreed to be paid to such first party the excess or deficiency occasioned by such alteration. But, should any dispute arise respecting the true value of any alteration or work added or omitted by the contractor, the same shall be valued by two competent persons,-one employed by the owner, and the other by the contractor,and these two shall have power to name an umpire, whose decision shall be binding on all parties." That the owner made some alterations in the plans and specifications, and, except the painting of some cresting, the building was completed and surrendered to him on the 24th day of November, about which time the contractors presented a claim for \$700 on account of extra work. That J. W. Babcock, one of the contractors, died, and his partner, J. W. Ball, was on February 2, 1891, duly appointed administrator of the copartnership estate, who, on the 13th day of March, and within 60 days from the final completion of the building, filed a mechanic's lien upon lots 9 and 10 in block 6 in the town of Mt. Tabor, Multnomah county, Or., to secure the payment of \$465 alleged to be due under the contract, and \$700 on account of extra work on the building. That said Doud died on the 25th day of April, 1891, and D. A. Doud, his widow, was by his last will nominated executrix thereof, and, upon being appointed by the county court, duly qualified as such. That the plaintiff, as administrator of the copartnership estate, on August 6, 1891, without attempting to ascertain the amount due in the manner prescribed in the contract, commenced this suit against the executrix of the iast will and testament of E. O. Doud to foreclose said lien. The plaintiff alleges that a dwelling house was erected upon said real property according to the plans, specifications, and contract, and that there became due from the owner to the contractors \$5,000 on account thereof, of which sum he had been paid \$4,535; that, in the construction of said dwelling, Doud ordered certain alterations and changes (which required extra

work and material of the reasonable value of \$700, an itemized account of which is given), that necessitated an extension of the time in which said dwelling was to have been completed,-and prayed for a judgment of \$1,165, with interest from January 13, 1891, \$5 for preparing and filing the notice of lien, and \$150 for attorney fees, and a decree foreclosing said lien. The defendant, after denying the material allegations of the complaint, admits that E. O. Doud ordered certain alterations and changes in the plans and specifications, which required extra work and material, and an extension of time for the completion of the building, but denied that more than 15 days were required therefor, or that the reasonable value of the extra work and material was greater than the sum of \$113.25, and alleges that by reason of the faulty construction of said dwelling, and delay in completing it within the extended time, the estate of E. O. Doud had been damaged in the sum of \$1,007, an itemized account of which is given, and prayed judgment against the plaintiff for \$420.75. A reply having put in issue the allegations of new matter contained in the answer, the cause was referred to M. C. George, Esq., to take testimony, and report his findings of fact and conclusions of law thereon; and having found for the plaintiff in the amount claimed on the contract, and \$339 for the extra work, he allowed the defendant an offset of \$81.75 on account of defective workmanship. The court, upon the hearing, affirmed the referee's report; and a decree was rendered against the defendant for \$722, as the amount due, \$1.25 for recording the lien. \$125 as attorney's fees, together with his costs and disbursements, and for the foreclosure of the lien, from which the defendant appeals.

Her counsel contend that, the contract having provided a method for ascertaining the value of the extra labor and materials necessitated by a change in the plans and specifications, no suit to recover the amount due on account thereof can be maintained until the plaintiff has ascertained it according to the terms of the contract, or at least till he has made an ineffectual attempt to do so. On the other hand, it is contended for plaintiff that he may, at his option, disregard the mode of settlement agreed upon, and resort directly to the tribunals provided by the state for the determination of questions in controversy. It is undoubtedly true that no person can be bound to deprive himself of his constitutional right to have his cause tried in a court of law or equity, and he may, if he choose, revoke an agreement to submit all matters of dispute to arbitration, at any time before an award has been made. Morse, Arb. 230. An agreement to refer all matters of dispute that may arise under an executory contract would oust courts of jurisdiction (Delaware & H. Canal Co. v. Pennsylvania Coal Co., 50 N. Y. 250), and therefore

such an agreement does not bar a party's [remedy by action at law, or by suit in equity (Smith v. Railroad Co., 36 N. H. 458). But, while a party may withdraw an agreement to submit all matters of dispute to arbitration, he cannot withdraw from an agreement to submit a particular question to the judgment of a third person for the purpose of ascertaining some particular fact. U.S. v. Robeson, 9 Pet. 327. If the work is to be done or materials are to be furnished to the satisfaction or acceptance of a third person, or the amount to be paid is dependent on his decision as to quantity, quality, or price of materials or workmanship, such provision is a condition precedent, and must be complied with before any cause of action exists. Smith v. Railroad Co., supra. This doctrine probably had its origin in the case of Scott v. Avery, 5 H. L. Cas. 811, in which it was held that no agreement of the parties can oust the courts of law of jurisdiction, but that a covenant to submit some particular fact, or to determine an amount due from one party to the other, was a condition precedent to any right of action. In an exhaustive note to the case of Kinney v. Association [(W. Va.) 13 S. E. 8] 15 L. R. A. 142, the learned editor has collated a list of cases in the American courts in which the distinction in Scott v. Avery has been observed, and among them that of Holmes v. Richet, 56 Cal. 307, which was an action to foreclose a mechanic's lien. There the contractor claimed a lien for extra work upon a building under a contract which provided that if any dispute should arise respecting the true value of the extra work, or work omitted, the same should be valued by two competent persons,-one employed by the owner, and the other by the contractor,-and in case they could not agree these two should have power to name an umpire, whose decision should be binding on all parties. The court held that no right of action accrued to the contractor, for the extra work done by him, until the same was valued, or some good and sufficient excuse for a failure to value the same in accordance with the agreement was shown. This decision was approved in Scammon v. Denio, 72 Cal. 393, 14 Pac. 98, which was also an action to foreclose a mechanic's lien, embracing a claim for extra work done under a contract providing that such claim should be submitted to arbitration. In Meyers v. Construction Co., 20 Or. 603, 27 Pac. 584, it was held that where a contract provided that disputes arising between parties should be submitted to some certain person for settlement, whose decision should be final, it was incumbent upon the plaintiff, in an action upon the contract, to allege and prove a compliance with that condition, or at least that a reasonable effort had been made to comply with the stipulation; and thus the distinction in Scott v. Avery, supra, was established as the rule of interpretation in this state. The parties having agreed that arbitrators, to be chosen

in a designated manner, should ascertain the expense necessitated or saved by alterations in the plans and specifications, and add or deduct the amount, as the case may be, to or from the contract price, and this provision being an agreement to refer a particular question, the decision of the arbitrators became a condition precedent to any right of suit for extra labor and material.

Another question presented is whether the agreement to refer would deprive the plaintiff of his right to recover the balance of the amount expressly agreed to be paid for the building. It was agreed that the last installment of the contract price, being 25 per cent. thereof, should be withheld 35 days after the satisfactory completion and acceptance of the building, which amount was to be applied, under the direction of the architect, in satisfying and discharging liens, and in liquidation of damages. This would probably mean such damages as the owner might sustain in consequence of a failure to complete the building within the agreed time, from defective material and from faulty workmanship. If the contract had contained no provision to deduct from the agreed price the deficiency caused by alterations in the plans and specifications, there can be no doubt that the lien might have been claimed, and a suit maintained to foreclose it, for the balance due, if the claimant honestly contended that the contract had been fully executed, without referring the question to arbitrators; and the damages sustained by the owner, if any, could then have become an issuable fact in the suit, and the decree could have settled the amount due under the express contract to pay \$5,000 for the completion of the building according to the plans and specifications. The owner agreed to pay 75 per cent. of the contract price as the work progressed but reserved the right to make such alterations therein, as he chose. If the changes made had lessened the cost of constructing the building 25 per cent., then there would have been nothing due under the contract; and in such case, had the contractors claimed more. they would have to submit the question of difference between the cost of constructing the building according to the plans and specifications, and as modified by the change, to the decision of the arbitrators, before a suit could be maintained therefor. The agreement to deduct the value of the work omitted would make the amount of the final payment, in case of change and disagreement, dependent upon the decision of the arbitrators; and it can make no difference whether the changes would have increased or reduced the contract price, and hence no suit can be maintained for any amount in excess of the 75 per cent. of the contract price until the value of the alterations has been ascertained in the manner agreed upon by the parties.

The remaining question is whether the defendant has waived her right to insist upon this defense. The plaintiff having set out

a copy of the contract, and not having alleged a compliance with its conditions, his complaint was demurrable. Meyers v. Construction Co., supra; 2 Estee, Pl. & Pr. (3d Ed.) § 3183. By answering to the merits, and not pleading in abatement, it is contended that the defendant has waived her right to insist upon the provisions of the contract. The object of a plea in abatement is to show to the court some allegation of fact that does not appear from the pleadings. Koenig v. Nott, 2 Hilt. 328. The complaint having set out the contract containing the provision to refer, the court was in possession of the fact, and there was no need of a plea in abatement. Failing to allege, after setting out the contract, that the amount due had been ascertained in the manner therein required, the complaint did not state facts sufficient to constitute a cause of suit (Meyers v. Construction Co., supra), and this objection is not waived by failure to demur or answer (Hill's Code, § 71), and may be urged on appeal (Evarts v. Steger, 5 Or. 147). The complaint not having stated a cause of suit, the decree will therefore be reversed, and the complaint dismissed.

EDGAR et al. v. EDGAR et al.

(Supreme Court of Oregon. June 26, 1894.) CONSTRUCTION OF WILL-JURISDICTION OF EQUITY -QUIETING TITLE.

1. A complaint setting out a will, and asking that a construction be given it, to see if it creates a trust, does not state facts to give equity jurisdiction.

2. A suit to have deeds declared a cloud on plaintiff's title cannot be maintained where

the complaint shows that plaintiff is out of pos-session, and his right to possession denied by defendant.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Suit by George W. Edgar and others against David W. Edgar and others. Decree for defendants. Plaintiffs appeal. Affirmed.

R. P. Boise, for appellants. D'Arcy & Bingham and W. M. Kaiser, for respondents.

LORD. C. J. This is a suit in equity to have the will of Moses Edgar, deceased, judicially construed. The complaint shows: That the will is in words and figures as follows, to wit: "State of Oregon, County of Marion-ss.: This is to certify that I, Moses Edgar, of said county, do make this my last will and testament: First. I give and bequeath all of my property, both real and personal, to my wife, Susan Edgar, for her own use and benefit, to use and control as she may wish during her lifetime; and at her death, if the real estate has not been disposed of, it is my will that the same be sold, and the proceeds thereof be equally divided between all my heirs. Secondly. I hereby appoint my son George W. Edgar as executor of this will, and authorize him to

collect all demands due me, and to pay all debts due by me to others. It is my wish that there be no administration of my estate, nor no public sale of my property, but that, after all debts are paid, that all my property be turned over to my wife, for her use as above set forth. In witness," etc. That it was duly proven and admitted to record, and that letters testamentary were issued to the executor thereof, who, having qualified, administered upon the personal property and effects of said estate, and, having filed his final account, was, by order of the county court, on the 2d day of May, 1871, discharged from further duty as such execu-That at the time of his death, in 1870. the said Moses Edgar was the owner in fee simple of the south half of the land claim donated by the government to him and his wife Susan, situated in township 9, etc., containing 318 acres of land. That he left surviving him the said Susan, and the several children of himself and said Susan, named therein, as his heirs at law. * * * That after his death his widow, by virtue of the provisions of the will, took possession of said lands, and continued in possession of the same until the 1st day of December, 1889, when she executed and delivered to her son David Edgar a deed purporting to convey in fee simple the said lands in consideration of love and affection, the sum of one dollar, and her support and maintenance during her natural life. That the said David Edgar, on the 5th day of February, 1893, executed and delivered to the defendant T. L. Golden a deed purporting to convey 310 acres of said land in fee simple, for the consideration of \$5,000, and that the said Golden has taken possession, and claims to be the owner thereof, in fee simple, by virtue of such deed. That said deeds are contrary to the provisions of the will. That the execution and record of the same clouds the title to said lands, and will embarrass the sale thereof. And that the said Susan Edgar died on or about the 10th day of March, 1893, etc. A demurrer to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of suit, having been sustained by the court, a decree was entered dismissing the suit, from which this appeal was brought.

The main object of this suit, as indicated by the argument, is to ascertain if the will in question creates a trust, and, if it does. to have it enforced by a trustee to be appointed by the court,-none being named in the will. In our inquiry as to the existence of the trust contended for, we are not aided by averment, but are left to determine the question from the language employed in the will itself. The plaintiffs do not allege a trust for their benefit, and ask a construction of the will as affecting such trust, nor do they ask that a trust be declared, and that a trustee be appointed to execute it. They desire the will construed, and, to support the jurisdiction of the court, attempt to raise a trust by construction and argument. The contention is that the language of the will, when properly interpreted, gives to Susan Edgar a life estate only, and that the fee descends to the heirs in trust for the purposes named. By this contention the trust is created by considering the words of the will, wherein the testator declares that, "If the real estate has not been disposed of at the death of my wife, it is my will that the same be sold, and the proceeds thereof be equally divided between all my heirs," as precatory, and therefore creating a trust. It treats the word "will" as an expression of a desire upon the part of the testator that his children, on the death of his wife, shall share alike in the proceeds of the land, and, as a deduction therefrom, that the estate descends to the heirs burdened with a trust. This is but taking the will by its four corners, and construing it so as to create a trust, in order to give the court jurisdiction to construe such will. As the word "will" has been held to have an imperative force, and not to be classed among precatory words (McRee's Adm'rs v. Means, 34 Ala. 364), it should be regarded as a command or direction. But if the word "will" be regarded as an obligatory direction by the testator that his estate be sold at the death of his wife, and the proceeds distributed among his heirs equally, it would be just as reasonable, especially in view of the whole will, upon the theory of the plaintiffs,-that the will only gives a life estate to the wife,-and no disposition being made of the fee, that it descended to the heirs unburdened with a trust, subject to be sold at the death of the wife, and its proceeds divided among such heirs, unless Susan Edgar and such heirs disposed of the estate before her death.

There is authority for the proposition that where a testator directs his lands to be sold, without designating the person to sell, the executor takes the power by implication, and that it is not necessary that the fee should be in the executor, to enable him to sell and convey the land. 18 Am. & Eng. Enc. Law, 952, and notes. In this view, there would be no trust. And the rule is well settled that where there is no trust an heir at law cannot come into a court of equity for the purpose of obtaining a judicial construction of the provisions of the will, and thus determine the title to real estate. The reason is that the decisions of such questions is purely legal, and equity will not assume jurisdiction to declare legal titles unless it has acquired jurisdiction of the case for some other purpose. Bowers v. Smith, 10 Paige, 193. On the other hand, it is by reason of the jurisdiction of equity over trusts that its courts, as an incident of such jurisdiction, take cognizance of and construe

wills. But such courts do not take jurisdiction of suits brought solely for the construction of wills, or when only legal titles are involved. In Bailey v. Briggs, 56 N. Y. 407, Folger, J., said: "It is when the court is moved in behalf of an executor, trustee, or cestui que trust, and to insure a correct administration of the power conferred by a will, that jurisdiction is had to give construction to a doubtful or disputed clause in a will. The jurisdiction is incidental to that over trusts." There must be actual litigation in respect to matters which are proper subjects of equity jurisdiction, such as trusts, before a court of equity can pass upon the interpretation of wills as incidental to its jurisdiction. Where parties plaintiff, by their complaint, allege a trust for their benefit, and seek its proper execution. they have a right to ask a court of equity, as incident to its jurisdiction over the subject-matter, to construe the different parts of a will which affect such trust, where there is ambiguity or a disputed clause. In such case the facts alleged disclose a trust which gives a court of equity jurisdiction, and enables it, as an incident of that jurisdiction, to give a construction to doubtful or disputed clauses in a will, when necessary to insure the due execution of the trust. As before stated, there are no facts alleged showing a trust for the benefit of plaintiffs. The will is set out, but it is not aided by any facts or suggestions disclosing a trust. Yet we are asked to give a construction to the will for the purpose of ascertaining whether it creates a trust, so that we must construe the will before we can know whether equity is authorized to exercise its jurisdiction in the premises. Manifestly, the complaint does not state facts which will give jurisdiction to a court of equity to entertain the case as one asking for a construction of the will.

Again, if it is the purpose of the suit to have the deeds decreed to be a cloud upon plaintiffs' title, it cannot be maintained, as the complaint shows that the plaintiffs are out of possession, and that their right to the possession is denied by Golden. We think there was no error, and the bill must be dismissed.

BOWEN v. CLARK et al.

(Supreme Court of Oregon. June 28, 1894.) LEASE—ORIGINAL UNDERTAKING—PERSON SIGNING AS SURETY.

Where a lease is made to several persons, one of whom is designated as "surety," and signs as such, and all parties execute it at the same time, on the same consideration, and without any condition, it is an original undertaking as to such person, so that he may be sued thereon jointly with the others for rent, though he never occupied the premises.

Appeal from circuit court, Baker county; Morton D. Clifford, Judge. Action by J. P. Bowen against John G. Clark and others. Judgment for plaintiff. Defendants appeal. Affirmed.

F. L. Moore, T. C. Hyde, and T. H. Crawford, for appellants. Wm. Smith, for respondent.

BEAN, J. This is an action brought against John G. Clark, John A. Basche, and P. Basche, jointly, to recover a certain amount claimed to be due for rent under the following written lease: "This indenture, made this tenth day of June, in the year of our Lord one thousand eight hundred and ninety, by and between John P. Bowen, of Baker City, Oregon, and John G. Clark and John A. Basche, and P. Basche, as surety, all of Baker City, Oregon, witnesseth that, in consideration of the covenants herein contained on the part of the party of the second part to be kept and performed by them, the said party of the first part do hereby let, lease, and demise unto the said Clark and Basche, party of the second part, the following described premises, situate, lying, and being in Baker City, Baker County, Oregon, to wit, all of and the entire building situate on Front street, together with the fixtures and shelving; to have and to hold the same to the said lessees for the term of three years ending June 1, 1893, from the first day of June, 1890. * * * And said lessees, for their executors and administrators, do hereby covenant to and with the said lessor, his heirs and assigns, to pay the said rent in monthly payments of one hundred dollars each, the first payment thereof to be made on the tenth day of June, 1890, and on the first day of each month thereafter. * * * In testimony whereof the said parties have set their hands and seals on the day and year first above written, to this and to another instrument of the same tenor and date. John P. Bowen. [L. S.] John G. Clark. [L. S.] John A. Basche. [L. S.] P. Basche [L. S.], Surety." The complaint alleges, in substance, that on the 1st day of June, 1890, plaintiff rented to the defendants, and the defendants hired of plaintiff, the premises described in the lease for the time, and upon the terms, therein stated; that the defendants immediately went into possession; and that they have failed and neglected to pay the stipulated rent, or any part thereof, since April 30, 1891, except the sum of \$240. The defendant P. Basche alone answered, and denied all the allegations of the complaint: and for a further defense, inter alia, alleged that in June, 1891, the lease was canceled, and the premises surrendered to plaintiff, by mutual consent of the parties. The reply put in issue the affirmative allegations of the answer, and, upon the issues thus made, a trial was had, resulting in a verdict and judgment in favor of the plaintiff, from which the defendant so answering appeals.

The errors assigned arise upon the admission of testimony, and instructions given and

refused, by the trial court. The principal question presented is whether the defendant P. Basche can be sued jointly with the other defendants, the solution of which depends upon whether his undertaking is original or collateral. If his contract is collateral, and one of guaranty only, his liability and that of his principals is several, and cannot be enforced by a joint action (Tyler v. Trustees, 14 Or. 485, 13 Or. 329); but, if he is a joint contractor with the other defendants, the action is properly brought. We understand the rule to be that where two or more persons execute an instrument at the same time, upon the same consideration, and for the same purpose, they are all, in legal effect, joint contractors or obligors, so far as their liability to the other contracting party is concerned, although one may be designated therein as surety, and sign it as such. That one of the parties may have executed the instrument as surety is mere evidence of the position and relationship of the makers among themselves. and does not affect the joint nature of their obligation or the right to sue them jointly for a breach of the contract. "The undertaking of a surety who signs upon the face or at the end of a contract, with the principal, although he adds the word 'Surety' to his name," says Johnson, J., "is an original, and not a collateral, undertaking. It is not a promise to answer for the debt, default, or miscarriage of another, but is an undertaking for a direct performance on his own part. He becomes a party to the contract, and may be treated as principal by the creditor, although he is a surety merely, as between him and the other party, with whom he jointly or severally undertakes. In such cases no writing, other than the body of the contract, is necessary; and the statute of frauds has no application. The debt is his if the contract is valid." Perkins v. Goodman, 21 Barb. 218. And, as was remarked by Mr. Justice Read in Stage v. Olds, 12 Ohio, 168: "The principle to be extracted from all the cases is that parties connected with the original execution and delivery of a bond, note, or other written instrument are, in law, unless it be otherwise clearly expressed, joint makers or obligors." But when the undertaking of the surety is not for a direct performance by himself, but only that his principal shall perform, and that he will be bound in case of default, his undertaking is not original, but collateral, and therefore his liability depends upon the terms of his contract, and not upon the character in which he may execute it. Now, in this case the lease was executed by all the parties, at the same time, upon the same consideration, and for the same purpose, and the undertaking of the appellant is not made conditional or dependent upon the default of the other defendants, but is an original, unconditional undertaking for a direct performance on his part. It is plain, therefore, within the rule stated, that his contract is not one of guaranty, or an agree-

ment to answer for the debt, default, or miscarriage of another, but that of a joint obligation as to the plaintiff, and, as a consequence, may be declared upon as such. Baylies, Sur. 393; Brandt, Sur. 31; Lightner v. Menzel, 85 Cal. 452; Thomas v. Gumaer, 7 Wend. 44; Preston v. Huntington, 67 Mich. 139, 34 N. W. 279; Leonard v. Sweetzer, 16 Ohio, 1; McLott v. Savery, 11 Iowa, 323; Watson v. Beabout, 18 Ind. 281; Scott v. Swain (Pa. Sup.) 8 Atl. 24; Giltinan v. Strong, 64 Pa. St. 242; Rose v. Madden, 1 Kan. 445. Nor is it a matter of any importance that he did not actually occupy the premises. By his contract he binds himself, jointly with his codefendants, to pay the rent when due, and, if not so paid, he became at once liable, whether he occupied the premises or not. Preston v. Huntington, supra. This is not an action for use and occupation, but for breach of a contract entered into by the defendants jointly. There was, therefore, no variance between the allegations of the complaint and the terms of the lease, and no error in instructing the jury that the defendant P. Basche was a joint contractor or obligor with the other defendants, and liable with them for the payment of the rent as it became due. The other assignments of error, relating to instructions given and refused by the trial court, are without merit. The court adhered substantially to the principles announced in Bowen v. Clarke, 22 Or. 566, 30 Pac. 430, and hence committed no error. Judgment affirmed.

(26 Or. 24)

UNION COUNTY V. HYDE. HYDE v. UNION COUNTY.

(Supreme Court of Oregon. June 28, 1894.) FREE OF DISTRICT ATTORNEY - ADJUDICATION OF ACCOUNT.

1. The action of the circuit court in ascertaining the district attorney's fees, and or-dering them paid, is not a final adjudication, and a county may recover from the district at-torney so much of the amount allowed and paid

torney so much of the amount allowed and paid as was unauthorized by law.

2. Under Hill's Ann. Code, \$ 1073, prescribing the district attorney's fees in criminal actions, he is not entitled to fees for "Not true bills" returned by the grand jury, as under section 1210, a criminal action is commenced only when an indictment is found, and filed with the

3. He is entitled to but one fee where several persons are jointly indicted for the same offense, and jointly tried.

4. When several persons are arrested and

tried before a committing magistrate, the district attorney is not entitled to a separate fee for each defendant, under Hill's Code, § 2167. fee

Appeal from circuit court, Union county.

Action by Union county against Charles F. Hyde. There was a judgment for defendant, and plaintiff appeals. Judgment entered for plaintiff.

R. Eakin, for appellant. T. H. Crawford, for respondent.

PER CURIAM. The questions in this case are:

1. Is the action of the circuit court, in ascertaining the fees to which the district attorney is entitled, and directing an order to be entered upon the journal that the same be paid, a final adjudication, so as to prevent an action by a county which has paid the amount so allowed to recover so much thereof as was unauthorized by law? We are of the opinion that in such case the court acts in an auditing capacity, or as an auditor, and, while the sums allowed are prima facie evidence as to the amounts due the district attorney, the order is not to be regarded as conclusive; and therefore, in our opinion, a county has a right to recover from the district attorney, as for money had and received, so much of the amount thus allowed and paid as was unauthorized by law.

2. Is a district attorney entitled to fees for "Not true bills" returned by a grand jury? We think not. The statute (section 1073) prescribing his fees limits them to "criminal actions;" and by section 1210 a criminal action, in the circuit court, is commenced when an indictment is found by the grand jury, and duly filed with the clerk of the court. We are of the opinion that his salary and per diem are intended to compensate him for work of the character indicted.

3. Where several persons are jointly indicted for the same offense, and jointly tried, is the district attorney entitled to a separate fee for each defendant? We think not. The statute provides for fees in a criminal action, and in the case stated there is but one criminal action, one trial, and one judgment, although there may be several defendants.

4. Where several persons are arrested and examined before a committing magistrate, is the district attorney who appears for the state entitled to a separate fee for each defendant so arrested? We think clearly not. By statute (section 2167 Hill's Code), he is allowed a fee for attending and conducting an examination before a committing magistrate, without regard to the number of defendants. Judgment will be entered accordingly.

(26 Or. 29)

PATTERSON et al. v. TARBELL et al. (Supreme Court of Oregon. June 28, 1894.)

LOCATION OF MINING CLAIM.

Where the discoverer of a mineral lode, instead of marking out his claim, takes three months in exploring the lode, and some one else, in his absence, makes a valid location on the find, the latter is entitled to the claim, under Rev. St. U. S. c. 6, tit. 32, providing that "the location must be distinctly marked on the ground;" and the discoverer is not entitled to any time before marking out his claim for exploring his find, in the absence of local custom or examine. or statute.

Appeal from circuit court, Baker county; Morton D. Clifford, Judge.

Action by Johnston Patterson and others against G. S. Tarbell and others. There was

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a judgment for plaintiffs, and defendants appeal. Modified.

M. L. Olmsted, for appellants. Wm. Smith, for respondents.

BEAN, J. This is a suit to determine the right to the possession of certain surface ground included within the boundaries of both the Collateral quartz mining claim, located and owned by the plaintiffs, and the Palmer quartz mining claim, located and owned by the defendants, in Baker county, Or. There is no material controversy about the facts, and in substance they are that in February, 1891, defendant Tarbell obtained permission from the owner of the Virtue mining claim to prospect within the boundaries of said claim for new veins or lodes of mineralbearing rock, with a view of tracing the same, if discovered, to the adjoining public land, and locating a claim thereon, and, while so prospecting, he discovered a spur or feeder, which, early in the following month, he traced to its intersection with a gold or silver bearing lode or vein of quartz or other rock, upon unoccupied public land. From that time until about the 1st of April, he continued his work at intervals for the purpose of determining the course or strike of the lead or lode discovered by him, and, in so doing, sunk or dug three pits or shafts, varying in depth from 8 to 15 feet, along the course or strike of the lode or vein. On or about the 10th of March, and soon after making the discovery, he posted some kind of a notice at the first shaft or pit dug by him, and put up some preliminary stakes, but as to the contents of the notice or the location of the stakes the record is silent. On the 2d of April, while the defendant was in Baker City, for the purpose, as he claims, of securing the services of a mineral surveyor to survey and mark the boundaries of his claim, the plaintiffs, supposing the ground to be unoccupied public land, and without any knowledge of defendant's work on the claim or rights therein, in good faith located the Collateral mining claim, by posting a notice at the shaft of the abandoned Robert Emmett mine, and marking the boundaries of their claim on the ground in the manner required by law. A few days later, the defendants, having secured the services of a surveyor, duly marked out and located a claim, 1,500 feet in length and 367 feet wide, along the lode or vein previously discovered by them, the surface of which includes about 8 acres of the Collateral claim, which disputed area embraces within its boundaries the said shafts or pits dug by defendants. The defendants subsequently made an application in the proper land office for a patent; and, an adverse claim being filed by plaintiffs, this suit was commenced by them, as required by section 2326, Rev. St., to determine the question of the right to the possession of the surface ground in dispute; and, a decree being entered in their favor in the court below, this appeal was taken.

The notice posted by the defendants and the stakes put up by them in March cut no particular figure in the case, because it is not claimed that these acts amounted to a valid location, but the contention for the defendants is that the first discoverer of a lode or vein of rock in place bearing precious metals has a reasonable time after the discovery in which to trace out and determine the direction or course of such vein or lode before locating his claim, and in the meantime is protected in his right to 1,500 feet of surface ground in length along the vein or lode, and 300 feet on either side; while plaintiffs contend that, as soon as a discovery is made, the claim must be located by marking its boundaries on the ground. In most of the mining states and territories the local rules of miners and the legislative regulations generally allow some specific time for exploration after a discovery is made before the location is required to be definitely marked on the ground, but the mining claims in question here are in no organized mining. district or governed by miners' rules, nor have we any legislation upon the subject; hence the question presented must be determined by the mining laws of the United States alone. The act of congress of May 10, 1872, declares that all valuable mineral deposits in land belonging to the United States are open to exploration and purchase, and the land in which they are found to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law and the local customs or rules of miners in the several mining districts, so far as such customs or rules may be applicable, and not inconsistent with the laws of the United States: that all mining claims located after the 10th day of May, 1872, may equal, but shall not exceed, 1,500 feet in length along the vein or lode, and 300 feet on either side, but no location shall be made until the discovery of the veln or lode within the boundaries of the claim located: that the locators of all mining claims shall have the exclusive right of possession and enjoyment of all surface included within the lines of their location; and that the miners of each mining district may make regulations, not in conflict with the laws of the United States or the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to certain requirements, among which is that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." Rev. St. tit. 32, c. 6. By this act the government of the United States has opened to exploration and purchased by its citizens, and those who have declared their intention to become such, the public mineral

lands, and, as a reward to the successful explorer, grants to him the right to take and possess the mineral within certain prescribed limits, upon his compliance with the terms and conditions of the grant, and the local rules and regulations, which terms, for the purpose of this case, are "discovery" and "location" or "appropriation." It thus appears that discovery and appropriation are both conditions precedent to the right to occupy the public mineral lands as a mining claim. The right to possession or occupation depends upon a valid location, and a location is made in this state by marking the boundaries of the claim on the ground so they can be readily traced, as provided in the act of congress, and posting a notice on the lode or vein, as required by section 3828 of Hill's Code. A location thus made carries with it a grant to the person making the same, and confers upon him the right to the exclusive enjoyment and possession of the surface ground within the boundary lines of his claim. Neither the act of congress nor the legislative regulations of this state provide any specific time after discovery within which the location or appropriation shall be made; but it is clear that until the boundaries are distinctly marked on the ground, and notice posted on the vein or lode, the location is not complete, nor the law complied with. A discoverer of a vein or lode who proceeds diligently, in good faith, to complete his location by marking its boundaries on the ground, and otherwise complying with the law, will no doubt be protected in his rights as against a subsequent locator of the same ground. Newbill v. Thurston, 65 Cal. 419, 4 Pac. 409.

But no claim is made in this case that defendants did not have ample time and opportunity after their discovery, and before plaintiffs' location, in which to complete their location by marking the boundaries of the claim on the ground, and posting the notice required by the statute. Their contention is that they were entitled to a reasonable time after the discovery in which to continue their explorations, and trace the course or strike of the vein or lode. As there are no local rules or regulations governing this matter, and the act of congress is silent on the subject, the question, it seems to us, depends upon whether mere possession and exploration are sufficient to give to the discoverer a right to hold a mining claim against one who peaceably enters and makes a valid location. Now, one of the imperative requirements of the statute, and an indispensable condition precedent to a valid location, is that it shall be "distinctly marked on the ground, so that its boundaries can be readily traced;" and, as we understand the law, there is no right after a discovery to a possession, as against the United States or its grantee, without such a location, and the surface ground being thereby segregated from the public domain, so that those who I tion. A location is not made by taking pos-

may be looking for unoccupied public ground may be able to ascertain what has been appropriated, in order to make their location upon the residue. The act of congress is, in effect, an offer by the government to grant to its citizens, and those who have declared an intention of becoming such, a certain definite portion of the public mineral lands, on condition that a discovery of a mineral-bearing lode or vein is made thereon, and the surface of the ground claimed along such vein or lode is distinctly marked on the ground, so that its boundaries can be readily traced; and, until these conditions are complied with, no right is conferred as against a valid location, in the absence of a local rule or statute giving some time in which to make a location after discovery. "Possession within a mining district, to be protected, or to give vitality to a title," says Chief Justice Wade, "must be in pursuance of the law and the local rules and regulations. Possession, in order to be available, must be properly supported. It must stand upon the law, and be a result of a compliance therewith. Representation of claim in the manner provided by law, and the local rules and regulations of the mining district, is the life of the possessory title to such claim. Possession, without a location, carries no title. * * * Possessory titles do not live upon possession alone. They must be supported by a proof of compliance with the law that gives the right to and sustains the possession. The mere naked possession of a mining claim upon the public lands is not sufficient to hold such claim as against a subsequent location made in pursuance of the law, and kept alive by a compliance therewith. Hence we say that, upon an issue joined as to the forfeiture of the right to the possession of a mining claim, by reason of failure in complying with the rules and regulations of the district, * * * proof of the actual possession, or of the delivery of such possession, from the date of the location to the trial of the issue, if unaccompanied by testimony showing that such possession was taken and held under and by virtue of a compliance with the local rules and regulations of the district, is immaterial proof." Hopkins v. Noyes, 4 Mont. 556, 2 Pac. 280. In Belk v. Meagher, 3 Mont. 80, it is said: "There is no grant from the government, under the act of congress, unless there is a location according to law and the local rules and regulations. Such location is a condition precedent to the grant. Mere possession, not based upon a valid location, would not prevent a valid location under the And the supreme court of the United States, in affirming this decision, say: "The right to the possession comes only from a valid location. Consequently, if there is no location, there can be no possession under it. Location does not necessarily follow from possession, but possession from loca-

session alone, but by working on the ground, recording, and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations." Belk v. Meagher, 104 U. S. 284. To the same effect are Noyes v. Black, 4 Mont. 527, 2 Pac. 769; Tibbitts v. Ah Tong, 4 Mont. 556, 2 Pac. 759; Russell v. Hoyt, 4 Mont. 412, 2 Pac. 25; and other authorities cited in the opinions quoted from. In Horswell v. Ruiz, 67 Cal. 111, 7 Pac. 197, it was held that prior occupation and working of mineral lands of the United States, without complying with the requirements of any law, either federal or district, or local custom, does not give a right of possession as against one who afterwards peaceably locates a mining claim covering the same ground, and in all respects complies with the federal, district, and mining laws and regulations. From the time the second person has perfected his location, the prior occupant is a trespasser. So, also, in Funk v. Sterrett, 59 Cal. 614, it is said: "The act of congress in question provides [section 2324, Rev. St.] that 'the location must be distinctly marked on the ground. so that its boundaries can be readily traced." Since the passage of that act, a party can show a right to the possession of a mining claim (when no patent has been issued) only by showing an actual pedis possessio, as against a mere wrongdoer, or by showing a compliance with the requisites of the act of congress." And in Garthe v. Hart, 73 Cal. 543, 15 Pac. 93, it is held that possession of a mining claim is good against mere intruders, but is not good as against one who has complied with the mining laws. See, also, Gregory v. Pershbaker, 73 Cal. 109, 14 Pac. 401. From these decisions, which are from the two principal mining states in this country, it would seem that the discoverer of a lode or vein of rock in place, bearing precious metals, in the absence of some local rule of miners or legislative regulations allowing some time for exploration, must immediately locate his claim by distinctly marking the same on the ground, so that its boundaries can be readily ascertained, in order to hold it against a subsequent valid location, peaceably made; and, the defendants having failed to comply with the law in so locating their claim, they are not entitled to the possession of the ground in dispute as against the plaintiffs, who made a valid location. Requiring the discoverer of a mine to proceed diligently to complete his location, without waiting to trace the cause or strike the vein or lode, may, in some instances, work an apparent hardship; but, until the matter is provided for by some local rule or regulation, it is better, whatever the effect may be in particular cases, that the rule should be settled, and thus prevent as far as possible the uncertainty in titles to mining claims, and the strife and litiga-

tion among miners, which would necessarily follow if the discoverer is allowed an indefinite time in which to develop his lode or vein, which in many instances would require much time and labor and a large expenditure of money. If, during such development or exploration, he is allowed to hold a floating grant to surface ground 600 by 1,500 feet in size, with the right to definitely locate the same as he may subsequently determine, it would create great uncertainty in mining titles, increase litigation, and often defeat the purpose and object of the law throwing open the mining lands of the country to occupation and purchase.

Nor do we find anything in the authorities cited by the defendants in conflict with the rule which we have suggested. The decisions in the cases of Iron Silver Min. Co. v. Elgin Min. & Smelting Co., 118 U. S. 196, 6 Sup. Ct. 1177, and Erhardt v. Boaro, 113 U. S. 527, 5 Sup. Ct. 560, were both made under the law of Colorado, which allows the discoverer a specified time for exploration before marking the boundaries of his claim. In Gleeson v. Mining Co., 13 Nev. 444, there is a dictum to the effect that the act of congress may be susceptible of a construction which will allow the discoverer of a vein a reasonable time to trace its course before being compelled to define his surface claim, and in the meantime be protected in his right to 1,500 feet of the vein; but no such question was presented by the record, and further on in the opinion it is distinctly stated that the court does not decide how soon after the discovery of a vein the location must be distinctly marked on the ground, so that its boundaries can be readily traced, as required by the act of congress. The holding in Field v. Grey, 1 Ariz. 404, 25 Pac. 793, is that the party in possession of a mining claim may hold the surface while he is seeking for a vein or lode believed to exist therein, as against all parties not having a better right thereto, which is simply an application of the general doctrine that one in possession of real property may hold the possession as against all persons except some one who can show a better right thereto. The other cases referred to are all from Colorado, in which state, as we have already said, there is a statutory provision allowing a specific length of time after the discovery in which to make exploration before being compelled to locate the claim by marking its surface boundaries, and hence have no application to the question presented by this record. So much, therefore, of the decree of the court below as ordered and decreed that plaintiffs are entitled to the possession of the disputed area is affirmed, but we do not think the evidence justifies the decree against the defendants for money, and in that respect the decree appealed from will be modified; neither party to recover costs in this court.

HUSBANDS v. MOSIER.

(Supreme Court of Oregon. June 26, 1894.) SWAMP LANDS-DEFAULT OF APPLICANT-FOR FEITURE.

1. Act Oct. 26, 1870, permitted any adult citizen to apply to purchase swamp lands, paying 20 per cent. of the price, and at any time within 10 years thereafter, on proof of reclamation and payment of the balance, entitled him to a patent, and provided that after expiration of the 10 years all lands "upon which received by the proof of welcometing and resympt had no such proof of reclamation and payment had been made shall revert to the state, and the money paid thereon shall be forfeited." Held that the time for making proof of reclamation and payment was of the essence of the contract,

and payment was of the essence of the contract, and it was competent for the legislature to declare forfeiture on default therein, as it did by Act Feb. 16, 1887.

2. Act Oct. 18, 1878, \$ 10, providing that when an application for swamp land had been regularly made, and the law complied with, and the 20 per cent. of the price paid, the applicant should, on payment of \$2.50 per acre before January 1, 1880, receive a conveyance without the proof of reclamation required by Act Oct. 26, 1870, did not waive the proof and payment provided for by that act unless the \$2.50 were actually paid.

\$2.50 were actually paid.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Action by S. R. Husbands against J. H. Mosier to recover land. Judgment for defendant. Plaintiff appeals. Affirmed.

Geo. E. Chamberlain, for appellant. H. S. Wilson, for respondent.

BEAN, J. The facts in this case are that on October 26, 1870, the legislature of this state passed "An act providing for the selection and sale of the swamp and overflowed lands" granted to the state by the act of congress of March 12, 1860. Laws 1870, p. This act of the legislature required the selection of such lands to be made under the direction of the commissioner of lands, who was required to make out, and file in his office, and in the office of the county clerk of the county where the lands were located, a map of the lands so selected, and to give public notice of such selection, approval, and filing, for four weeks, successively, in some weekly newspaper published in such county, or if no newspaper was published in the county, then in such newspaper as he might select in an adjoining county. It directed the commissioner to sell the lands so selected at not less than one dollar per acre, and provided that any person over the age of 21 years, who was a citizen of the United States, or had declared his intention of becoming such. might apply to the commissioner to purchase any tract or tracts thereof, designating the same by the actual survey, or, if no survey had been made, then by artificial or natural Within 90 days from the date landmarks. of publication of notice as aforesaid, the applicant was required to pay 20 per centum of the purchase price, for which a receipt was issued to him, and at any time within 10 years thereafter, on proof, to the satisfaction of the commissioner, that the lands "had been drained or otherwise made fit for cultivation," and the payment of the balance of the purchase price, he was entitled to a patent for the land so reclaimed; but a successful cultivation, in "either grass, cereals or vegetables for three years," is made a sufficient reclamation. It was further provided that, at the expiration of 10 years from and after the first payment, all lands "upon which no such proof of reclamation and payment had been made shall revert to the state and the money paid thereon shall be forfeited." On October 18, 1878, the legislature passed an act providing for the "selection, location and sale of state lands," including swamp and overflowed lands, and expressly repealed the act of 1870. Laws 1878, p. 41. By this act the selections were still to be made by the governor, as commissioner, but the power of sale was vested in the board of commissioners for the sale of school and university lands, consisting of the governor, secretary of state, and state treasurer, and the quantity one person might purchase was limited to 320 acres. Section 9 declared void, and of no force or effect, all applications for the purchase of swamp and overflowed lands, made prior to the passage of the act, which had not been regularly made in accordance with the law, or which were regularly made, and the applicant had not fully complied with all the terms and requirements of the law under which they were made, including the payment of the 20 per centum of the purchase price. Section 10 provides that when such applications have been regularly made, and the law fully complied with, including the payment of the 20 per centum of the purchase price, the applicant shall, on the payment of \$2.50 per acre for such lands at any time prior to January 1, 1880, receive a conveyance therefor without the proof of reclamation required by the act of 1870. On February 16, 1887, the legislature passed another act, entitled, in part, "An act to declare void certain certificates of sale, and to forfeit certain lands" (Laws 1887, p. 9), section 1 of which declares void all certificates of sale of swamp lands "on which the twenty per centum of the purchase price was not paid prior to January 17, 1879." And section 2 of this act declares forfeited all swamp lands sold under the act of 1870, which have not been reclaimed or paid for in accordance with the provisions of said act, and the board of school land commissioners is authorized to cancel the certificates of the sale thereof, which certificates are declared void; but actual settlers on lands of 320 acres or less, who had paid their 20 per centum, were allowed until January 1, 1889, in which to perfect their title, without reclamation, by the payment of the remaining 80 per centum. And by section 8 any actual settler who purchased any of the lands mentioned in the act prior to February 1, 1887, from the original holder of any certificate declared forfeited, could, by

making satisfactory proof to the board of such purchase, and of settlement and improvement of the land, obtain a deed thereto, not exceeding 640 acres, to be selected in not more than two tracts. Section 7 of the act provides that all swamp and overflowed lands reverting to the state under the provisions of said act shall be sold as provided in the act of 1878.

This suit is brought to obtain a decree declaring that the defendant holds the title of certain swamp lands, purchased by him from the state under the act of 1878, in trust for the sole use and benefit of the plaintiff, and comes here on appeal from a decree of the court below sustaining a demurrer to the complaint, from which it appears that on the 6th day of March, 1876, one John M. Marden made an application in due form for the purchase of lot 4 in section 32, township 3 N. of range 12 E. of the Willamette meridian, in Wasco county, containing 20.65 acres, paid 20 per centum of the purchase price, and was given a receipt therefor as required by law; that immediately thereafter he entered into the actual possession of said tract, fenced and successfully cultivated the same, in cereais and grass, for more than three years thereafter, and remained in the open, notorious, and peaceable possession thereof until on or about the 13th day of August, 1886, at which time, for a valuable consideration, he sold, transferred, and conveyed to the plaintiff all his right, title, and interest in and to the lands above referred to, and ever since said date the plaintiff has been, and now is, in the open and notorious possession and occupancy of said property; that, through oversight or inadvertence, the board of commissioners failed and neglected to note in the records of their office the sale of the land to Marden, and thereafter, on or about the 26th day of May, 1891, and while plaintiff was in the peaceable and quiet possession and occupancy of said lands, the defendant purchased the same, and received a deed therefor, under the act of 1878, with full knowledge of the plaintiff's rights; that long prior to the commencement of this suit the plaintiff tendered to the board the balance of the purchase price for said land, and demanded a deed thereto, which the board refused to execute for the reason that it had already executed a deed to the defendant for the same land.

From this summary of the complaint, it appears that Marden's application to purchase was made under the act of 1870, and that, at the time of the sale to plaintiff, more than 10 years had elapsed from the date of his first payment, and no proof of reclamation or payment of the remaining 80 per centum had been made, as required by the act under which he purchased, nor has he or plaintiff complied with the provisions of any legislative act walving such default. Under these circumstances the contention for the defendant is that, by the terms of the act under

which the application was made, "the lands reverted to the state," and were subject to sale and disposition under the act of 1878 at the time defendant purchased, in 1891; that is to say, argument of his counsel is that by the terms of the act of 1870 the time of payment and proof of reclamation are of the essence of the contract between the state and an applicant to purchase swamp lands, and upon a default by the applicant the contract is at an end, and he forfeits his rights thereunder without any legislative or judicial declaration to that effect. That act has been judicially construed as an offer for sale by the state of swamp lands on the terms therein mentioned, and that an acceptance of such offer by a qualified applicant, and a compliance by him with the terms of the act, constituted a contract between him and the state for the sale and purchase of the parcel of land described in the application, "binding on each of them until relieved therefrom by some substantial default of the other not overlooked or excused," and is protected by the constitution of the United States, which declares that "no state shall pass any law impairing the obligation of contracts." McConnaughy v. Pennoyer, 43 Fed. 196; Id., 140 U. S. 1, 11 Sup. Ct. 699. It was held in the case cited that the act of 1878 does not attempt to interfere with, or declare forfeited, the rights of applicants under the law of 1870 who were not in default at the time of the passage of the act of 1878, and that the act of 1887, in so far as it attempted to do so, as to applicants not in default, is void, as being obnoxious to the provision of the constitution quoted. The effect of the decision of Judge Deady, as well as that of the supreme court of the United States, in the case referred to, as we understand it, is that an applicant for the purchase of swamp land under the act of 1870 has a contract with the state from the time of the filing and acceptance of his application, which cannot be repudiated by the state so long as he complies with the terms of the act, and that he is entitled to complete his purchase under such act, although in the meantime it may have been repealed. But this case does not decide that either the act of 1878 or 1887 is void, in so far as they declare forfeited applications in which the purchaser or applicant was in default at the time of their passage. Nor was the question presented or considered as to the effect of neglect by an applicant to comply with the act of 1870 in making proof of reclamation and final payment within the time specified. From the construction of the act of 1878 adopted by the supreme court of the United States, it is manifest that it did not affect Marden's rights, because at the time of its passage he was not in default, as he had previously paid the 20 per centum, and the time in which he was required to make the final payment had not yet elapsed. The inquiry then is whether or not Marden's subsequent failure to make proof of reclama-

tion and payment within the time required by the act of 1870, and plaintiff's neglect to avail himself of the provisions of the act of 1887, had the effect to relieve the state from liability under the contract. We think it cannot be successfully contended that the state lacked power to provide, as one of the terms of the contract for the sale of its swamp land, that time of payment and proof of reclamation should be of the essence of the contract, and that, on a failure by the applicant to comply with such terms, his right to purchase should cease, and his contract be at an end; and this, it seems to us, is the manifest effect of the act of 1870. By that act the state offered for sale its swamp lands on certain terms and conditions, among which was that the applicant should, within 90 days after the publication of the notice of the map thereof being filed in the county clerk's office, make the first payment of 20 per centum, and within 10 years thereafter reclaim the land, and pay the remainder of the purchase price. And, as a condition precedent to the issuance of a patent, it required that the applicant should prove to the satisfaction of the commissioner that the land had been drained. or otherwise made fit for cultivation, and declared in positive terms that, at the expiration of 10 years from and after the first payment, all swamp lands upon which no such proof of reclamation and payment has been made "shall revert to the state and the money paid therefor shall be forfeited." From these provisions, it is manifest that the legislature intended to provide that all applicants to purchase swamp land, who should fail to comply with the act by making proof of reclamation and final payment within 10 years from the time of the first payment, should forfeit their right to purchase, and the land should again become subject to sale and disposition.

For the plaintiff, it is contended that successful cultivation of the land, in grass or cereals, for three years, dispensed with the proof of reclamation. But we are unable to so construe the law, although the question is practically immaterial in this case, because it cannot be claimed that successful cultivation, even if it rendered proof of reclamation unnecessary, would dispense with the necessity of making the final payment, which, by the act, is made a condition precedent to the right of an applicant to obtain title. Before a patent can issue the applicant is required to prove, to the satisfaction of the commissioner, that the lands have been drained, or otherwise rendered fit for cultivation, and also to make his final payment; and the only effect of the clause referred to, it seems to us, is that proof of successful cultivation for three years shall be sufficient evidence of reclamation. Nor do we think the act of 1878 dispensed with proof of reclamation and payment, as required by the act of 1870, unless the applicant availed himself of the offer therein contained, by the payment of \$2.50 per acre prior to January 1, 1880. The act of 1878 simply gave an applicant under the act of 1870, who was not in default, an option to pay \$2.50 per acre within a certain time, and obtain a title, without proof of reclamation, if he so desired, but did not deprive him of the right to proceed to obtain title under the act of 1870, which was a part of his contract, and binding on the state, so long as he complied with its terms, although repealed by the legisla-As a consequence, it would seem that, by the terms of the contract between Marden and the state, his right to purchase had ceased, and the land reverted to the state, freed from his claim, at the time plaintiff purchased from him, and therefore he had no interest in the land which he could sell or convey. But if it be conceded that we are mistaken in this view, and a legislative declaration of forfeiture was necessary, such is the manifest effect of the act of 1887, which declared forfeited all swamp or overflowed lands sold under the act of 1870 which had not been reclaimed and paid for in accordance with the provisions of the act, except that actual settlers, whether original applicants or purchasers from such original applicants, were permitted to perfect title to a certain quantity of land upon complying with the terms and conditions of the act. But no right is claimed in this case under this saving clause, because it is not pretended or alleged that the terms and conditions of the act were complied with. At the time of the passage of the act of 1887 the land embraced in Marden's application. although it had been reclaimed by successful cultivation, had not been pald for in accordance with the provisions of the act of 1870. and was therefore declared forfeited; and, as plaintiff does not bring himself within the saving clause of the act, it necessarily follows that the decree of the court below must be affirmed.

LOW v. RIZOR.

(Supreme Court of Oregon. June 28, 1894.) IRRIGATION - RIGHTS OF PRIOR APPROPRIATOR -INCREASE OF APPROPRIATION — TRIBUTARIES OF STREAM.

1. A prior appropriator of water for irrigation purposes abandons his right to increase the appropriation by failing for 13 years to increase the area cultivated, during which time subse-

quent rights have accrued.

2. The right of appropriation depends upon the application of the water to the intended use, and not upon the capacity of the irrigating ditch.

3. An appropriation of the waters of a stream to a beneficial use is an appropriation of

its tributaries.

Appeal from circuit court, Baker county: Morton D. Clifford, Judge.

Bill for an injunction brought by Leonard Low against John Rizor. From a decree for plaintiff, defendant appeals. Modified.

This is a suit to enjoin the defendant from diverting the waters of Alder creek, which flows in a natural channel through his land. and thence in an easterly direction, through

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plaintiff's adjoining land. The facts show that the plaintiff, in 1866, settled upon a tract of unsurveyed public land, and enlarged a ditch thereon, by which the waters of Alder creek had been appropriated by a former occupant of said tract, and in 1868 dug another ditch, and by them has diverted the water from said creek, and appropriated it to irrigate his cultivated land, consisting of about 55 acres of meadow and 5 acres of orchard, which he has since the date of his settlement constantly occupied; that, the township in which said land is situated having been surveyed in 1874, and the plat thereof having been filed in the local land office of the district May 1, 1875, the plaintiff made a homestead filing upon the N. 1/2 of the S. W. 1/2 the S. E. 1/2 of the S. W. 1/4, and the S. W. 1/4 of the S. E. 1/4, of section 34, in township 10 S., of range 42 K. of the Willamette meridian, containing 100 acres, and embracing his cultivated land, and on March 1, 1893, received a patent from the United States for said tract; that, about 1862, one C. W. Herman settled upon an adjoining tract of public land, commonly called "Straw Ranch," now owned by the defendant, built a house, and dug a ditch on the south side of said creek, capable of diverting about 20 inches of water, and appropriated a part of the water to irrigate a small garden, and on May 3, 1864, he conveyed all his interest in Straw ranch to Hiram Huffman, who that year dug another ditch on the north side of said creek, capable of diverting about 50 inches of water, and appropriated a part of it to the irrigation of another garden: that Huffman transferred said ranch to Valentine Gray, who took possession of it, and cultivated the gardens by irrigation, but, being unable to make payment of the purchase price, restored the premises to his said grantor; that a stage company built a house and barn on said Straw ranch, where it kept its stock and a way station, but, having discontinued the station at that place, the buildings were, in 1866, sold by one George Atkinson to the plaintiff, who moved them to his own land; that Robert Kitchen was the next occupant of Straw ranch, but from whom he obtained the right of possession, or when he established his residence thereon, are disputed facts of the case; that Kitchen, in 1879, transferred his interest in the premises to S. A. Heilner, from whom the defendant, by mesne conveyances and transfers, acquired possession, on May 10, 1884; that defendant made a homestead filing upon the N. 1/2 of the 8. E. 1/4, the N. E. 1/4 of the S. W. 1/4, and the S. E. 1/4 of the N. W. 1/4, of section 33, in said township and range, and on July 7, 1891, he obtained the United States patent for said land; that, when defendant took possession, the cultivated portion of Straw ranch consisted of a garden containing about two acres, and, in addition to the old ditches, two others had been dug,-one from Straw Ranch creek, and the other from Kitchen creek, tributaries

of Alder creek; that Kitchen and his successors in interest prior to defendant had appropriated about six inches of water to irrigate said garden, and the excess flowing in the ditches was returned to Alder creek, and appropriated by the plaintiff; that the defendant and his predecessors have for more than ten years used the waters of Straw Ranch creek, which furnishes about five inches till about the 1st of July, when it dries up, but that he has not used the water from Kitchen creek more than three or four years; that, in 1890, he irrigated a small garden by diverting the waters of a spring which discharged into Alder creek, and in the following year he dug another ditch from Alder creek, which diverts about four inches of water; that the defendant, since 1884, has increased the area of his cultivated land from two to forty acres, and, with the water so diverted, raises excellent crops of hay, grain, fruit, and vegetables, but, deprived of the use of the water, his land would be rendered nearly valueless. The plaintiff, for cause of suit, alleges a prior appropriation of all the waters of said Alder creek, and an unlawful diversion by the defendant, who, for answer, after denying the material allegations of the complaint, alleges that his grantors and predecessors made the prior appropriation; that he and they have acquired a right to the water of said creeks by an adverse user thereof; and that plaintiff seeks to obtain the water for speculative purposes. A reply having put in issue the allegations of new matter contained in the answer, the cause was referred to J. L. Rand, to take testimony and report the same, with his findings of fact and law thereon; and the referee, having found that defendant and his predecessors had acquired a right by adverse user of all the waters of Straw Ranch creek, that plaintiff was the prior appropriator of the waters of Alder creek to the extent of 65 inches under a 6-inch pressure, and that defendant was entitled to the next 50 inches, measured under like pressure, recommended a decree according to said findings. The court, however, modified the report of the referee, and found that the defendant and his predecessors made the prior appropriation of one-fifth of the natural flow of the waters of said Alder creek, at no time to exceed 20 inches; decreed a perpetual injunction against the diversion of more than that quantity; and awarded plaintiff his disbursements for clerk's and sheriff's fees, and, with this exception, each party to pay his own costs,-from which decree the defendant appeals.

Olmstead & Courtney, for appellant. Williams & Smith, for respondent.

MOORE, J. (after stating the facts). The defendant contends that Robert Kitchen obtained possession of Straw ranch in 1866, from Huffman, after Gray's relinquishment, and occupied the premises from that time

until 1879; that the absence of record evidence of transfers of the premises showing the chain of title is due to the loss of two volumes of the county records; and that he has, by other evidence, joined his possession to that of Herman, the original settler; and that plaintiff acquired no interest in Straw ranch by the purchase of the buildings from the stage company; while the plaintiff contends that by his purchase he secured possession of the premises; that he abandoned the same, together with the ditches and right of appropriation of water thereby; and that Straw ranch remained unoccupied from 1866 to 1871, when Kitchen took possession of it as vacant public land. The law is well settled in this state that improvements made upon the public lands of the United States can be transferred by a voluntary surrender of the possession of such lands, and that the transferee without a conveyance becomes vested with all the right his predecessor had in the premises. Hindman v. Rizor, 21 Or. 112, 27 Pac. 13. While there is an irreconcilable conflict in the evidence, we think the trial court correctly found that Kitchen succeeded to the rights of Huffman in Straw ranch, and that the defendant's possession is joined to that of Herman, the original settler; but we are not prepared to say that the appropriation was prior to that made by the plaintiff. A ditch had been dug from the creek, and the water diverted and appropriated to irrigate plaintiff's claim prior to his settlement thereon, in 1866; but it does not appear from the evidence when this ditch was completed, and hence it is impossible to say who has the prior right. Assuming that defendant has it, he would be entitled to divert and appropriate a sufficient quantity of water to irrigate his land if his grantors and predecessors in interest prosecuted the cultivation of it with due and reasonable diligence. Hindman v. Rizor, supra; Simmons v. Winters, 21 Or. 35, 27 Pac. 7; Cole v. Logan (Or.) 33 Pac. 568. The evidence conclusively shows that from the time the water was first diverted until the defendant secured possession, in 1884,-a period of 20 years,-only about two acres of land had been reduced to cultivation, from which it would appear that Robert Kitchen had no intention of farming Straw What constitutes a reasonable time within which the waters of a stream should be appropriated to some beneficial use, in order to establish a right thereto, is a question of fact dependent upon all the circumstances of the case. The evidence shows that while Kitchen or his son cultivated the small garden each year, and that the former claimed to be in the legal possession of the premises from 1866 to 1879, he spent the most of his time in another neighborhood, mining, and during 13 years not a single acre was added to the area of cultivated land. We think Kitchen, during that time, should have enlarged the cultivated tract, and, failing to do so, he abandoned the right to increase the

appropriation. The present right, therefore, to appropriate water for the irrigation of Straw ranch, must be confined to the quantity necessary to properly irrigate the garden maintained by him. The defendant's right cannot be enlarged because water in excess of the appropriation has been flowing through the ditches upon Straw ranch, and returned to the creek, to be appropriated by the plaintiff. The right of appropriation does not depend upon the size or capacity of the irrigating ditch, but upon the application of the water to the intended use (Ft. Morgan Land & Canal Co. v. South Platte Ditch Co. [Colo. Sup.] 30 Pac. 1032); and since the application, prior to defendant's possession, was confined to the irrigation of the garden, his right can be no greater than that possessed by his granters and predecessors in interest, where subsequent rights have attached.

To constitute a valid appropriation of water, three elements must always exist: First, an intent to apply it to some beneficial use, existing at the time or contemplated in the future; second, a diversion from the natural channel by means of a ditch, canal, or other structure; and, third, an application of it, within a reasonable time, to some useful industry. Black's Pom. Water Rights, 48-51. There having been a failure to make the application of the water to the irrigation of the land within a reasonable time, one of the elements of a valid appropriation is lacking; and bence the defendant's claim to a prior appropriation in excess of the quantity necessary to irrigate the garden must fail. The plaintiff has constantly for more than 25 years diverted and appropriated the water of said Alder creek after it flowed through the ditches on Straw ranch; and, if he were not a prior appropriator, he has in the meantime acquired the right to use a sufficient quantity to irrigate his cultivated land, subject, however, to the defendant's right to appropriate sufficient to irrigate the garden maintained by Kitchen; and, if the appropriation of the water to irrigate defendant's garden was not prior to that of plaintiff's, then, by a continuous use of it for more than 10 years under a claim of right by the defendant and his grantors and predecessors in interest, a right has been acquired to continue such use to that extent, and also to the appropriation of the waters from Straw ranch creek. The record shows that the plaintiff, on September 24, 1884, granted to the Oregon Railway & Navigation Company, and to its successors and assigns, the perpetual right to take water for all legitimate purposes from such place on Alder creek as said company or its agents might select, and that, in pursuance of such grant, said company laid a pipe to a point on said creek about four or five miles above plaintiff's point of diversion, and diverted about two inches of water to a tank erected on its line of railway and used to supply its engines. From this grant the defendant infers that plaintiff

seeks to enforce his claim to the use of the water of said creek for speculative purposes. The railroad company is not a party to this suit, and hence any conclusion upon the validity of the grant to it would be mere dictum. So far as the rights of the plaintiff and defendant are concerned, the grant would amount to a change of plaintiff's point of diversion; but, since the record shows that there is sufficient water in the channel of the creek at the point of defendant's diversion to supply his appropriation, he cannot be injured by it.

The defendant testified that Kitchen had never appropriated more than six inches of water to the irrigation of the said garden, and hence we conclude that quantity sufficient for such purpose, and the measure of defendant's right which he may alternately divert from Alder creek under a six-inch pressure at the head of either the old or the new ditch, in addition to the waters of Straw Ranch creek. Inasmuch as the appropriation of the waters of a stream, when applied to a beneficial use, has the effect of appropriating the tributaries also (Low v. Schaffer [Or.] 33 Pac. 678), the plaintiff is entitled to the uninterrupted flow into Alder creek of the waters of Kitchen creek and said spring, so that he may have the use of 150 inches of water from said Alder creek, less 2 inches granted to the railroad company, measured at the points of diversion under a 6-inch pressure, if there be that quantity remaining after supplying the defendant's appropriation. The decree of the court below will therefore be modified, and one entered here in accordance with this opinion.

MILLER V. HIRSCHBERG.

(Supreme Court of Oregon. July 5, 1894.)

ACTION BY WABEHOUSEMAN—SHIPMENT TO WRONG PERSON—RECOVERY—PLEADING AND PROOF.

1. A complaint alleging that plaintiff, a warehouseman, was induced by the fraudulent representations of defendant to ship him a certain quantity of wheat, which defendant converted, will support a judgment for plaintiff for the value of the wheat as for goods sold and delivered, though the evidence fails to show that its delivery was procured by fraud.

that its delivery was procured by fraud.

2. The fact that the statute prohibits a warehouseman from shipping grain, for which a receipt has been given by him, without the written assent of the holder (Hill's Code, §§ 4201–1207), does not prevent a recovery by the warehouseman in assumpsit for wheat shipped without a receipt, on the ground that he is in "pari delicto," where the evidence shows that plaintiff supposed defendant had the receipts, and would turn them over on demand; as, to prevent a recovery in such case, there must be a manifest intent on the part of the bailee to dispose of the wheat to the injury of the bail-

Appeal from circuit court, Polk county; George H. Burnett, Judge.

Action by J. E. Miller against H. Hirschberg. There was a judgment for plaintiff, and both parties appeal. Affirmed.

C. E. Wolverton and N. L. Butler, for plaintiff. J. W. Whalley, M. L. Pipes. and J. J. Daly, for defendant.

PER CURIAM. This is an action to recover the value of 10,211 bushels of wheat, sold and delivered to the defendant by L. Bentley, plaintiff's assignor. It is, in substance, alleged that from 1887 to 1890, inclusive, Bentley was engaged in the warehouse and storage business at Independence, Or., and received for storage large quantities of wheat, issued receipts therefor, and agreed to deliver the same upon the order of the persons entitled thereto; that the defendant during said years purchased wheat stored in said warehouse from the owners thereof, and, at divers times, falsely and fraudulently represented to Bentley that he was the owner of and had purchased large quantities of said wheat in storage, and that, well knowing said representations to be false and fraudulent, and with intent to defraud, ordered and directed him at divers times to ship for and deliver to the defendant large amounts of wheat, to wit, 84,007 10/60 bushels, and that, relying upon said representations, and being deceived thereby, the said Bentley, as such warehouseman, shipped for and delivered to the defendant that amount of wheat; that the defendant, during said years, owned only 73,796 bushels of the wheat so stored in said warehouse; that plaintiff had duly demanded the return of 10,211 bushels of said wheat from the defendant, but that he refused to return the same, or any part thereof, and had unlawfully converted it to his own use; that plaintiff was at all times, since the storage of said 10,211 bushels of wheat, lawfully entitled to the possession thereof, or to \$9,187.20, its value; and that, by reason of said unlawful conversion, he was damaged in that amount, for which, with interest and costs, he prayed judgment. The defendant, after denying the material allegations of the complaint, alleged that during said years he was the owner of 99,229 bushels of wheat stored in said warehouse, of which he had received only 84,007 10/60 bushels: that he was also the owner of 13.-692 bushels of wheat stored in Claggett's warehouse at Independence, which wheat was delivered to Bentley, with the understanding that it should be deducted from said 84,007 bushels, leaving only 70,315 7/60 bushels so shipped for defendant. The defendant also alleged that, at the close of each shipping season, he had an accounting with said Bentley, and finally, on April 1, 1801, they had a full, fair, and complete settlement of and concerning all matters of business between them, including all wheat transactions; and it was found upon such settlement that there was due and owing to the defendant \$46.18, for which sum Bentley gave, and the defendant now holds, his promissory note. The allegations of new matter contained in the answer having been denied

by the reply, the cause was, by consent of parties, referred to W. S. McFadden, to take evidence, and report his findings of fact and conclusions of law therefrom. After the action was commenced, L. Bentley having made a general assignment for the benefit of his creditors, J. E. Miller, his assignee, was, by order of the court, substituted as plaintiff. The referee, having found for the plaintiff upon all the issues of fact, as a conclusion of law therefrom also found that plaintiff was entitled to recover from the defendant \$7,703, with interest at 8 per cent. from December 15, 1888, and the further sum of \$178.75, with like interest from January 29, 1891, and the costs and disbursements of the action. The court, at the hearing of the motions to affirm and set aside the findings of the referee, modified them in part, and found that the allegations of fraud in the complaint were not supported by the evidence; that plaintiff was not entitled to interest; and rendered judgment against the defendant for \$7,881.75, the value of the wheat at the time of the conversion, with interest from the date of the judgment, together with the costs and disbursements of the action, from which judgment the defendant appeals. The plaintiff also appeals from the part thereof modifying the report of the referee.

Both the referee and court have found the quantity of wheat the defendant obtained from Bentley, together with its value, and, there being in the record sufficient evidence to support the findings, they become equivalent to the special verdict of a jury; hence it only remains to be seen whether the complaint contains a sufficient statement of facts to warrant the conclusion reached. This is not an action purely for deceit. The deceit alleged is important only as an element to sustain the action in its aspect as one of trover. If we view the case in the light of an action of trover, it is necessary, in order to sustain the action, that the fraud be shown, and that it was the inducement which led Bentley to part with his property in the wheat. There is no question but that he intended to part with his property therein, and to vest it in the defendant. But there is not, in our judgment, any testimony to sustain the allegation of fraud. The testimony shows nothing more than that Bentley, without any representations from the defendant as to the quantity of wheat owned by him, shipped 10,211 bushels upon Hirschberg's order, for which he has not been paid. The transaction is nothing more than a delivery of property at the special instance and request of the defendant, for which he has not paid. The history of the transaction shows an utter absence of fraud on the part of the defendant as an inducement to Bentley to make the shipment, and hence the court properly modified the finding of the referee In this respect, and, by so doing, eliminated the question of trover from the case.

It is substantially alleged in the complaint that the defendant ordered and directed Bentley to ship for and deliver to the defendant large quantities of wheat, aggregating 84,007 bushels, and that he complied with this request, and delivered the wheat, and that the defendant had no more than 73,995 bushels of wheat in Bentley's warehouse; and the allegation that the defendant converted the difference between the quantity stored and that withdrawn to his own use, coupled with the allegation that the plaintiff is damaged thereby in the sum of \$9,187.50, the value of the wheat, is, after the verdict. equivalent to an allegation that the defendant has not paid for the wheat. Thus, when the allegations of fraud are stripped from the complaint, there remains enough to sustain a judgment for goods sold and delivered at the special instance and request of the defendant, for which he has not paid. Under the rule that findings shall be liberally construed, this was permissible. Conaughty v. Nichols, 42 N. Y. 83; Suksdorff v. Bigham. 13 Or. 369, 12 Pac. 818; Corbett v. Wrenn (Or.) 35 Pac. 658.

It is contended, if the action be considered in assumpsit, that under the statute (sections 4201-4207, Hill's Code) prohibiting a ware houseman from shipping any grain, for which a receipt has been given by him, without the written assent of the holder thereof, when Bentley shipped the wheat at the defendant's request he violated the law; that the parties are in pari delicto; and that the rule "potior est conditio defendentis" prevents a recovery. The record shows that Bentley shipped the wheat, supposing that the defendant had the necessary receipts from the owners thereof, and would, when called upon, surrender them. The defendant was extensively engaged in buying wheat, and Bentley had every reason to believe, and did believe, that he had the necessary receipts in his possession. There must be a manifest intent on the part of the bailee to dispose of the goods to the injury of the owners, to warrant the application of the rule invoked. Here there was no such intent on Bentley's part, and no reason exists for the operation of a rule that regards the party as a wrongdoer.

There are other questions presented, but, after a careful examination of the record, we conclude that no error affecting the substantial rights of either party has been committed. It is therefore ordered that the judgment of the court below be affirmed, and that the plaintiff recover his costs and disbursements.

(10 Utah, 78)

SILVA v. PICKARD et al. (Supreme Court of Utah. June 4, 1894.) EVIDENCE—SELF-SERVING DECLARATIONS.

Prior statements of a party to an action are not admissible to corroborate his tes-

timony when the circumstances surrounding him at the time the statements were made show that his own interests were being subserved thereby.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by V. M. C. Silva against W. L. Pickard and others. From the judgment, defendants H. Cohn & Co. and F. H. Auerbach appeal. Reversed.

J. G. Sutherland, for Pickard. Marshall & Boyle and W. H. Dickson, for appellants. Powers & Hiler, for respondent.

PER CURIAM. This action was brought for the settlement of what is claimed to be a partnership account, and the distribution of a considerable sum of money, in the hands of Frederick H. Auerbach, belonging to the partnership. From the record it appears that on or about the 1st day of May, 1883, W. L. Pickard, Henry Cohn, and F. Auerbach and brother, constituting the firm of H. Cohn & Co., and V. M. C. Silva, for the purpose of trading in wool, as partners, entered into written articles of copartnership, as copartners under the name and style of the "Territorial Wool Association," specifying in such articles that they enter into this agreement of copartnership "each for himself, and to each other." These articles are drawn in the shape of a constitution and by-laws, and are signed by the parties, and form a part of the complaint. Section 11 of these bylaws is in the following words, to wit: "Sec. 11. The profits, if any, after deducting the expenses incurred in selling the wools, such as interest, brokerage, insurance, storage, labor, and other incidental expenses, shall be divided equally into three shares between W. L. Pickard, H. Cohn & Co., and V. M. C. Silva, the three members or firms of the association subscribing to these articles of association, and the losses, if any, shall also be equally divided." Section 12 of these bylaws further provides as follows, to wit: "Sec. 12. As soon as the whole amount of wool is closed out in Boston, the executive committee shall prepare a statement of all sales and expenses pertaining thereto, and submit the same to the association, and if any funds remain to the credit of the association, or the account with the Mass. Loan & Trust Co. representing the same, the same shall be subject to draft of the president of the association, who, as soon as he is notified that the same has been duly honored, shall subdivide the same into equal parts between W. L. Pickard, H. Cohn & Co., and V. M. C. Silva." Said agreement was for the period of one year, but it is agreed by all parties that, in so far as the original articles of agreement are concerned, they remain in full force between the parties up to the trial of this cause. Under the pleadings, and at the trial, Silva and Pickard alleged an addition thereto, made in 1887, of the following resolution, to wit: "Resolved, that, in view of the large amount of wool carried over from last season, we limit our entire purchase of wool for this season to one million (1,000,000) pounds of wool equally between us." Under the pleadings, and at the trial, H. Cohn & Co. denied that said last-named resolution was passed, or that the original articles of copartnership had been altered in any particular.

It seems that all parties to the suit stand upon the common ground that, if the resolution was in force (part affirming it was, and part denying), this was the only change in the original articles, and, with the exception of the resolution (if that was an exception), the Territorial Wool Association was acting and conducting its business under the original articles. The association made a good deal of money in the years 1883, 1884, and 1885, and the profits were shared equally between Silva, Pickard, and H. Cohn & Co. In 1886 the association lost money, but, under the articles of the association, the losses were apportioned in the same manner. In the early part of the season of 1887, the price of wool in the eastern market was low, but as the season advanced telegrams were received by the association here stating a heavy advance in the price of wool in the eastern market. In consequence of this news, all the members of the association commenced buying wool freely, H. Cohn & Co. purchasing 701,403 pounds, Pickard, 366,571 pounds, and Silva, 330,398 pounds. When these purchases reached a market, wool had fallen in price, and remained so low that the wool of the Territorial Wool Association was closed out in the east at a very heavy loss. In winding up the settlement with their eastern consignees. there was in January, 1889, remitted back to the association here a large sum of money, to be distributed to those entitled to it, and, pending distribution, placed in F. Auerbach's keeping, bearing interest. The amount so held by Auerbach, Silva and Pickard place at \$30,000, and H. Cohn & Co. at \$27,804.42. After the receipt of said money by Auerbach, H. Cohn & Co. attempted to obtain a settlement from Pickard and Silva, upon the basis that H. Cohn & Co. should bear one-third of the losses. Pickard one-third, and Silva one-third, according to the terms of the original articles; upon which basis Pickard would have been entitled to \$381.26 out of the money in F. Auerbach's hands, H. Cohn & Co. would have been entitled to all the residue of the money in F. Auerbach's hands, and also to an additional contribution and payment to them, from Silva, of \$5,533.02; said Silva being that much behind his equal proportion of one-third of the losses. Finally, in the latter part of 1889, or the early part of 1890, Silva claimed and asserted, and, as far as H. Cohn & Co. claimed to have any knowledge thereof, for the first time claimed and asserted, that the resolution in regard to one million pounds of wool had been passed and adopt-

ed by the association, and that, having been so adopted, the effect of it was to throw the whole burden of the losses for the excess of one million pounds in buying upon the parties who bought more than one-third of said one million pounds. On such claim being made by said Silva, H. Cohn & Co. demanded of Silva the evidence of the passage of any such resolution, and denied that any such resolution was passed. But Silva did not then, nor at any time before the bringing of this suit, produce to H. Cohn & Co. any evidence of the passage of said resolution, but claimed it was passed, and on the trial of this action Silva produced for the first time, as such original resolution, a sheet of paper, in his own handwriting, but not signed by any one, which was as follows, to "Salt Lake, Utah, May 4, 1887. a meeting of the Territorial Wool Association, held this day, at the office of W. L. Pickard, the following members being present: F. H. Auerbach, W. L. Pickard, H. Cohn, V. M. C. Silva,-the following resolution was unanimously adopted: Resolved, that, in view of the large amount of wool carried over from last season, we limit our entire purchase of wool for this season to one million pounds (1,000,000) of wool, equally between us. There being no further business, we adjourned." Pickard joined Silva in the position taken by Silva as to the resolution and the effect thereof, and on March 25, 1892, this suit was brought by Silva, plaintiff, v. the defendants. H. Cohn & Co. answered the complaint and filed a cross complaint. Pickard answered complaint, and filed a cross complaint. Silva and Pickard severally answered the cross complaint of H. Cohn & Co. H. Cohn & Co. answered the cross complaint of Pickard. By reason of the losses which ensued, the plaintiff claims, defendant Pickard in his answer admits, and in his own complaint alleges, the other defendants deny, and the referee decided, that, as to the purchases of the parties up to the agreed limit, the losses should be equally divided; that each member of the partnership should bear the loss on all purchases by himself in excess of 333,333 pounds to each party. The decree below declares the losses and disposes of the money between the parties upon these principles. Defendants Cohn & Co. appeal from this de-Silva and Pickard, who seem to have acted together in the proceeding, and to have a common interest, and are satisfied with the decree, are respondents.

It appears from the testimony that Pickard was acting as secretary and F. H. Auerbach as president of the association during the entire period of this relationship; that the resolution of May 4, 1887, was in the handwriting of Silva, and not in the handwriting of Pickard, the secretary; it was not signed by any one, nor copied into any record book, but was left as produced at the hearing. It is not claimed that one

week's notice was given prior to its alleged adoption, as required by article 9 of the constitution, nor is it shown that Pickard, the secretary, kept or made the record as required by article 6 of the constitution. Nor does the proof establish the fact that this resolution was adopted by the executive committee under section 13 of the by-laws. Both Silva and Pickard testify that the resolution was adopted at the time of its date, when all the parties except Samuel Auerbach were present, at a meeting of the association, and was written down by Silva because he was a ready penman. The appellants, Auerbach and Cohn, positively assert that such resolution was never adopted at any meeting of such association; that it was never assented to by them, and that they knew nothing of its pretended existence until in the latter part of 1889 or fore part of 1890, when Silva for the first time claimed there was such a resolution; and that it was never seen by either until the hearing of the case. It also appears that after the 4th of May, 1887, a dispatch was received by Pickard from his son in Boston advising the probable rise in the price of wool, and that in accordance therewith, and with the advice of all members, each party commenced the purchase of wool to a large extent, with the approbation of each partner. Soon after these purchases by each party, as before stated, wool declined heavily, to the great loss of the association and the members thereof. Whether this resolution was in fact adopted by the association, as claimed by Silva and Pickard, was about the only matter in controversy between the parties at the hearing. For the purpose of corroborating Silva and Pickard, Mr. Reybould was permitted, against defendants' objection, to testify that in May, 1887, Pickard and Silva separately but repeatedly stated to him, while cashier of the Union National Bank, and at a time when they desired credit, or an extension of time on payment of their indebtedness on acount of advances made by the bank to them for wool purchases, that the members of the wool association had agreed and determined to limit the purchase of wool for the season of 1887 to 1,000,000 pounds; and for the same purpose, and against the defendants' objection, the witnesses Knauss and West were permitted to testify that in May, 1887, Silva, the plaintiff, made a like statement to them. The admission of this testimony is assigned as error.

Upon this subject, the court says, in People v. Doyell, 48 Cal. 91, that "a witness cannot be confirmed by proof that he has given the same account before, for his mere declaration is not evidence. His having given a different account, although not upon oath, necessarily impeaches either his veracity or his memory; but his having asserted the same thing does not in general carry his credibility further than, nor so far as, his

oath. Such declaration may, however, be admissible in contradiction of evidence tending to show that the account is a fabrication of late date, when it may be shown that the same account was given before its ultimate effect and operation (arising from changed circumstances) could have been foreseen; and also, perhaps, in other peculiar cases." In Stolp v. Blair, 68 Ill. 541, the general rule, with its exceptions, is stated in the syllabus as follows: "Proof of the declarations of a witness made out of court in corroboration of testimony given by him on the trial of a cause is, as a general rule, inadmissible, even after the witness has been impeached or discredited; but, where the witness is charged with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made similar statements at a time when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement of facts." Com. v. Jenkins, 10 Gray, 485, it is said that "where a witness is sought to be impeached by cross-examination or independent evidence, tending to show that at the time of giving his evidence he is under a strong bias or in such a situation as to put him under a sort of moral duress to testify in a particular way, it is competent to rebut this ground of impeachment, and to support the credit of the witness, by showing that when he was under no such bias, or when he was free from any influence or pressure, he made statements similar to those he had made at the trial." In 2 Tayl. Ev. § 1476, it is said: "But evidence that he [the witness] has on other occasions made statements similar to what he has testified in the cause is not admissible, unless he be charged with the design to misrepresent, in consequence of his relation to the party, or to the cause; in which case it may be proper to show that he has made a similar statement before that relation existed." In 1 Whart. Ev. § 570, it is said: "Statements made by a witness corroborating his evidence upon the trial, such statements being uttered soon after the transaction, and at a time when the witness could not have been subject to any disturbing influences, are competent when proof has been offered to impeach him by showing that he had recently fabricated the narrative or had testified corruptly." See, also, People v. Doyell, 48 Cal. 85; Munson v. Hastings, 12 Vt. 346; Ellicott v. Pearl, 10 Pet. 412, 438, 439; Conrad v. Griffey, 11 How. 480; Queen v. Hepburn, 7 Cranch, 290; Robb v. Hackley, 23 Wend. 50; Reed v. Spaulding, 42 N. H. 114; 1 Thomp. Trials, §§ 573, 574; 1 Greenl. Ev. § 469; Mason v. Vestal, 88 Cal. 396, 26 Pac. 213.

The admission of this class of testimony is considered dangerous, and the exception to the rule should not be extended, except it

be in extreme cases and where the rejection of it would produce real and manifest wrong. And in no case should such evidence be admitted where it appears that the party making such declarations has any interest or motive in making them, or where it does not satisfactorily appear that the account given by the witness which is subject to be shown in corroboration was made at a time before its ultimate effect and operation arising from a change of circumstances could have possibly been foreseen, or where the witness is not shown to be free from any influence, pressure, or interest in making the declarations. At the time these statements were shown to have been made, both Silva and Pickard were parties to the contract, and directly interested in the purchase and sale of wool as members of this association. They were both heavily in debt in consequence of their purchases under their arrangement out of which this litigation grew. They were both asking extensions at the bank. Revbould testified that Silva and Pickard were each indebted to the bank for over \$10,000 at this time, and that the effect of the statements made by Silva and Pickard to him and to the bank as to the passage of such resolution to limit the purchase of wool by the association to 1,000,000 pounds for the year 1887 was to induce the bank to extend their credit, and that credit was extended to them by the bank on the strength of such representations made by them on that subject. For this court to extend the rule making admissible unsworn declarations of a party to the cause, under the circumstances that these statements are shown to have been made. would be to open the doors to fraud, and make easy the way by which a designing schemer and dishonest party could readily overreach his antagonist, and use the courts of justice as an instrument to advance his dishonest purposes.

After considering all the facts and circumstances surrounding this transaction, we have come to the conclusion that these statements were made by Silva and Pickard at a time when their own interest was being served by the making of such statements: at a time when they were both subject to disturbing influences, and when the ultimate effect and operation arising from a change of circumstances could have been, and probably was, foreseen by both. This testimony doubtless had a controlling influence in the decision of the case. We think the objection taken to the admission of this testimony before the referee should have been sustained, and that the admission of such testimony was error. There are many other assignments of error, but we consider the one passed upon decisive of the case. It is the opinion of this court that the judgment of the court below should be set aside, and a new trial granted.

ANDERSON PRESSED-BRICK CO. v. DU-BOIS et al.

(Supreme Court of Utah. June 4, 1894.) DISMISSAL OF APPEAL—DEFECTIVE RECORD.

Where the abstract on appeal is in disregard of the rules of the court, and does not show that any motion for a new trial was made, nor that any appeal is taken from the judgment, the court will dismiss the appeal on its own motion.

Appeal from district court, Weber county; before James A. Miner, Justice.

Action by the Anderson Pressed-Brick Company against Dubois & Williams and others. From a judgment for plaintiff, defendants appeal. Dismissed.

John W. Judd, for appellants. Evans & Rogers, for respondent.

PER CURIAM. The abstract in this case is very imperfect, and in disregard of the rules of this court. It shows the pleadings, verdict, and statement, on motion for a new trial, but it does not appear therefrom that there was any motion made in the trial court for a new trial or any notice of motion given, or that there was a hearing thereon, or any order made by the court in reference to a new trial; nor is there anything in the abstract to indicate that any appeal is taken from the judgment or from any order of the court; nor is there any transcript of the record of the proceedings on file in this court. The proceedings in the case do not sufficiently appear for review. Under such circumstances, this court will dismiss an appeal on its own motion. Comp. Laws 1888, § 3650; Rotch v. Hamilton, 7 Utah, 513, 27 Pac. 694. Considering this case on its merits, however, so far as its history is shown by the abstract, there appears to be no reversible error. The appeal is dismissed.

GROOME v. OGDEN CITY.

(Supreme Court of Utah. June 29, 1894.)

LEASE-IMPLIED COVENANTS OF TITLE-PAROL EVIDENCE.

1. Plaintiff leased land of defendant, on which were springs, the water from which flowed on the land of W., who had the sole title to the water by original appropriation for irrigation. Held, that the general covenant of title implied by the words "lease and demise," used in the lease, was limited by a covenant that the lessee should quietly keep the premises "without hindrance or molestation from the said lessor, or anybody claiming by, through, or under it," and that plaintiff could not recover for the loss of the use of the water, as W. did not claim by, through, or under it.

2. In the absence of fraud, accident, or mistake, conversations and oral agreements between the parties prior to its execution are not admissible to vary the terms of a written contract.

3. A failure to find facts is not reversible error if, when found, they would necessarily be adverse to appellant, and those already found are sufficient to sustain the judgment.

Appeal from district court, Weber county; before Justice James A. Miner.

Action by F. O. Groome against Ogden City for damages for breach of contract. Judgment for defendant, and plaintiff appeals. Affirmed.

Breeden & Gunnell, for appellant. R. H. Whipple, for respondent.

BARTCH, J. This is an action to recover damages for breach of contract. The court entered judgment in favor of the defendant, and, a motion for a new trial having been overruled, the plaintiff appealed, assigning various errors. It appears from the record that on the 30th day of July, 1892, the plaintiff was operating a tannery in the city of Ogden, and on the same day entered into a contract, by the terms of which the defendant demised to him a certain tract of land for a stipulated term. That portion of the contract which is material to the decision of this case, reads as follows: "That the said Ogden City hereby leases and demises unto the said F. O. Groome the following described tracts of land." Then follows the description of the land, the terms, covenants to be performed by the lessee, etc., and then it further provides: "And the said lessor, for itself, its successor, successors, and assigns, does hereby covenant to and with the said F. O. Groome that he shall quietly keep the said premises for the term aforesaid, for the purposes aforesaid, without hindrance or molestation from the said lessor or anybody claiming by, through, or under it; the said lessee well and truly keeping and performing the covenants aforesaid on his part to be performed;" and then follow other provisions. On the land described in the lease there were certain springs, the water of which flowed onto the land of one Weaver, who had appropriated it for the purposes of irrigation many years prior to the date of the lease. After the plaintiff had erected his tannery on the land, Weaver claimed the water, and by order of court restrained the plaintiff from using it. The appellant contends that the use of this water was included in the lease, as appurtenant to the land, and that the words "lease and demise," used in the lease, constitute a warranty of the title. or right of the lessee to let and lease the land and water. If this contention be correct, then the city is responsible in damages, for it is clear that the appellant was dispossessed, as to the use of the water, by one holding a paramount title to that of the respondent. The words "lease and demise" are technical terms, and are frequently used to signify the estate or interest conveyed. They properly apply to the instrument of conveyance, and to prevent a more general unqualified covenant of warranty by implication in law, an express covenant for quiet enjoyment is frequently inserted in the instrument, more as a protection to the lessor than to the lessee.

Such is the case in the instrument under consideration, for it is expressly stated that the lessee shall quietly keep the premises for the purposes therein stated, "without hindrance or molestation from the said lessor, or anybody claiming by, through, or under it." This express covenant limits the generality of the covenant implied in the words "lease and demise," and under such covenant the lessee becomes a purchaser pro tanto, and the maxim of caveat emptor applies. At his peril, therefore, he must ascertain the sufficiency of the lessor's title to the premises, including the appurtenances. In such a case the lessor intends to limit his liability to protect the lessee against injury resulting from defects of title and disturbances of possession to cases arising because of the lessor's own acts and of the acts of those representing him or claiming under him, and to this the lessee consents by executing and accepting the lease. A qualified covenant will not be rendered void in law by the more general covenant implied in the words employed in the lease. Wood, in his treatise on the law of Landlord and Tenant, in section 357 (2d Ed.), states the law as follows: "Such covenant may be safely entered into by any lessor who never had any title whatever to the demised premises, or any part thereof; because any subsequent entry, eviction, ejectment, or other interruption or disturbance by the real owner, or by the party entitled to possession, or by any other person who does not claim by, from, or under' the lessor, would be no breach of such qualified covenants." Again, in section 359, the same author states: "The usual qualified covenant for quiet enjoyment is frequently inserted more for the protection of the lessor than for the lessee, and to prevent a more general and unqualified covenant being implied by law from the word 'demise,' or any equivalent word, such as 'let' or 'lease.' So in conveyances the usual qualified covenants for title, etc., are introduced 'for the purpose of qualifying the general warranty with the old common-law covenant implied."
See, also, section 358. Tayl. Landl. & Ten. § 307; Rawle, Cov. § 275; Burr v. Stenton, 43 N. Y. 462; Deering v. Farrington, 1 Mod. 113; Dennett v. Atherton, L. R. 7 Q. B. 316.

Counsel insist that the court erred in rejecting the evidence offered by the appellant as to conversations, understandings, and oral agreements had between the appellant and officers of the respondent prior to the execution of the lease. There is no allegation of fraud, accident, or mistake in the complaint. How, then, can the plaintiff introduce evidence to show the understandings and agreements of the parties which led up to and culminated in the making of the lease? Clearly, in the absence of proper allegations, such evidence would be immaterial and incompetent, for the anterior proceedings between the parties were merged in the written instrument, which is complete in itself, and must speak for itself. It is executed by both parties, and does not require the aid of extrinsic evidence to comprehend its terms. Nor can such evidence be admitted to add to or vary the terms of the instrument in the absence of fraud or mistake. In Kain v. Old, 2 Barn. & C. 627, Chief Justice Abbott said: "Where the whole matter passes in parol, all that passes may sometimes be taken together as forming part of the contract, though not always, because matter talked of at the commencement of a bargain, may be excluded by the language used at its termination. But if the contract be in the end reduced into writing, nothing which is not found in the writing can be considered as a part of the contract." Benj. Sales, § 621; Mast v. Pearce, 58 Iowa, 579, 8 N. W. 632, and 12 N. W. 597; Baker v. Morehouse (Mich.) 12 N. W. 170; Johnson v. Walter, 60 Iowa, 315, 14 N. W. 325.

It is further claimed by counsel for appellant that the court failed to find on all the issues, and this is insisted upon as error. It is evident, as appears from the record, that the finding of further facts was immaterial for, if they had been found, they would necessarily have been prejudicial to the appellant. The facts found show that there was no breach of the covenant of the lease by the respondent, and this rendered further findings unnecessary. Even on material issues, a failure to find facts is not reversible error if, when found, they must necessarily have been adverse to the appellant, and when those already found are sufficient to support the judgment. Hutchings v. Castle, 48 Cal. 152; People v. Center, 66 Cal. 551, 5 Pac. 263, and 6 Pac. 481; Knowles v. Seale, 64 Cal. 377, 1 Pac. 159.

There is no pretense that Weaver, the successful claimant of the water from the springs in question, derived his title thereto from the respondent. It is shown that he was the original appropriator, and that the respondent never did have any title to the water. Nor is there any contention that the respondent, or any one by, through, or under it, has asserted any claim, or caused any disturbance to the title or possession of appellant. We are of the opinion that there is no material error in the record. The judgment is affirmed.

MERRITT, C. J., and SMITH, J., concur.

TURNER v. UTAH TITLE INSURANCE & TRUST CO. (KIMBALL, Intervener).

(Supreme Court of Utah. June 4, 1894.)

PLEADING AND PROOF—VARIANCE—FRAUD AND
UNDUE INFLUENCE.

1. In an action to recover on certificates of deposit alleged to have been assigned plaintiff by deceased, where the complaint alleges and the assignment recites a consideration of \$1,000, and the assignment is attacked as fraudulent testimony, that deceased said she intended plain-

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tiff to have all her property when she died is incompetent.

incompetent.

2. Judgment for plaintiff in an action to recover on certificates of deposit alleged to have been assigned plaintiff will be reversed where the court failed to find whether there was a consideration for the assignment.

3. An assignment of property will be set aside where, at the time it was executed, the assignor was in a dying condition, bereft of sight and of speech, and where the consideration therefor was less than one-twelfth of the value of the property assigned.

value of the property assigned.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by Martha Turner against the Utah Title Insurance & Trust Company to recover on certain certificates of deposit. Frank Kimball intervened, and from a judgment for plaintiff he appeals. Reversed.

E. W. Tatlock and W. C. Hall, for appellant. McDowall & Lyler, for respondent.

MERRITT, C. J. This action was brought by Martha Turner, respondent, to recover from defendant the sum of \$2,500 upon three certificates of deposit issued by defendant to Minnie Barton, bearing date September 9, 1891,-two for \$1,000 each, the other for \$500, all bearing interest from date at 5 per cent. per annum, and payable to the order of said Barton six months after date; also another certificate of deposit between the same parties for \$500, dated October 19, 1891, with like interest, payable three months from date; also another certificate of deposit between the same parties for \$1,-000, dated November 16, 1891, with like interest, payable six months after date; and also for a balance of \$36.67, upon deposit with defendant to the credit of said Barton. The respondent bases her right of recovery upon an assignment which she claims was made to her by Minnie Barton, February 20. 1892. The consideration expressed in the assignment is \$1,000, United States gold coin, in hand paid by Martha Turner to Minnie Barton, for which it is stated in the assignment, and claimed by the respondent, Minnie Barton sold, assigned, and transferred to respondent not only the said certificates of deposit, and deposit of credit, but \$2,500 cash on deposit with the Union National Bank, and \$3,350 on deposit with Wells, Fargo & Co. to the credit of said Barton, and also all her household goods, etc.. which were afterwards sold by respondent for \$2,500. The defendant answered the plaintiff's and intervener's complaints, and by cross complaint set up the adverse claims of plaintiff and intervener, to the subjectmatter of this action, and upon hearing of the cross complaint, taken as confessed by the plaintiff and intervener, on the 25th day of June, 1892, it was ordered, adjudged, and decreed by the court below that the defendant pay into court the sum of \$4,170, being the full amount due upon the certificates of deposit and on the open account, and to be held by the clerk to await the final determination of the action as to the ownership thereof.

Minnie Barton died intestate on said 20th of February, within one hour and a half after it is claimed she executed the assignment. On the 6th day of May, 1892, Clarence W. Hall was appointed special administrator of the estate of said deceased, and on that day qualified as such, and on the 20th day of April, 1893, by order and leave of court, filed his amended complaint of intervention. alleging, among other things, the death, intestacy of the deceased, and that she left estate situated in the city and county of Salt Lake, Utah T., consisting of said certificates of deposit and said deposit of cash with the defendant; also the cash on deposit with Wells, Fargo & Co., and the Union National Bank, and the household goods, etc.; and that defendants said Wells, Fargo & Co. and the Union National Bank were then doing a banking business in Salt Lake City. He claims title and possession of this property, and attacks the validity of, and as grounds for canceling this assignment alleges that, at the date of the alleged execution of the assignment, the deceased was seriously and dangerously sick, greatly prostrated in body, and weak in mind, could scarcely see, and could not speak, and could only sign by a mark, and died within an hour and a half after she had so signed the assignment, and that she had no attorney or other person present representing her in the transaction, and that she was not at the time able or competent to make a binding or valid contract (that is, from her physical and mental condition, she was incapable of understanding the nature and effect of the transaction), and that the assignment was obtained by solicitation, fraud, and undue influence of the plaintiff, and that the assignment was without any consideration whatever, and therefore void, and of no binding force or effect. These allegations of the intervener were controverted by the plaintiff, and, to the contrary, she averred that the deceased was of sound mind and understanding, and that for a good and valuable consideration-among other things, for services before then rendered by plaintiff to the deceased in taking care of, nursing, and maintaining her-the deceased, by assignment, sold, assigned, transferred, and delivered to plaintiff all of the aforesaid money and property. The court below found for plaintiff (respondent here), whereupon the intervener appealed to this court. In the meantime, the intervener Hall having died, the present intervener, Kimball, having been appointed administrator in his place, was substituted as intervener, and as such prosecutes this appeal.

The question for determination is whether the deceased, at the time she executed the assignment in question, possessed sufficient intelligence to understand fully the nature and effect of the transaction; or if, in fact,

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the assignment was ever made, and, if so, whether the assignment was executed under such circumstances as that it ought to be upheld, or as would justify the interference of equity for its cancellation. Allore v. Jewell, 94 U. S. 508. The plaintiff must recover, if at all, upon the assignment. From a careful examination of the testimony it must be admitted that the deceased, at the time it is claimed she executed the assignment, was and had been suffering for a long time from, and greatly prostrated with, her last sickness, viz. syphilitic degeneration of the kidneys, which frequently produces, and is one of the most common causes of, brain trouble. Her face was very thin, her eyes much sunken, and she was unable to converse. Could only respond by a nod or shake of the head, or at most with a faint whispered "Yes" or "No." Was totally blind in one eye, and so much so in the other that she could not see to read or write. To within a month of her death she could only recognize her acquaintances when they came up close by her, and her vision would be improved a little with a very strong glass, but not used during the last six weeks of her illness. She was in bed, dying of exhaustion, near the point of death, and bereft of speech or sight, the usual methods of communication. Great haste was manifested by those around the deceased, especially the plaintiff and the witness Helen Smith, to complete the affair before death should end it. It sufficiently appears from the evidence that the deceased was educated. and, when in health, a woman of fair business capacity. Also that the plaintiff and Helen Smith were crafty, avaricious, and selfish, and that no one was present at the time to counsel or advise with, or did counsel or advise, the deceased as to her rights, or act for her in the transaction. That she took no voluntary part whatever in the formation of the assignment is beyond question. She simply allowed her hand to involuntarily make the marks when guided by another person. The attorney who drew the assignment testified that a messenger informed him that his services were needed at the house of deceased to draw her will. Before leaving his office he drew the formal parts of a will, and arrived at her house about 3 o'clock p. m. He was met at the door by Helen Smith, who took principal charge of and informed him that they did not wish a will; that they wanted a bill of sale, or something of that sort, to turn over everything that "Minnie" had to Martha Turner. She gave the instructions in general to the attorney, with an occasional direction to him from Martha Turner, who enumerated some of the articles to be embraced in the assignment. From these the attorney, without ever having seen the deceased, drew up the assignment, placing the consideration, as directed by them, at \$1,000 gold coin in cash, paid the deceased by Martha Turner; and at about 4 o'clock p. m. he was hurriedly ush-

ered for the first time into the presence of the deceased. The attorney also testified that they desired him to come into the bedroom of Minnie Barton quickly; that she was liable to die at any moment; that the attending physician was present; that they were ready for "Minnie" to execute the assignment. The attorney read the instrument twice to the deceased, and thought, though he was not positive, that she nodded her head in assent. Then she was propped up in bed. He placed the instrument before her, gave her the pen, placed it within her fingers, and guided her hand in making the marks. At this time certain other assignments were written in the bank pass books of the deceased for her to sign, if she should recover from the exhaustion of this effort. She did not rally, but continued to sink, and shortly thereafter died. The attorney further testified that, irrespective of the signing, the deceased took no voluntary action, and gave no direction or instruction whatever in the transaction. Helen Smith testified that she had no authority from, nor did the deceased give her any instructions whatever; that the part she took, and the instructions and directions she gave to the attorney, were voluntary on her part, and without authority from the deceased, and were simply based upon previous conversations, which she claimed to have had with the deceased about a year previous, as to what she intended to do with her property when she died. The intervener objected to this and like declarations, assigning the following errors: "The court erred in permitting the witness Jennie Burke to answer the following question: 'State whether or not you ever heard Miss Barton, the deceased, say anything in reference to the disposition of her property.'-against the objection and exception of the intervener that the question was leading, incompetent, hearsay, and immaterial; and also in permitting said witness to testify as to what the deceased had said to her in reference to giving her property to the plaintiff, as also being hearsay, incompetent, and immaterial, and against the objection and exceptions of the intervener." And that, second: "The court erred in admitting the evidence of Martha Turner, the plaintiff, and also the evidence of the witnesses Helen Smith, Jennie Burke, and A. Alexander, as to the statements alleged by them to have been made to each of them respectively by Minnie Barton, as to what disposition she intended to make of her property in the case of her death; or that she said to them respectively that if anything happened to her she wanted all of her property to go to Martha Turner; that at her death she intended to give her property to Martha Turner,against the objection and exception of the intervener; that said evidence was irrelevant and immaterial, and also being an attempt to prove a consideration for the alleged assignment different from that stated in the as-

signment and in plaintiff's complaint." These objections should have been sustained. was error to admit such testimony, because it was irrelevant and immaterial, and brought about a variance between the proof and pleadings, and was an attempted proof of a different consideration than that stated in the assignment or alleged in the pleadings. In general, where no consideration at all is expressed in a deed, a party may prove the actual consideration to support it. where a consideration is expressed a party may prove any other actual consideration, if not wholly inconsistent with that stated. To this general rule there is the limitation that, where the consideration expressed in a deed is impeached on account of fraud, the party claiming under the conveyance cannot sustain it by proving another consideration different from that stated. If a pecuniary consideration is stated in the deed, and it is impeached, the party cannot rely on the consideration of blood, love, or affection. Kerr, Fraud & M. pp. 191, 192; Hartopp v. Hartopp, 17 Ves. 184-192; Clarkson v. Hanway, 2 P. Wms. 203; Willan v. Willan, 2 Dow. 274; cases cited, notes, pp. 433, 434, 2 Pom. The intervener excepted to the Eq. Jur. Andings of fact as a whole, and to each of them separately, as being contrary to and not supported by the evidence, and because they did not contain, and the court failed to find, whether there was in fact a consideration for the assignment, and made the same objections and assignment of errors to the findings of fact in the first and second assignment of errors.

The failure of the court below to find as to the fact of the consideration for the assignment was reversible error. Marsters v. Lash, 61 Cal. 623. No money or any other thing was given by plaintiff to the deceased. The board and lodging given by plaintiff to deceased was a gratuity; therefore the assignment was without a consideration, and of no binding force or effect whatever. Scully v. Scully's Ex'r, 28 Iowa, 550; Allen v. Bryson, 67 Iowa, 596, 25 N. W. 820. And, again, in view of the circumstances stated, should there have been the consideration claimed and attempted to have been proven by respondent, we are not satisfied that the deceased was, at the time she executed the assignment, capable of comprehending fully the nature and effect of the transaction. She was in a state of extreme mental and physical weakness, sick, dying, at the point of death, bereft of speech and sight. If not disqualified, she was unfitted to attend to business of such importance as the disposition of her entire property, of the value of not less than \$12,335, for the insignificant sum of \$1,000, or for the board or lodging of deceased, as claimed by respondent. Certain it is that in negotiating for the disposition of the property she stood on no terms of equality with the plaintiff, the deceased being alone, with no attorney or other person

representing her in making the assignment. It is not necessary, in order to secure the aid of equity, to prove that the deceased was at the time insane, or in such a state of mental imbecility as to render her entirely incapable of executing a valid deed. It is sufficient to show that from her sickness and infirmities she was at the time in a condition of great mental weakness, and that there was gross inadequacy of consideration for the conveyance. From these circumstances imposition or undue influence will be inferred. Allore v. Jewell, 94 U. S. 510, 511; Harding v. Handy, 11 Wheat. 125; Kempson v. Ashbee, 10 Ch. App. 15. In the case of Harding v. Wheaton, 2 Mason, 378, Fed. Cas. No. 6,051, a conveyance executed by one to his son-in-law for a nominal consideration, and upon a verbal arrangement that it should be considered as a trust for the maintenance of the grantor, and after his death for the benefit of his heirs, was, after his death, set aside, except as security for actual advances and charges, upon application of his heirs, on the ground that it was obtained from him when his mind was enfeebled by age and other causes. Justice Story, in deciding the case, said: "Extreme weakness will raise almost necessary presumption of imposition, even when it stops short of legal incapacity." In the case of Allore v. Jewell, 94 U. S. 511, Mr. Justice Field, in delivering the opinion, said: "The same doctrine is announced in adjudged cases almost without number, and it may be stated as settled law that whenever there is great weakness of mind in a person executing a conveyance of property, arising from age, sickness, or any other cause, though not amounting to absolute disqualification, and the consideration given for the property is grossly inadequate, a court of equity will, upon proper and seasonable application of the injured party, or his representatives or heirs, interfere, and set the conveyance aside." And the present case comes directly within this principle. Judgment and decree reversed, and cause remanded, with instructions to the court below to enter a judgment and decree in favor of the intervener, canceling the assignment, delivering the same and the certificates of deposit to the intervener, and a direction to the clerk of the court to pay over the money in his hands as the custodian of the court to the intervener.

MINER and SMITH, J.J., concur.

BARTCH, J., concurs in the conclusion reached.

TURNER v. WELLS, FARGO & CO. (KIM-BALL, Intervener).

(Supreme Court of Utah. June 4, 1894.)
Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by Martha Turner against Wells, Fargo & Co. to recover a sum of money on deposit with defendant, and which she claims was assigned to her by Minnie Barton, the depositor. Frank Kimball, administrator of the estate of Minnie Barton, intervened, and from a judgment for plaintiff appeals. Reversed.

E. W. Tatlock and W. C. Hall, for appellant. McDowall & Lyles, for respondent.

MERRITT, C. J. In the court below, this case and the two cases of Martha Turner. Plaintiff and Respondent, vs. Union National Bank, Defendant, and Frank Kimball, Intervener and Appellant, and also the case of Martha Turner, Plaintiff and Respondent, vs. The Utah Title Insurance & Trust Company. Defendant, and Frank Kimball, Intervener Appellant, were tried together. The same evidence was heard and considered. The findings of fact and conclusions of law and the exceptions were substantially the same, and the same objections and exceptions to the admission of evidence, and the same assignment of errors, were made in each case. The pleadings were alike, and the basis of each action, and the facts and legal principles involved, were the same. All of these cases were submitted upon the argument and submission of the case against the Utah Title Insurance Company (decided at the present term) 37 Pac. 91. Upon the authority of the decision in that case, the judgment and decree of the court below in this case is reversed, and the case remanded, with directions to the court below to enter a judgment and decree in favor of the intervener, canceling the assignment, and delivering the same to the intervener, and directing the clerk of the court below to pay over the money in his hands in this case as custodian of the court to the intervener.

MINER, SMITH, and BARTCH, JJ., concur.

TURNER v. UNION NAT. BANK (KIMBALL, Intervener).

(Supreme Court of Utah. June 4, 1894.)
Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by Martha Turner against the Union National Bank to recover a sum of money on deposit with defendant, and alleged to have been assigned plaintiff by Minnie Barton, the depositor. Frank Kimball, administrator of Minnie Barton, intervened, and from a judgment for plaintiff appeals. Reversed.

E. W. Tatlock and W. C. Hall, for appellant. McDowall & Lyles, for respondent.

MERRITT, C. J. In the court below, this case and another case of the same title, and the case of Martha Turner, Plaintiff and Re-

spondent, vs. Wells, Fargo & Co., Defendant, and Frank Kimball, Intervener and Appellant, and also the case of Martha Turner, Plaintiff and Respondent, vs. Utah Title Insurance & Trust Company, Defendant, and Frank Kimball, Intervener and Appellant, were tried together. The same evidence was heard and considered. The findings of fact and conclusions of law and the exceptions were substantially the same, and the same objections and exceptions to the admission of evidence, and the same assignment of errors. were made in each case. The pleadings were alike, and the basis of each action, and the facts and legal principles involved, were the same. All of these cases were submitted upon the argument and submission of the case against the Utah Title Insurance & Trust Company (decided at the present term) 37 Pac. 91. Upon the authority of the decision in that case, the judgment and decree of the court below in this case is reversed, and the case remanded, with directions to the court below to enter a judgment and decree in favor of the intervener, canceling the assignment, and delivering the same to the intervener, and directing the clerk of the court below to pay over the money in his hands in this case as custodian of the court to the intervener.

MINER, BARTCH, and SMITH, JJ., concur.

STATE ex rel. JOHNSON et al. v. CASE, Justice of the Peace.

(Supreme Court of Montana. July 2, 1894.)

JUSTICES OF THE PEACE — ALTERATION OF JUDGMENT-JURISDICTION-REMEDY-CERTIORARI.

1. Code Civ. Proc. §§ 794, 799, provide that upon a verdict by a jury the justice shall "immediately" render judgment, and that when the prevailing party is entitled to costs the justice shall add their amount to the verdict. Held, that where, in an action on a note, in which the only contention was as to costs, a justice rendered judgment in favor of plaintiff for the amount of the note and interest, and in favor of defendants for costs, in accordance with the verdict of a jury, he had no jurisdiction, eight days afterwards, on plaintiff's motion, to change the judgment, as to costs, and tax them to defendants. Harwood, J., dissenting.

fendants. Harwood, J., dissenting.

2. Where a justice, eight days after rendering judgment in accordance with the verdict of the jury, changes the judgment, as to costs, without having jurisdiction to do so, certiorari is the proper remedy. Harwood, J., dissenting.

Appeal from district court, Missoula county; C. S. Marshall, Judge.

Application by the state of Montana, on the relation of A. P. Johnson and another, for a writ of certiorari to review the action of J. F. Case, justice of the peace, in an action before him, by Edmund Giggy, against relators. From a judgment dismissing the writ, and affirming the judgment of the justice, relators appeal. Reversed.

This case comes here on an appeal from a judgment of the district court which dismiss:

ed an application for a writ of certiorari t against a justice of the peace, and affirmed a judgment of that justice. The application for a writ of certiorari in the district court shows that on February 6, 1892, Edmund Giggy commenced an action in the justice's court of J. F. Case against A. P. Johnson and John H. Bell, the relators in this application, and appellants herein, and that on February 16th the action was tried. The cause of action was upon a promissory note. Judgment was demanded for the amount of the note, interest, costs, and an attorney fee of \$25. The defendants in that case (relators herein) now contend that they pleaded in that case what they claim was a tender of the amount of the promissory note, with interest, made before the commencement of the action. They offered to submit to a judgment for the amount of the note and interest, without costs. A jury was demanded in the justice's court, and the cause was tried before such jury upon that issue. The jury found a verdict for the plaintiff for the amount of the note and interest, without costs, and a verdict for the defendants for the costs of the action. The jury were then discharged. On the same day (February 16th) the justice entered judgment in accordance with that verdict. Afterwards, on the 23d of February, the plaintiff made a motion in the justice's court, which he called a "motion to correct the judgment." The motion was, in substance, as follows: Plaintiff moves the court to correct the verdict of the jury, and the judgment rendered by the court upon said verdict, and to tax the costs of said action to the defendants herein, for the reason, etc. This motion was by the justice granted, and in pursuance thereof, on the 24th of February, the justice entered a judgment against the defendants for the amount of the note and interest and costs, and also, after hearing proof, as the justice's docket of February 24th recites, for \$50 attorney's fee in favor of plaintiff. So it appears that the defendants, on the 16th of February, obtained, in pursuance to the verdict of a jury, a judgment in accordance with what they here contend that they claimed; that is, that they should pay the note, with the interest, and that they should not pay the costs of the action. It then further appears that the justice, in effect, on a later day (February 24th), set aside the judgment which he had rendered on the 16th of February in accordance with this verdict, and gave a so-called judgment for the plaintiff for the whole amount, with costs and an attorney fee of \$50. The defendants thereupon applied to the district court for a writ of certiorari to review the action of the justice of the 24th of February; their claim being that he exceeded his jurisdiction in giving the judgment of that date, and that there was no appeal therefrom, nor any plain, speedy, and adequate remedy. Code Civ. Proc. \$ 555. Upon the hearing of the certic-

rari matter in the district court, that court dismissed the writ, and affirmed the judgment of the justice of the peace of February 24th. From that judgment of the district court this appeal is taken. The questions now before this court are, did the justice of the peace, in rendering the judgment of February 24th, exceed his jurisdiction? And, if so, was there no appeal from that judgment? And was there no plain, speedy, and adequate remedy, other than by certiorari?

Henry C. Stiff, for appellants. Murray & Musgrave and Geo. W. Reeves, for respondent.

DE WITT, J. (after stating the facts). This case is in fact an action ex relatione, in which the relators are A. P. Johnson and another, and the respondent is J. F. Case, a justice of the peace, although the papers in the court below were entitled Johnson et al. v. Case. Territory v. Potts, 3 Mont. 364.

Section 794 of the Code of Civil Procedure provides, in reference to justice courts: "Upon a verdict by a jury the justice shall immediately render judgment accordingly." In the case at bar the justice followed this statute; and in accordance with the verdict of the jury, and on the same day, to wit, February 16th, he entered judgment for the claim and interest against defendants, and judgment for costs against the plaintiff. motion of plaintiff, on February 24th, the justice undertook to partially set aside the judgment above described, and thereupon enter another judgment. This attempted judgment of February 24th varied from the judgment of February 16th, in that it added to the judgment against defendants an attorney's fee for the plaintiff, and also taxed the costs against the defendants, which was contrary to the verdict of the jury, and contrary to the judgment of February 16th. This was not done upon a new trial. A new trial was not applied for, nor granted, nor had. The action of the justice was simply a setting aside of the verdict of the jury as to costs, and the judgment in accordance therewith, and the entering of another and different judgment as to the costs, with the attorney's fee added to the judgment for plaintiff, without any further or other trial. For convenience in referring to the action of the justice, we will call the judgment of February 16th the first judgment, and the action of the court of February 24th the second judgment. As we understand this case, all that was sought to be attacked and overthrown by the writ of certiorari in the district court was the second judgment. No attack was, or ever has been, made upon the first judgment, except the action of the justice of February 24th. The issue and contention upon the trial on February 16th were solely as to the costs, as defendants admitted their liability upon the demand and interest. It is quite likely that that issue was not properly

made, and that the pleadings were such, and defendants' alleged tender was such, that the judgment of February 16th, in favor of defendants for costs, was erroneous. But, upon the application for the writ of certiorari, no one complained of the first judgment. The question was wheher the justice had jurisdiction to render the second judgment, and to that inquiry, we think, we should address ourselves.

The statute provides that "upon a verdict by a jury, the justice shall immediately render judgment accordingly." Code Civ. Proc. "When the prevailing party is entitled § 79**4**. to costs * * * the justice shall add their amount to the verdict." Id. § 799. As the case was tried to the justice the "prevailing party" was, in effect, the defendants, i. e. the defendants prevailed in the contention. The only contention was as to the costs. In this, defendants prevailed, i. e. the verdict was in their favor. The justice rendered judgment in accordance with the verdict, and in favor of defendants for costs. The word "immediately," as used in the statute above, has often been construed by courts. It has sometimes been construed as liberally as to mean 24 hours. But we have not observed that it has ever been construed as 8 days. Now, if the justice is to immediately render judgment upon the verdict of the jury (section 794), and if he is to add the costs to the verdict (section 799), it would seem to be in contemplation that the question of who was to pay costs was something determinable upon the return of the verdict, and the immediate rendering of judgment; that is, we say that the question of, against whom the judgment for costs is to be, seems to be determinable with the general verdict. We do not think that we can be understood as holding that a justice has no jurisdiction or power after judgment to add an omitted item of costs, or cut out an item wrongly and inadvertently taxed. Such questions we do not understand are now before us, and upon them we express no opinion. What we are considering is the matter of a verdict and judgment upon the question of who shall pay the costs,-not what the costs should be, in items. And. the matter of who shall pay the costs being adjudged by a justice in accordance with the verdict of a jury (section 794), has the justice jurisdiction, eight days afterwards, to set aside that judgment, and readjudge the costs against another party? We understand that to be the question before us.

On February 18th there was a judgment in favor of defendants, for their costs. Plaintiff did not attempt an appeal from this judgment. It was rendered by the justice upon the verdict of a jury. Code Civ. Proc. § 794. We are of opinion that we should not hold, under the circumstances of this case, that the costs were simply an incident of the judgment in the justice court, and, therefore, that the justice could add them eight days after the trial. Such view was not presented

by counsel for the justice, who appeared and argued the case in this court. Whatever may be suggested about costs being incidental to the judgment occurs to us as scarcely applicable to this case, where the costs, instead of being an incident, were in fact the only contention which was tried; improperly tried, perhaps; the issue badly pleaded, probably. But still it was the only contention tried, and therefore seems not quite properly called, in this case, "incidental." The verdict and judgment for costs in favor of defendants was separate and independent, and was not attached to any other judgment. It does not, therefore, seem to be appropriately called "incidental." We are of opinion that the proceeding of the justice in rendering the judgment of February 24th was clearly beyond his jurisdiction. Code Civ. Proc. § 794; Winter v. Fitzpatrick, 35 Cal. 269; Weimmer v. Sutherland, 74 Cal. 343, 15 Pac. 849; Fox v. Meacham, 6 Neb. 530; Foist v. Coppin. 35 Ind. 471; Foster v. Alden, 21 Mich. 507; Stephens v. Santee, 49 N. Y. 35; Hamill v. Champlin, 12 R. I. 124; People v. Delaware Common Pleas, 18 Wend. 558; Corthell v. Mead (Colo. Sup.) 35 Pac. 741. In the Colorado case last cited, it is held that, when a justice enters judgment on a verdict of a jury, his act is simply ministerial, and not judicial. That case further remarks: "The judgment being entered according to the verdict, the aggrieved party may appeal; but the justice has no authority to render any judgment contrary to the verdict, and, if he does so, such judgment may be regarded as a nullity. Any other doctrine would involve proceedings in justices' courts in troublesome, expensive, and vexatious delays, and would greatly hinder and embarrass the administration of justice. Freem. Judgm. § 53a; High, Extr. Rem. §§ 235-242."

The attempted judgment of February 24th was therefore void. Then the question remaining for our consideration is, can that judgment be reached and overturned upon a writ of certiorari? The respondent contends that an appeal lies to the district court from the justice court, from such judgment, and cites Ducheneau v. House, 10 Pac. 427, 4 Utah, 363; Saunders v. Seed Co. (Utah) 24 Pac. 532; Trustees v. Shepherd (III. Sup.) 28 N. E. 1073; Bank v. McKee, (S. D.) 50 N. W. 1057; Livermore v. Campbell, 52 Cal. 75; Fox v. Nachtsheim, 3 Wash. St. 684, 29 Pac. 140. He therefore contends that if an appeal lay from the judgment of the justice of February 24th the certiorari was properly dismissed by the district court. Hayes v. District Court, 11 Mont. 225, 28 Pac. 259. But let us examine whether, in fact and in substance, there is an appeal which reaches the attempted judgment of February 24th. Anderson's Law Dictionary defines an "appeal" as, "To remove a cause to a higher court for review and retrial." In general terms, an appeal is a resort to an upper court, to review the action of a lower

court. In the justice court, in this case, there were two records, each of which is called in the argument a "judgment." was the first judgment, of February 16th; the other was the second or attempted judgment, of February 24th. Of the former, the defendants had no complaint. The latter was their grievance, which they wished to have righted. If the defendants could have appealed from the second judgment, and if they could have had that action of the justice reviewed, and if they could have had the district court decide whether the justice of the peace was right or wrong in his action of February 24th, and if, it appearing he was wrong in that respect, the district court could have reversed that wrongful action, and have sent the case back with directions to the justice to wipe out the attempted judgment of February 24th, and leave defendants as they ought to have been ieft by the justice (that is, with the judgment of February 16th standing until it was properly attacked), then, if such could have been the result of the appeal by the defendants from the justice's to the district court, the defendants would have had an appeal in substance as well as in name,-an appeal which would have reached the grievance which they claimed to have suffered. But an appeal to the district court would have wrought out no such result as above suggested. Had the defendants appealed, the district court would never have reviewed the pretended judgment of February 24th. The case would have been tried de novo. attempted judgment of February 24th and the judgment of February 16th would have each been ignored, and the matter would have been tried de novo in the district court. There would have been a retrial in that court of the merits of the case. There would not have been a review of the performance of February 24th. The latter, the defendants wanted; the former, they did not. They would therefore get what they did not want, which would be an injury to them, and would be deprived of that which they sought to obtain. They would ask for bread, and receive a stone. State v. Evans, 13 Mont. ---, 33 Pac. 1010. If it be suggested that an appeal by defendants from the judgment of February 24th would obtain for them a review of the determination of the question of who should pay the costs of the action in the justice's court, it may be replied that defendants had obtained a judgment in their favor once (February 16th) upon that subject (a judgment which had been set aside by the justice without jurisdiction), and, if there were appealing to do, defendants had the right to look to plaintiff to assume that burden. It is said in the Colorado case, cited above: "Did petitioners have a plain, speedy, and adequate remedy, by the ordinary course of law, for the action of the justice in refusing to enter judgment upon their verdict? It is

urged that their remedy was by appeal, but this view is not sustained by sound reasor. nor by the weight of authority. As we have seen, the justice, in assuming to arrest judgment upon the verdict, and in dismissing the case against claimants, acted wholly without authority. Even if the claimants could have appealed from the entry of such orders, such a remedy would not have been adequate. They had tried and won their cause, and were entitled to the fruits of their victory. Why should they be required unnecessarily to assume the expense, trouble, and hazard of another trial? Judgment should have been entered upon the verdict, and then the burden of an appeal, if any had been taken, would have fallen upon the plaintiffs. The taking of an appeal is a matter of some inconvenience and hardship. It involves the giving of a bond, with surety. and the advancement of costs, as well as the hazard of another trial. A remedy, there fore, which required the claimants, rather than the plaintiffs, to take an appeal, was not adequate. Besides, if the judgment had been entered for the claimants, it is not certain that any appeal would have been tak-Corthell v. Mead, 35 Pac. 743. It is said by the supreme court of California. as to another matter, but of kindred nature: "A mandate that the superior court proceed to a hearing of the appeal on the merits, or to a retrial of the issues, would not annul, but simply ignore, the order dismissing the appeal. The order must first be annulled by a direct proceeding; that is, by certiorari. Such is the remedy when the court has entered a judgment or made an order in excess of jurisdiction." Levy v. Superior Court, 66 Cal. 202, 5 Pac. 353. So, in the case at bar, by an appeal the defendants in the justice court would attack and destroy that which was not to them a grievance, but rather a benefit; that is, the judgment of February 16th. And they would never be able to attack, or have reviewed, the grievance which they sought to appeal from, and which, in name and in shadow, they would appeal from; that is, the attempted judgment of February 24th. We are satisfied that such an appeal would be wholly unsubstantial. It would not be a review or retrial of the matter complained of. See definitions of "appeal," supra. Its only characteristic of an appeal would be its name. It is said in Bank v. McKee, supra: "To justify the issuance of the writ, there must not only appear an excess of jurisdiction, but that there is no appeal, or other adequate remedy. If the judgment complained of could have been brought to this court by appeal, and the question of jurisdiction determined in such proceeding, that fact alone would prevent the issuance of the writ. Upon this point the statute could hardly be plainer. The evident design of the statute is to make appeal the ordinary method of bringing cases up for review, and certiorari

an extraordinary method, to be resorted to only when necessary to save rights which would otherwise be lost." We are of opinion that the case at bar is just such a one as is suggested in the closing words of that South Dakota case. The certiorari before us in this case is necessary "to save rights which would otherwise be lost." It is necessary to save to the defendants in the justice court the right to have the illegal action of the justice on February 24th obliterated and destroyed, and, moreover, to have it destroyed without carrying down in such destruction the judgment of February 16th. Such right of defendants to demolish the illegal judgment of February 24th, and preserve the judgment of February 16th, could not be saved by an appeal on the part of the defendants, and such right could be saved by this writ of certiorari. Fox v. Nachtsheim, supra; Paul v. Armstrong, 1 Nev. 95.

The result of these views is that we are of opinion that, conceding that an appeal did lie from the justice court to the district court, yet that such an appeal was one in name only, and was not an appeal in substance or in fact, as reaching to the griev-Certiorari was therefore an appropriate remedy against the justice. The judgment of the district court, dismissing the writ of certiorari and affirming the judgment of the justice, is reversed, and the case is remanded, with instructions to the district court to sustain the writ of certiorari, and, in pursuance thereto, to annul the judgment which the justice of the peace attempted to render and enter on February 24th. versed.

PEMBERTON, C. J. I concur in the conclusion.

HARWOOD, J. (dissenting). Viewed in the light of the facts disclosed by the record. it seems to me the foregoing is a remarkable treatment and determination of this case. The authorities cited and quoted are undoubtedly correct in affirming that a justice of the peace is bound to enter judgment according to the verdict returned by the jury upon the issues involved in a case submitted to a jury. I do not understand that there is a dispute, or a difference of opinion, upon that proposition. Nor do I suppose the learned judge of the district court, whose decision is, by the foregoing opinion, declared erroneous, and ordered reversed, would hesitate a moment to so hold, upon such a point being presented. My impression is that a reporter preparing the foregoing opinion for publication would note, as his syllabus, that: "A justice of the peace must enter judgment, in a case tried in his court, according to the verdict of the jury returned on the issues presented; and a judgment entered contrary thereto will be annulled by a higher court on writ of certiorari. Judgment of the district court, holding otherwise, reversed." And I presume it i

would be a matter of some astonishment to those reading the majority opinion, and regarding the case from the impression thereby conveyed, that the learned judge of the district court should have fallen into such palpable error, and a matter of more astonishment that there should be dissension in this court on so plain and simple a proposition, especially in the light of the foregoing exposition. But notwithstanding a syllabus to the effect above stated would, as I think, express the impression naturally derived from the foregoing treatment, and state a correct conclusion of law upon a hypothetical proposition of fact, I cannot subscribe thereto, as applicable to determine the case at bar, because, on submission of the opinion for concurrence, my examination of the record disclosed what seemed to me a state of facts showing an entirely different case than that manifestly proceeded upon in reaching the conclusion announced. This led to a very thorough canvass and discussion, in the counsels of this court, of the facts disclosed by the record. But to my surprise, not finding any facts reconcilable to the assumptions of the majority opinion, the same was nevertheless adhered to, as originally determined upon; and, evidently to support the same in point of fact, a statement of the case has been prefixed thereto, which purports to give the facts upon which the determination of the majority, reversing the district court, is based. Therein, after briefly setting forth the nature of the proceedings in the justice's court, the review and affirmance thereof on writ of certiorari by the district court, and the appeal therefrom to this court, it is stated that "the defendants in that case (relators herein) now contend that they pleaded in that case what they claimed was a tender of the amount of the promissory note, with interest, made before the commencement of the action." The same assumption is also reiterated in that statement of the case, as follows: "So it appears that defendants, on the 16th of February, obtained, in pursuance of the verdict of the jury, the judgment in accordance with what they here contend that they claimed; that is, that they should pay the note, with interest, and that they should not pay the costs of the action." From this it plainly appears that the majority, according to the statement prefixed to their opinion, proceed not upon what the record shows defendants pleaded in the case,—although the pleadings are entirely in writing, prepared by counsei of the respective parties, and fully set forth in the record,-but they proceed upon the assertion that defendants "now contend that they pleaded in that case what they claimed was a tender," or, as they secondly assert in the statement, "what they here contend they claimed; that is, that they should pay the note, with interest, and that they should not pay the costs of the action."

The taxation of costs is the only thing involved in this case; and the importantthe vital-point upon which this decision turns is whether defendants pleaded a tender in the justice's court. Indeed, that is really the only fact stated in the majority statement, outside of the mere mention of the nature of the case, and how it came to this court; and that important proposition as to defendants' plea of tender is reiterated in the majority statement of the case. Now, if the record on file in this case showed that defendants pleaded in the justice's court a tender prior to the commencement of the action, and that they followed it up, when the action was brought, by depositing in court the amount due, as required by section 504 of the Code of Civil Procedure in such cases, it would thereby clearly appear that the ruling of the district court was wrong, and ought to be reversed; and there would not be a moment's dissension on my part from the majority decision to that effect. On the other hand, if the record shows the contrary, the majority of this court proceed upon an hypothesis which contradicts the record, and the decision of the majority is utterly wrong and defenseless, and the district court was right. But if the record, which contains the pleadings, disclose that defendants pleaded facts showing a tender of payment prior to the commencement of the action, why not so state in unequivocal language? Wherefore is it said in the majority statement that defendants "now" and "here" "contend" that they did somethingthat defendants pleaded a tender-in a particular wherein the record discloses just what defendants pleaded? That fashion of statement, it seems to me, would appear extraordinary in any statement of facts upon which depended the solemn determination of the rights of litigants, but especially so in respect to pleadings prepared by counselors at law, in writing, which are set forth in the record. Even if the pleadings in the justice's court had been stated orally, the law requires the same to be noted by the justice in his docket (section 770, Code Civ. Proc.), and the docket entries are set forth in the record. Herein is the vital point on which the decision ought to and does turn,the point of contention, and the one in respect to which the record was carefully scrutinized and discussed. And an examination of the record discloses that it does not show either that defendants pleaded in the justice's court a tender of payment prior to the action, or that they followed up any such "contended" tender by deposit in court of the amount admitted to be due, as required by statute in case a tender had been made. Code Civ. Proc. § 504. The majority statement of facts does not come into direct conflict with the record, because that statement, as we have seen, asserts only that defendants "here contend" that they pleaded a tender. Forbearing comment, it is sufficient to bring to view these conditions respecting the treatment of the case in this court to show the point and cause of dissension. I therefore proceed to an examination of the case as shown by the record.

It appears from the proceedings disclosed by the record in this case that an action was commenced in the justice's court of J. F. Case, justice of the peace in Missoula county, by Edmund Giggy, plaintiff, against A. P. Johnson and J. H. Bell, defendants, to enforce payment of a promissory note. The complaint in the action sets forth the execution and delivery of the promissory note by defendants, whereby they promise to pay B. F. Buffum \$150, with interest at a rate stated; the assignment and transfer of said note to plaintiff; the nonpayment thereof; that said note provided for recovery of reasonable attorney's fees in case of its enforcement by action, and that \$25 was a reasonable fee for the prosecution of this action to enforce payment thereof,-and demands judgment for the amount of the note. with interest and said attorney's fee and costs of suit. Defendants answered, admitting the execution and delivery of said note, and the indebtedness thereby evidenced, but alleged that on a certain date, before the commencement of the action, at a certain place in Missoula county, defendant Johnson (quoting from the answer) "tendered to plaintiff, in lawful money of the United States, the full amount then due upon said note, less the sum of \$22.16, then owing and due to Johnson by said plaintiff, but that plaintiff then and there refused to accept the same. And defendants further allege that on the 13th of February, 1892, defendant Johnson recovered judgment in the justice's court in and for," etc., "* • • in the sum of \$22.16, and \$24 costs of suit, and that no part of said judgment has been paid; that said A. P. Johnson is willing, and hereby consents, that said judgment be applied as a setoff against the demand of plaintiff. Defendants further allege that they, each of them, are willing, and now offer, that judgment be entered against them in this action for the sum of \$150, principal of the note sued upon, with interest thereon from,' "* * * to the present date, without costs, and defendants demand judgment against plaintiff for their costs herein expended." This is the answer of defendants, as shown by the record. There is no denial that the note provided for recovery of reasonable fees for services of plaintiff's attorney in prosecuting an action to enforce payment thereof, or that \$25 was a reasonable fee for such services. It appears that the justice, on motion of plaintiff, struck out of said answer the allegations therein relating to recovery of said judgment against plaintiff by defendant Johnson for \$22.16, and \$24 costs. As the pleadings then stood, plaintiff alleged, and defendants admitted, the indebtedness represented by said promissory note, that it was due and unpaid, and that plaintiff ought

to have judgment (quoting from the answer) "for the sum of \$150, principal of the note sued upon, with interest," as stipulated in the note, "to the present date." The facts alleged as to tender show no legal tender whatever. Defendants' counsel plainly recognize this, for having alleged the facts about Johnson's claim against plaintiff for \$22.16 "damages," and tender of payment of the amount due on the note, less that claim for damages, and recovery of judgment against plaintiff by Johnson in the justice's court, for that amount of damages,-having interpolated all those facts in the case,defendants manifestly do not rely upon them as a legal tender, because they close their answer with an offer to allow judgment for the whole amount of the promissory note, "with interest to the present date." Interest would have stopped at the date of tender, had a legal tender been made. A tender less an amount of damages demanded by the debtor from the creditor would not ordinarily be a good legal tender at all, because the creditor would not be bound to accede to the opinion of the other as to the amount of damages. Even after the demand for damages had been fixed by judgment in the justice's court, it is not relied on as an offset; for it is expressly shown in the answer that defendants offered to have judgment entered against them for the full amount of the note, with interest to date of judgment, and the alleged facts as to judgment for damages were stricken out of the answer. Therefore, it left the answer of defendants, with the allegation as to tendering payment, less said damages, followed by an offer to allow judgment to be entered against defendants for the full amount of plaintiff's claim, with interest to date, but "without costs." Now, while the answer failed en-Now, while the answer failed entirely to plead a legal tender, and the majority of this court do not affirm that the facts alleged in the answer constituted a legal tender, but cover the point by setting down in the statement of the case that defendants "here contend" that they pleaded a tender, still, for the sake of great liberality in viewing defendants' position, I may grant that, in so far as merely offering payment previous to the action, the facts alleged in the answer constituted so much of a tender. Nevertheless, this bare offer of payment was insufficient to throw the burden of costs on plaintiff, unless defendants brought the amount due into court, and deposited the same there for plaintiff, according to the requirements of section 504 of the Code of Civil Procedure. It is not pretended that any one ever "contended" that was done. This is a provision of statute which requires that where previous conder is alleged the amount due shall be brought into court for plaintiff. It is reasonable and just, too. In such a case there is absolutely no reason for court proceedings; no reason for summons, trial, or execution. which accrue court costs. The money is laid down in court, and, if previous!

tender is found to have been made, plaintiff takes payment of the debt by taking the money deposited in court, without entry of judgment or necessity for execution, and the costs are taxed against him. That is the only way to put the parties on a proper basis to rightfully compel plaintiff to pay the costs of an action. Should defendant be allowed to come into court, and say that upon a certain time he tendered payment of the debt, and then keep the money in his pocket, and say, "I am willing the plaintiff shall take judgment, and get what he can out of it, and hunt me with an execution in the hands of an officer of the law, and collect the judgment, if he can, at great expense, but the plaintiff shall pay the costs in the case?" The statute plainly answers this question in the negative, and the justice of the peace and the district court followed the plain provision of the statute; but the majority of this court overrule them, however, without mentioning the facts shown, or the disregarded statute.

Turning to another view of the law, as ap plied to the facts disclosed by the record, it should be noted that the statute provides that. "If the defendant, at any time before trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs there accrued, but if he do not accept such offer before the trial, and fail to recover in the action a sum larger than the one mentioned in the offer, he shall not recover any costs accruing after the offer was made, but the offer and failure to accept shall not be given in evidence to affect the recovery otherwise than as to costs." Code Civ. Proc. \$ 797. Defendants offered, as we have seen, to have judgment entered against them for the full amount claimed by plaintiff; so there was not, nor could there be, any dispute or trial as to the amount for which plaintiff should have judgment. But defendants, without having pleaded any tender, or depositing anything in court, as required by section 504 of the statute in case they "contended" here, as the majority statement asserts that they pleaded, a tender prior to the action; and without having any offset, or relying upon any, defendants confessed that plaintiff ought to have judgment for all he asked, and offered to allow judgment to be entered for the full amount demanded, not with costs then accrued, as the statute provides, but attached to their offer a condition that judgment might be entered against them, "without costs," and that plaintiff should pay the costs. In this attitude defendants stood in court, and demanded a jury trial, as disclosed by the record in this case; and a jury was impaneled, and the constable sent for witnesses, and some sort of a trial ensued, upon the demand of these defendants, where by costs exceeding \$100 accrued, as shown by the record, when in fact there was no issue whatever to try. It certainly did not

require a jury to find that plaintiff should recover the amount of his note, "with interest to present date," when that was confessed by the written answer of defendants, nor to try the validity of an alleged offset which, although alleged, was not relied on, and was stricken out and abandoned. Nor was there need of a jury to try the question of a tender which had not been alleged, nor made good by a compliance with the statute if it had been alleged. There was absolutely nothing presented in the case to try. And, observe, the majority of this court do not venture, in the face of the record, to affirm the contrary. Nevertheless, defendants demanded a jury trial; and the upshot of the wrangle before the jury was that a verdict was returned to the effect that plaintiff have judgment for the amount of said note and interest, already confessed, but added that the costs be taxed against plaintiff. Thereupon, on the 16th of February, the justice entered judgment in favor of plaintiff for recovery of the amount of the note (\$150) and interest. according to its terms, but taxed the costs which had accrued (exceeding \$100) against plaintiff. Thereafter, on the 24th of the same month, plaintiff's counsel moved the justice to tax the costs of said action against defendants, on the ground that the law required the justice to tax the costs of an action in favor of the party prevailing. Code Civ. Proc. § 828. This motion related entirely to the taxation of costs, and did not ask the justice to either set aside or re-enter, or otherwise make any entry touching, the judgment for the principal recovery. The motion is as follows: "Now comes the above-named plaintiff, by his attorneys, and moves the court to correct the verdict of the jury in the above-entitled action, and the judgment herein rendered by the court upon said verdict, and tax the costs of said action to the defendants herein, for the reason that said verdict is contrary to law, and not warranted by the statutes of the state of Montana: and. second, for the reason that said verdict, as returned, in so far as it relates to the costs, is contrary to law, and absolutely void." It is made to appear in the majority statement and opinion that the justice of the peace, "in effect, on a later day (February 24th), set aside the judgment which he had rendered on the 16th of February." The record contains the justice's docket entry made on the 24th, and therein I am unable to find any provision, either in terms or "in effect," setting aside the judgment for the principal recovery in favor of plaintiff, entered on the 16th. That docket entry deals with the motion to tax the costs to defendants, and grants the same, and then orders that plaintiff recover "of defendants the sum of \$150, with interest from the date of said note until paid, together with costs of the action." Instead of setting aside the judgment of February 16th, this later docket entry, which followed the first, reaffirms the

judgment for the principal recovery, saying that plaintiff should recover the amount demanded and confessed, together with "his costs of this action." Now, had the justice of the peace jurisdiction to tax the costs, as required by law and the facts appearing in the case, eight days after entry of judgment for recovery of the debt claimed by plaintiff? When the real point for consideration is brought into view, as disclosed by the record, it is found to relate merely to the taxation of costs, which is a subject generally held to be incidental to the main recovery, and the costs provided by law are to be taxed as the law directs. The statute regulating practice in justice's courts provides that "costs shall be allowed the prevailing party in the justice's court." Code Civ. Proc. § 828. But this provision, of course, is to be construed in harmony with section 797, which provides that the defendant may, at any time before the trial, offer, in writing, to allow judgment to be taken against him for a specified sum; and, if no greater sum is recovered in the action, he shall not be liable for the costs accruing after such offer is made. Section 799 provides that, "when the prevailing party is entitled to costs by this chapter, the justice shall add their amount to the verdict." These provisions of statute gave the justice jurisdiction to tax the costs against defendants, when applied to the facts in the case as admitted. The plaintiff prevailed completely in this case, without the necessity of trial or verdict, as the pleadings stood. I observe with astonishment that in the majority opinion it is asserted that "defendants prevailed." If courts are instituted merely as a place for the propagation of costs on the "contention" of a litigant in some matter outside of the record (without foundation, too, because in this case it was confessed that plaintiff ought to have judgment for all he asked),—if courts are instituted as a place for that purpose,-defendants prevailed, as the majority opinion is pleased to assert. But if the court is instituted for the purpose, among others, of enforcing delinquent obligations,-to give judgment therefor, especially where defendants confess, by solemn pleading in writing, that plaintiff is entitled to all he asks,-and to see that the provisions of statute are enforced and observed in such matters, then plaintiff prevailed. But I do not propose to dwell upon such a proposition. If, where a plaintiff brings an action in court, asking for a judgment for the amount of an obligation due, and the defendants, by written answer, confess that plaintil ought to have judgment for the full amount asked, and show no prior tender of payment, nor even pretend to rely thereon by paying the money into court, and there is nothing whatever presented for trial,-if, in such a case as that, it is to be asserted that defendants prevailed, I am willing to leave such assertion without comment. The statute above referred to, applied to the facts disclosed by

the record, gave the justice jurisdiction to tax the legal costs of the action to defendants. The justice followed the law, with the exception of taxing one item of cost, not authorized by law, which will be noticed below. The district court was right in affirming the proceedings of the justice, except as to the item of cost mentioned.

Moreover, the district court properly dismissed the writ of certiorari, whereby the proceedings of the justice of the peace were brought up for review, on the ground that relators had a remedy by appeal, if dissatisfied with the action of the justice in taxing the costs as part of the judgment against them in his court. If so, certiorari could not be invoked to review and correct, even if erroneous, said action of the justice in the adjudication in his court. The statute (section 822, Code Civ. Proc.) provides that "any party dissatisfied with a judgment rendered in a justice's court may appeal therefrom to the district court of the county at any time within thirty days after the rendition of the judgment." The statute regulating the use of the writ of certiorari (section 555, Id.) provides that "the writ shall be granted in all cases when an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction of such tribunal, board or officer, and there is no appeal, nor in the judgment of the court any plain, speedy and adequate remedy." Relators were evidently dissatisfied as to the costs taxed against them as part of the judgment in the justice's court, resulting from the adjudication of the case therein. The taxation of costs allowed by law belonged to the adjudication, and depended upon the facts shown therein; and in no other way could it be determined by any court whether the justice was right or wrong in taxing the costs against the defendants. It is true, in this particular case, the facts are all shown and admitted by the pleadings, and thereby the propriety of taxing costs against defendants appears by looking at the pleadings. This, however, discloses the facts, without the necessity of the trial of any disputed facts; but it yet remains for the court to apply the law to the facts in determining the case, both as to costs as well as to the principal judgment. In the case of State v. Evans, 13 Mont. —, 33 Pac. 1010, it was held that the action of the justice there shown could not have been corrected on appeal; hence, the jurisdictional question involved in the action of the justice was properly reviewable by a writ of certiorari. Why? Because on appeal the appellate court would adjudicate and determine the issues in the case by trial de novo; but such trial of the issues involved in the case would not include the review or correction of the irregularities or unwarranted action on the part of the justice as to forfeiting defendant's bail money deposited to guaranty her appearance, which was in excess of the justice's jurisdiction, and was not involved in the issues, elther of fact or law, to be determined on appeal, if appeal had been taken. But here, in the present case, it is insisted that relators have an adequate remedy by appeal, because the action of the justice, complained of, was directly concerned with the adjudication of the case, and depended upon the adjudication and determination thereof, which would also come into adjudication, and necessarily be determined by the appellate court on appeal. This seems to be true. The appellate court, on appeal, would determine everything in dispute involved in the issue, and apply the law to the facts found or admitted. In thus passing judgment on the appeal and trial de novo, the appellate court must necessarily also assess costs against the parties subject thereto according to the requirements of law and the facts shown, as part of the judgment; and by appeal the party dissatisfled with the action of the justice in taxing the costs would clothe the district court with power to determine the question as to who should be subjected to the costs of the case. It cannot be denied that defendants had the right of appeal, and that the action of the justice, complained of, would thereby have been placed directly within the adjudication of the district court, for such determination as the law and the facts demanded. If that be true, it follows, without question, that certiorari would not lie, because of the remedy available by appeal.

The foregoing discussion relates entirely to the question of taxation of the costs provided by law, as shown by the procee. ags in the action, and to the jurisdiction of the justice to tax such costs as directed by statute in favor of the party prevailing in the principal recovery. If the justice of the peace should add to the judgment any sum, under the guise of costs, not authorized by law and the proceedings, as legitimate costs in the case, such as taxation of an attorney's fee, where the pleadings showed no foundation therefor, his excessive action in that respect would undoubtedly be subject to correction through the writ of certiorari, because such element added to the judgment would be found, on review of the proceedings, to be entirely foreign to the case, and hence in excess of the jurisdiction of the justice,-as much so as though he should adjudge any other recovery in no way pertaining to the case presented. There appears in this case such an element, for the return of the justice to the writ of certiorari shows that on the 24th of February, when he considered the motion, and determined to assess the costs of the action to defendants, he also, on motion, inquired, by hearing of evidence, as to what would be a reasonable fee for services of plaintiff's attorney in prosecuting the action to enforce collection of said note, and determined that \$50 was a reasonable fee for such services, and included that sum in the costs taxed against defendants. As already shown, defendants did not deny the allega-

tion of the complaint that the note provided for the recovery of a reasonable attorney fee in case the obligation was enforced by action at law, nor that \$25, as alleged, was a reasonable fee for that service. No foundation appears for the assessment of any further sum in that respect; and such assessment, therefore, is entirely unwarranted, and in excess of the jurisdiction of the justice in the case. I think the district court should have modified the proceedings of the justice by eliminating from the assessment of costs the excessive sum of \$25 taxed as attorney fee. This point, however, may not have been brought to the attention of the district court. The case may have been argued in the district court wholly upon other points of contention, as it was here. And, with the modification mentioned, the rulings of the justice and of the district court were correct, as plainly appears when the case, as disclosed by the record, is examined and considered.

ATCHISON, T. & S. F. R. CO. v. SEELEY.

(Supreme Court of Kansas. July 6, 1894.)

ACTION AGAINST RAILROAD COMPANY-DEFECTIVE-LY LOADED CAR-FELLOW SERVANTS - BRAKE-MAN AND STATION AGENT-EVIDENCE.

1. A construction train was operating in 1. A construction train was operating in Missouri, carrying supplies along the line of the railroad. An open car was loaded with coal at a station, and upon the top of the load two smokestacks were loosely placed, subject to be shaken off by a jerk resulting from the starting or stopping of the train. The duty of loading such cars devolved upon the station agent, and not upon the trainmen, and it was the duty of the yard master, and, in his absence, that of the station agent to see that open cars were propersultations. station agent, to see that open cars were properly inspected and prepared to be put into the train for transportation. When the train reached the station, a brakeman was directed to hurry and couple the car ahead of the engine, so as to get out of the way of a coming train, and was then directed to hurry and get upon the front end of the car, and keep a lookout upon the track in the direction they were going, the car being pushed ahead of the engine to a siding a short distance away. In this position, and looking forward, his back was towards the loose smokestacks on top of the coal. While he was occupying this place, the engineer carelessly applied the air brake, the engineer carcassiy applied the air brake, cheeking the speed of the train, and jerking the coal car, so that the loose smokestacks pushed forward, and struck the brakeman upon the body, throwing him down under the wheels of the car, whereby he was badly injured. There was testimony that he had no knowledge or opportunity to know of the dangerous condition of the car. Upon a trial, the jury found that the injury resulted from the negligence of the company, and not from any want of care on the part of the brakeman. Held, that it was the duty of the company to properly prepare and inspect the car before it was turned over to the trainmen for transportation; and those who did prepare and inspect the same were not in the same grade of service with the trainmen, and they did not stand as to each other in the relation of fellow servants; and, further, that the company is liable for the negligence and resulting injury.

2. Evidence examined, and held to be sufficient to sustain the verdict of the jury.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by Alfred M. Seeley against the Atchison, Topeka & Santa Fe Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. A. Hurd, Robert Dunlap, and W. Littlefield, for plaintiff in error. A. Smith Devenney, for defendant in error.

JOHNSTON, J. This was an action brought by Alfred M. Seeley against the Atchison, Topeka & Santa Fe Railroad Company to recover damages for personal injuries alleged to have been sustained because of the negligence of the railroad company. In his petition he alleged that on April 2, 1889, he was in the employ of the Atchison, Topeka & Santa Fe Railroad Company, which operated and controlled a railroad extending from Kansas City to Chicago, known as the Chicago, Santa Fe & California Railroad Company. He acted in the capacity of brakeman on a construction train, and on the morning of April 2, 1889, the construction train, composed of several box cars, loaded with coal, with an engine attached, started from Coburn, Mo., in charge of a conductor, and when they reached the station of Courtney, in Missouri, the conductor and trainmen were ordered to attach to the train a coal car, loaded with coal, and upon which there were two round iron smokestacks, about 16 feet in length and two feet in diameter, and take the car so loaded with coal and the smokestacks to Wayne City, about 11/2 miles distant. In obedience to this direction, the car so loaded was attached in front of the engine, and, by order of the conductor, Seeley took his station on the top of the coal car, which was being pushed in advance of the engine, in order to signal the engineer when they approached the switch where the car was to be placed, when !t was his duty to leave the coal car and turn the switch. While he was thus at his post, and in the act of passing along the end of the coal car in front of one of the iron smokestacks, which were lying loosely on top of the coal, with his back towards the engineer, and exercising due care, the engineer, well knowing the plaintiff's dangerous position in front of the smokestacks, and not waiting for the usual and necessary signal from Seeley to slow up, as was his duty, carelessly applied the automatic air brake and air pump to his engine, and without any warning to plaintiff of his intention to do so, thereby checking the speed of the train and violently jerking the coal car, causing the smokestacks, which were lying loosely on the top of the car, to push forward, striking Seeley violently upon the breast and body, throwing 'im from the car, upon the rails in front of the train, and under the wheels of the car, whereby he was cut and badly bruised, his right leg was caught under the wheels, and crushed and mangled to such an extent that

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amputation near the knee joint was necessary in order to save his life, and that he was otherwise permanently injured, to his damage in the sum of \$15,000. It was alleged that the smokestacks were improperly and defectively loaded, being "unscotched" and unfastened on top of the coal, and that Seeley had no connection with the loading, and no knowledge of the negligent manner in which they were loaded, and was not guilty of any negligence which contributed to his injury. This negligence of the company is claimed to be the principal and proximate cause of the injury suffered. The answer of the defendant was-First, a general denial; next, that the common law was in force in Missouri, and that the injury was caused by negligence of the fellow servants of Seeley, or by his own carelessness or negligence.

Upon the trial, the jury found that on April 2, 1889, the Atchison, Topeka & Santa Fe Railroad Company was the lessee of and operated the Chicago, Santa Fe & California Railroad, and that Seeley was at that time in the employment of the lessee as brakeman. It was further found that the defendant company was guilty of negligence in loading the smokestacks upon the coal car; and, further, that the engine driver of the construction train was also guilty of a want of ordinary care in handling his train; but that the manner in which the smokestacks were loaded upon the car was the proximate cause of the injury. In answer to questions it was found that the conductor ordered Seeley to hurry up and couple the coal car in front of the engine, and to hurry and get upon the front end of the coal car, and keep a lookout ahead for danger until the place for switching should be reached; and that, in order to obey this order, he had to stand with his back to the smokestacks and to the engine, and therefore had no reasonable opportunity to observe the defectively loaded condition of the smokestacks or the dangerous position in which he stood. It was further found to be the duty of the yard master to inspect the loads of all open cars before such cars were put into the trains for transportation; and that such yard masters were employes of a higher grade than that of brakeman on a construction train; and that the defendant company knew, or could have known, by the exercise of reasonable diligence, that the smokestacks were dangerously loaded; and that, if they had been scotched or fastened in some manner to the car, Seeley would probably not have been injured. The jury found that Seeley was entitled to recover the aggregate amount of \$7,943.25, which was made up from three items,-\$350, for loss of time from April 2, 1880, to November 1, 1889; \$700, for the pain and bodily suffering endured since that date by reason of his injury; and \$6,893.25, for the permanent disability, including interest from April 2, 1889.

The railroad company alleges error, and contends that the evidence fails to show

that Seeley was in the employment of the Atchison, Topeka & Santa Fe Company when the injury occurred, but that it does conclusively show that he was in the employ of the Chicago, Santa Fe & California Railroad Company. There is testimony to the effect that the plaintiff in error had leased and was operating the Chicago, Santa Fe & California Railroad on April 2, 1889, when Seeley was injured, and also testimony that he and the other trainmen associated with him were in the employ of the Atchison Company as such lessee. It is true that there is much testimony tending to show that the Chicago road had not yet passed into the hands of the Atchison Company, and that the officers of the former had employed Seeley, and were still in the control of the road when he was injured. The form of the pay checks used tended to sustain this position. E. Wilder, however, who was secretary and treasurer of the Atchison Company, stated positively that the Chicago road had been leased to and was operated by the Atchison Company since the 1st of March, 1889, which was more than a month prior to the occurrence of the injury. Which one of the companies was controlling and operating the road was a question for the jury to settle, and, having been decided upon conflicting evidence, the controversy on that point is ended.

The principal contention in the case is that the injury was the result of the negligence of the fellow servants of Seeley, for which, at common law, the company was not liable. It was admitted at the trial that the common law was in force in Missouri where the injury occurred, and the decisions of the supreme court of that state were introduced in evidence, which showed that the common law in respect to the liability of the master has not been changed or modified by any statute of that state. The placing of the smokestacks upon the top of a loaded coal car, without fastenings or guards, was a clear case of negligence on the part of those who loaded them and those whose duty it was to inspect and prepare the car for transportation. The bed of the car was filled with coal, and the smokestacks lay loosely upon the top, subject to be shaken off by a jerk resulting from the starting or stopping of the train. Neither Seeley nor any of the trainmen associated with him loaded or assisted in loading the smokestacks upon the car, and he claims that he had no knowledge or opportunity to know that they were loose and unscotched. There was no yard master at the station of Courtney, and the duty of loading them, and seeing that they were properly loaded, devolved upon the station agent at that place. The car was already loaded, and was hurriedly placed in the train as soon as they reached the station of Courtney. If Seeley had inspected the car, he would readily have seen the dangerous condition of the smokestacks; but he accounts for his failure to notice the danger by the fact that the

top of the car was higher than his head, and by the urgent character of the orders given him by the conductor. He was told to hurry up and couple the car ahead of the engine, so as to get out of the way of another train that was following them, and was then told to hurry up and get on the front end of the car, and keep a lookout for anything that might appear upon the track. In this position, and looking forward, his back was towards the smokestacks, and hence he did not discover their condition or the peril he was in until one of them slipped and struck him upon the body. Taking the testimony of Seeley as true, it is enough to sustain the finding that he was not guilty of contributory negligence. He had a right to assume that the car was safely loaded and in a fit condition for transportation, and that the place of lookout which he was required to take on the end of the car was free from peril on account of the manner in which it was loaded. It was the positive duty of the company to safely load the car, and, before starting it, to inspect and see that it was in a safe condition for those who were required to handle it; and Seeley had a right to expect that it was properly prepared for shipment, had been duly inspected, and found to be in a suitable condition to be attached to the train. Whether he was aware of the condition of the car or under the circumstances should have observed its condition was a question for the jury to determine. From the testimony which he gives respecting his want of knowledge or opportunity to know of the danger, the positive command to hurry up so as to get out of the way of a coming train, and the order to keep a lookout in a direction which did not bring the danger within the range of his vision, it cannot be said that the finding of the jury with respect to his care is without support.

The question remains whether the company can be held liable for its negligence in failing to properly prepare and inspect the car before it was turned over to the trainmen for transportation. It is contended that those who inspected and made the car ready for transportation were the fellow servants of Seeley, and that he not only assumed the risk incidental to the nature and character of his work, but also assumed the risk of being injured through the negligence of a fellow servant. According to the testimony and findings, it was the duty of the yard master to inspect the loads of all open cars before they were put into trains for transportation; and it was also found that this officer is one who has authority to hire and discharge men under him, and that he was an employé of a higher grade of servsce than that of a brakeman on a construction train. It also appears that, in the absence of the yard master, the duty of preparing and inspecting cars belonged to the station agent. The fact that all these servants draw their pay from a common master, and are engaged together in carrying on his work, does not necessarily make them fellow servants. If it had been the duty of the trainmen to have loaded the car, and one of them had negligently done so, it might be held that the resulting injury was due to the negligence of a fellow servant; but in this case, although they were working for a common master, they were not engaged in the same grade of service. The trainmen had no part in the loading of this car, nor in the inspecting of it. It was the positive duty of the company to furnish suitable instrumentalities for the performance of the work, and a safe place in which to carry it on; and it has been held that "those employed by the master to provide or to keep in repair the place, or to supply the machinery and tools, for labor, are engaged in a different employment from those who are to use the place or appliances when provided, and they are not therefore, as to each other, fellow servants. In such case the one whose duty it is to provide and look after the safety of the place where the work is to be done represents the master, in such a sense that the latter is liable for his negligence." Sadowski v. Car Co., 84 Mich. 100, 47 N. W. 598. According to the record, the principal and promoting cause of the injury was the defective condition of the car furnished to the trainmen for transportation. If it had been properly inspected, the defect would have been remedied; and, although this duty was to be performed by a servant of the company, it was a duty which the company owed to Seeley and his associates, and it cannot be exonerated from liability because the duty was delegated to an agent or an employé. Whether they are fellow servants does not depend so much upon the grade or situation which each holds as upon the character of the work out of the negligent performance of which the injury arises. Although there is much diversity of opinion as to whether the negligence of inspectors and such employés as those who loaded and should have inspected the car can be attributed to the company, our own decisions, as well as the weight of authority, are to the effect that the employes in question in this case do not stand as to each other in the relation of fellow servants. In Railroad Co. v. Moore, 29 Kan. 644, it is said that, "at common law, a master assumes the duty towards his servant of exercising reasonable care and diligence to provide the servant with a reasonably safe place at which to work, with reasonably safe machinery, tools, and implements to work with, with reasonably safe materials to work upon, and with suitable and competent fellow servants to work with him; and, when the master had properly discharged these duties, then, at common law, the servant assumes all the risks and hazards incident to or attendant upon the exercise of the particular employment or the performance of the particular work, including those risks and hazards resulting from the possible negligence and carelessness of his fellow servants and coemployes. And, at common law, whenever the master delegates to any officer, servant, agent, or employe, high or low, the performance of any of the duties above mentioned, which really devolve upon the master himself, then such officer, servant, agent, or employé stands in the place of the master, and becomes a substitute for the master,-a vice principal,-and the master is liable for his acts or his negligence to the same extent as though the master himself had performed the acts or was guilty of the negligence." In Railroad Co. v. Moore, 31 Kan. 197, 1 Pac. 644, this doctrine was applied, and it was held that the duty of keeping the road in safe condition devolved upon the master, and that the company was liable for injuries resulting from the negligent performance of those duties by its servants or employés. same doctrine was applied in Railway Co. v. Fox, 31 Kan. 586, 3 Pac. 320, where it was held that the company was liable where an employé was injured in Missouri, through the negligence of a car repairer, and without fault of his own. In Railway Co. v. Weaver, 35 Kan. 420, 11 Pac. 408, it was held that a section foreman was not a coemplové with a person who was assisting in operating a railroad train for the same employer. In Railway Co. v. Dwyer, 36 Kan. 58, 12 Pac. 352, it was held that an inspector of cars is not a fellow servant with a brakeman operating such cars, within the meaning of that rule of the common law which exempts the master from liability for negligence between coemployés or fellow servants. In that case it was urged that, if the company had employed careful and competent inspectors, and had performed its whole duty, it would not be liable, even though the injury complained of was the result of their negligence, upon the ground that the inspectors were fellow servants of the brakemen. Chief Justice Horton declared that the law was otherwise in this state, and cited Long v. Railway Co., 65 Mo. 225, and Condon v. Railway Co., 78 Mo. 567, showing that the supreme court of Missouri entertained a like view. In Railway Co. v. Barber, 44 Kan. 612, 24 Pac. 969, it was ruled that it was the positive duty of a railroad company to inspect a freight car, and see that it was reasonably fit for service, and that the omission of this duty renders it liable for resulting injury to its employes.

As has been said, there are some duties which the company, as master, owes to its employés, from which it cannot relieve itself except by performance. The providing of a safe place for Seeley to work, and of serviceable and safe appliances and instrumentalities to be used in connection with his work, was a positive duty, and those who performed or should have performed the

same stand in the place of and represent the company. In Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, which is cited by the plaintiff in error, this doctrine was recognized to the fullest extent, although it to some extent modified the decision in Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. 184. As to positive duties of this character, it was held that the servant had "a right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore, it will be seen that the question turns rather on the character of the act than on the relations of the employés to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable therefor." In the Baugh Case the supreme court of the United States fully indorses the doctrine of Railroad Co. v. Moore, 29 Kan. 632, and quotes largely from that opinion as to the relations of the master to the servant and of the doctrine of fellow servants. In the recent case of Railway Co. v. Snyder, 14 Sup. Ct. 756, a brakeman in the employment of the company was alleged to have been injured through the negligence of an inspector, and it was held that they were not fellow servants, and that, under the circumstances, it was the duty of the company to see that the cars that were about to be drawn out upon the road were in a safe and proper condition, and that this duty could not be delegated by the company so as to exonerate it from liability to its servants for injuries resulting from omission to perform that duty, or through its negligent performance. It was held that "the duty of a railroad company to exercise reasonable care in furnishing adequately safe trains for the use of its employes is not discharged by simply using reasonable care to employ and retain only competent and diligent inspectors, but it is liable if its inspectors in fact fail to discover a defect which a reasonable examination would have disclosed." Aside from the consideration that it was the positive duty of the company to properly prepare and inspect the car for transportation in the train, it is also clear that those who were to perform that duty were not in the same grade or employment of the service as the brakeman on the train, and therefore could not, in either view, be held to be fellow servants. An authority is cited to the effect that, where the company has employed a competent inspector to see that the cars are properly loaded and in good condition, it

cannot be held liable for the negligence of the inspector in failing to observe that the car was improperly loaded. Dewey v. Rallroad Co. (Mich.) 56 N. W. 756. This authority is not satisfactory to us, nor in line with the decisions that have been cited. We are unable to see any reason for a distinction between the preparation and inspection of the car itself as a fit instrumentality to be placed in a train and the preparation and inspection of a loaded car to be placed in the train for transportation. Each is an instrumentality to be used in connection with the services necessary to be performed by the trainmen in its transportation, and no distinction between them is seen, so far as the obligation of the company or the safety of the employés engaged in handling it are concerned. The inspection in either case is made with reference to the same end, and the person to whom this duty is delegated stands in the place of the company, and the latter is responsible for his

The charge of the court is criticised, and while the instructions are voluminous, and involve many repetitions and some immaterial matter, we find nothing in them which is not in harmony with the views expressed, nor which can be held to be prejudicially erroneous. The judgment will be affirmed. All the justices concurring.

ORCHARD PLACE LAND CO. v. LEWIS. (Supreme Court of Kansas. July 6, 1894.)

GRANT OF NEW TRIAL-REVIEW ON APPEAL

Where the testimony at the trial is conflicting, and the trial court sets aside the verdict of the jury, and grants a new trial, this court will not undertake to weigh the evidence, but will affirm the order of the lower court.

(Syllabus by the Court.)

Error from district court, Wyandotte courty; O. L. Miller, Judge.

Action by S. M. Lewis against the Orchard Place Land Company and another. A verdict in favor of said company was set aside, and a new trial granted, and said company brings error. Affirmed.

Mills, Smith & Hobbs, for plaintiff in error. True & True, for defendant in error.

ALLEN, J. This case grew out of the same overflow of Splitlog creek as the cases of the City of Kansas City v. Brady, 52 Kan. 297, 34 Pac. 884, and City of Kansas City v. Slangstrom (Kan.) 36 Pac. 706. In this case, the jury rendered a verdict against the city of Kansas City only. The special findings of fact are very different from the findings in the other cases named. The court, on the application of the plaintiff, set aside the verdict in favor of the Orchard Place Land Company, and granted a new trial. Where the trial court sets aside a verdict based on conflicting evidence, and grants

a new trial, the order will not be disturbed by this court. McCreary v. Hart, 39 Kan. 216, 17 Pac. 839; Black v. Berry, 40 Kan. 489, 20 Pac. 194. The order of the court granting a new trial is affirmed. All the justices concurring.

BURRTON LAND & TOWN CO V. HANDY et al.

(Supreme Court of Kansas. July 6, 1894.)

EQUITY JURISDICTION—REPORMATION OF DEED.

1. The rule is that, where property has been included by mistake in a deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, a court of equity will interfere and correct the mistake.

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2. Where a grantee purchased from a grantor a fractional 80-acre tract of land subject to the right of way of the Union Pacific Railway Company, which, under an act of congress, was 400 feet in width, but the parties did not actually know the width of the right of way, and the conveyance, without conforming to the intent of the parties, included the right of way with covenants of general warranty, hdd, that the grantor was entitled to have the deed reformed so as to except therefrom the right of way, to which he had no title.

(Syllabus by the Court.)

Error from district court, Ellsworth county; W. G. Eastland, Judge.

Action by Jerome B. Handy against the Burrton Land & Town Company and the Ellsworth Loan & Investment Company. Judgment for plaintiff and for said loan and investment company, and the land and town company brings error. Modified.

On April 2, 1888, Jerome B. Handy commenced his action against the Burrton Land & Town Company and the Ellsworth Loan & Investment Company to recover \$1,662.50 upon a promissory note executed to Ruth A. Tarr on the 21st of May, 1887, with interest at 8 per cent, from that date, by the Burrton Land & Town Company, which note was afterwards transferred and assigned to the plaintiff, and also to foreclose a mortgage upon the north half of the southeast quarter, and the south half of the northeast quarter, of section 19, township 15, range 8, in Ellsworth county, executed by the land and town company to Mrs. Tarr to secure the note. The petition further alleged that the Ellsworth Loan & Investment Company claimed an interest or lien upon the mortgaged premises, but that the same was inferior to plaintiff's lien. The Elisworth Loan & Investment Company, having obtained a similar note from Mrs. Tarr, filed its answer and cross petition, praying for judgment upon the note held by it, and also to foreclose the mortgage given to secure the same. notes were given by the land and town company to Mrs. Tarr as part of the purchase price of the real estate purchased of her. After the commencement of this action, the

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Union Pacific Railway Company, in a case brought by it as plaintiff against the parties to this action, in the nature of ejectment, in the district court, obtained a judgment on April 2, 1889, for 200 feet of right of way on each side of the center of its railroad track over and across the real estate purchased, to secure the purchase money for which the notes were given. Handy, by his amended petition, in addition to the foreclosure of the mortgage, also alleged a mutual mistake in the execution of the deed given by Mrs. Tarr and her husband, Smith R. Tarr, to the Burrton Land & Town Company, and also of the mortgage, and asked to reform the instruments so as to except from the covenants thereof a right of way 400 feet in width, in favor of the Union Pacific Railway Company, over and across the real estate. The Burrton Land & Town Company alleged in its defense, by way of counterclaim, damages for a breach of the covenants of warranty of the deeds to the land purchased by it from Mrs. Tarr and her husband, in consequence of the railway company being the owner and in possession of 400 feet of right of way over and across the same. Trial had at the November term of the court for 1889, before the court with a jury. The jury returned a verdict in favor of Handy against the Burrton Land & Town Company for \$1,931.771/2, and also returned a like verdict in favor of the Ellsworth Loan & Investment Company. The jury answered the following questions, submitted upon the part of Jerome B. Handy and the Ellsworth Loan & Investment Company: "Q. At the time the Burrton Land & Town Company purchased the fractional 'eighty' in controversy, was the same occupied by the Tarrs, and used for farming and grazing purposes? A. It was. Q. At the time of the purchase of the land in controversy, was it well known and understood between the parties to such purchase and sale that the railroad ran through the fractional eighty? A. It was. Q. At the time of the purchase of the fractional eighty, was it discussed and understood that the Union Pacific Railway Company had a right of way through said fractional eighty? A. It was. Did the Burrton Land and Town Company purchase the said fractional eighty with the understanding and belief that they were buying the same subject to a right of way through the land? A. It did. Q. Did Ruth A. Tarr and Smith R. Tarr each sell the land with the intention of selling the same subject to the right of way through said eighty? A. They did. Q. Did the Burrton Land and Town Company make a proposition to the Tarrs that they would give \$5,000.00 for the fractional eighty, and blocks thirty-one and thirty-two in Minnick's Addition, subject to the right of way of the Union Pacific Railway Company through fractional eighty? A. They did. Q. If you answer the last question in the affirmative, then state if the

; amount of such right of way was not unknown or undetermined upon by the parties. A. It was unknown and undetermined. Q. Did the Tarrs accept the proposition to sell the land subject to the right of way of the Union Pacific Railway Company? A. They did. Q. If you answer the last question in the affirmative, was there any new contract between the parties, that the Tarrs accepted, other than the proposition of the said Burrton Land & Town Co. as stated in question 6? A. There was none. Q. If you allow the Burrton Land and Town Company damages in this case, then state how much, if any, damages you allow by reason of the right of way passing over a portion of block thir-A. \$100.00. Q. If you allow the ty-two. Burrton Land & Town Company damages in this case, please state how much, if any, you allow by reason of the 400 feet right of way through the fractional eighty. A. None, as it was bought subject to the R. R. right of way." The jury also answered the following questions, submitted by the Burrton Land and Town Company: "Q. For what purpose did defendant buy the land in question? A. For platting. Q. Did defendant know that the Union Pacific Railway Company owned a right of way 100 feet wide through the fractional 80-acre tract at the time it purchased the land? A. An undeter-Q. If you answer the last mined width. question yes, please state, then, who told them so. A. By general discussion at the time. Q. Did Ruth A. Tarr, or any of her agents, inform defendant, at the time of said purchase, there was a 100-feet right of way through said land? A. Informed them that there was one of an undetermined width: Q. Did defendant ever agree with Ruth A. Tarr that a 100-feet right of way should be excepted out of the covenants in the deed? A. No. not with Ruth A. Tarr in person, but with her agent, E. W. Wellington, of a right of way of undetermined width. Q. If you say yes to the last question, state when, where, and by whom said agreement was made. A. At the time of sale, on or near the premises, by her agent, E. W. Wellington, and the representatives of the Burrton Land and Town Company. Q. Did defendant have any knowledge, when they bought the land in question, that the Union Pacific Railway Company owned, or claimed to own, a 400 feet of right of way through said land? A. According to evidence, the width of the right of way was not known. Q. Did defendant and Ruth A. Tarr ever agree that a 400-feet right of way should be excepted out of the covenants of the deed for said lands? A. No, not with Ruth A. Tarr in person, but with her agent, E. W. Wellington, of a right of way of undetermined width. Q. If you say yes to the last question, state when, where, and by whom the agreement was made. State specifically. A. At the time of sale, on or near the premises, by her agent, E. W. Wellington, and the representatives of

the Burrton Land and Town Company. Q. How much land is there in the tract purchased by defendant, outside of the two blocks, or in the fractional 80-acre tract? A. 80 acres, more or less, subject to whatever right of way the R. R. Co. had. Q. How much land is there in the 400-feet strip from which the Union Pacific Railroad Company has ejected defendant since its purchase? A. Evidence shows that there is 24 and a fraction acres. Q. What portion of the \$5,-000.00 was agreed to be paid for this fractional 80-acre tract? **A**, \$3,000. Q. What was the expense of the defendant in regard to the action brought by the U. P. Ry. Co. for the right of way over the real estate in question? A. From the evidence, and our instructions, we believe that there is nothing due said defendant." Subsequently, judgments were rendered upon the verdicts, and a decree entered for the foreclosure of the mortgage as prayed for. The Burrton Land & Town Company excepted, and brings the case here.

Jetmore & Jetmore, for plaintiff in error. Ira E. Lloyd, for defendants in error.

HORTON, C. J. (after stating the facts). The principal question involved in this case is whether the deed executed by Ruth A. Tarr and her husband, Smith R. Tarr, to the Burrton Land & Town Company, on or about the 20th of May, 1887, purporting to convey the following premises, situate in Ellsworth county, in this state, to wit: "All that portion of the north half of the southeast quarter, and the south half of the northeast quarter, of section nineteen, township fifteen, south of range eight, west of sixth principal meridian, lying north of the center of the Smoky Hill river, being eighty acres, more or less,"-may be reformed so as to except the right of way of the Union Pacific Railway Company over the premises described in the conveyance. The deed contains covenants of general warranty. The right of way of the railway company contains 200 feet in width on each side of the railroad. 12 Stat. 491, § 2. At the time of the purchase of the land from the Tarrs, the railway was in operation, and the land and town company must be presumed to have purchased with full notice thereof. The evidence and findings of the jury show that the land and town company submitted two propositions to the Tarrs to buy the land,—one proposition being to measure the tract, and deduct the amount of land taken by the right of way and the river, and pay \$65 an acre for the land remaining, the other proposition being to pay \$3,000 for the land, without measurement, subject to the right of way of the railway company. The Tarrs accepted the last proposition. The deed was executed, but omitted to make any exception of the right of way. The complications in the case grow out of the fact that the width of the right of

way seems to have been unknown to all the parties at the time of the conveyance, yet the railway, which was constructed under the provisions of the act of congress of July 1, 1862, providing for a railroad and telegraph line from the Missouri river to the Pacific ocean, was entitled to a right of way to the extent of 200 feet in width on each side of its road, where it passed over public land. The evidence is sufficient to show that the land and town company purchased the land subject to the right of way. We think it is immaterial in this case whether the right of way was known at the time to be 50 feet, 100 feet, or 400 feet. All of the parties had the same knowledge as to the width of the right of way as the other. The Tarrs did not intend to convey and warrant the title to the right of way, and the land and town company did not expect to purchase and obtain a good title to the same. Before the purchase, there was much discussion among the parties as to the extent of the right of way. The secretary and general manager of the land and town company figured out that 100 feet of right of way would take something over six acres of the land, and when the offer of \$3,000 was made for the 80-acre tract, and \$1,000 each for the two blocks, the right of way was taken into consideration. The counsel for the land and town company admit that, if the right of way had been only 100 feet in width, there would have been no trouble between the parties. This is a concession that the company did not, in its purchase, expect to obtain a good title to the right of way. That the Tarrs did not intend to convey and warrant the title to the right of way of the railway company; that the land and town company knew that there was a right of way of the railway upon the land; that it made its offer in view of such right of way, and purchased the land subject to the right of way, are sufficient, in our opinion, to permit a reformation of the deed, and relieve the Tarrs from any damages for the breach of their covenants of warranty, on account of their want of title to the right of way. The covenants of warranty were never intended by the Tarrs to embrace the right of way, and the land and town company did not purchase the land with that understanding. The rule is that, where property has been included by mistake in a deed, which the parties never intended should be conveyed, which the grantor was under no legal or moral obligation to convey, and which the grantee in good conscience has no right to retain, a court of equity will interfere and correct the mistake. 2 Pom. Eq. Jur. § 843; Benson v. Markoe (Minn.) 33 N. W. 38; Canedy v. Marcy, 13 Gray, 373; Stedwell v. Anderson, 21 Conn. 139; Clayton v. Freet, 10 Ohio St. 544. The evidence shows that the land and town company knew that the right of way was 400 feet in width, a few weeks after its purchase of the land, yet, with full

knowledge of this, the general manager of the company, in the fall of 1887, wrote several letters promising to pay the notes, but wanting time. This evidence was properly received, as tending to show that the company accepted the deed subject to the right of way, and made no complaint when it learned that the width was 400 feet, instead of 50 or 100 feet. In view of the special findings of the jury, and the evidence supporting the same, the other alleged errors concerning the evidence of the 80-acre tract of land are immaterial. The two blocks of land purchased for \$1,000 each were conveyed by a separate deed. It does not appear from the evidence that these blocks, or either of them, were conveyed or accepted subject to any right of way, therefore the jury properly allowed \$100 damages, on account of the breach of the covenants of warranty in the conveyance of block 32. The land and town company had some expenses in defending the action brought by the Union Pacific Railway to eject it from a part of block 32. One witness testified that \$75 or \$100 was paid in looking up the matter. On account of this evidence, \$100 will be allowed as additional damages, to be deducted from the judgment rendered. The judgment will be modified accordingly. All the justices concurring.

MOLINE PLOW CO. v. RODGERS et al. (Supreme Court of Kansas. July 6, 1894.)

Sale of Goods—Passing of Title — Option to Retake Goods—Effect — Election of Remedies—Conclusiveness.

- I. A vendor who sells and delivers goods at prices and on terms of payment definitely fixed by the contract, but retains the right to elect to take the goods remaining unsold by his vendee as the property of the vendor, is not the owner of the goods until after the actual exercise of such election, and creditors of the vendee who attach such goods prior to any election by the vendor acquire a valid lien thereon.
- 2. Where goods are delivered by the owner to an agent, under a contract authorizing the agent to sell and retain all the proceeds over the price fixed in the contract, and also giving the owner the right at the close of the season to require payment from the agent of the price fixed for all goods delivered to him, and where the agent absconds, and the property so in his possession is attached by his creditors, if the owner, with knowledge of these facts, commences an action against the agent for the purchase price of the goods, treating the transaction as a sale, the commencement of such action passes the title to the agent, and will prevent the owner from thereafter maintaining an action to recover the property from the sheriff holding it under writs of attachment.

(Syllabus by the Court.)

Error from district court, Ness county; V. H. Grinstead, Judge

Action by the Moline Plow Company against P. A. Rodgers and I. C. Cooper. Judgment for defendants, and plaintiff brings error. Affirmed.

The plaintiff brought this action to recover

from the defendants, who are the sheriff and under sheriff of Ness county, certain agricultural implements, which had been attached under process issued against one L. H. Underwood. The property was obtained by Underwood from the plaintiff under two written contracts,-one of them for the mowers alone, and the other for the other implements, consisting of plows, cultivators, harrows, corn planters, etc. The contract with reference to the mowers is one by which Underwood was appointed agent of the plaintiffs for the sale of the mowers. The contract contains the following provision: "The above mowers, and all others ordered and sold by the second party during the season, to be settled for at above prices on or before September 1, 1887, with farmers' notes taken in accordance with section six of this contract, maturing, one-half not later than October 1, 1887, and one-half not later than January following: provided, that the party of the second part shall have the privilege of paying all cash September 1, 1887, less a discount of five per cent. from above net prices on mowers. Any Knowlton mowers remaining on hand at close of season are to be settled for by notes of second party, maturing, one-half October 1, 1888, and one-half January 1, 1889, or to be stored free of charge, in accordance with section four of this contract, as the property of the Moline Plow Company, until following season. Settlement to be at the option of the party of the first part." The other contract is an order for the goods on terms of payment therein stated, containing also the following written clause: "It is understood and agreed that L. H. Underwood is to remit promptly to the Moline Plow Company, at Kansas City, Mo., all the notes and cash for goods sold. Said notes to be held as security for the payment of the said Underwood's individual notes, given in accordance with within contract, and said notes to be returned to the said Underwood (or whomever the Moline Plow Company may appoint), for collection, and all goods remaining unsold at end of season to be settled for by said Underwood's individual notes, due October 1, 1888, secured (if the Moline Plow Company so direct) by farmers' notes, or said unsold goods to be stored, free of charge, as the Moline Plow Company's property. Either settlement, as above, to be wholly optional with the Moline Plow Co. And it is further understood that all farmers' notes given by the said Underwood as security shall be replaced by good notes from other sources, if not paid within 60 days from maturity. In consideration of the Moline Plow Company's appointing L. H. Underwood their agent, the said Underwood agrees to neither buy nor sell any other makes of plows, cultivators or listers, except those ordered herein." These contracts were made on the 23d day of February, 1887. In the fore part of May, 1887, Underwood quit business, and left Ness City, leaving the property in care

of one Grisson. On the 12th of May, an attachment in a suit brought by one John Dunham against L. H. Underwood was levied by the sheriff on the goods in controversy, and other attachments were levied thereon a few days afterwards. The plaintiff, learning that Underwood had mortgaged his stock, sent one E. W. Daily to Ness City to look after its interests. After learning that Underwood had absconded, T. B. Gorton, the manager of plaintiff's business at Kansas City, went to Dade county, Mo., and brought suit against Underwood for the full amount of all goods delivered to him, and obtained an order of attachment, and had the same levied on certain lands situated in that county. This writ of attachment was issued on the 13th day of May, 1887. This action was brought by the plaintiff, in Ness county, on the 23d day of May, 1887. The plaintiff afterwards amended its petition in the Dade county attachment suit so as to leave out all the goods in controversy in this case, and asked and obtained judgment for the balance only. The case was tried to a jury, and a verdict rendered in favor of the defendant, and the plaintiff brings the case here for review.

Lewis & Fierce, for plaintiff in error. George S. Redd and Buchan, Freeman & Porter, for defendants in error.

ALLEN, J. (after stating the facts). While · various questions are raised by the plaintiff in error on the rulings of the court as to the admission of evidence and on the instructions, it is only necessary to consider whether the plaintiff is entitled to recover on the conceded facts of the case. In the brief for the plaintiff in error, two questions are asked: (1) Did the written contracts under which Underwood obtained the property constitute a sale from plaintiff to him? (2) If not, did the act of the plaintiff in bringing the attachment suit in Dade county, Mo., have the effect to pass title to him? These questions will be considered in their order: (1) As to the Knowlton mowers, we think the contract was one of agency, under which the title to the mowers remained in the plaintiff until it elected to treat the transaction as a sale to Underwood. As to the contract under which the plows and other implements were shipped to Underwood, we think it a contract of sale which passed to Underwood a title to the property in the first instance, subject only to be defeated by the actual exercise of the election of the plaintiff to retake the unsold property as its own. instead of notes of the plaintiff, as provided in the contract. This contract is, first, an order from Underwood to the plaintiff for the goods, to be paid for in installments, and upon terms stated in the order. This alone, if accepted by the plaintiff, would be a simple sale on credit. The only language in the contract under which the plaintiff can | and commenced the attachment suit without

claim title is as follows: "All goods remaining unsold at the end of season to be settled for by said Underwood's individual notes. due October 1, 1888, secured (if the Moline Plow Company so direct) by farmers' notes, or said unsold goods to be stored, free of charge, as the Moline Plow Company's property. Either settlement, as above, to be wholly optional with the Moline Plow Company." Until the Moline Plow Company exercised its option to recover the goods as its own property, we think the title was in Underwood. There is no pretense that this option was exercised prior to the attachment of the goods by the defendant, and the levy on them as the property of Underwood was therefore valid. (2) As the title to the Knowlton mowers remained in the plaintiff until it, by some subsequent act, treated them as sold to Underwood, it becomes necessary to consider the effect of the attachment suit in Dade county, Mo.

It is not contended by the plaintiff that it could pursue both remedies,-one for the recovery of the specific property, and the other for the price,-at the same time, but the claim is that, inasmuch as the plaintiff was in ignorance as to the exact facts with reference to what had been done with the mowers, it might commence an action for the purchase price of all of the property which had been shipped to Underwood, and thereafter amend its petition so as to leave out all property that might be reclaimed; that the mere bringing of a suit for the purchase price did not operate as a complete and final election, if the plaintiff at the time intended to recover all of the property it could, and then obtain a judgment in the action only for the balance. The plaintiff claims that it acted without definite knowledge as to the facts, and therefore is not bound by its apparent election to sue for the value of the goods. It may be conceded that, if the plaintiff had been induced to bring the attachment suit by false information from Underwood, or the attaching creditors, as to what had become of the mowers, on discovery of the actual facts it might recover the specific property, and that an election induced by fraud would not be binding. This proposition finds support in the cases. Hays v. Midas (N. Y. App.) 11 N. E. 141; Foundry Co. v. Hersee, 103 N. Y. 25, 9 N. E. 487; Kraus v. Thompson (Minn.) 14 N. W. 266. But. under the plaintiff's own showing, can it be said that the attachment suit was brought in ignorance of the facts? It appears from the testimony of T. B. Gorton, plaintiff's manager; that he learned that Underwood had placed a chattel mortgage on his property, and absconded, and that he at once sent Mr. E. W. Daily to Ness City to look after the company's interest, to get security for what was owing the company, and to make disposition of the goods remaining on hand: that Gorton then went to Dade county, Mo.,

having accurate information as to the goods that had been sold by Underwood. The company thus had representatives at both places. It seems to have been plaintiff's purpose to pursue both remedies, knowing that it had both. Its only lack of knowledge as to the facts was want of definite and specific knowledge as to the exact amount of unsold goods. It does not appear from the evidence that the plaintiff's agent, Daily, who went to Ness City, was not already in possession of accurate information as to the condition of the property there before the attachment suit was commenced. Daily was sent to Ness City to replevin the goods on These instructions were given after Gorton knew that they had been attached, and before the attachment suit was commenced in Dade county. At the time the attachment suit in Dade county was commenced, Gorton counseled with his attorneys as to the effect of bringing the replevin suit and the attachment suit at the same time, and the attachment suit was brought under the advice of counsel that both suits could be brought, and that plaintiff could afterwards amend its petition in the attachment suit so as to claim only for the goods not recovered in the replevin action, without affecting its rights in the latter suit. In view of all these facts, shown by the plaintiff's own testimony, it cannot be held that the plaintiff acted in ignorance of its rights. That the two remedies are inconsistent is clear. The plaintiff had no right to recover from Underwood the purchase price of goods which it had not sold to him, but elected to still retain. Unless the title had passed to Underwood, it had no claim on him for the value. If the title had passed, it had no right to the goods. We think, under this contract, after Underwood had absconded, the plaintiff had the right to treat the season as closed, and the goods sold to Underwood; that, in order to maintain an action for the price, it was not necessary that the plaintiff should wait until the expiration of the ordinary season for the sale of agricultural implements, nor that Underwood should have actually given or refused to give his notes in accordance with the contract, but that his acts were sufficient to authorize the plaintiff to treat the goods as sold to him, and bring an action for the purchase price. Having made its election with a knowledge, at least, of the more important facts affecting its rights, the plaintiff may not thereafter abandon its first election and choose the opposite remedy. An election once fairly made by a party having the right to make it is final and conclusive. Fowler v. Bank, 113 N. Y. 450, 21 N. E. 172; Bailey v. Hervey, 135 Mass. 183; Crompton v. Beach (Conn.) 25 Atl. 446; Gray v. St. John, 35 Ill. 222; Nield v. Burton, 49 Mich. 53, 12 N. W. 906. The subsequent amendment of the pleadings, and the fact that the plaintiff took judgment only for the goods actually sold by Underwood, under the authorities, cannot affect the rights of the parties in this case. We think there was no substantial error in the ruling of the court on the admission of testimony, and that the instructions are quite as favorable to the plaintiff as the law will warrant. We do not see that the plaintiff could have been prejudiced by the instruction that a demand was necessary. The proof showed, without contradiction, that a demand was in fact made. None of these matters are important in the view we take of the case, for, under the facts disclosed, the plaintiff cannot recover. The judgment is therefore affirmed. All the justices concurring.

CITY OF EUREKA v. MERRIFIELD et ux. (Supreme Court of Kausas. July 6, 1894.) DEATH BY WRONGFUL ACT — ACTION BY NEXT OF KIN-WHEN LIES.

1. In the absence of a statute giving an action to the family or next of kin for the recovery of damages or loss of services resulting from death, the death of a human being can-

not be complained of as an injury.

2. An action to recover damages juries resulting in death is maintainable only by the person who is, by the terms of the stat-ute, authorized to maintain it.

3. Section 420 of the Civil Code, as con-

strued with sections 422 and 422a of the Civil Code, only permits actions to survive for injury to the person when death does not result from the injury

the injury.

4. When death results from the wrongful act or omission of another, sections 422 and 422a of the Civil Code apply.

5. Under the provisions of sections 422 and 422a of the Civil Code (Gen. St. 1889), before the next of kin of a deceased, whose death is council by the wrongful act or omission of caused by the wrongful act or omission of another, can maintain an action for damages another, can maintain an action for damages in the place of the personal representative of the deceased, the petition must allege that the deceased, at the time of his death, was a non-resident of this state, or, if a resident of this state, that no personal representative of his estate has been appointed.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. A. Leland, Judge.

Action by L. A. Merrifield and Mary E. Merrifield against the city of Eureka. Judgment for plaintiffs, and defendant brings error. Reversed.

James A. Merrifield, an infant of the age of about two years, the son of L. A. and Mary E. Merrifield, on the 8th of December, 1888, fell into a privy vault in the city of Eureka, in Greenwood county, which was situate upon lot 6 in block 25, in the possession of the Eureka Hotel Company. The Merrifields lived on a lot adjoining the one containing the vault. The little boy was playing in the yard where his parents lived, and adjoining the lot on which the vault was situated; he went into the alley, and probably stepped onto a trapdoor over the vault, which tipped, throwing or permitting him to fall therein, where he was found on the same day, dead. On the 7th of October, 1889, L. A. and Mary E. Merrifield, the parents of James A. Merrifield, filed their amended petition against the city of Eureka to recover \$10,000 damages, alleging, among other things, "that an alley of the city abutted directly onto the vault, and that the city grossly, carelessly, and negligently, on the 8th of December, 1888, and for a long period of time prior thereto, omitted to put up or around the vault any guard or railing, and that the city carelessly and negligently permitted the vault to remain uncovered, save and except by a loose trapdoor, and thereby carelessly and negligently permitted the opening of the vault to remain in a dangerous condition." On the 26th of October, 1889, the city of Eureka filed its demurrer to the amended petition, upon the following grounds: (1) Because there is a misjoinder of parties plaintiff; (2) because the same does not state facts sufficient to constitute a cause of action against the defendant; (3) because the same does not state facts to show that the plaintiff sustained any damage by reason of the death of said child. At the January term for 1890, the demurrer come on for hearing, and, after argument, was overruled by the court. The city duly excepted. Subsequently an answer and reply were filed. The cause was tried before a court, with a jury, at the May term for 1890. The jury returned a verdict for the plaintiffs, and assessed the amount of their recovery at \$1,000. Subsequently judgment was rendered thereon against the city of Eureka. The city excepted, and brings the case here.

Ira P. Nye, C. N. Sterry, Kelley & Lamb, and W. S. Martin, for plaintiff in error. A. M. Hunter, James Shultz, and Clogston & Fuller, for defendants in error.

HORTON, C. J. (after stating the facts). A preliminary question is presented. It is insisted that the case made should be stricken from the files, because it was not attested by the district clerk of Greenwood county with the seal of the court, and indorsed as filed at the time the case was settled and signed. Civ. Code, § 548. It appears from the record that service of the case was accepted by the attorneys of plaintiffs below on the 19th day of September, 1890; that at that time they signed the following indorsement or writing upon the case: "We have no amendments to suggest, and consent that the same be settled and signed." The case was settled and signed by the district judge on the 10th of October, 1890. In his certificate, he directed that the case made "be filed as a part of the record in said action." That implied that the case made should be attested. It could not be properly filed as a part of the record unless attested with the signature of the clerk and the seal of the court. The case was complete and perfect when it was signed by the trial judge, and all that was necessary to make it evidence in this court was its attestation and authentication by the district clerk. Appeals are favored, and mere technical objections, which do not go to the merits of the case, ought not to prevail, if a court, in its discretion, may, in the furtherance of justice, allow amendments to be made or omissions to be supplied. Upon an application made to this court by the plaintiff in error, and a showing that the district clerk had failed to attest the case made, and indorse thereon the date of its filing, this court permitted the record to be withdrawn for the purpose of being properly attested and marked "Filed" by the district clerk. It was returned, attested, and marked as filed. Upon the showing, when application was made to this court to withdraw the record, it appeared that it was left with the district clerk for filing when it was settled and signed. It was not filed in this court until October 29, 1890. The mere omission of a district clerk to enter upon a paper or record left with him the date of its filing ought not to prejudice any one. We think this court had full power, under the circumstances, to permit the attestation and filing by the clerk of the district court at any time before the case was heard or disposed of upon proceedings in error. Pierce v. Myers, 28 Kan. 364. The motion to strike out will be overruled.

Upon the merits of the case, the first question presented is, did the petition, filed in the court below, state facts sufficient to constitute any cause of action in favor of L. A. and Mary E. Merrifield against the city of Eureka? Section 420 of the Civil Code, as construed with section 422, only permits action to survive for injury to the person when death does not result from the injury, but occurs from other causes. When death results from the injury, section 422 is exclusive. McCarthy v. Railroad Co., 18 Kan. 46; Tiff. Death Wrongf. Act, § 119. Under section 422, the action for damages or loss by death from the wrongful act or omission must be commenced by the personal representative of the deceased. By section 1, c. 131, Sess. Laws 1889, it is provided that where the residence of a party whose death is caused by the wrongful act or omission of another is or has been at the time of his death in any other state or territory, or when, being a resident of the state, no personal representative is or has been appointed, the action for damages or loss may be brought by the widow, or, where there is no widow, by the next of kin, of the deceased. Civ. Code, § 422a. An action for injury resulting in death is maintainable only by the person who is, by the terms of the statute, authorized to maintain it. If the little boy who was drowned in the vault had been a nonresident of this state at the time of his death, or if, since his death, no administrator has been appointed for his estate, an action would be maintainable, under section 422a, by his parents as next of kin. Gen.



St. 1889, par. 2611. "In a statutory action like this, where the right is conditional, the plaintiff must bring himself clearly within the prescribed requirements necessary to confer the right of action." Hamilton v. Railroad Co., 39 Kan. 56, 18 Pac. 57; Barker v. Railroad Co., 91 Mo. 86, 14 S. W. 280. To justify L. A. and Mary E. Merrifield, as the next of kin of the deceased, to maintain this action, the petition must have alleged that the deceased was a nonresident of the state at the time of his death, or that, since his death, no administrator has been appointed for his estate. All of this is omitted from the petition. These conditions attach to the right to bring this action at all, by the next of kin. The demurrer was well taken. It should have been sustained.

Counsel for the defendants in error cite section 420 of the Civil Code as giving the right of action, but this is contrary to the prior decisions of this court where death results from the injury. If section 420 was of any force where death occurs by wrongful act. which it is not, an administrator or personal representative of the deceased, and not the parents, as next of kin, would be entitled to bring the action. But sections 422 and 422a of the Civil Code take away the right of the administrator to sue for the benefit of the estate when death results from the wrongful act or omission of another. It is immaterial whether the death is or is not instantaneous.

It is suggested that the action was brought to recover for the damages the parents sustained by reason of the loss of anticipated services that might have been rendered to them by the deceased up to his majority, and, therefore, that this action is maintainable by them. At common law this action could not be maintained. McCarthy v. Railroad Co., supra. In the old case of Baker v. Bolton, 1 Camp. 493, the plaintiff's wife was traveling in a stagecoach, when it was overturned, whereby she was so severely hurt, that she died within a month. The husband brought his action for damages upon the ground, among others, for the loss of services of his wife, who had been of great use to him in conducting his business. He was defeated by the ruling of Lord Ellenborough, who then laid down his famous proposition that, "in a civil court, the death of a human being could not be complained of as an injury." His statement of the law has been accepted as final in the courts of this country, "equally in actions brought by the husband for the death of the wife, by the wife for the death of the husband, by the parent for the death of a minor child, by the widow in her own right and as tutrix of her minor children, by the executor or administrator suing in his representative capacity, and by an insurance company suing to recover by reason of having been forced to pay an insurance policy on the life of a person killed by the defendant." Tiff. Death

Wrongf. Act, § 11. In Insurance Co. v. Brame, 95 U.S. 754, it is observed: "The authorities are so numerous and so uniform to the proposition that, by the common law, no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question. It has been decided in many cases in the English courts and in many of the state courts, and no deliberate, well-considered decision to the contrary is to be found." In Hilliard on Torts (page 87, § 10) the rule is thus laid down: "Upon a similar ground, it has been held that at common law the death of a human being, though clearly involving pecuniary loss, is not the ground of an action for damages." The most of the cases upon the subject are there referred to. See, also, The Harrisburg, 119 U.S. 199, 7 Sup. Ct. 140.

On account of the petition not stating facts sufficient to constitute any cause of action in favor of L. A. and Mary E. Merrifield, owing to the omissions referred to, the judgment of the district court will be reversed, and cause remanded. All the justices concurring.

FLETCHER v. CITY OF ELLSWORTH.
(Supreme Court of Kansas. July 6, 1894.)

MUNICIPAL LIABILITY—CEILLAR WAY IN ALLEY—
CONTRIBUTORY NEGLIGENCE.

1. Where there is a cellar way or opening 17 feet and 5 inches in length and 9 feet and 6 inches in depth on the side of a building adjoining an alley open for public travel, and such cellar way or opening is all located on and in the alley, and not on a lot or private ground, and has no railing, guard, or other protection around it, and a person walking in the alley, upon a dark night, falls therein, without any negligence upon his part, hdd, that the city is liable for the injuries entained thereby

liable for the injuries sustained thereby.

2. The evidence in this case examined, and held, that it cannot be said, as a matter of law, upon the facts disclosed, that the plaintiff was guilty of such contributory negligence as to prevent any recovery. Held, further, that there was sufficient evidence introduced upon the trial, in support of the cause of action alleged by the plaintiff, to go to the jury.

(Syllabus by the Court.)

Error from district court, Ellsworth county: W. G. Eastland, Judge.

Action by Kate Fletcher against the city of Ellsworth. Judgment for defendant, and plaintiff brings error. Reversed.

On the 7th day of June, 1889, Kate Fletcher brought her action against the city of Ellsworth to recover \$10,000 damages for injuries by her sustained from falling, in the night of the 9th of November, 1888, into a cellar way or opening which was located in an alley in Ellsworth on the west side of a building known as the "Masonic Temple." On November 9, 1888, there was a ball or party at the Masonic Temple, and a Mrs. Lincoln was hired to do some work at the party. She asked Mrs. Fletcher if she would go with her, and help. A trial was had at the January term for 1890 before the court, with a

jury. A verdict was rendered by the jury for the plaintiff for \$3,800. Upon a motion filed by the defendant, a new trial was granted. The second trial commenced on the 7th of April, 1890, before the court with a jury. It was stipulated upon the trial, among other things, that "there was at the time of the injury to plaintiff, and still is, an alley on the west side of the Masonic Temple; that the alley extends northerly and southerly, and connects with First street at the north; that the cellar way or opening in which the alleged injury occurred is on the west side of the temple, and is located wholly on and in the alley; that the cellar way or opening is surrounded by a level stone curbing, eighteen inches in width, the front of which is on a level with the sidewalk in front of the temple; that the cellar way or opening is nine feet and six inches deep, and seventeen feet and five inches in length, outside measurement; that the elevation of the coping around the cellar way above the rest of the ground in the alley was from 21/2 to 5% inches; that the alley and First street were, prior to the injury complained of, duly established, platted, and dedicated and accepted as an alley and a public highway of the city of Ellsworth, the same as any other alley in the city; that at the time of the injury the sidewalk extended in front of the temple, and along in front of the alley, the boards in the sidewalk in front of the alley being laid lengthwise for teams to pass and repass. It is further stipulated and agreed that block twenty-nine is located in the city of Ellsworth, Ellsworth county, and that the city of Ellsworth was at the time of the injury complained of a duly-incorporated and existing city of the third class, and having more than six hundred people. It is further admitted that the claim of plaintiff was duly presented for payment to the city council, and that the city refused to pay the claim, in whole or in part." The temple was built in 1887, and was open for use about a year before the injury complained of. The building stands flush with the east side of the alley. The cellar way on the west side of the temple, where the injury occurred, was intended to be used as an entrance to a basement, but the basement has never been finished or used, and the basement entrance or stairway has never been used for a passage or repassage since the construction of the temple.

Valentine Hank, among other things, testified as follows: "Q. I will ask you if you are acquainted with the cellar way on the west side of the Masonic Temple? A. Yes, sir. Q. Was that there at the time of the party I have asked you about? A. Yes, sir. Q. What was its condition, at that time, with reference to its being open? A. It was open. Q. What was its condition with reference to guards around it? A. There were none. Q. How long had you been janitor at this time? A. From the opening of

the building. It was a little before Christ-The opening was the 19th of December before, when it was opened first. I had been there a few days before that. Q. In what condition was this cellar way in the alley, during all the time, with reference to being open or covered? A. There was no guard to it. It was open. Q. Was there any sidewalk at that time in front of the Masonic Temple building? A. Yes, sir; eightfoot sidewalk. Q. The same sidewalk that is there now? A. Yes, sir. Q. Had that sidewalk been removed or taken away, in any way? A. Not to my knowledge. How is that sidewalk adjoining the cellar way, and in front, with reference to being on the same level? A. It is the same level with the sidewalk. Q. You may state whether or not, in passing from the sidewalk in front of the Masonic Temple to the cellar way, there is anything to cause you to know when you are off the sidewalk, and on the alley or stone which is around the cellar way, by elevation or depression? A. There is no depression, but the stone runs up on a line with the building, and there is a stone which goes around the cella: way, eighteen inches wide, on a level with the sidewark. Q. The sidewalk runs on a line with the building, eighteen inches wide on the side, and from the street to the cellar way, and there is no perceptible difference in the height of this stone and the sidewalk? A. I don't think there is. Q. And you say it has been unprotected in any manner since Christmas the year before? A. Yes, sir. Q. And you have been janitor during all that time? A. Yes, str. Q. For what purpose was this opening Mr. Lloyd has spoken of used as a cellar way? A. It was for the purpose of going down under the Masonic building, which leads to the cellar. and also a room which was to be fixed up for some purpose. It has windows, and everything complete in it. Q. How did you get down this cellar way? A. Regular steps. Q. Do you know how many? A. I could not tell. Probably ten; between eight and ten; somewhere in that neighborhood. I have walked it many a time."

Ira E. Lloyd testified: "In February, 1888, I occupied rooms in a bank building on lot 14 in the city of Ellsworth. There is a rear stairway to the building, which comes down into this alley. From the time I occupied my rooms up above the bank, I would frequently pass, in going home and towards the courthouse, through this alley and up through the alley by the Masonic Temple. In walking. I invariably went along this alley west of the Masonic Temple, and there is a commonly traveled path close to that curbing, and within six inches of it. Sometimes I would walk along up that place, and sometimes I would walk on the curbing. I lived northeast from the Masonic Temple. In going to my office, when it was over the bank, I would frequently come down this street [indicating First street], and turn at this

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corner [indicating the corner of Masonic Temple next to cellar way]; and, in turning, I would invariably walk on that curbing. I have probably done that fifty or one hundred times. I have done it twenty-five or thirty times prior to this accident. That was the way for passengers on foot along the west side of that curbing, and I have frequently seen them walking along there in the daytime, and frequently, in the evening, have seen people turn and walk in this direction [south] on the curbing."

Mrs. Fletcher testified: "That she was 43 years of age, and resided in Ellsworth. That she went to the Masonic Temple, on the night in question, to help Mrs. Lincoln. Q. Please state what, if anything, occurred to you after you went to the Masonic Temple at the time spoken of? A. Some time in the night, after I went there,-between ten and eleven o'clock,-Mrs. Lincoln asked me to go out with her, and empty a pail of swill. I went out with her,-the north door,-down the sidewalk, a piece. She stepped into the alley, and I stood on the sidewalk, and I heard a footstep coming along the sidewalk towards me. I stepped back a few steps. The footsteps still came on, and I stepped into the alley. I looked around to see where I would stand, and saw nothing. I stepped back a few steps, carefully, and fell into that hole. Q. What was the nature or character of the surface of the ground over which you stepped? A. It appeared all even to me; no inequality in it. Q. At the time, did you know of any hole being at that place? A. No, sir." She further testified that the night was very dark; that she had good eyesight; that she could not see the sidewalk on the occasion of the injury: that she heard footsteps approaching in a westerly direction, and she looked to see if any one was coming, and could see nothing; that she could not see the sidewalk; that she could not see in the alley at all. She testified that she knew there was an alley or street running along the west side of the Masonic Temple, as she had observed wagon tracks down that way, and that the boards ran lengthwise there, instead of crosswise. She testified, also, that she never saw the cellar way before she fell into it, nor since her fall. She also testified, on cross-examination: "Q. Which way, when you stepped off the sidewalk, on the occasion of your injury, into this alley, were you looking? A. It was along in the street, before me. Q. Which direction was that? A. It was south; There were no lights shining through the windows of the Temple building, across the alley, at that time. If there had been lights, I would have seen them. Q. Where were you standing, in reference to the traveled portion of the alley, when you looked around to see where you could step? A. About the middle of the alley. Q. How far were you at that time from the sidewalk? A. I don't know. A few steps. I can't really know. Q. What did you next do? A. The next I did was to fall into the hole, I guess. Q. How did you go from the place where you were standing to the hole? A. I stepped back two or three little steps, carefully, to stand there until the lady should come in that I was waiting on. I was facing west, I guess. Q. Did you walk forward or backward? A. I stepped a little, just carefully, backward, to stand there until this lady should come in, I was waiting for. Q. What do you mean by the use of the word 'carefully,' as you were stepping back? Describe the manner of your stepping. A. I was careful. Q. Why didn't you remain standing on the sidewalk? A. Well, I just stepped aside to let that man pass that was going on. I did not know whether it was a man or woman. Q. Before you stepped into the hole, you tell us you stepped from the sidewalk, and a few steps into the alley, and then you stepped back two or three little steps, and fell into the hole. Why could you not have remained standing at this place in the alley where you were before you moved back towards the building? A. I looked around to see where I could step, and I stepped this far thinking I could stand there till she come on. Q. Was there anything in the way of your standing there in the alley as you then stood, before you moved back to the building? A. Nothing that I remember. Q. Then why could you not have remained standing right there, and not moved back towards the building? A. Well, I went just to see whether I could hear her coming. I wanted to try to face the way I thought she was. That was the reason of it. Q. What did you step on after you left the sidewalk.-what substance? A. Well, it appeared to me to be the alley. Q. What substance,—boards, dirt, or stone? A. It was not boards, any way. Q. Was it dirt? A. It appeared hard under my feet. I can't say quite what it was. Q. About how many steps did you take from the point where you were in the alley, towards the building, until you fell into the hole? A. They were small, little steps. I just moved carefully back,-small, little steps. Q. When you stepped from the sidewalk into the alley, did you intend to step off the sidewalk? A. I intended to step off, and wait for Mrs. Lincoln, and to wait there till she come in. Q. Did you leave the alley—the traveled portion of the alley when you first stepped into the alley, and moved back towards the Masonic Temple for the purpose of avoiding being seen by the person whose footsteps you heard approaching? A. It was to wait on Mrs. Lincoln."

After the introduction of all of the testimony, except Mrs. Fletcher's, the court sustained a demurrer thereto. Then the court permitted the plaintiff to reopen her case, and her deposition was introduced. Thereupon the defendant again interposed a demurrer to the evidence, which was overruled,

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and the defendant excepted thereto. The defendant then introduced the testimony of several witnesses. The court at that time again sustained a demurrer to the evidence. The court, in sustaining the demurrer to the used the following language: evidence, "Having duly considered all of the evidence introduced by the defendant and the plaintiff, it sustains the demurrer to the evidence interposed by the defendant on the ground. that the evidence clearly shows to the satisfaction of the court that the plaintiff has been guilty of such contributory negligence as will prevent her recovery herein, as shown by the evidence introduced on her behalf." The plaintiff excepted to the ruling of the court, and brings the case here.

Ira E. Lloyd, for plaintiff in error. Theodore Sternberg, for defendant in error.

HORTON, C. J. (after stating the facts). In this state a city is liable for any injury to private individuals, caused by the negligence of its officers in not keeping its streets in a reasonably safe and proper condition, and a city has no more right to create or permit an unsafe and dangerous condition of one of its streets than it has to create or permit a public or common nuisance. Smith v. City of Leavenworth, 15 Kan. 81; City of Eudora v. Miller, 30 Kan. 494, 2 Pac. 685; Gould v. City of Topeka, 32 Kan. 485, 4 Pac. 822, and cases cited.

The dedication of an alley, in this state, has the same force, and is in the same terms, as the dedication of a street. The fee is in the public,-not in the lot owner. "Public money may be expended by a city upon alleys, to improve them, and they can be used by the public generally. The abutting lot owners have no such control over them as to exclude the general public from their enjoyment; and an injury happening in an alley, used for public travel, occasioned by an obstruction therein, may make the city liable for the injury so sustained." Osage City v. Larkin, 40 Kan. 206, 19 Pac. 658.

A city is bound to keep its streets in a reasonably safe condition for persons to pass thereon in safety by night as well as by day. In one case it might require more vigilance on the part of a person traveling upon a street or alley in the nighttime than it would in the daytime; but after all the care required would simply be ordinary care under the circumstances surrounding that particular case, and nothing more. Corlett v. City of Leavenworth, 27 Kan. 673; Osage City v. Brown, 27 Kan. 673; City of Emporia v. Schmidling, 33 Kan. 485, 6 Pac. 893; City of Kinsley v. Morse, 40 Kan. 577, 20 Pac. 217; 2 Thomp. Neg. 767, note 7; City of Lincoln v. Walker, 18 Neb. 244, 20 N. W. 113.

This court has ruled "that the onus probandi as to the negligence of the plaintiff is on the defendant; that if the record shows negligence on the part of the defendant, and is silent as to the conduct of the plaintiff, it makes out a case for recovery." Railway Co. v. Rollins, 5 Kan. 167; Sawyer v. Sauer, 10 Kan. 466; Railway Co. v. Pointer, 14 Kan. 37.

It appears from the testimony that the cellar way or opening which Mrs. Fletcher fell into is 17 feet and 5 inches in length, and 9 feet and 6 inches deep; that it is on the west side of the Masonic Temple in Ellsworth, and is all located on and in the alley, -not on private property. It has no railing or guards around it. When Mrs. Fletcher was injured, on the 9th of November, 1888. the night was dark. She could not and did not see the cellar way or opening. The law holds no one responsible for exposing himself to a danger of which he knows nothing. and of which he is under no obligation to inform himself. Of course, every one must use ordinary care to avoid the ordinary and usual perils that beset us; but no one is bound to guard against that which he has no reason, under the circumstances, to suspect. Mrs. Fletcher had no knowledge of the probable danger, or a sufficient reason to apprehend it, when she fell. Kansas City v. Manning, 50 Kan. 373, 31 Pac. 1104; City of Abilene v. Cowperthwait, 52 Kan. 324, 34 Pac.

Before a demurrer can be sustained to evidence, the court must be able to say that the plaintiff has entirely failed to prove a case. Brown v. Railroad Co., 31 Kan. 1, 1 Pac. 605; Gardner v. King, 37 Kan. 671, 15 Pac. 920. In Christie v. Barnes, 33 Kan. 317, 6 Pac. 599, it was ruled that "a demurrer to evidence admits every fact and conclusion which the evidence most favorable to the other party tends to prove;" and in Wolf v. Washer, 32 Kan. 533, 4 Pac. 1036, it was held that "upon a demurrer to evidence the court cannot weigh conflicting evidence, but must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer." Considering all of the evidence introduced, we think there was sufficient for the consideration of the jury, and that the trial court erred in disposing of the case as it did. City of Lincoln v. Walker, supra; Osage City v. Brown, supra; Osage City v. Larkin, supra; Kansas City v. Manning, supra; Pettis v. Johnson, 56 Ind. 139; City of Abilene v. Cowperthwait, supra.

In support of the judgment, it is said that the city kept a sufficient space in the alley in a reasonably safe condition for people to use in the usual way of travel; that Mrs. Fletcher, without any good reason, went outside of the traveled path, and stepped into the cellar way or opening, carelessly; that the cellar way or opening into which she fell was a basement entrance; and that the city was not bound to maintain any railing around or in front of it. Whatever may be the rule permitting a part only of a street or alley to be improved for public travel, yet an injury happening in a street or alley open for public travel, occasioned by an obstruc-

tion or excavation, may make the city liable. Osage City v. Larkin, supra. Mrs. Lincoln was in the line of her duty when she went out of the temple, and down the alley to empty the pail which she carried. As Mrs. Lincoln did not like to go alone in the dark, she asked Mrs. Fletcher, who was assisting her, to accompany her. When Mrs. Fletcher heard footsteps coming along the sidewalk towards her, we cannot say, as a matter of law, that she was guilty of negligence in stepping into the alley, and then stepping back to wait for Mrs. Lincoln. It is possible that her injuries were more severe, in stepping into the cellar way in the manner she did, than if she were walking forward. If her face had been towards the cellar way, she might have protected herself somewhat with her hands. Her conduct in stepping from the sidewalk into the alley, and then moving carefully back a few steps, is for a jury to pass upon. Generally, a stairway or cellar way leading into a basement under a building is upon the lot or private ground, not a part of the alley or street,—surely, not wholly in the alley or street. Even when it opens on a street or alley, only a narrow entrance to the basement is generally used; and this should be protected by side railings, but in this case all of the cellar way was open. Over 17 feet in length were located in a public alley, not upon any lot or private ground, and without railing or guard of any We can find no authority which justifles a city in devoting a large part of a street or alley to private purposes, to the injury of the traveling public. Upon a street or alley the rights of the public are para-

Our attention is called by the counsel of the city to Beardsley v. City of Hartford, 50 Conn. 529; Fitzgerald v. City of Berlin, 51 Wis. 81, 7 N. W. 836; Alline v. City of Le Mars, 71 Iowa, 654, 33 N. W. 100; Zettler v. City of Atlanta, 66 Ga. 195; and similar So far as the Beardsley Case is concerned, it may be observed that, in Connecticut, municipal corporations are liable only by force of the statute. In that case the open space in front of the hotel was upon private property.—not in an alley or street. The court remarked: "The city had no power to erect a railing that should simply fence in, in front and on the sides, this basement stairway. It would have had to go upon private ground to do this, and that it had no power to do." In the Fitzgerald Case, it is not clear that the stairway was within the limits of the sidewalk. The court said: "Structures of this character, which do not encroach upon the sidewalk, are lawful. The existence of such a structure, however, imposes upon the municipality in which it is situated the duty of providing proper safeguards to prevent the happening of accidents by reason of its proximity to the sidewalk, to persons traveling thereon with ordinary care." In the Alline Case, it was not so dark but that the plaintiff could see; but that decision, unless founded upon the opportunity of plaintiff to avoid stepping into the hole, is not satisfactory to us, considering what is said in the case of Kansas City v. Manning, 50 Kan. 373, 31 Pac. 1104. In the Zettler Case, the plaintiff voluntarily left the sidewalk, and fell into an excavation on a vacant lot. She was not injured on an alley or a street, but the court, in that case, remarked: "Had this excavation been near enough to the sidewalk for accidental deviation, or an unintentional misstep to have caused the injury, then the case would have been such as to make the corporation liable." The judgment will be reversed, with direction to overrule the demurrer, and for further proceedings in accordance with the views herein expressed. All the justices con-

LANPHEAR et al. v. KETCHAM.
(Supreme Court of Kansas. July 6, 1804.
CREDITOR'S BILL — SETTLEMENT AND DISMISSAL—
EFFECT.

Where a plaintiff brings an action against a defendant and his wife to recover upon an unliquidated claim of the husband, and an account is sought therein, and the petition is also in the nature of a creditor's bill against the wife, claiming she holds specific real estate of the husband as trustee, and an attachment is obtained and levied upon the real estate, upon the ground that the husband has sold and disposed of the same with the intent to hinder, delay, and defraud his creditors, and subsequently, upon a settlement between the plaintiff and the defendants, the action is dismissed upon the consideration that the husband gives the plaintiff his note for \$1,800, held, that thereafter, in an action upon the note, the plaintiff is not entitled to attach the real estate referred to in the former petition as the property of the husband, the title of which, at the time of settlement, was, and still is, in the wife, who then and now claims to own the same. (Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by A. M. Lanphear & Co. against William Ketcham. An attachment was issued by plaintiffs, and levied on certain property, and Harriet Ketcham moves to discharge the property from the levy. The motion was granted, and plaintiffs bring error. Affirmed.

On the 17th day of May, 1890, Lanphear & Co. commenced their action against William Ketcham to recover \$1,800 on a note of that amount dated August 14, 1889, payable six months after date. The firm of A. M. Lanphear & Co., consisted of A. M. Lanphear and H. N. Jewett. On the 17th day of May, 1890, plaintiffs, after having filed an affidavit and bond for attachment, caused a writ to issue, and the same was levied on the E. 1/2 of lot No. 4 in block 39 in the city of Atchison, upon which there is a store building. The property was appraised by the sheriff at \$7,000. Later, and on May 31, 1890, Harriet Ketcham, the wife of the defendant, filed a motion to discharge the prop-

erty from the attachment on the ground that the same was owned by her, and that William Ketcham had no interest therein. The property attached was, on the 26th day of February, 1889, deeded by William and Harriet Ketcham, his wife, to David Martin, and on the same day David Martin executed a quitclaim deed to Harriet Ketcham. Afterwards, on July 10, 1889, Herbert H. Jewett, a partner of Lanphear & Co., commenced an action in the district court of Atchison county against William Ketcham and Harriet Ketcham to recover a judgment against William Ketcham for \$1,677.03, and interest thereon from May 11, 1887, and to enjoin both defendants from disposing of, incumbering, or selling the real estate in controversy, and for general relief. It was claimed in the petition that William Ketcham and A. M. Lanphear had been partners in business, and that in May, 1887, H. N. Jewett had purchased the interest of William Ketcham in the firm, and had overpaid him that much on the purchase price; and the action was brought to recover the amount of the alleged overpayment. It was further averred that, at the time of the purchase, William Ketcham was the owner of the E. 1/2 of lot 4, block 39, and that on or about February 26, 1889, he had conveyed the same to Harriet Ketcham, his wife, without consideration, for the purpose of cheating, swindling, and defrauding his creditors, and especially H. N. Jewett, as Harriet Ketcham well knew at the time, and that William Ketcham was insolvent. A part of the petition was in the nature of a creditor's bill, but it concluded with a prayer for an injunction. A temporary injunction was granted against the sale or conveyance of the property by Harriet and William Ketcham; and an order of attachment was also sued out and levied on the same property, the ground therefor alleged in the affidavit being that "the defendant William Ketcham has assigned and disposed of his property with intent to defraud, hinder, and delay his creditors." On August 22, 1889, a stipulation was entered into, acknowledging the settlement of the case, and providing for its dismissal, as settled, at the cost of the plaintiff; and on September 9, 1889, the case was so disposed of by the court. The settlement of the case was effected by giving the promissory note by William Ketcham to A. M. Lanphear & Co. for \$1,800, which is the basis of this action. The trial court discharged the property from the attachment. Lanphear & Co. excepted, and bring the case here.

Mills, Smith & Hobbs, for plaintiffs in error. W. W. & W. F. Guthrie, for defendant in error.

HORTON, C. J. (after stating the facts). In the action of Jewett against Harriet Ketcham and her husband William Ketcham, temporary injunction was allowed, re-

straining them from selling or disposing of the real estate attached in this action. In that action, to obtain the attachment issued. A. M. Lanphear, as the agent of Jewett, made an affidavit that William Ketcham had assigned and disposed of his property with intent to hinder, delay, and defraud his creditors. The second paragraph or count of the petition was in the nature of a creditor's bill, seeking to have Mrs. Ketcham held as trustee of the real estate. If the first action had been dismissed, at the instance of the plaintiff, for defects in the petition only, or without prejudice to a future action, many of the questions discussed on the part of the plaintiffs would be entitled to serious consideration; but the first action was settled, as well as dismissed. It was dismissed because it was settled. It was settled for the consideration of an \$1,800 note given by William Ketcham to the plaintiffs. This is the note sued on. With full knowledge of all the facts attending the transfer by William Ketcham to his wife of the real estate in dispute, Jewett settled the former action, and discharged the attachment under an agreement with the parties. The plaintiffs cannot assail now the transfer of the real estate from Ketcham to his wife upon a transaction prior to the settlement, even if any wrong existed originally concerning the same. The plaintiffs received the note in settlement of the former action, and therefore do not stand in the position of prior or existing creditors, with power to attack the transfer as a fraud upon their rights. Brooks v. Hall, 36 Kan. 697, 14 Pac. 236. Their status is rather that of a creditor subsequent to the transfer, with full knowledge, at the time of accepting the note in settlement, that Mrs. Ketcham held the title of and claimed the real estate in question. Sheppard v. Thomas, 24 Kan. 780. The judgment will be affirmed. All the justices concurring.

(53 Kan. 742)

HOWELL et al. v. CAMPBELL et al. (Supreme Court of Kansas. July 6, 1894. JUDGMENT—NECESSITY OF SERVING PROCESS.

Before judgment can be ordered against parties named as defendants in an action, who have not been served with summons, and who are in default, it must be clearly shown, either that they personally appeared in court, or that some authorized person appeared for them.

(Syllabus by the Court.)

Error from district court, Decatur county; G. Webb Bertram, Judge.

Action by Howell Bros. against S. B. Campbell, Moses Lewis, and others. Judgment in favor of defendant Lewis, and plaintiffs bring error. Affirmed.

Mills, Smith & Hobbs, for plaintiffs in error. Bertram & McElroy, for defendants in error.

JOHNSTON, J. This was an action by Howell Bros. to recover a judgment against 8. B. Campbell for the value of lumber and building material sold to him for the construction of a building, and to declare a lien upon the premises whereon the building stood. It was alleged that after the material had been furnished, and the building erected, Campbell sold the same to C. A. Lewis and Moses Lewis, who were made defendants, and who agreed to pay the claim of Howell Bros. for the lumber and building material with which the house had been constructed. Several parties were made defendants, but the only one who appeared and answered was Moses Lewis. Two of the defendants filed disclaimers, but it does not appear that S. B. Campbell, M. A. Lewis, and C. A. Lewis, who were in default, were served with summons, or were properly brought into the case. The cause was tried upon the petition of the plaintiffs and the answer of the defendant Moses Lewis, who alleged and contended that there was no liability against him, and in favor of the plaintiffs. Judgment was given in his favor, and against the plaintiffs.

It is now contended that the plaintiff was entitled to a personal judgment against the Campbells and C. A. Lewis, who were in default for answer. If the parties named had been served, or had entered an appearance, the plaintiff would be entitled to a personal judgment against them. It does not appear, however, that any service was made, and the only claim of an appearance is the manifest inadvertent use of the word "defendants" in several places in the record. The only attorneys who appeared in the case were those of the answering defendant, Moses Lewis. The trial was had upon the issues joined between the plaintiff and that defendant. Before defendants not served can be held to be in court, it must be clearly shown that they have appeared, or some authorized person had entered an appearance for them. It does not appear that the attention of the court was called to the omission to enter judgment against the Campbells and C. A. Lewis, or that any personal judgment was demanded against them. In the absence of a clear showing that they were properly in court we cannot now direct a personal judgment against them. The judgment of the district court will be affirmed. All the justices concurring.

(53 Kan. 728)

SAFFORD et al. v. TURNER.

SCHRAM et al. v. SAME.

(Supreme Court of Kansas. July 6, 1894.)

APPEAL-SETTLEMENT OF CASE-NOTICE.

By order of the district court, an extension of time to make and serve a case was granted. The order fixed the time for suggesting amendments, and provided for settlement of the case on five days' notice. The record fails to show any amendments suggested. No notice of the time of settlement was given, and there

For opinion on rehearing, see 37 Pac. 985.

was no appearance on the part of the defendant. *Held*, that the petition in error must be dismissed.

(Syllabus by the Court.)

Error from district court, Butler county; C. A. Leland, Judge.

Error by S. J. Safford and others and by Charles Schram and others from judgments in favor of Honor Turner. Motion to dismiss. Motion sustained.

F. L. Jones, for plaintiffs in error. E. N. Smith, for defendant in error.

ALLEN, J. In both these cases, motions to dismiss on the ground that the cases were settled in the absence of the defendant in error, and without notice, are interposed. record shows that on the 17th day of July, 1890, motions for a new trial were overruled, and 60 days given to make and serve a case. On the 12th day of September an order was made, extending the time for 10 days from the 14th day of September. The order then provides that the defendant shall have 10 days thereafter to suggest amendments, and the case to be settled upon 5 days' notice by either party. The cases were settled on the 31st day of October. There is nothing in the record showing either that amendments were suggested, that notice of the time of settlement was given, or waived, or that the defendant was present when it was settled. On the other hand, an affidavit of the attorney for the defendant in error is filed, showing that no notice was given or waived, and that there was no appearance for the defendant at the time the case was settled. The motions to dismiss must be sustained. Weeks v. Medler, 18 Kan. 425; Railway Co. v. Roach, Id. 592; Shoe Co. v. Martin, 45 Kan. 765, 26 Pac. 424. All the justices concurring.

(54 Kan. 82)

GUESS et al. v. BRIGGS et al.

(Supreme Court of Kansas. July 6, 1894.)
REVIVAL OF ACTION—NOTICE OF APPLICATION.

In order to revive an action pending in this court on a petition in error, where no consent to such revivor is given, it is necessary that notice of the application shall be served on the adverse party, as required by section 428 of the Code, and an order obtained without either consent or notice is a nullity.

(Syllabus by the Court.)

Error from district court, Atchison county; Robert M. Eaton, Judge.

Action by Lewis M. Briggs and others against Franklin Guess and others. Judgment for plainting, and defendants bring error. On motion to dismiss petition in error. Motion sustained.

D. C. Tillotson, for plaintiffs in error. H. M. & W. A. Jackson, for defendants in error.

ALLEN, J. This was an action of ejectment brought by the defendants in error, Lewis M. Briggs, William W. Letson, and

Henry C. Linn, against plaintiffs in error, and judgment was rendered in favor of the plaintiffs below. Since the petition in error was filed, and on the 22d day of May, 1891, the defendant in error L. M. Briggs died, leaving a widow and four children. On March 4, 1892, on motion of plaintiff in error, an order was entered in this court reviving the action against Emma G. Briggs, executrix of her deceased husband's will, and also against her and the children, as heirs of his estate. A motion is made to dismiss the petition in error because the action was not revived within one year after the death of Lewis M. Briggs. While the order above referred to was entered within a year after the death of Lewis M. Briggs, it appears that it was made without the consent of the parties against whom a revivor was had, and that the only notices served on any of the parties were those sent by mail to Emma G. Briggs, the widow, and Lutie Briggs, one of the children, who was of age at that time. These notices were received through the post office a few days before the time set for hearing. No notice whatever was served on the other children. Section 428 of the Code of Civil Procedure provides: "Sec. 428. If the order is made by consent of the parties, the action shall forthwith stand revived; and, if not made by consent, notice of the application for such order shall be served in the same manner and returned within the same time as a summons, upon the party adverse to the one making the motion; and if sufficient cause be not shown against the revivor, the order shall be made." There having been no service in the manner provided by law, and no consent to a revivor, the order heretofore entered was made without jurisdiction, and is therefore a nullity. It is said in the brief that the judgment was revived in the district court of Atchison county on behalf of the executrix, but there is no proof of that fact before us. It is also contended that the plaintiffs below were partners, and that no revivor was necessary. We think this claim untenable. There is no showing in the record to uphold the claim that this land is a part of a partnership estate, and that the remaining defendants in error have given bond to settle up the partnership estate in accordance with the statute. The motion to dismiss must be sustained. All the justices concurring.

MORBACH v. HOME MIN. CO.

(Supreme Court of Kansas. July 6, 1894.)
INJURY TO MINING EMPLOYE—DEFECTIVE TIMBERING OF SHAFT — CONTRIBUTORY NEGLIGENCE—ACTION BY STOCKHOLDER OF DEPENDANT.

1. Where, in an action by a coal miner to recover damages from a mining corporation for a personal injury caused by the falling of a heavy stone from the side of a mining shaft about 80 feet deep, which was being sunk by workmen to a greater depth, on account of the 'its agents and employes, greatly injured, by

failure of the corporation to properly crib or timber the sides of the shaft to within a sufficient distance of the bottom thereof to reasonably protect the workmen, and the evidence introduced upon the trial showed that the miner, although experienced in mines of other states, knew nothing about the shaft where he was employed until he was taken down in a tub or bucket, excepting that it had been represented to him by the superintendent in charge of the shaft that it was "All right, nice, and safe," and "that everything was all safe, and kept nice," and that he had no knowledge or opportunity to ascertain the dangerous condition of the shaft before his injury, hid, the evidence was sufficient to go to a jury upon the right of the injured coal miner to recover damages from the corporation.

the corporation.

2. The interest of a stockholder of a corporation is of a collateral nature, and not the

interest of an owner.

3. The mere fact that a coal miner engaged by a mining corporation in sinking a coal shaft in the ground is a small stockholder of the corporation will not prevent him from recovering damages for a personal injury caused by the negligence of the corporation. Such a stockholder has no personal control or management of the coal shaft, or of the corporation or its property.

4. Where the employer and employé are equally competent to judge of the risks and hazards, and both have equal knowledge of the surroundings, the employer cannot be culpably negligent to the employé, although the work may be dangerous and hazardous, and although it might be made safer by the employer, if he should choose so to do. Rush v. Railway Co., 12 Pac. 582, 36 Kan. 129; Railroad Co. v. Schroeder, 27 Pac. 965, 47 Kan. 315.

5. An employé should leave the dangerous

5. An employe should leave the dangerous employment of his employer on discovery of the master's method of doing business, when he finds that the master does not remedy the danger complained of; and especially is this true when the danger is imminent or obvious from former injuries received by the employe in the

place where he is employed.

(Syllabus by the Court.)

Error from district court, Leavenworth county; Robert Crozier, Judge.

Action by John Morbach against the Home Mining Company. Judgment for defendant, and plaintiff brings error. Reversed.

On the 20th of August, 1889, John Morbach commenced his action against the Home Mining Company, and in his petition, as his first cause of action, alleged: "That at the time of the happening of the wrong and grievances hereinafter complained of, the defendant was and now is a corporation duly organized under the laws of the state of Kansas, and that, as such corporation, it was engaged in the work of sinking a coal mining shaft in the county of Leavenworth, state of Kansas, and is now engaged in the business of working and operating said shaft in said county and state; that it had then and there certain machinery, agents, employés, and workmen engaged in its said business of sinking and operating said coal mining shaft; that on or about the 13th day of August, 1888, plaintiff, while engaged in the capacity of workman and employé of the defendant in the work of sinking said shaft, was, on account of the fault, negligence. carelessness, and recklessness of defendant,

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being struck on his right side and hip by a large and heavy stone falling from a point in the shaft above where plaintiff was at work, thereby mashing, bruising, and lacerating his side, and mashing, bruising, and breaking his hip, resulting to plaintiff in the loss of the use of his right hip and leg, and in great pain and misery in his right side, and that, in consequence thereof, plaintiff is permanently injured; that said injuries occurred to plaintiff solely and wholly on account of the fault, carelessness, negligence, and recklessness of defendant, its agents and employes, and without any fault or negligence on the part of the plaintiff, in not using and exercising proper care and caution and skill in bracing, casing, and timbering said shaft above the place where plaintiff was at work, and in not properly bracing, casing, and timbering the same, so as to prevent accident and injury by falling earth and stone from above where plaintiff was at work sinking the shaft; that plaintiff, at the time of receiving his injuries, was in the exercise of due care and caution, and had no knowledge, notice, or warning of the dangerous condition of the shaft; that, in consequence of the premises aforesaid, plaintiff has, on account of said injuries so as aforesaid received, suffered great bodily pain and mental anguish, and is permanently injured, to his damage in the sum of ten thousand dollars." He also alleged in his petition a second cause of action from a similar accident that occurred on the 25th of October, 1888, when a stone fell upon his left shoulder; and he further alleged a third cause of action, founded upon the negligence of the defendant, occurring on January 4, 1889, by which his left leg was broken between the knee and ankle joint. On September 16, 1889, the Home Mining Company filed its answer, alleging first a general denial, and alleging, further, contributory negligence on the part of the plaintiff. On the 21st of September, 1889, the plaintiff filed his reply, containing a general denial for the answer. Trial commenced on the 30th of April, 1890, before the court, with a jury. After all of the evidence had been introduced on the part of the plaintiff, and after the defendant had examined one witness in its behalf, a demurrer was filed by the defendant to the evidence bearing upon the second and third causes of action. This demurrer was sustained by the court, and thereupon the defendant filed another demurrer to the evidence bearing upon the first cause of action, which was also sus-Subsequently, judgment was rentained. dered in favor of the defendant, and against the plaintiff for costs, amounting to \$213.40. Proper exceptions were taken by the plaintiff to the rulings, and to the judgment rendered. He brings the case here.

William C. Hook and C. W. Chase, for plaintiff in error. Lucien Baker, for defendant in error.

HORTON, C. J. (after stating the facts). On August 13, 1888, when the plaintiff was injured in the coal shaft of the Home Mining Company, that company was engaged in sinking, in Leavenworth city, a vertical shaft, hundreds of feet deep, with lateral dimensions of about 16 by 16 feet. Peter Strauss was the superintendent in charge of the work. The sinking of the shaft was prosecuted night and day by three shifts of men, working eight hours each. Each shift was under the control of a foreman, who stayed at the bottom of the shaft while the men under his charge were working. workmen were raised and lowered, in going and coming from their work at the bottom of the shaft, by a tub or bucket on a rope operated from above. The shaft, on its way downward to the coal veins, passed through many different strata of formations, varying in thickness and kind, such as earth, sandstone, soapstone, limestone, shale, rock, etc. In going through the harder formations, it was necessary for the workmen to drill and blast, the men going out of the shaft when the blasts were fired. For the protection of the men at work in the bottom of the shaft, it was necessary to crib or case the sides with timbers, to prevent rock and other substances from falling upon the men. This cribbing or timbering was done by making a lining of heavy timbers against the four sides of the shaft, fastening them to the walls, and bracing them with cross-beams, between which the tub and rope moved up and down. It appears from the testimony that the casing in the shaft should have been kept down to within a few feet of the bottom of the shaft. It was the duty of the superintendent to see that the shaft was properly timbered. plaintiff was a newcomer in Leavenworth, having been there a month only before he first went to work in the shaft. He previously worked in mines in Ohio, and had been connected with the sinking of coal shafts there. On the 13th of August, 1888, plaintiff applied to Strauss, the superintendent, for employment. The shaft was then about 80 feet in depth. The plaintiff, at this time, had no knowledge of the condition of the shaft, excepting such as he obtained from the representations of the superintendent, and what he could see in going down, and after he was at the bottom of the shaft. He testified: "Q. You may state about what time in 1888 you went to work. A. In August. I believe, on the 13th. Q. Who employed you? A. Mr. Strauss. Q. What knowledge, if any, had you of the condition of the shaft, when you went to work? A, Mr. Strauss said, 'It is all right, nice, and safe.' Mr. Strauss told me that everything was all safe, and kept in nice shape. What time in the day did you go to work in the mine? A. In the afternoon. About two o'clock. Q. How long had you been in the mine when you received the first injury? A. Well, I am not sure. Two hours. It might be three. I could not tell. Q. Now, state to the jury just how your first injury happened. A. Well, I came down in the shaft, standing on the bucket. got down, I stepped out of the bucket, and the shift boss told me to bail water from a kind of a hole made there, and to bring it out in a bucket. I sat there with my face to the south, on the west side. A stone came down, and struck me on the hip, knocking me down in the water. Q. What did you do immediately after you were knocked down? A. A man put me in the bucket, and pulled me out. Q. How long were you in the house at this time from this injury? A. Well, I think about three weeks. It might be more. Q. Tell the jury whether it was light or dark in the shaft. A. It was dark. Q. What kind of lamps? A. A. little lamp hangs on the caps. Q. How many of you were there working in that shaft when you first got hurt? A. I believe there were six men. Q. Who was this shift boss that told you where to go to work? A. Mr. Sutton." An examination of the evidence of the plaintiff and the other witnesses shows that there was ample testimony offered on the trial that the representations made by the superintendent to induce the plaintiff to go to work in the coal shaft were not true; that the cribbing or timbering of the sides of the shaft was not kept sufficiently far down to reasonably protect the workmen, that those in charge of the work had knowledge of the dangerous condition of the shaft prior to the time the plaintiff commenced work, and that at the time he was first injured the plaintiff had no knowledge of, or any opportunity to ascertain, the dangerous condition of the shaft. The personal injury complained of by the plaintiff, which occurred on the 13th of August, if the evidence contained in the record be true, was caused by the fault or negligence of the superintendent of the mining company having charge of the coal shaft. Such officer or agent was the substitute for the master, -the corporation. The company was liable for his acts or negligence. Railroad Co. v. Holt, 29 Kan. 152; Railroad Co. v. Moore, Id. 644; Railroad Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914; Railway Co. v. Snyder, 14 Sup. Ct. 756. It cannot be said that the plaintiff entirely failed to prove his case. Therefore, the evidence was sufficient to go to the jury to sustain the allegations of the first cause of action of the petition. Osage City v. Brown, 27 Kan. 74; Brown v. Railroad Co., 31 Kan. 1, 1 Pac. 605; Wolf v. Washer, 32 Kan. 533, 4 Pac. 1036; Christie v. Barnes, 33 Kan. 317, 6 Pac. 599; Gardner v. King, 37 Kan. 671, 15 Pac. 920.

It is suggested upon the part of the defendant that as the plaintiff was a stockholder in the mining company, owning three shares of stock, of the par value of \$50 each, he was a partner with the other stockholders,—sink-

ing his own shaft, and managing his own business,-and that he cannot recover. This contention is not tenable. A corporation differs from a partnership in many respects. The members of a partnership are all agents of the firm, and of each other, in all matters within the scope of the partnership business. The members of a partnership are jointly and severally liable to pay all the debts or demands of the partnership. But the partnership is not liable, in an action at law, to the individual members, for any claim or demand in a matter within the scope of the partnership, except that each member of a partnership may have, in certain cases, an action for an accounting with his copartners. The members of a corporation can only act about the business of a corporation in their aggregate capacity, through a board of directors or trustees whom they have chosen; and the members are not liable for any corporate debts or demands, except as provided by the charter of the corporation, or by some statute. The stockholders are not the private and joint owners of the property of the corporation, and the interest of each stockholder is of a colinteral nature,-not the interest of an owner. Button v. Hoffman. 61 Wis. 20, 20 N. W. 667; Thomp. Liab. Stockh. §§ 1, 2; Hyatt v. Allen, 4 Am. Corp. Cas. 624. The plaintiff, as a stockholder, had no personal control or management of the mine, the coal shaft, or of the company. corporation does its business by its regular, appointed officers and agents, whose acts are those of the corporation only.

After the plaintiff partly recovered from the injury which he received on the 13th of August, 1888, he went to work again in the mine. His second alleged cause of action is the same, in substance, as the first, except that he alleged therein another injury in the same shaft, by the falling of a stone, on October 25, 1888, because the timbering was not kept close enough to the bottom of the shaft, where he was working. The reason he gave for going to work again was that Strauss, the superintendent, "promised him that he would keep the timbering down to within two or three feet of the bottom of the shaft." He testified that the timbering ought to have been kept down near to the bottom. He worked about 50 days before he was hurt the second time. The former injury had made him acquainted with the danger of working in the shaft. At his second injury, he knew how the business was being conducted, and whether the timbering was being kept down for the protection of the workmen. Yet when he was hurt the second time the timbering was up from 12 to 15 feet. It was his duty to assist in the timbering, under the direction of the foreman, and he therefore knew just how far the timbering was up. "Usually, where some instrument or appliance has become unsafe, from use or otherwise, and the danger from its use is not imminent or obvious, the servant may continue in the master's employment, and use it, for a short time, with the expectation that the master will restore the defective instrument or appliance to its former condition." Rush v. Railway Co., 36 Kan. 129, 12 Pac. 582. But if a servant continues in his work an unreasonable length of time after the master has agreed to remedy the defect complained of, or if the danger is imminent or obvious, he assumes the risks incident thereto. Generally, the question of reasonable time is one of fact, for a jury; but where a servant has full knowledge of the danger of his employment, as in this case, after his first injury, and continues in the master's service while he is conducting his business in a way which the servant knows is dangerous, the servant cannot continue to wait, and, after being injured, then claim damages. He should leave his dangerous employment within a reasonable time, on discovery of the masters's method of doing business, when he finds that the master will not remedy the danger, or fulfill his promise in that respect. We think that the plaintiff, who was fully capable of contracting for himself, and was an old and experienced miner, knew the danger, which was imminent and obvious, from his own experience, in working in the shaft after he went back, about September 4th, when the timbering of the shaft was not kept in a reasonably safe condition, and cannot recover for the injury of October 25th. Railroad Co. v. Schroeder, 47 Kan. 315, 27 Pac. 965. For the same and stronger reasons, the trial court properly sustained the demurrer to the third cause of action. Railway Co. v. Crocker, 41 Kan. 747, 21 Pac. 785, is an extreme case. In that case the plaintiff had merely complained about the handle of the hammer be was using. He had not been previously injured, and the danger to him in using it was not clearly obvious. The judgment of the district court will be reversed, and cause remanded, with direction to the court below to overrule the demurrer to the first cause of action, and for further proceedings in accordance with the views herein expressed. All the justices concurring.

THAYER v. HOFFMAN et al.

(Supreme Court of Kansas, July 6, 1894.)

Sale by Commission Merchant—Right to Proping — Reception of Evidence — Correspondence—Identification of Cross-Examination.

1. An agent employed to sell flour on commission is presumed to act for his principal in making sales, unless it clearly appears that it was understood between the parties that the agent was dealing in the particular transaction with the principal on his own account, and, where it does not so appear, profits obtained by the agent in the sale of the principal's goods belong to the principal.

2. Where all the negotiations between the

2. Where all the negotiations between the parties to a case are included in letters and telegrams, and the plaintiff offers a part of the correspondence, after having identified the same by

one of the defendants, it is not error for the court to permit the witness, on cross-examination, to identify the balance of the correspondence with relation to the same transaction, and offer the same in evidence in connection with the cross-examination.

(Syllabus by the Court.)

Error from district court, Dickinson county; M. B. Nicholson, Judge.

Action by C. H. Thayer against C. Hoffman & Son. Judgment for defendants, and plaintiff brings error. Affirmed.

The plaintiff in error, who was plaintiff below, brought suit against the defendants to recover the sum of \$442.50, as money had and received by the defendants to the plaintiff's use. The plaintiff is a commission merchant in New Orleans, doing business under the style of C. H. Thayer & Co. His claim is that on the 29th day of September, 1888, he bought 750 barrels of flour from the defendant; that the flour was sold by him at an advance, and the proceeds, including the plaintiff's profits, were received by the defendants. The correspondence with reference to this particular transaction consists of telegrams and letters, as follows: "Telegram received at Enterprise, Kansas, 9-29-1888. To C. Hoffman & Son, Book three cars of Fanchon, five forty five. Two H. S., four ninety. Mailing shipping directions. Express samples immediately. C. H. Thayer." To this the defendants answered by letter, as follows: "Enterprise, Kans., Sept. 29, 1888. C. H. Thayer & Co., New Orleans-Dear Sir: Wired you to-night as follows: Book four cars of Fanchon, five forty five, three cars of H. S., at four ninety, and note advance five sixty five for Fanchon, and five fifteen for H. S. You caught us pretty bad, for, the way wheat is going up, we cannot replace it; but we will stand it, and try to push it out as fast as we can. We await your shipping directions. Again let us say, don't sell to any but gilt-edge parties, thirty days acceptance against B. of L., one per cent. off for cash. We inclose you quotation confirming telegram. Yours, respectfully, C. Hoffman & Son." On the same day, Thayer wrote the following letter: "New Orleans, September 29th, 1888. Mess. C. Hoffman & Son, Enterprise, Kans.-Gentlemen: Your favor of the 24th and 25th inst. at hand and noted. Smith's flour sold, 30 days. Same as Voight's. Upon receipt of draft and B. of L., we presented same to Smith for acceptance, but he gave us a check for the amount. taking five cents a barrel off, which amount will be settled by us with him, so you can credit us with it. Inclosed find N. Y. exchange for \$675.00, amount of draft and bill. Please acknowledge receipt. What is the matter with samples asked for? Waiting for them patiently. We placed seven cars to-day, and inclose shipping directions. Could have sold more this evening, but thought it advisable to hold off, owing to advance in Chicago. We always sell on last price received, using judgment in case of advance.

Yours, truly, C. H. Thayer & Co." The parties had only been dealing with each other a short time. Consignments of flour were solicited by the plaintiff, by letter. The first one answered by the defendant, so far as the evidence discloses, is as follows: "C. H. Thayer & Co., No. 54 Magazine street, New Orleans, La., Aug. 31st, 1888. Mess. C. Hoffman & Son, Enterprise, Kans.-Gentlemen: We would respectfully ask you to send us samples, with prices delivered on track in wood, including 10 cents a barrel commission. At the same time solicit consignments, on which we are willing to make cash advances. We have a large safe spot and shipment business, obtaining in both cases highest market prices, giving shipper full benefit of advance in jobbing over round and car-lot prices. Refer to our cards in 'Northwestern' and 'Modern Millers.' Awaiting your favors, we remain, yours, truly, C. H. Thayer & Co." The defendants acknowledged the receipt of the amount for which the flour was sold to the parties to whom it was consigned by direction of the plaintiff, and that the amount received is the amount stated by the plaintiff, but they deny any liability therefor, claiming that the plaintiff was their agent, selling for 10 cents a barrel commission; that this commission has been paid, and their liability to him satisfied. A demurrer to the testimony offered by the plaintiff was sustained.

Burton & Moore, for plaintiff in error. Stambaugh & Hurd, for defendants in error.

ALLEN, J. (after stating the facts). As the case made does not affirmatively show that it contains all the evidence offered at the trial, we can only consider a part of the errors alleged. The first is that the court erred in permitting C. B. Hoffman, who was placed on the witness stand by the plaintiff to identify certain letters and telegrams which were offered in evidence, to identify a number of other letters on cross-examination, and in permitting such other letters to be read in evidence in connection with the cross-examination of the witness. It is only where the court has clearly abused its discretion that a judgment will be reversed on account of the order in which testimony is admitted. The letters identified and read in evidence on cross-examination were clearly competent, and, even if it be conceded that they properly constituted a part of the defense in the case, the judgment could hardly be reversed on account of their admission out of time. But in this case it is not clear that the court would have abused its discretion if it had required the plaintiff to introduce, as his own testimony, the whole of the correspondence relating to the transaction. The contract between the parties, under which the flour was shipped, was made entirely by letters and telegrams, and it is difficult to see how the plaintiff could

introduce a part of the writings, and withhold the balance, any better than he could offer a part of a contract contained in one connected written instrument. The plaintiff having failed to offer the whole of the correspondence, we think the court committed no error in allowing the defendants to offer the balance in connection with the cross-examination of the witness. The plaintiff offered the depositions of four witnesses to show, as it is claimed, a custom among commission merchants in New Orleans to purchase goods from parties from whom they were receiving consignments to sell on commission. These depositions were excluded by the court. It is a sufficient answer to this claim that the depositions offered failed to show any established custom in that city which would vary in any manner the ordinary rule of law with reference to the dealings between a principal and his agent. About the most that can be claimed under the showing in the depositions is that a commission merchant, who is engaged in selling merchandise for a correspondent, may also purchase merchandise outright from such correspondent. This proposition must be conceded without any proof of custom. In this particular case, the plaintiff seeks to show that the fact of his having ordered the flour without naming the purchasers was notice to the defendants that he bought it on his own account. We think the language of the telegram and the letter not such as to indicate to the defendants that the plaintiff was purchasing on his own account. The telegram simply uses the word "book," which is not shown to have any special meaning in the trade. The letter written by Thayer & Co., on the same day, says: "We placed seven cars to-day, and will inclose shipping directions. Could have sold more this evening, but thought it advisable to hold off, owing to advance in Chicago. We aiways sell on last price received, using judgment in case of advance." This language conveys to our minds the impression that the plaintiff had sold the flour as the defendants' agent to other parties, rather than that he was buying on his own account. The letter of the defendants in response to the telegram cautions the plaintiff against selling to any but "giltedged" parties. If they understood that the plaintiff was buying on his own account, they certainly would have had no interest in the financial standing of any one but himself. It is true that, in the subsequent correspondence, there is language used which might indicate that the defendants regarded this flour as sold to the plaintiff, but when the whole correspondence, so far as we have it before us, is construed together, we think the transaction must be held one of agency. We think it fairly inferable from the record. if not conclusively shown, that the plaintiff received his regular commission of 10 cents a barrel on the sale of this very flour, and



he contends that he is entitled to the commission, and the difference between the price stated in his order and that at which the flour was sold also, on the ground that the defendants would realize just as much from a sale to himself as to any one else. This contention is not sound in principle. The employer is entitled to the full benefit of the services of his agent, and the agent can never be permitted to take advantage of the confidential relation in which he stands towards his principal, to speculate, to his principal's disadvantage. An agent may not order a consignment of his principal's goods, using ambiguous terms, so that the loss may fall on the principal if the market declines, while if it advances he may claim a sale to himself, and collect the profits of the transaction. The general rule of law is that profits resulting from the transactions of the agent belong to the principal. Story, Ag. § 207. It is unnecessary, however, to pursue this inquiry further, or to discuss the distinction urged by counsel between a commission merchant and a broker. We think the facts disclosed by the record do not warrant a recovery by the plaintiff. The case failing to show that all of the evidence is before us, all presumptions are in favor of the ruling of the district court on the demurrer to the evidence. The proposition urged by counsel that, if there is any evidence in support of the plaintiff's claim, the case must go to the jury, has little application where the whole transaction is in writing, as in this case. It is for the court to construe written instruments. We find no substantial error in the record, and the judgment is affirmed. All the justices concurring.

FIRST NAT. BANK OF LARNED v. TUFTS.

(Supreme Court of Kansas. July 6, 1894.)
CONDITIONAL SALES—FAILURE TO RECORD—RIGHTS
OF SUBSEQUENT PURCHASERS—ACTUAL NOTICE.

Considering the purpose of the provisions of chapter 255, Sess. Laws 1889, relating to "the recording of title notes or evidences of conditional sales," a true interpretation thereof makes actual notice of such title notes or conditional sales to a subsequent purchaser or the creditors of the vendee before the purchase or obtaining a lien on such property as effectual as constructive notice by deposit or record in the office of the register of deeds in the county where the property is kept.

(Syllabus by the Court.)

Error from district court, Pawnee county; S. W. Vandivert, Judge.

Action by James W. Tufts against the First National Bank of Larned. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was instituted by James W. Tufts, who claimed to be the owner of a soda-water fountain and apparatus, against the First National Bank, to recover damages for an alleged conversion of the property.

The answer of the bank was a general denial. At the trial, the testimony showed that on December 30, 1887, Tufts made a conditional sale of the fountain to H. C. Lichtenthaler, for about \$1,375, payments to be made in accordance with a number of notes executed by Lichtenthaler in Tufts' favor, and the notes and the agreement specified that the fountain or apparatus was to remain the property of Tufts until fully paid for. Some time in August, 1888, Lichtenthaler failed in the drug business. He had executed a chattel mortgage in favor of the bank, but this mortgage did not include the fountain or apparatus. Upon his failure, he turned over his store and the property therein to the bank, and the store was afterwards rented to the bank by Mr. Vernon, who was also the attorney for Tufts. The officers of the bank knew at the time that the fountain was not included in their chattel mortgage, and they were also aware that it was the property of Tufts, and that there remained all the outstanding unpaid notes-something like \$800 or \$900-due to Tufts. Some time in September, or prior to November, 1888, Mr. Vernon, the attorney for Tufts, had an understanding with the officers of the bank whereby, at their request, they were to retain possession or custody of the soda fountain, with permission to sell the same if they could realize a sum sufficient to pay off the indebtedness due to Tufts. The bank had possession under this arrangement at the time of the passage of the act to regulate the recording of title notes or evidence of conditional sales, approved March 1, 1889, being chapter 255 of the Laws of 1889, which went into effect May 25, 1889. After the taking effect of chapter 255, it is claimed by the bank that the situation of the parties changed. In a conversation had some time in January, 1890, between Mr. Vernon, the attorney of Tufts, and Mr. Rush, the president of the bank, Rush informed Vernon that the bank had concluded to hold the fountain, and not give it up, and thereupon a formal demand was made by Vernon for the property, which was refused. Trial was had on the 7th of April, 1890, before the court, with a jury. The jury returned a verdict for Tufts for \$990. Subsequently judgment was entered thereon against the bank, with interest and costs. The bank excepted, and brings the case here.

C. N. Sterry, for plaintiff in error. W. H. Vernon and Hurd & Dunlap, for defendant in error.

HORTON, C. J. (after stating the facts). It is insisted that the verdict and the judgment were contrary to the evidence and the law. The contention is that, there having been no conversion or interference with the rights of Tufts by the bank prior to the taking effect of chapter 255, Sess. Laws 1889, the bank, being then in possession of the property, for the purpose of securing the in-

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debtedness to it, was and became a creditor, with a lien thereon, against which Tufts could have no right, under the provisions of the act, until he had complied with its requirements. It is admitted that neither the original agreement nor the notes given by Lichtenthaler to Tufts for the soda-water fountain or apparatus, nor any copy thereof, were deposited in the office of the register of deeds of Pawnee county, where the property was kept.

The question involved in this case is whether chapter 255 applies. That chapter provides, among other things, that the title notes or evidence of conditional sales "shall be void as against innocent purchasers or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall be deposited in the office of the register of deeds," The purpose of the statute is to prevent the possession of property from being used in fraud by persons relying on facts showing such possession as sufficient indicia of ownership. 20 Am. & Eng. Enc. Law, 537. In interpreting the statute, the purpose of the legislature in passing the same must be considered. We have a similar statute concerning chattel mortgages. Gen. St. 1889, par. 3903. This court has held in several cases that actual notice is as effectual as constructive notice by record against subsequent purchasers, and that a creditor stands in no better position. Cameron v. Marvin, 26 Kan. 612; Corbin v. Kincaid, 33 Kan. 649, 7 Pac. 145; Neerman v. Caldwell, 50 Kan. 61, 31 Pac. 608. If a purchaser or a creditor has actual notice of the existence of the title notes or evidence of conditional sales before his purchase, or obtaining a lien on such property, he cannot be misled or imposed upon, if the original instrument, or a true copy thereof, is not deposited for record. The filing of a contract of a conditional sale with a register of deeds is constructive notice. only of its existence, and, if a party has actual notice of such existence otherwise than by the record, the full purpose of the statute is attained. Actual notice given in time is a substitute for recordation. It is impossible to make any good distinction between actual and constructive notice, though it may be very well said that actual notice is even better than constructive. Actual notice gives personally to a party full and ample informa-Allen v. McCalla, 25 Iowa, 464.

We think there was sufficient evidence to sustain the verdict and judgment rendered. Before the bank obtained possession of the soda fountain or apparatus, it had full knowledge of the title notes from Lichtenthaler to Tufts, and of the amount due thereon. The bank, through its officers, requested permission from Mr. Vernon, the agent of Tufts, to sell the fountain, and pay Tufts the amount due on his notes. At that time they were of the opinion that they could realize something for the bank over and above the notes. Under the facts disclosed in the record, the provisions of said chapter 255 have no application in this case to protect the bank against the rights of Tufts to the property. The judgment will be affirmed. All the justices concurring.

HASIE v. CONNOR, Sheriff.

(Supreme Court of Kansas. July 6, 1894.) ATTACHMENT BY MORTGAGOR'S CREDITORS - RE-PLEVIN BY MORTGAGEE - FRAUDULENT CONVEY-ANCE-ANTECEDENT DEBT.

1. In an action of replevin brought by a mortgagee to recover goods attached by the creditors of the mortgagor, who claim that the mortgage is fraudulent and the debt which it purports to secure is not bona fide, and where it is shown that the mortgage is fair on its face, duly recorded, and that the mortgagee was in the actual possession of the mortgaged property at the time of the levy of the attachment, it devolves upon the defendants to show that the debt secured by the mortgage was not actual and honest, and that the mortgages were made for the purpose of delaying and defrauding the

creditors of the mortgagor.

2. A creditor who in good faith obtains from an insolvent debtor property or security in payment of an onest debt, where the debtor may have acted with the design of delaying and defrauding other creditors, will not lose his preference by reason of notice of the wrong-ful design of the debtor, providing his only purpose is to fairly obtain satisfaction or security for his own debt, and that he does not participate in the wrongful intent of the debtor.

3. A creditor who in absolute good faith takes the property of his debtor at a fair valuation in appropriate of the second section.

tion in payment of an honest debt, although the payment of his debt may absorb the entire property of the debtor, commits no fraud against any one.

4. The mortgagee was named as defendant in the attachment suits brought by the creditors, but the goods were levied upon as the property of another. These suits were pending and undetermined when the replevin action was begun, but, before the trial of the latter, the attachment creditors abandoned the prosecution of the attachment suits against the mortgagee, and they were dismissed as to him. *Held*, that the creditors were estopped from asserting that the action of replevin could not be maintained, because it was begun before the attachment proceedings were determined.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Replevin by George E. Hasie against J. W. Connor, sheriff. Verdict for defendant, and plaintiff brings error. Reversed.

John W. Shartel, Henry E. Asp, and James R. Cottingham, for plaintiff in error. J. D. Houston and W. H. Boone, for defendant in error.

JOHNSTON, J. A stock of goods was seized upon attachment by the sheriff of Cowley county, as the property of M. S. Hasie, with a view of appropriating the same to the payment of the claims of several of the creditors of M. S. Hasie. An action of replevin was soon brought by George E. Hasie, a brother of M. S. Hasie, to recover the same goods. He claimed them upon a mortgage executed November 29, 1888, to secure an indebtedness of his brother to him, which had existed for a period of eight months. The debt was evidenced by a note for \$12,978.93, given on March 10, 1888, and upon which there was a credit of \$5,690.69, purporting to have been made on November 1, 1888. The mortgage was recorded on November 30th, and possession of the goods was soon afterwards taken by the plaintiff. The sheriff answered, denying the allegations of the petition, and alleging that the goods levied upon belonged to M. S. Hasie, and were held under orders of attachment issued in an action wherein George E. Hasie was a party, which action was pending when the replevin action was begun; and he further averred that the mortgage was fraudulent, without consideration, and void. The trial resulted in a verdict in favor of the sheriff, and several grounds of error are assigned for reversal.

It is first contended that the action was not maintainable, because it was commenced while the attachment suits against him and his brother were pending and undetermined. It appears that George E. Hasle was named as a party defendant in the two attachment suits wherein the sheriff levied upon the goods in question. The levy, however, was made to satisfy the debt of M. S. Hasle, and the goods were attached as the property of M. S. Hasle.

The point that the property replevied was in the custody of the law might have been made with some force but for the conduct of the creditors who were plaintiffs in the attachment suits. The attachments were sustained, and judgment taken as to M. S. The actions were not prosecuted Hasie. against George E. Hasie, but were discontinued and dismissed from the court as to him for want of prosecution. Having voluntarily abandoned the prosecution of the attachment suits against him, and permitted their dismissal from court before the trial of the replevin action, the defendant in error, who represents them, was estopped from insisting that the action of replevin by George E. Hasie was not maintainable. The abandonment and dismissal were shown by the defendant's own testimony, and together they constituted a waiver of the defense that the replevin action was begun before the attachment proceedings were disposed of.

The principal grounds of error are based upon the rulings of the court in charging the jury. One of the contentions in the case was whether the mortgage represented an actual indebtedness, or whether it had been executed with intent to deceive and defraud the creditors of M. S. Hasie. The jury were instructed that, before the plaintiff could recover, he must satisfy them, by a preponderance of the evidence, that the mortgage under which he claimed the property was executed and delivered to him by his brother in good faith, to secure an actual indebtedness then in good faith existing between them,

and then added the following: "And the burden is upon him to satisfy you by a preponderance of the evidence of the truthfulness of this proposition in the first instance in this case." This instruction was clearly erroneous. The mortgage was fair upon its face, was properly recorded, and under it the plaintiff had taken possession of the goods at the time they were seized by the sheriff. In such a case the burden of proof was upon the sheriff and those whom he represented to show that the mortgage was fraudulent, or that it had been executed for the purpose of delaying and defrauding the creditors of M. S. Hasie. Fraud is never presumed, and the burden to prove the same rests upon him who asserts it. In requiring the plaintiff to show in the first instance that the indebtedness was bona fide, and that the mortgage to secure the same was without fraud, the court committed prejudicial error. Gleason v. Wilson, 48 Kan. 500, 29 Pac. 698; Landauer v. Mack (Neb.) 57 N. W. 555. To overcome this error, we are referred to another portion of the charge, in which the court appears to place the burden of establishing the bad faith and fraudulent purpose of the plaintiff and his brother upon the defendant. This, however, does not take away the vice of the instruction first given, but it would rather create confusion in the minds of the jury, and it cannot be said that the contradictory instructions were not prejudicial to the plaintiff.

The next assignment of error is based upon instructions to the effect that actual or constructive notice of a purpose on the part of the plaintiff's mortgagor to hinder, delay, or defraud his other creditors would defeat the plaintiff's mortgage. The jury were advised that if M. S. Hasle made the mortgage with the intent to delay and defraud his creditors, and George E. Hasie knew of such intent, or of such facts as ought to put him on inquiry as to the wrongful intention of his brother, then the plaintiff cannot recover. There were several repetitions of this view included in the charge, and the court refused an instruction to the effect that fraud on the part of the mortgagor does not affect the mortgagee unless he was a party to it, and received the mortgage with the intent to delay or defraud the creditors of the mortgagor; that both parties must participate in the fraudulent intent to make the mortgage void, if the mortgage is taken in good faith, to secure an actual indebtedness existing at the time the mortgage is taken, In another instruction, the court, in effect, charged that the preference could not be sustained unless both parties acted in good faith, and that constructive notice of the bad faith of the debtor would defeat the security which the creditor obtained. The rule laid down and repeated by the court does not apply in the case of a creditor whose only purpose is to fairly obtain satisfaction of or security for an honest debt. A stricter rule obtains where a party is a mere volunteer. In such case, if a purchaser has knowledge of the fraudulent intent of the vendee, or of facts which would put him upon inquiry, the transfer will ordinarily be deemed to be fraudulent as to him. Phillips v. Reitz, 16 Kan. 396; Gollober v. Martin, 33 Kan. 252, 6 Pac. 267. A bona fide creditor, however, may in good faith secure a preference of his debt, whatever may be the motive of the debtor in giving it. In taking either property or security from one who is insolvent, or whom he knows is attempting to dispose of his property to defraud other creditors, he must act in the utmost good faith, and pay or allow his debtor adequate prices or fair value for the property so taken. Lewis v. Hughes, 49 Kan. 23, 30 Pac. 177. If his purpose is to assist the debtor in covering up his property or in hindering and delaying creditors, he cannot be said to act in good faith. "However, a purchaser who in good faith takes the property of his debtor, at a fair valuation, in payment of his honest debt, is not guilty of fraud against any one. The fact that the payment of his claim in this manner may absorb the entire property of the debtor is no evidence of bad faith, and does not necessarily taint the transaction with fraud." Schram v. Taylor, 51 Kan. 547, 33 Pac. 315; Davis v. McCarthy, 52 Kan. 116, 34 Pac. 399; Standard Implement Co. v. Parlin & Ordndorff Co., 51 Kan. 632, 33 Pac. 362; Bank v. Nail (Kan.) 34 Pac. 797. In Bank v. Ridenour, 46 Kan. 717, 27 Pac. 150, the court, in considering the effect of a mortgage given to secure a bona fide debt, said that "the plaintiff knew nothing of any wrongful intent, and it is probably true, under the authorities, that any amount of knowledge of the intent of the mortgagors on the part of the plaintiff would not render the mortgage void in its hands in favor of liens created after the recording of the mortgage, so long as the debt to secure which it was given was bona fide, and it got by its security no more than the fair value in property of the debt secured. Worland v. Kimberlin, 6 B. Mon. 608, and cases there cited; Covanhovan v. Hart, 21 Pa. St. 495; Cooper v. Bank, 40 Kan. 5, 18 Pac. 937." See, also, Chase v. Walters, 28 Iowa, 469; Kohn v. Clement, 58 Iowa, 589, 12 N. W. 550; Owens v. Clark, 78 Tex. 547, 15 S. W. 101, Although there is considerable testimony against the validity of the transaction, there was sustaining evidence offered by the plaintiff which entitled him to have his theory of the case fairly put to the jury, and from the record we cannot say that the error in the charge was without prejudice.

Complaint is made that undue prominence was given in the instructions to the relationship of the parties to the transaction. Of course, a failing debtor may prefer a brother or other relative, and no inference of wrong or fraud is to be drawn from the relationship alone. The fact, however, that

they are closely related, is a proper consideration for the jury, in connection with the other facts of the case, to aid them in determining the honesty and validity of the transaction. The charge of the court appears to have substantially embodied this view, and we cannot say that the court placed too much importance on the matter of relationship.

There are other questions suggested which we do not deem of importance; but, for the errors pointed out, the judgment must be reversed, and a new trial granted. All the justices concurring.

FIRST NAT. BANK OF COBLESKILL v. HELLYER et al.

(Supreme Court of Kansas. July 6, 1894.)
PAYMENT—BURDEN OF PROOF.

In an action to recover personal property mortgaged to secure a debt, where the defendant sets up the claim of payment, and which was the controverted issue in the case, the burden of proof rests upon the defendant to prove such payment, and the giving of an instruction which in effect casts this burden upon the plaintiff in error.

(Syllabus by the Court.)

Error from district court, Phillips county; G. Webb Bertram, Judge.

Action by the First National Bank of Cobleskill, N. Y., against James M. Hellyer and Sarah J. Hellyer. Judgment for defendants, and plaintiff brings error. Reversed.

G. A. Spaulding, for plaintiff in error. N. B. McCormick and Frank McKay, for defendants in error.

JOHNSTON, J. This was an action to recover personal property which had been mortgaged by defendants to secure the payment of a promissory note executed by them for the sum of \$1,245.75. The plaintiff, which was the owner of the note, claimed that there was a balance due thereon of about \$350, and claimed a special ownership and right of possession by virtue of the chattel mortgage given to secure the payment of the debt. While the answer was a general denial, the only real controversy between the parties was with reference to the payment of the debt. The record shows that there was no contention as to the ownership of the note, or that the property had been mortgaged to secure the payment of the debt. Neither was there any controversy as to the value of the property, or that demand for the same had been made. The evidence in the case was directed to the question of payment, and, taking the testimony of the defendant with regard to the credits indorsed and the payments made, there is great doubt whether the whole of the debt in question was actually paid. While the amount of all the payments made would more than equal the amount of this debt, yet Hellyer admits that a portion of the money so paid was to

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be applied to other indebtedness, and it is difficult to find from the evidence that a sufficient amount was paid upon the debt in question to discharge the same. The jury, however, found that the debt had been fully paid, and gave verdict in favor of the defendants. In the trial of the case the court called their attention to the issue of indebtedness, and then, in effect, placed the burden of proof upon the plaintiff. As the defendauts set up the claim of payment, the burden rested upon them to prove such payment, and, from the character of the testimony, we are unable to say that this erroneous ruling was not prejudicial. Cuttermann v. Schroeder, 40 Kan. 507, 20 Pac. 230. The judgment of the district court will be reversed, and the cause remanded for another trial. All the justices concurring.

CITIZENS' NAT. BANK OF KINGMAN v. BERRY et al.

(Supreme Court of Kansas. July 6, 1894.)
BANKS—AUTHORITY OF PRESIDENT.

The president of a banking corporation has the power to employ counsel and manage the litigation of the bank, in the absence of any order of the board of directors depriving him of such power.

(Syllabus by the Court.)

Error from district court, Kingman county; S. W. Leslie, Judge.

Action by George F. Berry & Co. against the Citizens' National Bank of Kingman. Judgment for plaintiffs, and defendant brings error. Reversed.

S. S. Ashbaugh and James Steck, for plaintiff in error. Hay & Hay, for defendants in error.

ALLEN, J. George F. Berry & Co. brought suit against the Citizens' National Bank of Kingman to recover certain sums of money alleged by them to have been paid to the bank as usurious interest, and the penalty provided by the national banking law therefor. An answer containing merely a general denial was filed by Lydecker & Cooper on behalf of the defendant. A demurrer alleging various grounds was filed by R. W. Hodgson, as president. The attorney for the plaintiffs moved to strike from the files Hodgson's demurrer, and Lydecker & Cooper moved for an order requiring Hodgson to show by what authority he appeared for the bank. Hodgson also moved for an order requiring Lydecker & Cooper to show by what authority they appeared. On this motion, affidavits were introduced, from which it appears that Hodgson was president of the bank, and the owner of \$30,800 of the capital stock, the total amount of which was \$50,000; that the corporation had gone into volun-

tary liquidation in December, 1888; that Lydecker & Cooper had been employed as attorneys of the bank by the board of directors, and had never been discharged as such; and that Lydecker was one of the directors. On hearing these motions, the court ordered the demurrer filed by Hodgson stricken from the files, and sustained the right of Lydecker & Cooper to represent the bank. Thereupon Messrs. Ashbaugh & Steck asked leave to file an answer on behalf of the president of the bank, under employment from him, setting up the fact that Berry and Jett, the plaintiffs, were directors in the bank at the time of the alleged usurious transaction, and also the facts with reference to the bank having gone into voluntary liquidation, and other matters of defense. The court refused to consider such answer, and held that Hodgson had no right to be heard. The case was then tried, and a judgment rendered in favor of the plaintiffs for \$940.-Aside from the fact that Hodgson was the party principally interested in the result of the litigation, it appears that he was president of the bank at the time it went into liquidation, and, if the corporate existence of the bank had not terminated, was still its president.

In Morse on Banks and Banking (section 143) it is said: "Indeed, it is a singular fact that the entire collection of judicial authorities justifies the enunciation of only one act as falling within the properly inherent power of the president. This solitary function is to take charge of the litigation of the bank. There is no question that this matter belongs to him by virtue of his office. He may institute and carry on legal proceedings to collect demands or claims of the bank. He may appear, answer, and defend in suits against the bank. He may retain and employ counsel on behalf of the bank. See, also, Boone, Banking, § 144, and cases cited. It is said in the brief that, as the evidence is not all contained in the record, the court cannot consider the case. It is immaterial whether the case contains all the evidence or not, for the substance of the claim of the plaintiff in error is that it was refused a hearing. There is nothing in the record showing that the board of directors had attempted to take away from the president the power to employ attorneys and conduct the bank's litigation. The mere fact that the board of directors had employed counsel would not necessarily take away from the president the right to control a case in court, and to have the bank represented by other counsel, if he saw fit. It was error for the court to deny the president this right; and the judgment is therefore reversed. All the justices concurring.

CITIZENS' BANK OF KINGMAN v. Mc-CLELLAND.

(Supreme Court of Kansas. July 6, 1894.) EXECUTION-ILLEGAL SEIZURE-PARTIES TO JUDG-MENT.

B. & Co. obtained a judgment against the Citizens' National Bank of which defendant claims that plaintiff is successor. Under an execution issued on such judgment, without any proceedings against the Citizens' Bank (plaintiff in this case), the defendant, as sheriff, seized plaintiff's property, to satisfy such judgment. Held, that such seizure was wrongful.

(Syllabus by the Court.)

Error from district court, Kingman county; S. W. Leslie, Judge.

Action by the Citizens' Bank of Kingman against J. C. McClelland. Judgment for defendant. Plaintiff brings error. Reversed.

S. S. Ashbaugh and James Steck, for plaintiff in error. John E. Lydecker, for defendant in error.

ALLEN, J. This case grows out of that of Bank v. Berry, 37 Pac. 131. On the judgment in that action, an execution was issued and levied on moneys of the Citizens' Bank of Kingman, under the claim on the part of the plaintiff in that case that the Citizens' Bank of Kingman was merely a successor in interest of the Citizens' National Bank, and that the property of the plaintiff in this case was liable to seizure under an execution issued against the Citizens' National Bank. The judgment in that case has just been reversed by this court. The action of Berry v. Bank was instituted after the organization of the Citizens' Bank. The Citizens' Bank was never made a party to that action, and, of course, was not bound by any judgment rendered therein. Even if the claim is correct that the Citizens' Bank took all the property and assumed all the liabilities of the Citizens' National Bank, Berry & Co. would have no right to levy on an execution on the property of the Citizens' Bank until they had obtained a judgment against it. The judgment is reversed. All the justices concurring.

CENTRAL KANSAS LOAN & INV. CO. ▼. CHICAGO LUMBER CO. et al.

(Supreme Court of Kansas. July 6, 1894.) APPEAL-DEFECT OF PARTIES-DISMISSAL.

Where a judgment against several defendants is brought up to the supreme court for review, and it appears that a modification or reversal will affect a defendant who has not been made a party, the proceeding in error will be dismissed.

(Syllabus by the Court.)

Error from district court, Kingman county; S. W. Leslie, Judge.

Action by the Central Kansas Loan & Investment Company against the Chicago Lumber Company and others. To a judgment

Chicago Lumber Company, plaintiff brings error. Dismissed.

Hay & Hay, for plaintiff in error. W. E. Stanley, for defendant in error.

JOHNSTON, J. The plaintiff in error brought an action to foreclose mortgages executed by Hiram Stout and wife upon lots situated in the city of Kingman. The Chicago Lumber Company and eight other parties, who claimed an interest in the premises, were made defendants; and the lumber company, in an answer and cross petition, set up a lien for building material which was contracted for by Stout prior to the execution of the mortgages. The Stouts answered, alleging that a great part of the mortgage debt was usurious and without consideration; and, further, that the plaintiff was not the owner and holder of the notes. They also replied to the answer and cross petition of the Chicago Lumber Company, denying the averments which it contained, and a like reply was made to the answer and cross petition of the contractor, George Keys. When the trial was had, the Stouts appeared, and contested the claims of the investment company, the Chicago Lumber Company, and of George Keys, all of whom were represented by attorneys. The result was a recovery of a judgment against the Stouts, in favor of the Chicago Lumber Company, for \$1,519.52, a judgment for the amount claimed by the investment company, and it was further decided that the judgment for the lumber company was a first lien upon the mortgaged property, and that the mortgage debt of plaintiff was a second lien, and the other parties were barred and foreclosed of any right, title, or interest in the premises. plaintiff excepted, and brings the case here for review, but the Chicago Lumber Company is the only defendant that has been made a party to the proceedings in this court. Hiram Stout and his wife, as well as the defendant Keys, filed answer, and raised material issues in the case. They are interested in the judgment sought to be reviewed, and their presence, or at least the presence of the Stouts, is necessary to a review. They are interested in the amount of the recovery, and the plaintiff in error insists that the judgment obtained by the lumber company against Stout, and which was made a first lien against the premises, was excessive and erroneous.

There is more involved than the mere question of priority between the two lien holders, and a reversal necessarily affects the interests of the absent defendants. It is held that the absence of a party to a judgment who will necessarily be affected by a modification or reversal defeats the jurisdiction of the court, and there can be no review of any part of the judgment. Paper Co. v. Hentig, 31 Kan. 322, 1 Pac. 529; McPherson v. Storch, 49 Kan. 313, 30 Pac. 480; Paving against the defendant Stout, in favor of the | Co. v. Botsford, 50 Kan. 331, 31 Pac. 1106;

Steele v. Baum, 51 Kan. 165, 32 Pac. 918. The failure to bring into this court the necessary parties compels an allowance of the motion to dismiss. Before taking up the motion to dismiss, we had examined the record in the case, and found that it does not legally appear to contain all the evidence, and hence we could not have considered the sufficiency of the evidence to sustain the judgment. An examination of the answer and cross petition of the Chicago Lumber Company satisfies us that the demurrer thereto was properly overruled, and that no error was committed in that ruling. The absence of necessary parties, however, compels a dismissal of the proceeding. All the justices concurring.

(53 Kan. 682)

CLEMENT v. WICHITA & S. W. RY. CO. (two cases).

(Supreme Court of Kansas. July 6, 1894.) EMINENT DOMAIN-NOTICE OF PROCEEDINGS-RE-PORT OF COMMISSIONERS.

1. The notice required, by paragraph 1395 of the General Statutes of 1889, to be given in proceedings to condemn the right of way for a railroad, may be given and signed by the commissioners appointed to make the condemnation.

2. The commissioners may properly embody in the report which they file with the county clerk a statement of their doings with reference to giving notice of the time when they will proceed to lay off the route of the railroad, and such recitals are prima facts evidence of the facts therein stated.

3. Recitals in the report of the commissioners appointed to condemn a right of way showing the following facts: "Afterwards, on the 1st day of July, A. D. 1887, we caused to be published in the Sumner County Standard, a newspaper published in said Sumner county, a notice, of which the following is a copy,"—following which is a notice that they will proceed to be some the 20th days of July. following which is a notice that they will proceed to lay off the route on the 30th day of July, A. D. 1887, which notice is dated at the bottom 'June 28, 1887,' and signed by the commissioners. After this comes the following recital: "Which said notice was published for 30 days before the time fixed for proceeding to lay off said route, and afterwards, on, to wit, the 30th day of July, A. D. 1887, at the time and place mentioned in said notice aforesaid, we met, organized, and adjourned, to meet at the same place on the 8rd day of August, 1887,"—having been acted on by the commissioners, as a valid notice, and so construed by the district court, hedd to show prims facie that 30 days' notice was given as required by the statuts. Allen, was given as required by the statute. Allen, J., dissenting.

(Syllabus by the Court.)

Error from district court, Sumner county; J. T. Herrick, Judge.

Actions by Thomas B. Clement against the Wichita & Southwestern Railway Company. Judgments for defendant, and plaintiff brings error. Affirmed.

These were actions brought by Thomas B. Clement, as plaintiff, against W. A. Black, the Wichita & Southwestern Railway Company, and others, to foreclose mortgages on two tracts of land in Sumner county. The mortgage in the first case was executed by Black on the 24th of February, 1887, to secure a note for \$4,000, and that in the other case was executed by the same party, on the same day, to secure a note for \$5,000. Judgment was rendered against Black for the amount of the notes and foreclosure of the mortgages, and sale of all the lands, except that claimed for a right of way by the railway company. The railway company claimed title to that part of the land occupied by it for a right of way, by virtue of condemnation proceedings instituted in June, 1887, and the payment to the county treasurer of the damages awarded by the commissioners appointed to condemn the right of way. The trial court found in favor of the railway company, and the plaintiff brings the case here.

Lucas & Nebeker and W. W. Schwinn, for plaintiff in error. A. A. Hurd, Robert Dunlap, and O. J. Wood, for defendant in error.

ALLEN, J. (after stating the facts). The only question in this case is as to the validity of the condemnation proceedings under which the defendant in error claims to have acquired its right of way as against the lien of the mortgagee. On the trial, the defendant introduced in evidence the application for an order of appointment of commissioners to condemn the right of way, the report of the commissioners, and proof of payment of the amount of the award to the county treasurer, and of its receipt by Black, the mortgagor. The only proof offered with reference to the publication of the notice, required by paragraph 1395 of the General Statutes of 1889, of the time when the commissioners would proceed to lay off the route, and assess damages, was the recitals contained in the report of the commissioners. It is urged that this notice is jurisdictional: that the commissioners had no right to proceed until after it had been given; that the facts with reference to the notice are not matters required to be embodied in the report, and that it therefore furnishes no evidence of such facts. We have held, in accordance with the clear import of the statute, that notice is essential to the validity of the condemnation. Railway Co. v. Fisher (Kan.) 38 Pac. 1004. The statute fails to designate the person by whom the notice shall be given. It simply says "that notice of the time and place when the same shall be commenced shall be given," etc. As the condemnation is to be made by the commissioners, and claims for damages are to be made in the first instance to them, we think a notice signed by the commissioners officially is clearly sufficient. It is not necessary to now decide whether notice given by any one else would be valid or not, for the notice recited in the report was signed by the commissioners. Paragraph 1391, Gen. St. 1889, provides that upon application the board shall proceed to lay off the route, and assess damages, and that they shall embody all such doings in a written report, and file it

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in the office of the county clerk. The provision for giving the notice is in a subsequent section.

As we are of the opinion that the notice may properly be given by the commissioners in their official capacity, and as no other provision is made for a record of proof of the fact that publication has been made, we think it fairly comes within the proper range of the duties of the commissioners to state in their report what they have done with reference to giving notice, and that recitals contained in their report, with reference thereto, are evidence of the facts therein stated. The commissioners in this case were appointed by the judge of the district court. While their power to proceed to condemn the right of way depended on the publication of the statutory notice, their appointment as commissioners was valid, and made them officers for that purpose without reference to the notice. The act of giving the notice was an official act, as much as any of the subsequent proceedings. As no other proof was offered at the trial, the case must be decided on the recitals in the commissioners' report, and the only remaining question is whether these recitals show publication of the notice for 30 days before the time fixed for proceeding to condemn the land. After reciting their appointment, and taking the oath of office on the 28th day of June, 1887, the report proceeds to state: "And afterwards, on the 1st day of July, A. D. 1887, we caused to be published in the Sumner County Standard, a newspaper published in said Sumner county, a notice, of which the following is a copy." Then follows a copy of a notice fixing the 30th day of July, 1887, at 9 o'clock a. m., as the time when they would proceed to lay off the route, etc. This notice is dated, at the bottom, the 28th day of June, 1887, and signed by the commissioners. The report then proceeds: "Which said notice was published for 30 days before the time fixed for proceeding to lay off said route, and afterwards, and on, to wit, the 30th day of July, A. D. 1887, at the time and place mentioned in said notice aforesaid, we met, organized, and adjourned, to meet at the same place on the 3d day of August, 1887." If from this report we are to understand that the first publication was made on the 1st of July, then, according to the statutory rule for the computation of time (section 722, Civ. Proc.), but 29 days' notice was given. The majority of the court are of the opinion, however, that the report, as a whole, shows that the proper notice was given. The commissioners qualified on the 28th of June, and the notice bears that date at the bottom. report does not state that the first publication was on the 1st day of July, nor does it state that the Sumner County Standard was published weekly. The subsequent recital that the notice was published for 30 days before the time fixed for proceeding to lay off the route, coupled with the further fact that the commissioners, who could act only after having given the proper notice, did act, is deemed, especially after having been so construed by the trial court, as a sufficient showing that proper notice was given. There are authorities holding that, where the performance of a prior act by an officer or board is essential to the validity of a subsequent act, the performance of the subsequent act by the officer or board raises the presumption of the due performance of the prior one. Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 13 Sup. Ct. 267. The individual view of the writer is that the fair and reasonable construction of the commissioners' report is that the notice was written out, dated, and signed by the commissioners on the 28th day of June; that it was first published in the newspaper on the 1st day of July,-only 29 days before the board convened; that the subsequent recital. that it was first published for 30 days before the time fixed for laying off the route, is not sufficient to overcome the statement that it was published on the 1st day of July; that the two, taken together, show that the commissioners committed an error in their computation of time, by including both the day of the first publication and of the meeting of the commissioners to condemn the land. It is not shown whether the Sumner County Standard was a daily or a weekly paper. If it was a weekly paper, then, if the recital that it was published on the 1st of July is true, it follows that a notice dated the 28th day of June could not have been published 30 days before the 30th day of July. It is claimed that no question was raised on the trial as to the sufficiency of the notice, but that the contention there was that the rights of the mortgagee could not be cut off by the condemnation proceedings without compensation having been awarded to him, and that this position was abandoned because of the decision in Goodrich v. Commissioners, 47 Kan. 355, 27 Pac. 1006. The fact that no proof, aside from the commissioners' report. was offered as to the time when the first publication was in fact made, would seem to support this claim. Upon the construction of the report of the commissioners by the majority of the court, the judgments in both cases are affirmed.

JOHNSTON, J., concurs. ALLEN, J., dissents.

HORTON, C. J. I concur in the affirmance of the judgment of the district court, for the reasons stated in the foregoing opinion and several others. If the notice referred to was not published for 30 days before the time fixed for laying off the right of way, as stated in the official report of the commissioners, it could have been shown by plaintiff below, outside of the written report. Upon the judgment rendered, and the action of the commissioners, all the presumptions are favorable to the regularity of the proceedings

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of condemnation, and, in the absence of any evidence aliunde the written report, it cannot be said the proceedings were irregular. If there was any evidence existing showing the requisite notice was not given, it is strange it was not offered upon the trial, after the report was received as prima facie evidence. 19 Am. & Eng. Enc. Law, 42-50; Muir v. City of Glasgow Bank, 4 App. Cas. 356; Knox Co. v. Ninth Nat. Bank, 147 U. S. 91-97, 13 Pac. 267; 19 Am. & Eng. Enc. Law, 43. See. also, Goodrich v. Commissioners, 47 Kan. 355, 27 Pac. 1006. If the Sumner County Standard was a daily paper, there was sufficient time from the 28th of June for 30 days' publication before the 30th day of July, and the record contains the positive statement that the notice was published 30 days before July 30, 1887. Again, it would be unfair to the trial court to dispose of this case in this court upon the insufficiency of the notice, if that matter was not presented on the trial.

In re SIMS.

(Supreme Court of Kansas. July 6, 1894.) CONSTITUTIONAL LAW—CONTEMPT—POWERS OF COUNTY ATTORNEYS.

Paragraph 2543 of the General Statutes of 1889, so far as it attempts to confer on county attorneys the power to commit witnesses for contempt on account of a refusal to be sworn or testify as provided in this section, is unconstitutional and void.

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(Syllabus by the Court.)

Application of J. D. Sims for a release on habeas corpus. Petitioner discharged.

Oscar Foust & Son, for petitioner. A. H. Campbell and Ewing & Bennett, for respond-

ALLEN, J. The petitioner was restrained of his liberty by the sheriff of Allen county, under a commitment issued by the county attorney for refusal to answer questions propounded to him touching violations of the prohibitory liquor law. Paragraph 2543 of the General Statutes of 1889 makes it the duty of the county attorney, when notified of any violation of the prohibitory law, to issue his subpoena, commanding witnesses to appear before him, to swear such witnesses, examine them, reduce their testimony to writing, and cause it to be subscribed by such witnesses, and expressly authorizes the county attorney to punish for contempt any witnesses disobeying his process or refusing to answer questions. If the testimony so taken discloses the fact that an offense has been committed, he is required forthwith to file the statements of the witnesses with his complaint or information against the person having committed the offense, and thereupon to proceed with the prosecution of the of-

The single question presented for our con-

sideration is whether that portion of the statute which authorizes the county attorney to punish as for contempt is in violation of the constitution of this state. Nothing is more firmly fixed in the governmental systems of all English-speaking countries than the division of powers between the three great departments of government,—the executive, legislative, and judicial. The question before us is whether the legislature has power to confer on an executive officer, charged with the duty of searching out violations of the law, inquiring into the facts, instituting and carrying on prosecutions for violations of the criminal laws of the state, the power, at the same time and as ancillary to the performance of his duties as a prosecuting officer, to commit persons to jail as for a contempt of his authority. That a proceeding to punish for contempt is in its nature a criminal proceeding has been directly decided by this court (State v. Dent, 29 Kan. 416), as well as by the courts of other states (Cartwright's Case, 114 Mass. 230; Puterbaugh v. Smith [Ill. Sup.] 23 N. E. 428). The right to appeal from an order punishing for a contempt has been frequently recognized by this court. Peyton's Appeal, 12 Kan. 398; In re Dalton, 46 Kan. 253, 26 Pac. 673; State v. Henthorn, 46 Kan. 613, 26 Pac. 937; State v. Vincent, 46 Kan. 618, 26 Pac. 939; In re Nickell, 47 Kan. 734, 28 Pac. 1076; In re Noonan, 47 Kan. 771, 28 Pac. 1104; In re Harmer, 47 Kan. 262, 27 Pac. 1004; State v. Durein, 46 Kan. 695, 27 Pac. 148. An appeal to a superior court can only be taken from a judicial decision; never from one involving merely executive or legislative discretion. Fulkerson v. Commissioners, 31 Kan. 135, 1 Pac. 261; Kent v. Board, 42 Kan. 534. 22 Pac. 610. In committing the prisoner for contempt, the county attorney therefore decided a case in its nature criminal, and in making such decision assumed to act in a judicial capacity. That the statute referred to gives him this power in terms is clear. Is the statute valid? The cases of In re Abeles, 12 Kan. 451, and In re Merkle, 40 Kan. 27, 19 Pac. 401, are cited in support of the proposition that power to commit for contempt may be given to other than a judicial officer, and it is said that it is not necessary in order to confer judicial power that the legislature should first in terms create a court. The constitution of this state provides that "the judicial power of this state shall be vested in a supreme court, district courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as may be provided by law." Section The legislature therefore is at 1. art. 3. liberty to confer judicial power, and to create courts inferior to the supreme court. It may be conceded that the legislature may confer judicial power on an individual who also fills an executive office. The prior decisions of this court go no further than this. The point here involved, whether executive and judicial

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power may be mingled and combined,—may be exercised by the same person at the same time and in the same proceeding,—has never yet been decided by this court.

The county attorney is peculiarly an executive officer. He is not only authorized to appear on behalf of the state, and prosecute all criminal cases arising in his county, but it is his duty to do so; and the act concerning the sale of intoxicating liquors imposes on him the specific duty of making inquiries and investigations for the purpose of detecting violations of the prohibitory law, to compel witnesses to testify, to reduce their statements to writing, to cause them to be signed by the witnesses, to file them in the district or other court having jurisdiction, and with them his complaint or information charging offenders with such offenses as the testimony shows they are guilty of. In all these proceedings the county attorney acts as an administrative officer, prosecuting on behalf of the people. It is for the purpose of aiding him in the effectual execution of this duty that the power to commit for contempt is given him. It is given to him, not as a judicial officer, but as county attorney, and for the very purpose of aiding him in performing the duties of that office. Such a combination of powers is not in accordance with the theory of our government, nor with the orderly administration of justice as administered in this country and in England. power to punish for contempt is never exercised except by legislative bodies or judicial officers. Whitcomb's Case, 120 Mass. 118; Langenberg v. Decker (Ind. Sup.) 31 N. E. 190; Kilbourne v. Thompson, 103 U. S. 168; Attorney General v. McDonald, 8 Wis. 703, It is sought to distinguish the case before us from those cited, because of provisions in the constitutions of Wisconsin and Indiana with reference to the separation of executive and judicial powers. We think, however, that in our constitution these powers are as clearly separated as though the framers of the constitution had said so in terms. It needs but a suggestion to show that the combination of executive and judicial powers may become tyranny at once. The advancement in the science of government made in modern times is due to the separation of the three great co-ordinate departments. If the legislature may confer on the county attorney one of the highest and most distinctive attributes of judicial power,that of punishing for contempt,—to aid him in ascertaining from witnesses the facts with reference to violations of law, might the legislature not also confer on any attorney the power to examine witnesses in civil cases in the same manner, and to commit them for contempt if they refuse to answer his questions? Might it not also give to any executive officer, from the governor down, the power to subpoena witnesses to inform his judgment, and to aid him in any executive decision or determination? And, if the rule

is established, can it be doubted that the division between executive and judicial offices will be completely broken down, and all constitutional barriers removed from those forms of oppression which have always attended this combination? In this very case the county attorney, as a prosecuting officer. issued his subpoena. When the witness came before him, as a prosecuting officer, he asked him a question. When the witness refused to answer, he at once passed on his own right to ask the question, on its pertinency and propriety, judicially determined that he, as prosecuting attorney, had asked a proper question; and, as a judicial officer, declared and determined that the witness was guilty of a judicial contempt in refusing to answer the question which he himself had asked as a prosecuting attorney. This is a commingling and confusing of executive and judicial functions in a manner incompatible with the constitution, obnoxious to its whole spirit and to the spirit of free institutions, and the act to that extent is void. The petitioner will be discharged.

HORTON, C. J. (concurring specially). Paragraph 2543, Gen. St. 1889, confers upon county attorneys of the state, when notified of any violation of the provisions of the prohibitory liquor law, the power to inquire into such violation, and for that purpose they are authorized to issue subpoenas for any person they believe has information or knowledge thereof to appear before them and testify. The testimony in every case must be reduced to writing, and signed by the witness, the same as a deposition in a civil cause. Power is also attempted to be conferred upon county attorneys to imprison any witness for refusal to testify concerning any violation of the statute, when required to do so. Laws 1885, c. 149, § 8. Paragraph 2543 further provides that, if the testimony taken discloses any offense has been committed against the provisions of the statute, the county attorney taking the testimony must file the statement of the witness and a complaint or information against the offender in some court of competent jurisdiction. The complaint or information may then be verified by the county attorney upon information and belief. All of the provisions of the statute are for the purpose of assisting county attorneys in procuring testimony for violations of the act, and in preparing their cases for successful prosecution in the court. far as the power conferred by the statute is ministerial or administrative, it is constitutional, and must be obeyed; but, if a witness refuses to testify, I do not think county attorneys have, or ought to have, the power to imprison such a witness for contempt. County attorneys are executive or administrative officers, but the power attempted to be conferred upon them, or any other officer taking depositions or testimony, to commit a witness for refusing to answer, is judicial in

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character. Kilbourne v. Thompson, 103 U. S. 608. If the statute is constitutional and open to no legal objection, county attorneys have the power to ask questions of the witnesses brought before them, and then to pass upon the competency or pertinency of the same, and, if the witness refuses to answer, to imprison him in the county jail, there to remain until he submits to testify. It is an old maxim of the law that "no man can be a judge in his own cause." This wise maxim is infringed upon by conferring on a prosecuting attorney judicial power to commit a witness called before him to testify in a case which he is preparing for trial, or in which he proposes, if his investigation warrants, to file a complaint or information. In such a proceeding, on the examination of a witness, the prosecuting attorney has a pecuniary, professional, and official interest. He is not acting disinterestedly. The statute would be very similar, and liable to like objection, if it authorized notaries public and attorneys at law to personally take depositions or perpetuate testimony in actions they were intending to commence for other par-In a civil action no deposition or affidavit can be taken before a relative or an attorney of either party, or before any one interested in the event of the proceeding. Civ. Code, \$ 350; Foreman v. Carter, 9 Kan. 681; Warner v. Warner, 11 Kan. 121. The rule in criminal cases ought to be as strict.

The legislature has full authority to confer the power to imprison a witness for contempt, prescribed in paragraph 2543, upon justices of the peace, probate judges, notary publics, clerks of courts, or on any individual not the prosecuting attorney or interested in the proceeding. I fully concur in the judgment pronounced in Re Clayton, 59 Conn. 510, 21 Atl. 1005, but some of the reasons given are not satisfactory to me. In that case the examination was taken before a police judge, not before a prosecuting attorney or any one interested in commencing criminal proceedings upon the testimony which it was sought to compel the witness to disclose. I am of the opinion, as observed in that case, that "it is the duty of all good citizens, when legally required so to do, to testify to any facts within their knowledge affecting public interest, and no one has a natural right to be protected in his refusal to discharge this duty. Public policy does not forbid, but, on the contrary, often requires, legislation to facilitate the administration of justice." But the power to compel a citizen to testify should be exercised legally, not unconstitutionally. If this ruling shall in any way interfere with full and successful investigations on the part of county attorneys of violations of the provisions of the prohibitory liquor law, it can be remedied speedily. The legislature will convene in a few months, and the power to imprison recusant witnesses, attempted to be conferred upon county attorneys by paragraph 2543, may, as before stated, be constitutionally and legally imposed upon any officer or individual not the county attorney or otherwise interested in the proceeding. My attention has been called recently to the case of De Camp v. Archibald (Ohio) 35 N. E. 1056, ruling that the power to commit a person for contempt for refusing to answer is not judicial in character. That decision, although made by an able court, is not supported by logical reasoning, is not in line with our own decisions, and is opposed to the great weight of authority.

JOHNSTON, J. (concurring specially). In the enactment of the provisions authorizing the county attorney to make preliminary inquiry as to the commission of offenses, the legislature appears to have proceeded upon the theory that the duties imposed and power conferred in that respect were not judicial in character. If they were executive or merely quasi judicial in their nature, the objections urged against the statute would be without force; and the fact that they were imposed and conferred upon an executive officer indicates the legislative view, and may be some argument that they are not judicial. Some of the steps in the preliminary inquiry are clearly the exercise of executive functions, and whether or not any of them are judicial must be determined from their nature, rather than from the position or station of the one by whom the act is to be performed. Assuming that the authority to punish for contempt was an incident to the exercise of executive power, the legislature vested it in the county attorney; and this is not to be wondered at, in view of the fact that the supreme court of Ohio, in a recent case, has determined that the exercise of such authority is not the exercise of judicial power. De Camp v. Archibald (Ohio) 35 N. E. 1056. Although I entertain the highest respect for that tribunal, I am unable to reach the same conclusion. The authority to hear and determine a controversy upon both the facts and the law is judicial power. When the witness refuses to answer the question proposed, the county attorney must then determine upon the propriety of the question, and whether, under the circumstances, an answer should be compelled. At that stage of the proceedings an issue is formed, and a controversy arises between the state and the witness. A contempt of court is a substantive criminal offense, and to adjudicate a case of contempt, and to impose punishment for such offense, is generally said to be the highest exercise of judicial power. The county attorney not only inquires and decides, but he is given full power to enforce his decision, and that by one of the most severe methods known to the law. The authority to try one accused of a criminal offense, pronounce judgment against him, and enforce that judgment by imprisonment, is surely an exercise of judicial power. If, then, the power is to be regarded as judicial, it can only be exercised by one of the tribunals mentioned in section 1 of article 3 of the constitution. Under this constitutional provision, the legislature may vest judicial power in such courts as it may see fit to create, provided, only, that they are inferior to the supreme court. Can the county attorney be regarded as a "court." within the meaning of this constitutional provision? The contention of the state that the legislature may create a court, or confer judicial power, without designating the tribunal created as a court, must be conceded. Malone v. Murphy, 2 Kan. 250; State v. Young, 3 Kan. 445. I am unable, however, to sustain the position of the petitioner, and hold that the vesting of judicial power in an executive officer, and requiring him to perform both executive and judicial functions, is a sufficient objection to the statute. It is highly important to separate the legislative, judicial, and executive functions, and that the officer of one department should not exercise the functions conferred upon another. Under our system, however, the absolute independence of the departments and the complete separation of the powers is impracticable, and was not intended. "It is true, with some exceptions, that the legislature cannot exercise judicial or executive power, that the courts cannot exercise legislative or executive power, and that the executive department cannot exercise legislative or judiclal power; but it is not true that they are entirely separate from each other, or independent of each other, or that one of them may not in some instances control one of the others." Martin v. Ingham, 38 Kan. 654, 17 Pac. 162. The governor has been vested with some judicial functions, and the legislature acts judicially when it tries a charge of contempt, and adjudges punishment therefor. Ministerial duties have been placed upon courts, and, while scrupulous care should be used to prevent an officer of one department from intruding to any extent upon the duties conferred upon an officer of another department, nothing in our state constitution, as there is in that of some other states, prevents the vesting of more than one function in a single individual. Illustrations of conferring more than one of these powers upon the same person are numerous. It has been held that the mayor of a city of the second class might, while acting as mayor, exercise the powers of a court, although the statute did not in terms create him a court. Prell v. McDonald, 7 Kan. 426. Judicial powers have been conferred on county commissioners and coroners, whose duties are mainly ministerial. Probate judges, whose duties are mostly judicial, have had conferred upon them many ministerial duties, and legislation giving such powers has been upheld. In re Johnson, 12 Kan. 102; Intoxicating Liquor Cases, 25 Kan. 759. Other instances might be cited, but these are sufficient to show that the legislature may confer judicial powers upon an executive officer, provided such duties are not inconsistent with those required of such officer. No case has been sustained, however, where the new duties conferred upon an officer were incompatible with those already imposed by such office. When the petitioner refused to answer the question, and a controversy arose, he was, in effect, accused of an offense. The state was the plaintiff, and the petitioner the defendant. The county attorney is the representative of the state, and required to appear in all prosecutions in its behalf. When the issue was thus formed, the positions of county attorney and judge became antagonistic, and the duties of the respective places incompatible. It is not within the power of the legislature to make a judge an arbiter in his own cause, and to give an attorney for one of two adverse parties the power to determine the controversy is wholly inconsistent with our system of jurispradence. The legislature has not clothed the county attorney with the paraphernalia of a court, and it does not seem to have been its purpose to invest him with the attributes of a judicial tribunal. Manifestly, it proceeded upon the theory that the powers conferred were such as might be carried out by an executive officer, and are not "judicial," within the meaning of the constitution. As that view cannot be sustained, and as the authority to punish for contempt must be regarded as the exercise of judicial power, it follows that the statute cannot be upheld.

STATE v. HOFFMAN.

(Supreme Court of Kansas. July 6, 1894.)

LARCENY—INDICTMENT—EVIDENCE—POSSESSION

OF STOLEN GOODS.

1. An information for grand larceny describing the property taken as four head of "nent cattle" is sufficiently specific.
2. The rule announced in the case of State v. Cassady, 12 Kan. 550, that "the possession

2. The rule announced in the case of State v. Cassady, 12 Kan. 550, that "the possession of stolen property, recently after it is stolen, is prima facie evidence of guilt, and if unexplained may be sufficient of itself to warrant a conviction," followed.

3. The evidence in the case examined, and held sufficient to support the verdict of guilty, and the sentence pronounced thereon.

(Syllabus by the Court.)

Appeal from district court, Chase County; Lucien Earle, Judge.

William Hoffman was convicted of larceny, and appeals. Affirmed.

Thomas H. Grisham and Madden Bros., for appellant. John T. Little, Atty. Gen., and F. P. Cochran, for the state.

HORTON, C. J. The defendant was convicted of grand larceny, and sentenced to the penitentiary of the state for the term

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of two years and six months. He appeals. 1. It is insisted that the information for grand larceny was defective; that, instead of charging the taking of four head of "neat cattle," it should have charged the taking of four steers. In support of this, it is said that the term "neat" may mean "nice," or "clean." We think the description in the indictment sufficiently specific. "Neat cattle," in the statute describing the offense of grand larceny, and in the information, do not mean "nice," or "clean." "Neat cattle" are animals of the genus bos, as distinct from horses, sheep, and goats. Bish. Cr. Proc. § 700; Johnson v. State, 1 Tex. App. 118; Hubotter v. State, 32 Tex. 479; People v. Winkler, 9 Cal. 234.

2. It is next insisted there was a total failure of proof that the defendant was guilty of the larceny charged in the information. In view of the general verdict of guilty, and the approval thereof by the trial court, all of the evidence must be considered in its most favorable light to support the conviction. We are of the opinion that the evidence was sufficient to justify the verdict and sentence.

It appears from the record that in June. 1893, Julius Panzram, living in Chase county, in this state, was the owner of four dehorned steers, all three year olds, and branded with a "box P" on the left hip. One of them was a dun color, two were spotted, and one red. One of them had a hole in the ear. If any of the others had holes in their ears, Panzram had not noticed it. He bought them from a man named Schultz, marked as they were. He missed the cattle from his pasture, in Chase county, on the morning of June 26, 1893. The first part of July, 1893, he found all of them. except the dun steer, in the possession of Kygger & Liggett, near Standbury, Mo. He recognized his three cattle from some 20 other cattle in the pasture, about 100 yards from them. He picked them out before he was close enough to see the brands, and requested Kygger, who was with him, to go and examine the cattle, and ascertain if they were branded with "box P" on the left hip, as his were. Kygger made the examination, and discovered that the three cattle claimed by Panzram were branded as he had described, and that they were dehorned. He also found that there were no other cattle in his yard with a similar brand. The defendant, who is a farmer, lived, in June, 1893, about six miles from where Panzram kept his cattle. He shipped 16 head of cattle in a car on the night of June 28, 1893, from Cedar Grove, in Chase county, to Verner & Scroggins, a commission firm at Kansas City. The defendant testified there were 9 cows and 7 steers in his car. He accompanied the cattle to the stock yards at Kansas City, about 148 miles from Cedar Grove. After Panzram missed his cattle, he met the de-

fendant in the road, and concerning such meeting, and the conversation between them, testified as follows: "Q. Did you have any words with him? A. Yes, sir. Q. State your conversation. A. Says I to the defendant, 'I understand you shipped some cattle.' He answered, 'Yes, sir.' Q. Had you then learned he had shipped some cattle? A. Yes, sir. I had learned that. Says I, 'How did you come out?' 'Oh, pretty good.' 'Make on it?' 'Yes; twenty-seven dollars and a half.' Says I, 'What did you ship?' 'Cows.' 'All cows?' 'Yes, all cows.' That was about all of the conversation." The cattle shipped by Hoffman, which were not all cows, as he untruthfully informed Panzram, went to the stock yards in car No. 51,010, and was the only car load of cattle he shipped to Verner & Scroggins within a year of that time. The car, with the cattle, reached Verner & Scroggins on the morning of June 29, 1893, and they were unloaded into pen 10, block 7, at the yards. Scroggins went with Hoffman to the pen to see the cattle, and they talked about the price. Scroggins paid Hoffman for the cattle partly in cash and partly by draft. C. H. Hill was the salesman for Verner & Scroggins. He testified that Hoffman's cattle in the pen consisted of 8 steers and 8 cows, which would make one steer more and one cow less than Hoffman testified to. Hill sold the 8 steers, part horned and part dehorned, on the 29th of June, 1893, to W. C. Trower, a cattle speculator, and Trower was at pen 10 at the time he made the purchase. He kept the steers for several days, and then sold them to W. F. Moore, with the exception of the dun steer, which he kept a few days afterwards, and then sold that animal with other cattle, but did not recollect where this lot went to. After Trower purchased the 8 steers, he moved them from pen 10 to pen 22, in block 24 of the stock yards. When Trower sold them to Moore, they were in pen 22, and, after Moore bought them, he put them in pen 13, block 36, and then shipped them, with other cattle, to Kygger & Liggett, at Ravenswood, in Nodaway county, Mo. Moore would not buy the dun steer from Trower. He testified "that three of the seven head purchased were dehorned, were three year olds, were all branded alike on the hip of the left side, and that two of them were spotted and white, and one red." His description is identical with Panzram's, except that the latter was better acquainted with the brand of his own cattle. Moore also testified that none of the other cattle he shipped to Kygger & Liggett with the three he bought from Trower were, to the best of his opinion, branded. He seriously objected to the three he purchased, on account of being branded. Kygger drove the cattle from Ravenswood to his pasture, near Standbury, where Panzram identified his three steers. The jury were the judges of Digitized by G00816 the credibility of the witnesses, and also of the weight of the evidence. If the evidence of the state is to be believed, four steers were stolen from Julius Panzram about June 26, 1893. Three of them were found, and fully identified by him, near Standbury, Mo., in the early part of July, 1893. These cattle, according to the evidence of the state, are the same the defendant shipped and sold to Verner & Scroggins at the stock yards at Kansas City, which were subsequently shipped to Kygger & Liggett. Hoffman was with the cattle in pen 10, block 7, at the stock yards in Kansas City, both with Scroggins and Hill, who sold the cattle from the pen as Hoffman's cattle. The objection to the verdict upon the ground that there was an entire absence of material facts necessary to be found for a conviction is not tenable. The evidence of the state, if believed, not only identified the subject-matter,-the steers,but also identified the person in possession of the stolen cattle soon after they were stolen. There was also other evidence that the defendant was guilty.

3. It is further insisted that the trial court erred in instructing the jury, among other things, as follows: "That the possession of stolen property, recently after it has been stolen, throws upon the possessor the burden of explaining such possession, and, if unexplained, may be sufficient of itself to warrant the jury in convicting the defendant of the crime of grand larceny. Of course, it must be so recent after the time of the larceny as to render it morally certain that the possession could not have changed hands since the larceny." The defendant did not admit that he took the steers owned by Panzram innocently or by mistake. His evidence was a denial of any possession or knowledge of Panzram's steers. He claimed that the 16 head of cattle he shipped to Kansas City belonged to him, or members of his family. He made no pretense that any were purchased or obtained from Panzram. This case, therefore. differs from State v. Warden (Mo.) 8 S. W. 233, and many similar cases. Notwithstanding the conflict of the courts concerning the possession of stolen property, we see no good reason, in such a case as this, for not adhering to the rule of State v. Cassady, 12 Kan. 550. A similar instruction was approved in that case. In 1 Greenl. Ev. (15th Ed.) § 34, it is stated 'that possession of the fruits of crime, recently after its commission, is prima facie evidence of guilty possession, and, if unexplained, either by direct evidence, or by the attending circumstances, or by the character and habits of life of the possessor, or otherwise, it is taken as conclusive." The possession of the stolen cattle by the defendant was unexplained, either by direct evidence or by attending circumstances. All the other persons who had possession of or anything to do

with the stolen cattle after they were missed by Panzram, up to the time he found three head of them near Standbury, explained fully their possession, where they bought them, and what they paid for them. The defendant relied upon proof of his good character, not upon any explanation of his possession, except his absolute denial thereof. He offered evidence of his good character for honesty in the neighborhood where he resided. That was a matter for the consideration of the jury. The court so instructed them in the following language: "The evidence of previous good character is competent evidence in favor of the party accused of a crime, as tending to show he would not be likely to commit the crime alleged against him, and in this case, if you believe, from the evidence, that, prior to the commission of the alleged crime, the defendant had always borne a good character for honesty and a law-abiding citizen among his acquaintances, and in the neighborhood where he lived, then this is a fact proper to be considered by you, with all the other evidence in the case, in determining the question whether the witnesses who have testified to facts tending to criminate him have been mistaken or have testified falsely or untruthfully; and if, after a proper consideration of all the evidence in the case, including that bearing upon his previous good character, you entertain any reasonable doubt of the defendant's guilt, then you should acquit him." We have examined the other alleged errors, including the one for a new trial on account of newlydiscovered evidence, but find nothing substantial in them, and, upon the whole record, the judgment of the district court will be affirmed. All the justices concur-

WETMORE v. BARRETT et al. (No. 15,-282.)

(Supreme Court of California. June 26, 1894.) GAMBLING CONTRACTS - STOCK PURCHASED ON MARGINS-ACTION TO RECOVER MONEY LOST.

1. Money paid a broker as margins on stock purchased by him with his own money for a customer, and retained as security until sold, may be recovered. 26 Pac. 883, followed.

2. Assessments paid by a broker on stock purchased for a customer, who put up only a margin, the stock being held as security, cannot be set off in an action by the engagement to re-

be set off in an action by the customer to recover such margins.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by W. N. Wetmore against Emmett P. Barrett and others to recover money lost in stock speculations. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

W. T. Baggett, for appellants. Roger Johnson, for respondent.

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PER CURIAM. This action was brought to recover moneys paid to brokers in consideration of purchases of mining stock on margins. Most of the points raised are precisely those which were considered in Cashman v. Root, 89 Cal. 373, 26 Pac. 883. As we are entirely satisfied with the conclusion there reached, it is not necessary to go over the matter again. Defendants had printed the terms and conditions upon which they were doing business, and required plaintiff's agent to agree to them. Those printed terms show that the transactions upon which the money was paid were purchases of stock on margins, within Cashman v. Root. During the time defendants held the stock as security they paid certain assessments which they now insist should be deducted from the amount recovered. The answer contains no claim for a set-off, nor is there a plea of payment or counterclaim. No such credit seems to have been asked for in the trial court. Had there been such a plea, however, the contention could not have been sustained. There was no request made by plaintiff for the payment; and, as the transaction was void, defendants did not hold the stocks, upon which the assessments were paid, for plaintiff, or as security for a debt due from him. The law will not, therefore, imply a request to pay nor a promise to repay. So far as the statement shows any indebtedness arising more than two years before the action was commenced, it also shows that such indebtedness was based upon similar transactions to those after that period. We cannot presume that any part of the moneys recovered were paid upon any such transactions. No specification as to the insufficiency of the evidence suggests such point. The judgment and order are affirmed.

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JOHNSON v. GREENBERG et al. (No. 15,-375.)

(Supreme Court of California. June 26, 1894.)
REVIEW ON APPEAL—CONFLICTING EVIDENCE.

Where there is a substantial conflict in the testimony, with sufficient proof to sustain them, the findings of the trial court will not be set aside.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by C. B. Johnson to enjoin Edwin F. O'Neni, as sheriff, from executing a deed to one of defendants, B. Schwartz, and to enjoin defendants Meyer Greenberg and B. Schwartz from further proceedings in the case of defendant Greenberg against defendant California Bituminous Hock Company. judgment for defendants, and plaintiff appeals. Affirmed.

T. C. Van Ness (Wilcoxon & Bouldin, of counsel), for appellant. Reinstein & Eisner, Graves & Graves, and E. P. Cole, for respondents.

PER CURIAM. This action was brought to enjoin the defendant Edwin F. O'Neal, as sheriff of the county of San Luis Obispo, from executing or delivering to defendant B. Schwartz a deed to certain land situated in said county of San Luis Obispo, the property of defendant the California Bituminous Rock Company (a corporation), which lands were sold by said sheriff under an execution issued upon a judgment in favor of defendant Meyer Greenberg against California Bituminous Rock Company, and also to enjoin defendants Greenberg and Schwartz from further proceedings in the action upon which said judgment was rendered. The theory of the amended complaint may be briefly stated as follows: The plaintiff and defendants L. M. Warden and Meyer Greenberg were the owners of the certain lands described in the complaint, the title of which, by common consent, stood in the name of Greenberg, but who held in trust for his co-owners, the plaintiff being the beneficiary as to one-fourth thereof. The corporation defendant was organized by them, and the land conveyed to such corporation. There were 1,250 shares of the capital stock of the corporation, of which stock, plaintiff, defendants Warden, Greenberg, and Underhill each held 800 shares, and defendants Graves 50 shares. On January 17, 1891, defendant Greenberg brought suit against the corporation to recover \$8,155.15 for money advanced by him and paid out for the corporation, and on the 7th of March, 1891, obtained judgment. The land in question was sold on the 11th of April, 1891, under an execution issued on such judgment, and purchased by defendant B. Schwartz for the sum of about \$8,155.15. The complainant avers that the corporation defendant was not indebted to Greenberg in the sum of \$8,155.15, or any other sum of money, at the commencement of the suit, and that the action and the sale of the property was a fraudulent scheme on the part of defendants Greenberg and Warden to defraud plaintiff and the other defendants of the property, and that the purchase thereof by Schwartz was for the benefit of Greenberg, and to procure the title for him, and that, thereafter, Greenberg and Warden were to become the owners thereof, to the exclusion of plaintiff and the other defendants: that plaintiff knew nothing of the suit until within a month prior to the commencement of this action; and that the land is of the value of \$50,000. The answer denies all the allegations charging fraud; avers that the defendant corporation was justly indebted to Greenberg; that his claim was a bona fide claim and demand, as plaintiff, who was a director of the corporation, well knew, and that he was well aware of the pendency of Greenberg's action against the corporation within one month after it was brought; and that the value of the land is not in excess of \$10,000. The written findings fully negative all allegations of fraud, and, in addition

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thereto, it is found that all the allegations of the answer are true, except that as to the value of the land, which is found to be \$15,000.

Upon the close of the testimony, counsel for the plaintiff asked leave of the court to amend his complaint so as to charge, in substance, that the amount sued for by Greenberg, as due him on account of advances made for the corporation, and in payment of the unpaid balance of the purchase price of the land, was not in fact due him, but that he, the said Greenberg, had in fact borrowed the sum of \$8,155.15 from Schwartz for and on behalf of the corporation defendant, and with the money so borrowed for the corporation had paid off and discharged the obligations of the corporation, all of which was known to defendant Schwartz before and at the time of the sheriff's sale, etc. The court permitted the amendment on condition that the case be opened, and defendants permitted to introduce such further proofs as they might desire. The complaint was amended accordingly, whereupon defendants introduced further testimony.

Formal objections are made to each of the 12 findings of the court, upon the ground that the evidence is insufficient to sustain them. The only question, however, in the case, worthy of consideration, is as to whether the money loaned by defendant Schwartz was so loaned to Greenberg on his own account, or through him to the defendant corporation. Greenberg was secretary of the corporation, and a son-in-law of defendant Schwartz. That he procured from Schwartz the sum of \$8,155.15, or thereabouts, is well established. The deposition of Schwartz was read in evidence and he was also called as a witness on behalf of plaintiff. His testimony was not at all clear or convincing but may be fairly interpreted as showing that he supposed he was advancing the money to the defendant corporation, or to obtain a mortgage or some lien against the corporation, or to purchase notes of the corporation; and portions of his testimony go to show that he thought he was loaning the money to the corporation defendant. The language used by the witnesss indicates that he is a German, who speaks our language indifferently; and the testimony, taken as a whole, shows that his understanding of English is imperfect. He advanced this money, as he thinks, in March or April, 1891. On the other hand, it was conclusively proven that plaintiff and defendants Warden and Greenberg, in 1887, gave their joint and several note to Jack and Goldtree for \$2,937.50, with interest, being for a part of the original purchase price of the land; that the corporation defendant assumed to pay, but did not pay, the note; that Warden and Greenberg paid it by a new note made by them for \$3,191.12, with interest, etc.; that the corporation defendant, engaged in mining and selling bituminous rock from the land in question, met with losses, and that defendants Warden and Greenberg borrowed other moneys at the request of and for the corporation, for which they gave their notes, until in 1890, when the aggregate of the indebtedness of the company for which they were responsible was \$8,000, for which they and one H. Crocker gave their joint and several note for said sum of \$8,000, at 30 days, with interest. Crocker paid the note off at maturity and brought suit against Greenberg and Warden. On the 9th day of January, 1891, Greenberg paid the demand in suit by an overdraft on the First National Bank of San Luis Obispo for \$8,155.15, promising the bank to come to San Francisco, and borrow from Schwartz the money to meet such overdraft. On January 17th he brought this suit, and subsequently procured the money from Schwartz. and paid the overdraft with it. As Greenberg procured judgment March 7, 1891, it may well be that the fact that Greenberg had a lien upon the property was an idea prevalent in the mind of Schwartz when he testified, and which will account for many of the statements that he thought the property good for the investment, etc. But waiving all explanation of his testimony, and the fact still remains that there was a substantial conflict in the testimony, with sufficient proof to sustain each and every finding of the court. The judgment and order appealed from are affirmed.

103 Cal. 94

MORRISON v. STONE et al. (No. 15,408.) (Supreme Court of California. June 13, 1894.) ADOPTION OF SPECIAL VERDICT—FINDINGS—

HARMLESS ERROR.

1. A special verdict, adopted as the basis of a judgment, is equivalent to findings by the

court.

2. Failure to find upon a fact in issue is harmless error, when a finding in favor of appellant thereon would not affect the judgment.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. H. Levy, Judge.

Action by George H. Morrison against N. J. Stone and others to recover damages for a conspiracy. From a judgment for defendants, plaintiff appeals. Affirmed.

Pierson & Mitchell, for appellant. Reddy, Campbell & Metson, for respondents.

HAYNES, C. This action was brought by Morrison, a stockholder in the History Company, a corporation, on behalf of himself and of all other stockholders in said corporation who should join him in the action, against N. J. Stone, J. L. Hebert, Elizabeth C. Latham, administratrix of the estate of A. S. Latham, and said History Company. The complaint charges a conspiracy between Stone, Hebert, and Latham, all of whom were connected with said History Company (Stone being vice president), to injure that

corporation by organizing another, known as the Pacific Publishing Company, and that, after the formation of the last-named corporation. Stone assumed to sell and transfer to it the stock of eastern subscription books belonging to the History Company, together with the agency and good will thereof, whereby the History Company had been deprived of a large portion of its stock in trade, had lost valuable agencies, was crippled in its business, and had been compelled to suspend payment of dividends, to the damage of the History Company in the sum of \$50,000. The prayer is for damages and for an accounting. The answers of the several individual defendants put in issue all the material allegations of the complaint, including the facts upon which the plaintiff assumed the right to bring the action in his own name. The case was tried before a jury upon nine special issues properly submitted to it, to all of which the jury returned answers in favor of the defendants, and also therewith returned a general verdict in their favor. The defendants moved for judgment thereon, and their motion was granted; and the plaintiff excepted, and brings this appeal upon the judgment roll and a bill of exceptions.

The only ground upon which appellant contends for reversal is that findings were not waived, and that none were filed. It is said by respondents that this is an action at law for damages, and that the general verdict covers all the issues, and that findings are not required, while appellant insists that it is an equitable action. Without deciding that question, we will assume that the action is of equitable cognizance, since there could be no possible ground of reversal if the action is at law. Where a special verdict of a jury is adopted by the court, it takes the place of, and is equivalent to, findings by the Warring v. Freear, 64 Cal. 56, 28 Pac. court 115. Nor is it necessary that the word "adopt" be used, in order to show an adoption of the findings made by a jury upon special issues. Goldman v. Rogers, 85 Cal. 578, 24 Pac. 782. That the special verdict was adopted by the court, we think, is sufficiently Upon the hearing of defendants' moclear. tion for judgment an order was made "that judgment be entered in accordance with the verdict of the jury rendered herein;" and all the special issues submitted to the jury, with their answers or findings thereon, were incorporated in the judgment, together with the general verdict. Indeed, it is not even suggested by counsel for appellant that the special findings by the jury were not adopted, nor is it contended that the special verdict does not cover all the issues. Whether it does or not is immaterial, since the findings made by the jury are decisive of the case, and no others were necessary. Among other things, the jury found that the demand of the plaintiff upon the History Company to bring this action, and its refusal to do so, were simulated, and not in good faith. These findings negative the right of the plaintiff to maintain the action. Bacon v. Irvine, 70 Cal. 225, 11 Pac. 646; Hawes v. Oakland, 104 U. S. 460, 461; Mor. Corp. §§ 240, 241. The material facts, involving the merits of the action, were also found in favor of the defendants. We can discover no fact in issue upon which a finding is not made, which, if found in favor of appellant, would affect the judgment; and a failure to find thereon, if erroneous, is not prejudicial. Diefendorff v. Hopkins, 95 Cal. 347, 348, 28 Pac. 265, and 30 Pac. 549, and cases cited. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. 121

BRODER et al. v. SUPERIOR COURT OF MONO COUNTY. (No. 15,513.)

(Supreme Court of California. June 15, 1894.)

Mandamus to Judge.

When a retiring judge filed conclusions of law and fact, and directed the counsel to prepare an interlocutory judgment for the purpose of an accounting between the parties, a mandamus will not be granted to compel his successor to enter judgment on such findings, as until final judgment the trial court is not concluded by any of its orders, and its judicial discretion cannot be directed by mandamus.

In bank.

Application for a writ of mandate by R. C. Broder and others against the superior court of Mono county (W. H. Virden, Judge). Denied.

Rich. S. Miner, for petitioners. P. Reddy and W. H. Metson, for respondent.

HARRISON, J. In Broder v. Conklin, 98 Cal. 360, 33 Pac. 211, the order of the superior court of Mono county, setting aside a judgment that had been entered on the judgment book of that court in pursuance of certain findings of fact and conclusions of law previously filed therein, was affirmed; and after the remittitur had been filed in the court below the petitioners herein made a motion before that court that a judgment and decree be entered in the cause upon said findings of fact and conclusions of law. This motion was denied by the superior court, and the petitioners have made application to this court for a writ of mandate directing the respondent to render and enter a judgment in accordance with and upon said findings of fact and conclusions of law.

A judgment is the final determination of the rights of the parties in an action, and, when the action is tried by the court, cannot be entered until after a decision of the cause has been rendered. Hence, a writ of mandate will not be granted to compel a court to enter a judgment in a cause until after the

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court has tried the cause, and rendered its decision. So long as any judicial act remains to be performed before the decision can be made, the cause has not been tried, and a judgment cannot be entered. While the cause remains undetermined the court before which it is pending cannot be compelled to try it in any particular mode, or to make any special order for the mode in which it is to be tried. The action of the court is to be reviewed upon appeal, but cannot be controlled or supervised by a previous direction of this court. While the cause remains undecided the trial court is not concluded by any ruling or order that it may have made during the trial, or by any conclusion which it may have reached upon a controverted question of fact. It may change its ruling whereby evidence has been excluded or received, and allow such evidence, and make a ruling with reference thereto according to its subsequent view: it may set aside the submission of the cause, and allow additional evidence upon one or all of the issues in the case, even if it has indicated or formulated its conclusion upon the evidence already received; it may set aside an order of reference to try an issue, and try the issue itself; or it may vacate any other interlocutory order made in the progress of the trial. Until all the issues in the case have been decided, and the decision filed with the clerk, the cause remains in the breast of the judge, and during that time cannot be controlled or directed by any supervisory court. In Broder v. Conklin, supra, we said: "It sufficiently appears in the present case that, at the time when Judge Rooney filed his findings of fact and certain conclusions of law, he did not himself consider that the action had been fully tried. His conclusion that the plaintiffs were entitled to judgment was qualified by the next clause, in which he directed counsel to prepare an interlocutory judgment for the purpose of directing a referee to take an account between the parties. It is manifest from this direction that the character and extent of the judgment was not to be determined by him until after such account had been As the rights of the parties to this action cannot be finally determined, and a corresponding judgment rendered, until after an account has been taken, and as the trial court cannot be compelled to enter an interlocutory order or judgment for the reference and an accounting, it follows that the cause has not been fully tried, and that the mode of trial and the decision yet to be made are to be determined in the discretion of the trial court. After the aforesaid findings were filed the court still retained the power to set aside its direction to counsel to prepare an interlocutory judgment directing a reference, and to take such steps with reference to completing the trial as it might deem expedient, or most in accordance with

order of May 13th, that the cause be placed upon the calendar to be set for trial, was an exercise of its judicial discretion, and is not to be set aside or superseded by a direction from this court to act in a different manner. The application for the writ is denied.

concur: McFARLAND, J.: GA-ROUTTE, J.; FITZGERALD, J.

102 Cal. 153

WARREN v. McGILL. (No. 15,404.) (Supreme Court of California. June 18, 1894.) CLAIMS AGAINST DECEDENT'S ESTATE -COMPETEX-OF OF WITNESS-INTEREST.

1. Under a statute requiring creditors, when 1. Under a statute requiring creditors, when they file their claims against a decedent's estate, to file an affidavit stating that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of the "affiant" (Code Civ. Proc. § 1494), an affidavit, filed by the claimant, which recites to the knowledge of the "claimant," is sufficient. Davis v. Browning, 27 Pac. 937, 91 Cal. 603, followed.

2. In an action against an executor for a debt due from his decedent, the fact that a prior claim for a less amount was filed by the claim-

claim for a less amount was filed by the claimant and disallowed does not estop her from asserting her rights under the later claim, where she testified, without being contradicted, that the first claim, which she never saw, was large-

3. The fact that plaintiff's witness also has a case of the same kind pending does not dis-qualify him from testifying.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Mrs. M. J. Warren against H. M. McGill, executor of Thomas Hovenden. There was a judgment for plaintiff, and defendant appeals. **▲**ffirmed.

Henry M. McGill, for appellant. H. C. Firebaugh, for respondent.

BELCHER, C. Action to recover money due from an estate. The complaint avers, in substance, that Thomas Hovenden was indebted to the plaintiff in the sum of \$6,-828.06, and died leaving a will, in which the defendant, McGill, was named as executor; that the will was admitted to probate, and letters testamentary were issued to defendant, who duly qualified, and entered upon the discharge of his duties as executor; that notice to creditors to present their claims was published, and thereafter within the time prescribed the claim of plaintiff, a copy of which is attached to the complaint, verified by the oath of the claimant, was duly presented to the defendant, as such executor, for allowance, and was by him rejected. The answer denies the indebtedness, denies that the claim on which the action is founded was duly presented to defendant for allowance, and avers that no claim for the alleged indebtedness was ever presented to defendant, as such executor, "in manner or form as required by the statute the interests of the parties before it. The of this state in such case made and provided." The case was tried by the court, and the findings were, in effect, that the plaintiff was entitled to judgment for the sum of \$4,116.65 and costs of suit, to be paid in due course of administration. Judgment was accordingly so entered, from which, and from an order denying a new trial, the defendant appeals.

1. The point that the evidence was insufficient to justify the findings cannot be sustained. Much of the evidence introduced by the plaintiff is omitted from the record, but enough is set out to support the decision. It is true there was some conflict in the evidence, and some inconsistencies were shown, but those were matters for solution by the trial court, and its action cannot be disturbed on appeal.

2. The point that the claim was not duly presented in manner or form as required by statute is rested upon the fact that the affidavit attached to the claim stated "that no payments have been made thereon which are not credited, and that there are no offsets to the same to the knowledge of said claimant;" and it is argued that the affidavit was fatally defective, because the words found in the statute (section 1494, Code Civ. Proc.), "to the knowledge of the affiant," were not used. This point is without merit. It appears from the affidavit that the same person was "claimant" and "affiant," and the use of one word rather than the other was, therefore, wholly immaterial. See Davis v. Browning, 91 Cal. 603, 27 Pac. 1031, where the same point was raised, and decided against the contention of appellant here.

3. The point that the plaintiff is estopped from asserting any rights under the claim sued upon is based upon the fact that, prior to its presentation, another claim, verified by her, and showing the indebtedness to be of a less amount, was presented to defendant for allowance. No such defense is set up or suggested in the answer, and, in our opinion, it is untenable. It is true that a prior claim was made out and sent to defendant, but it was never approved by him, and, as shown by plaintiff's uncontradicted testimony, it was never read to or seen by her, and was largely incorrect. Under these circumstances the doctrine of estoppel cannot be invoked.

4. Cartain errors of law are specified in the statement, but they are simply referred to in appellant's points and authorities, without any argument, and may be briefly disposed of. The first error specified is that the court erred in overruling defendant's objection to the introduction in evidence of plaintiff's account book. The objection was: "That the entries in said book were in several instances without date and unintelligible; and, further, that a mere inspection of said book shows that all the entries therein, purporting to cover a period of several months, had been written at the same time,

and were evidently incorrect, and had been made at a very recent date." There is nothing in the record showing that this objection was based on any valid ground. No part of the contents of the book or of the evidence in relation to it is set out, and it must therefore be presumed that the ruling of the court was correct. The second error specified is that the court erred in overruling defendant's objection to the competency of plaintiff's witness David Dalzell, and permitting him to testify. The objection was that the witness was incompetent because he had a suit pending against defendant of the same character as this, and "was personally interested in sustaining the alleged claim of plaintiff against defendant." There was nothing in this objection. The interest of the witness in the result did not at all affect his competency to testify. At most it could be considered only in determining what weight should be given to his testimony. The third error specified is that the court erred in overruling defendant's motion for a nonsuit. The ground of the motion was that no claim for the money sued for had been presented, and there was no evidence to justify or sustain the demand. But the defendant expressly admitted that the claim was presented to and rejected by him, and there was, as we have seen, evidence sufficient to justify and sustain the demand. The ruling of the court was therefore without error, We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DALZELL v. McGILL. (No. 15,405.)
(Supreme Court of California. June 26, 1894.)

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by David Dalzell against H. M. Mc-Gill, executor of Thomas Hovendon. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Henry M. McGill, for appellant. H. C. Firebaugh, for respondent.

PER CURIAM. This case is in all material respects, except as to the amount involved, the same as that of Warren v. McGill (No. 15,404, filed June 18, 1894), 37 Pac. 144. The cases were tried about the same time, and it was stipulated that the testimony given in the Warren Case, where applicable, might be considered as evidence in this. Upon the authority of the decision in the case referred to, the judgment and order appealed from in this case are affirmed.

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103 Cal. 252

STEVENS v. SAN FRANCISCO & N. P. R. CO. (No. 15,468.)

(Supreme Court of California. June 26, 1894.) EXECUTORS AND ADMINISTRATORS—PERSONAL LI-ABILITY FOR COSTS—STATUTES CONSTRUED.

Under Code Civ. Proc. § 1509, providing that administrators shall be individually liable for costs adjudged against them, and section 1031, providing that costs may be recovered in an action prosecuted or defended by an administrator, but such costs must, by the judgment, be chargeable only upon the estate represented, an administrator is personally liable for costs, unless charged by the judgment upon the estate represented.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Catherine Stevens against the San Francisco & North Pacific Railroad Company. There was a judgment for defendant, and from an order denying a motion for execution against plaintiff, personally, for costs, defendant appeals. Order reversed.

Charles F. Hanlon, for appellant. Henry E. Highton, for respondent.

PER CURIAM. By the final judgment entered in this case, it was "ordered, adjudged, and decreed that Catherine Stevens, administratrix of the estate of Joseph Stevens, deceased, plaintiff, do take nothing by this her said action against the San Francisco & North Pacific Railroad Company, a corporation, defendant, but that judgment be, and the same is hereby, entered herein in favor of said defendant for its costs and disbursements incurred herein," taxed at \$640.75. Subsequently, the defendant demanded of the clerk of the court that he issue an execution on the judgment against the plaintiff personally. The clerk refused to comply with this demand upon the ground that he had no power or authority to do so. Thereupon the defendant applied to the court for an order directing the clerk to issue such an execution. The court denied the motion, and the defendant appeals from the order. The Code of Civil Procedure contains the following provisions:

"Sec. 1031. In an action prosecuted or defended by an executor, administrator, trustee of express trust, or a person expressly authorized by statute, costs may be recovered as in action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be chargeable only upon the estate, fund, or party represented, unless the court directs the same to be paid by the plaintiff or defendant personally, for mismanagement or bad faith in the action or defense.'

"Sec. 1509. When a judgment is recovered, with costs, against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts, unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause."

Here the judgment was against the plaintiff, as administratrix, for costs, but such costs were not by the judgment made chargeable only upon the estate, as they might have been under the section of the Code first above quoted. If they had been made so chargeable, the judgment would have contained the following or equivalent words: "And it is further ordered that said costs be, and the same are hereby, made payable out of the estate of said Joseph Stevens, deceased." This being so, the plaintiff, under the section of the Code last above quoted, was individually liable for the costs, and the defendant was entitled to the execution asked for. We see no necessary conflict in the two sections referred to. When properly construed, each may have full force and effect. The case of Hicox v. Graham, 6 Cal. 169, is in point, and there is nothing in Reay v. Butler, 99 Cal. 477, 33 Pac. 1134, in conflict with what has been said. The order appealed from must be reversed, and it is so ordered.

103 Cal. 251

TOULOUSE et al. v. PARE et al. (No. 15,-339.)

(Supreme Court of California. June 26, 1894.) REVIEW ON APPEAL-ASSIGNMENT OF ERRORS-Nonsuit-Findings.

1. Where an order granting a nonsuit is not assigned as ground for a new trial, no action prior to the nonsuit will be reviewed.

2. A nonsuit may be granted after the evidence on both sides is closed.

3. Where a nonsuit is granted, findings are

unnecessary.

Department 2. Appeal from superior court, city and county of San Francisco; W. C. Van Fleet, Judge.

Action by Bernard Toulouse and others against Antoine S. Paré and others. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal.

Wheaton, Kallock & Kierce, for appellants, John L. Boone, for respondents.

McFARLAND, J. This is an appeal by plaintiffs from a judgment in favor of defendants, and from an order denying plaintiffs' motion for a new trial.

After the evidence on both sides was in, the court granted a nonsuit. Before the nonsuit was granted, appellants made a demand for findings, which was refused; and afterwards they took an exception, which perhaps included both the failure of the court to make findings, and the nonsuit. But the order of the court granting a nonsuit is nowhere assigned as error, and therefore it cannot be assailed. "When a nonsuit is granted, and the plaintiff makes a statement for a new trial, in the specifications of errors why a new trial should be granted he must insert the alleged error of granting a nonsuit."

McCreery v. Everding, 44 Cal. 284. "The question presented on a motion for a nonsuit is a question of law, and in the statement on new trial the decision of the motion should be specifically an error of law." Donahue v. Gallavan, 43 Cal. 573.

As the order granting the nonsuit is not assigned as error, no action of the court prior to the nonsuit need be examined. We may say, however, that a nonsuit can be properly granted after the evidence on both sides is closed (Geary v. Simmons, 39 Cal. 224; Vanderford v. Foster, 65 Cal. 49, 2 Pac. 736), and that findings are not required in a case of nonsuit (Reynolds v. Brumagim, 54 Cal. 254; Mining Co. v. Gilson, 47 Cal. 601). Judgment and order affirmed.

We concur: DE HAVEN, J.: FITZGER-ALD, J.

108 Cal. 168

BENSON v. SHOTWELL. (No. 15,186.) (Supreme Court of California. June 19, 1894.) REVIEW ON SECOND APPEAL-MODIFICATION OF CONTRACT-EVIDENCE.

1. Where, on a second appeal, the facts disclosed by the record are in substance the same as on the former, the propositions of law arising therefrom will not be reconsidered.

2. Defendant wrote to plaintiff, who had contracted to sell him certain land, with good title, requesting him to bring him a certain deed, which was not on record, that he might examine it, and have it recorded. Plaintiff brought the deed, but did not show it to defendant, and stated that he considered the original deed better than a record of it, and would nal deed better than a record of it, and would give it to defendant on delivery of the property. Held, that it was, in substance, a refusal to submit it for examination, or allow defendant to have the deed recorded.

3. The provision of a written contract can-

o. The provision of a written contract cannot be altered by any unexecuted oral agreement between the parties. Civ. Code, § 1698.

4. A waiver of the conditions of a contract cannot be predicated on conduct of which the

cannot be predicated on conduct of which the other party had no knowledge.

5. The motives of a party to a contract, in requiring a strict compliance with the conditions precedent to his liability, are immaterial.

6. Exceptions to the admissibility of evidence which is afterwards stricken out cannot

be considered on appeal.

7. Testimony of a witness at a former trial is admissible when at the time he is out of the jurisdiction of the court.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by John Benson against J. M. Shotwell to determine adverse claims to land. There was a judgment for plaintiff, and defendant appeals. Reversed.

For former appeal, see 87 Cal. 49, 25 Pac. 249.

A. N. Drown, for appellant. Edward J. Pringle, Henry C. McPike, and Pringle, Hayne & Boyd, for respondent.

VAN FLEET, J. This is the second appeal in this case. The first appeal was from a judgment in favor of plaintiff, which was reversed, and the cause was remanded Cal.Rep. 35-37 P.-43

for a new trial. 87 Cal. 49, 25 Pac. 249. On the second trial the plaintiff again recovered judgment, and the defendant appeals from the judgment and an order denying his motion for a new trial.

The facts are sufficiently stated in the opinion of the court on the former appeal. On that appeal it was determined, as matter of law, that, by the terms of the contract in question, defendant was entitled to a good paper title of record, and was not bound to accept a title resting on matters dehors the record; that the title tendered by plaintiff was not such as was required by the contract; that defendant was entitled to receive an actual possessio pedis of the whole lot, and was not bound to accept a constructive possession by attornment of tenants; and that the attempted delivery of possession did not meet the requirements of the contract. The facts disclosed by the record on this appeal are in substance the same as those which were before the court on the former appeal; and the propositions of law there decided are therefore the law of this case, and we are not at liberty to reconsider them. It is true that nothing that was said in that opinion as to the facts could bind the court below upon the second trial, nor be conclusive now, since the rule of the law of the case has no application to questions of fact. But the evidence on the last trial appears to us to be without any material conflict, and indeed without any conflict whatever, nor can there be any question as to the inferences to be drawn from it, and it discloses a state of facts precisely the same as that on which the former decision was based. The legal effect of those facts was determined by that decision, and the case must now be determined accordingly.

The argument of respondent is practically confined to a restatement of the points discussed on the former appeal, and does not disclose any material particular in which the evidence differs from that on the former trial. Some points are suggested, as to which it is claimed that the evidence is now different. Some of them are as to matters entirely immaterial; and, as to the others, we fail to discover any such difference. Respondent contends that the evidence does not now show that plaintiff "refused" to submit his deed for examination, or to permit it to be recorded correctly. But the evidence, viewed most favorably to plaintiff, shows now, as it showed then, that, five days before the expiration of the time limited in the contract, defendant wrote to plaintiff, saying, "If you have the deed in your possession among the papers relating to the lot, please let me have it, to show Mr. Drown, and, if necessary, have it re-recorded;" that plaintiff called on defendant, with the deed in his hand, and stated what it was, but did not open it, or show it to defendant; that defendant

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asked him why he did not record it, and his reply was that he considered the original deed better than any record, but that he would give it to defendant, with the rest of the papers, on the delivery of the property; and that he thereupon took the deed away, did not record it, and had no further communication with defendant on the subject. On cross-examination, plaintiff admitted that he never proposed to do anything with the deed, beyond delivering it to defendant when he should take the property. In view of the request contained in defendant's letter, plaintiff's conduct must be considered as amounting to a refusal to submit the deed for examination by counsel, or to have it recorded; and his testimony that he did not "decline" to put it on record, or to allow defendant to do so, is a mere conclusion, to which no weight can be at-

With regard to the attempted delivery of possession, respondent claims that the evidence now shows that the persons supposed to be in occupation at the time who were not found, nor their names ascertained. turned out afterwards to be mere licensees or servants of known tenants, and who had no possession to deliver, and also that the apparent adverse occupation by Mrs. Klumpke was afterwards discovered not to be adverse. It is not necessary to review the evidence on these points, though we fail to discover any substantial divergence from the former testimony. It is sufficient to say that on September 22d, when the only attempt at delivery was made, no delivery was effected. None of the tenants vacated; and Mrs. Klumpke, by her tenant, remained in the actual possession of the strip in the rear. At no time did plaintiff tender to defendant the actual, present possession of the lot described in the contract. Defendant, having on the day of the maturity of the contract tendered full performance on his part, was not bound to repeat his offer, and no tender was thereafter made by plaintiff. Indeed, though time was not originally of the essence of the contract, it was made so by the demand of defendant, and the failure of plaintiff to comply with it, and a subsequent tender by plaintiff would have been unavailing.

Respondent also claims that the proof shows a waiver by defendant of the delivery of actual possession. The evidence relied on for this purpose was before the court on the former appeal, but it is contended that, as the allegation of waiver was inserted in the pleadings since the former trial, the question is now open. We see nothing in the facts relied on from which any waiver can be inferred. They do not indicate any intention on defendant's part to waive anything. They consist solely of transactions with third parties. Plaintiff is not shown to have known of them, or to have acted upon them; defendant received

no consideration for any waiver; and, lastly, the provisions of the written contract could not be altered by an unexecuted oral agreement, if one had been made. Civ. Code, § 1698.

The court below found that the grounds upon which defendant based his refusal to take the lot were but pretenses,—were excuses for retiring from the bargain,—and were not made in good faith. We fail to find the slightest evidence to support that finding, or to impugn defendant's entire good faith. But, if the fact were as found, it would be immaterial. Defendant was entitled to insist strictly on the contract, and his motives for doing so cannot be inquired into.

The findings as to the controverted matters are therefore unsupported by the evidence, and respondent, indeed, admits that some of them are so. A new trial must therefore be granted.

It is not necessary to notice all the assignments of error in law. The certificate of acknowledgment to the deed from Agard to Perrie was sufficient, and the existence of an erasure not shown, otherwise than by defendant's objection. The testimony of Moxley as to conversations with Hansen was stricken out, and the exception to its admission, therefore, cannot be considered. The testimony of Christie showed that the witness Aspden was out of the jurisdiction of the court, and the testimony of the latter, taken on the former trial, was admissible. Hicks v. Lovell, 64 Cal. 22, 27 Pac. 942. The other assignments do not require notice. The judgment and order denying a new trial are reversed, and the cause remanded for a new trial.

I concur: HARRISON, J.

GAROUTTE, J. I concur in the judgment, and what is said by Mr. Justice VAN FLEET. If Benson had repudiated his contract entered into with Shotwell for the sale of this land, then Shotwell would have been entitled to recover from Benson the amount of money he had paid thereunder, less the actual damage sustained by Benson by reason of any breach of the contract committed by Shotwell. Shively v. Water Co., 99 Cal. 260, 33 Pac. 848, and cases there cited. Benson's conduct in bringing this action was in effect a repudiation of any rights of Shotwell under the contract. It was as substantial and effectual a repudiation as we can imagine. It necessarily follows that defendant in this action is at least entitled to recover the money he has paid to plaintiff under the contract, less the damage suffered by reason of any breach thereof; and to this extent the questions as to whether plaintiff had a good title to the land, or was able to give defendant actual possession thereof, or made a good and valid tender of the deed, are entirely immaterial

as I view the case, and the decisions of this court bearing upon the principles here involved. This is the first case coming before us where a vendor has attempted to quiet his title under the circumstances here presented, and I am clear that he can be entitled to such relief only upon the return of the money he has received from the vendee. This would seem to be sound equity, for the vendor has no right to both land and money.

108 Cal. 286

BOWEN v. WENDT. (No. 15,295.) (Supreme Court of California. June 26, 1894.) Enjoining Nuisance—Right by Prescription.

A prescriptive right to use a stream in a manner amounting to a public naisance cannot be acquired so as to be a defense to an action by a private party especially injured thereby to enjoin the maintenance of the same.

Department 2. Appeal from superior court, Santa Clara county; John Reynolds, Judge. Action by J. J. Bowen against 6. Wendt. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. C. Kennedy and Morehouse & Tuttle, for appellant. Frs. E. Spencer (D. W. Burchard, of counsel), for respondent.

PER CURIAM. Plaintiff is the owner of certain land and premises, containing 25 acres, more or less, situate in the county of santa Clara, through which a stream known as "Coyote Creek" runs, and upon said land and near said stream the plaintiff has his dwelling-house. Plaintiff uses his land for grazing cattle and other domestic animals, and the waters of said stream are useful and necessary for the watering of plaintiff's stock. Defendant maintains a slaughterhouse upon or near the stream, above plaintiff's premises, from which the offal, etc., is turned into said Coyote creek, pollutes the waters thereof so that they are unfit for domestic use and unfit for cattle, and the odors therefrom are injurious to health, etc. Plaintiff avers a nuisance, and that he is specially injured thereby beyond the general injury to others, etc. Defendant, in addition to general denials, sets up in his answer facts tending to establish a prescriptive right to use the stream as a place of deposit for the offal from his slaughterhouse. The cause was tried by the court without the intervention of a jury, and written findings waived. Plaintiff had a decree enjoining defendant from depositing the blood, offal, etc., from his slaughterhouse in the stream, which decree recites that for more than two years next before the commencement of the action the defendant had been guilty of maintaining and committing a public nuisance by polluting the waters of Coyote creek by, etc., and that said nuisance has been specially injurious to the plaintiff, etc. The evidence was sufficient to show

that the acts of the defendant constituted a public nuisance, and that the plaintiff was specially injured thereby. He might, therefore, maintain the action. Civ. Code, § 3493; Payne v. McKinely, 54 Cal. 532; Code Civ. Proc. § 731. "No lapse of time can legalize a public nuisance, amounting to an actual obstruction of public right." Civ. Code, § 3490; People v. Gold Run, etc., Min. Co., 68 Cal. 152, 4 Pac. 1152; Hoadley v. San Francisco, 50 Cal. 275. A prescriptive right cannot be maintained against a public nuisance where the action is brought by a private party who has suffered special injury in consequence thereof. Woodruff v. Mining Co., 9 Sawy. 513-517, 18 Fed. 753; Mills v. Hall, 9 Wend. 315. The judgment and order appealed from are affirmed.

103 Cal 258

LIVINGSTON V. KODIAC FACKING CO. (No. 15,180.)

(Supreme Court of California. June 26, 1894.)
Who are Fellow Servants.

The mate of a ship engaged in carrying freight and passengers between distant points is a fellow servant of a man employed in the steward's department to wait on the officers' table.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Robert F. Livingston against the Kodiac Packing Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Daniel Titus and J. B. L. Brandt, for appellant. Pierson & Mitchell, for respondent.

PER CURIAM. Action to recover damages for a personal injury alleged to have been suffered by plaintiff in consequence of negligence of defendant. Trial by jury. Verdict in favor of plaintiff, assessing damages at \$12,500, on which judgment was rendered. Appeal by defendant from the judgment and from an order denying a new trial.

In October, 1891, the defendant was owner of the steamship Haytien Republic, then engaged in carrying passengers and freight from San Francisco to various Northern Pacific ports in British Columbia, Oregon, and Washington, and thence back to San Francisco; and for that purpose was supplied by defendant with the ordinary complement of officers, sailors, and servants. G. W. Brown was captain, George W. David mate, and the plaintiff a servant in the steward's department, whose principal duty it was to serve as waiter at the officers' table, but also to perform such other services as ordered by the steward. At the time of the accident in which plaintiff was injured-October 22, 1891 -the ship was moored at the wharf in Departure Bay, where it was taking in a cargo or partial cargo of coal. The shippers of the coal were moving it to the ship, and

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dumping it into a hatchway by means and appliances of their own, which consisted of a tramway or bridge extending from the coal bunkers on the wharf to the hatchway on the ship. Upon this bridge was laid a railroad track for small coal cars. No part of the bridge rested upon the ship. That end of it from which the coal was dumped into the hatchway was supended by chains attached to trestlework and machinery on the wharf, by which it could be raised or lowered so as to adapt it to the varying height of the ship's deck, the part thus raised and lowered being attached to the main part on the wharf by hinges. The hatchway being used at the time of the accident is about 41/2 feet square, and the end of the bridge extended nearly to the middle of it. The width of the bridge being about 51/2 feet, the sides of it projected about 6 inches beyond the sides of the hatchway. Mr. David, the mate, was superintending the receiving of the coal and the "trimming" of it in the hold of the ship, but had nothing to do with it until it was dumped from the cars into the hatchway. About 5:30 o'clock p. m. the steward ordered plaintiff to call the officers to dinner, and he went upon deck and to the captain's room for that purpose, but, not finding the captain on the ship, he was ordered to go and look for him upon the wharf. Going from the ship to the wharf, he passed over the railroad bridge then being used by the coal shippers, and returned to the ship the same way. In returning he stepped down from the side of the bridge to the deck at a point about five feet from the end of the bridge, then moved two steps in a direction parallel with the side of the bridge and towards the end of it which projected over the hatchway, and in attempting to make another step "twisted" his ankle, and fell headforemost into the hatchway, from which he was taken in an unconscious condition. As to this, plaintiff testified: "I stepped down off the bridge onto the deck, and made one or two steps. My right ankle twisted, and I fell. I don't remember anything after On cross-examination, being asked where he got off the tramway down on the deck, he answered: "Well, it was about halfway between the hatchway and the side of the ship before I touched the deck. There was coal on the deck. Ques. How many feet would that be from the hatchway? Ans. Well, I couldn't say, for I would not be sure of it. Where I got off was about halfway between the hatchway and the bulwarks; perhaps three feet from the bulwarks. It was about three feet from the point where I reached the deck to the port side of the hatchway. Ques. What did you do with yourself after you got off? Ans. Well, to my recollection, I had about two steps, and after that I don't recollect anything." The port side of the ship was to the wharf, and only about two feet from it, and the upper deck was about on a level

with the wharf. Plaintiff further testified that in stepping from the bridge to the deck he landed safely on his feet without hurting himself.

It appears that it was the duty of the mate, Mr. David, to place gang planks from the ship to the wharf, and to guard the open hatchways while taking in cargo, so far as it was practicable to do so; and the only negligence charged by respondent is that the mate failed to perform those duties, it being claimed that the plaintiff was compelled to pass over the bridge, because no gang plank was in place; and also that he would not have fallen into the hatchway if it had been guarded in the usual way by chains or ropes supported by stanchions.

The appellant answers: (1) That a gang plank was in place at the times plaintiff passed to the wharf and returned to the ship; (2) that he might have safely stepped from the ship to the wharf and back without a plank, as the distance was only about two feet; (3) that it was impracticable to guard the small hatchway in use at the time. as the necessary stanchions for that purpose could not have been put in place, for the reason that one side and two corners of the hatchway were covered by the bridge; and (4) that the defendant was guilty of contributory negligence. Although the evidence, as read from the transcript, seems to preponderate in favor of defendant upon nearly all these issues, yet we think there is enough in favor of plaintiff to create a substantial conflict, and therefore pass to a consideration of the only other point made by appellant, which is that the mate, David, and the plaintiff were fellow servants "employed by the same employer in the same general business." We think this point is well taken, and should be sustained. There is no question that the only negligence complained of was that of the mate, David, nor that plaintiff and the mate were employed by the same employer. Nor is it claimed that there was any negligence on the part of the defendant in selecting or employing David as such mate. Nor is it now questionable in this state that a difference in the grades of service does not destroy nor affect the relation of fellow servants of the same employer, provided only that they are employed "in the same general business." In this case the respondent denies that plaintiff, the waiter, and David, the mate, were employed in the same general business: and whether or not they were so is the only question debated under this head. It is agreed that the general business in which the defendant was engaged was that of carrying passengers and freight by a steamship from port to port so distant from each other as to require several days to make a passage either way, and also requiring probably 20 employes for different grades of necessary service, including captain's mates, engineers, pilots, sailors, stewards, cooks, waiters, and

firemen. In view of the necessity of furnishing meals to passengers, as well as to employes, are not the services of stewards, cooks, and dining-room waiters an essential part of the general business of carrying passengers and freight from San Francisco to ports in British Columbia and the states of Washington and Oregon by steamship? We think it clear that they are, and that it follows from section 1970 of the Civil Code, as construed in numerous cases, that the defendant is not bound to indemnify the plaintiff for injuries suffered in consequence of the negligence of the mate, David. McLean v. Mining Co., 51 Cal. 255; Fagundes v. Railroad Co., 79 Cal. 97, 21 Pac. 437; Congrave v. Railroad Co., 88 Cal. 360, 26 Pac. 175; Daves v. Railroad Co., 98 Cal. 19, 32 Pac. 708. The judgment and order are reversed, and the cause remanded for a new

103 Cal. 255

WILSON v. STUMP. (No. 14,992.) (Supreme Court of California. June 26, 1894.) REWARD—ACTION TO RECOVER.

- 1. A complaint in an action to recover a reward offered for the production of a letter, which, after alleging the offer, alleges that plaintiff, "in consideration of said offer, promise, and agreement on the part of defendant," produced the letter, sufficiently shows that plaintiff knew the reward had been offered, and produced the letter in reliance on defendant's promise.
- 2. Where the complaint shows that the letter was produced within five days after the reward was offered for it, the fact that the reward had been revoked is a matter of defense, as it will be presumed that the offer continued for such length of time.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Russell J. Wilson against Irwin O. Stump. There was a judgment for plaintiff, and defendant appeals. Affirmed.

James A. Waymire, for appellant. Stanley, Stoney & Hayes and Arthur Rogers, for respondent.

VANCLIEF, C. The complaint in this action shows that in October, 1890, the defendant was desirous of obtaining a certain letter said to have been written by Henry H. Markham, the alleged contents of which were in dispute. That on or about the 24th day of October, 1890, the defendant proclaimed and asserted that he was desirous of obtaining a genuine letter written by said Markham of the alleged character and contents, and that he would pay a reward of \$1,000 for the production to him of such genuine letter containing the disputed matter. "That, in consideration of said offer, promise, and agreement on the part of the defendant, this plaintiff did, on the 29th day of October, 1890, produce to and left in the personal custody of the defendant, for the period of twentyfour hours, the said genuine letter, so as aforesaid written by said H. H. Markham, and did then and there demand from the defendant the payment to him of said offered reward or compensation of \$1,000; but, notwithstanding such production and delivery of such genuine letter, defendant did then refuse and ever since has and still does refuse to pay to plaintiff said sum of \$1,000, or any part thereof." The defendant demurred "on the ground that said complaint does not state facts sufficient to constitute a cause of action, in this, to wit, that it does not show a sufficient consideration, or any consideration, for the agreement therein alleged." The court overruled the demurrer, and rendered judgment in favor of plaintiff for the sum demanded by default of defendant in failing to answer. The defendant brings this appeal from the judgment upon the judgment roll, and contends that the court erred in overruling the demurrer.

It is true that the alleged offer and promise to pay the reward was only a proposal or conditional promise on the part of the defendant, and not a consummated contract; but if, in reliance upon that offer, the plaintiff accepted the proposal, and performed the service for which the reward was offered, before the offer was revoked, a valid contract was thereby consummated. Ryer v. Stockwell, 14 Cal. 134. Nor is this controverted by appellant's counsel, but he contends that the complaint does not show that plaintiff knew the reward had been offered, or that plaintiff performed the service in reliance upon the promise of defendant. I think, however, the language of the complaint clearly implies all this, and is quite sufficient to stand the test of general demurrer. alleged deficiencies are not specified in the demurrer, the only specification (if it may be called such) being that the complaint does not show any consideration for the alleged contract, while the points made here are much more specific, and not necessarily suggested by the demurrer. But the allegation of the complaint is "that in consideration of said offer, promise, and agreement on the part of the defendant" the plaintiff produced the letter, etc., and "then demanded" the reward; and this means that the offer of the defendant was the cause which moved plaintiff to perform (Webst. Dict. "Consideration"), and implies that he knew, before he performed, that the offer had been made.

It is further objected that the complaint does not show that the offer had not been revoked before the performance. The complaint shows that the offer was made October 24th, and that within five days thereafter, in reliance upon it, the plaintiff performed the service requested. Prima facie, this shows a complete contract and performance on the part of the plaintiff. The offer was not limited in time, and the presumption is that it was open on the fifth day after it was made, nothing to the contrary appear-

ing. The revocation of it, if it had been revoked, was matter of defense. Hewitt v. Anderson, 56 Cal. 476, cited by appellant, is not in point. In that case the court, upon a trial, found as a fact "that none of the acts of the plaintiff were done with a view to obtaining said reward, or any part thereof, but all of said acts were done without any intention of claiming said reward, or any part thereof." I think the judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. 239

HOUGHTON v. TRUMBO et al. (No. 15,-518.)

(Supreme Court of California. June 26, 1894.) REVIEW ON APPEAL-BILL OF EXCEPTIONS-MAT-TERS NOT APPARENT OF RECORD-WAIVER.

1. A bill of exceptions filed by, and certified to as that of, one of the defendants, cannot be considered on an appeal by another defendant, as such other defendant may have waived

all such points.

2. The fact that a judgment assumes a partnership between the parties, inconsistent with allegations in the complaint, is not ground for reversal, in the absence of a history of the trial, so as to enable the court to see what objectively. tions were interposed by defendant, or what de-fenses and points were made or waived.

3. A judgment will not be reversed, on the ground that the findings are not sufficiently full,

where the parties especially waived further findings.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Herbert R. Houghton against Isaac Trumbo and R. P. Thomas. From a judgment for plaintiff, defendant Thomas ap-Affirmed.

H. D. Talcott, for appellant. Thos. V. Cator and Pierson & Mitchell, for respondent

McFARLAND, J. This may be described, generally, as an action for an accounting between plaintiff and defendants, of matters growing out of business connected with the property known as the "Bijou Theater." Defendant Trumbo filed a demurrer to the complaint, which was overruled. He then filed an answer, and also a cross complaint. Defendant Thomas did not demur, but filed an answer and cross complaint. Each of the defendants filed an answer to the other's cross complaint. Judgment was rendered for plaintiff against Trumbo for a certain sum of money, against Thomas for a certain sum of money, and also in favor of Trumbo, against Thomas, for a certain sum of money. Thomas appeals from the judgment. He procured the case to be submitted upon his own points and authorities, because none had been filed by respondent within the time prescribed by the rules of this court.

There is no bill of exceptions or statement before us which we can consider. The defendant Trumbo made a motion for a new trial, and submitted a draft of a bill of exceptions to be used on his said motion, and on any appeal which he might take. The judge certified it in this language: "The foregoing bill of exceptions is hereby certified to be correct, and may be received as the engrossed bill of exceptions of the defendant and cross complainant Isaac Trumbo on his motion for a new trial, and may also be used by him on any appeal that he may have taken, or may hereafter take, from the judgment and decree rendered herein." Trumbo has not appealed, and it does not appear whether or not his motion for a new trial was ever determined. The appellant, Thomas, has procured this bill of exceptions f Trumbo to be printed in the transcript, but it is quite evident that it cannot be considered. It was prepared and submitted by Trumbo alone, and certified as his bill. There is not in it. from beginning to end, a single objection made by Thomas, or a single exception taken by him. He may have waived every point made by Trumbo, and every exception which the latter took. If it had been intended to be, and had been, Thomas' bill of exceptions, to be used by him on any motion on appeal, the matter of the bill might have been materially different. He also prints on the last page of the transcript, after the stipulated certification thereof, what is called, "Bill of Exceptions of Defendant and Cross Complainant and Appellant, R. P. Thomas," and consists entirely of specifications of errors, but it is not certified or authenticated in any way whatever. Leaving out of view all but the judgment roll, there is nothing to warrant a reversal of the judgment. The complaint is certainly good as against the general objection of want of facts, or of jurisdiction.

Appellant contends that the judgment should be reversed because the judgment seems to contemplate that the relation between the parties was that of partnership, while the complaint states some facts inconsistent with the theory of partnership. But the prayer of each party asks for an accounting against the others of the business transactions related in the complaint; and we have not a history of the trial before us, and cannot now know upon what theory it was conducted, what objections, if any, were interposed by appellant, or what defenses or points were made or waived. We cannot, therefore, reverse the judgment upon this point.

Appellant also contends that the findings are not full enough. There were some findings at the time a certain interlocutory decree was rendered, but none at the time of the final judgment; and we find in the transcript a written stipulation of the parties "that findings other than those hithertofore signed and filed upon the rendition of the interlocutory decree be, and the same are hereby, waived." Indeed, the judgment looks very much like a consent judgment, although its character as such judgment is not quite so pronounced as to warrant us in granting respondent's motion to dismiss the appeal on that ground. But we see no reason for reversing the judgment. The judgment is affirmed.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

(4 Cal. Unrep. 680)

WARNER v. F. THOMAS PARISIAN DYE-ING & CLEANING WORKS. (No. 15,266.)¹

(Supreme Court of California. June 19, 1894.)
REVIEW ON APPEAL—AMENDMENT OF RECORD.

1. The action of the court in granting a new trial must be affirmed where the grounds for granting the same are not stated.

for granting the same are not stated.

2. After the statement of the case has been settled for an appeal, the court can allow additions to be made thereto, though the omissions arose from the negligence of the attorney.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Seth Warner against the F. Thomas Parisian Dyeing & Cleaning Works. There was a judgment for plaintiff, and, from an order granting defendant a new trial, plaintiff appeals. Affirmed.

Horace W. Philbrook, for appellant. Reinstein & Eisner, for respondent.

PER CURIAM. A verdict was rendered in this cause in favor of the plaintiff for \$1,821. The defendant moved for a new trial upon several grounds, one of which was that the evidence was insufficient to justify the verdict. The court granted the motion without specifying the ground upon which it made the order, and from this order the plaintiff has appealed.

Upon well-established rules, the action of the court must be affirmed. Crooks v. Miller, 89 Cal. 35, 26 Pac. 615; Kauffman v. Maier, 94 Cal. 269, 29 Pac. 481; Domico v. Cassassa (Cal.) 35 Pac. 1024; People v. Flood (Cal.) 36 Pac. 663; Mills v. Navigation Co., Id. 772.

After the statement of the case had been settled by the judge, and filed with the clerk, it was brought to the notice of the court that the statement was incomplete, in that several exhibits referred to therein had not been engrossed at length, although it was recited in the statement that it contained all the material evidence taken at the trial of the action. The defendant's attorney thereupon moved the court that the settlement and allowance of the statement be vacated, and that they be allowed to re-engross the same, and place these exhibits therein. This motion was resisted by the attorney for the plaintiff, but, after a hearing of the parties, was granted; and the plaintiff's attorney excepted to this action of the court. We see no error in this proceeding. Courts of justice are organized for the purpose of determining the controversies between litigants according to their respective rights; and rules of procedure are intended to facilitate this purpose, rather than to hamper or obstruct the action of the court in determining which of the parties is entitled to a judgment. Section 659, Code Civ. Proc., makes it the duty of the judge, in settling the statement, to make it "truly represent the case, notwithstanding the assent of the parties to any inaccurate statement." If the judge shall become satisfied that a statement, as settled by him, does not truly represent the case, he is authorized, and it is his duty, to make such corrections therein as will cause it to conform to the facts. In the present case the defendant's attorney, in preparing the proposed statement, had included therein a reference to these exhibits by inserting the words, at the place where they were referred to, "here insert plaintiff's exhibit --- " so that the plaintiff's attorney was not misled in preparing amendments thereto; and, when the attention of the judge was drawn to the fact that the exhibits had not been engrossed in the statement, he was authorized to vacate his certificate of settlement, and direct that they be engrossed therein, so that his certificate may conform to the facts. Whether the omission to engross them was the result of inadvertence or carelessness on the part of the defendant's attorney did not deprive the court of a discretion to settle it correctly; and, for the purpose of determining what exhibits were in reality referred to in the statement, it was authorized to make such investigation as would enable it to settle the statement according to the facts. The order is affirmed.

(103 Cal. 242)

PEOPLE v. HARTMAN. (No. 21,100.)
(Supreme Court of California. June 26, 1894.)
RAPE—RIGHT TO A PUBLIC TRIAL—UNCHASTE
CHARACTER OF PROSECUTRIX.

1. On indictment for assault with intent to rape, an order excluding all persons from the court room, except defendant and the officers of the court, violates defendant's right to a public trial, and is erroneous.

2. The fact that prosecutrix is of unchaste

The fact that prosecutrix is of unchaste character is no defense to an indictment for assault with intent to rape.

Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Horace G. Hartman was convicted of assault with intent to rape, and appeals. Reversed.

C. W. Hartman, for appellant. H. V. Rearden and Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant was convicted of an assault with the intent to commit rape, and now presents this appeal from the judgment of conviction.

^{*}For opinion on motion to set aside judgment, and to reinstate causes. see 37 Pac, 213, 000

When the information had been read to the jury, and the defendant's plea stated, on motion of the district attorney, and against the objection of the defendant, the court made an order excluding from the court room, during the trial of the case, all persons except the officers of the court and the defendant. This was a novel procedure, and has no justification in the law of modern times. We know of no case, decided in this country, supporting the course of procedure here pursued. It is in direct violation of that provision of the constitution which says that a party accused of crime has a right to a public trial. The fact that the officers of the court were allowed to be present in no way made the trial public. For the purposes contemplated by the provision of the constitution, the presence of the officers of the court-men whom, it is safe to say, were under the influence of the court-made the trial no more public than if they too had been excluded. While a right to the public trial contemplated by the constitution does not require of courts unreasonable and impossible things, as that all persons have an absolute right to be present and witness the court's proceedings, regardless of the conveniences of the court, and the due and orderly conduct of the trial, yet this provision must have a fair and reasonable construction in the interest of the person accused. Judge Cooley, in his work up on Constitutional Limitations (page 383), has well declared the true rule in the following language: "The requirement of a public trial is for the benefit of the accused,-that the public may see that he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triors keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn hither by a prurient curiosity, are excluded altogether." In the case of People v. Murray, 89 Mich. 276, 50 N. W. 995, the question now before the court is elaborately discussed; and, upon a state of facts more favorable to the accused than is presented by the present record, it was held that the defendant had not had a public trial. There is nothing to be found in Grimmett v. State, 22 Tex. App. 36, 2 S. W. 631; State v. Brooks, 92 Mo. 573, 5 S. W. 257, 330; or People v. Kerrigan, 73 Cal. 222, 14 Pac. 849, -that justified the action of the court in making the order of exclusion here assailed. The facts of those cases are widely at variance with the facts before us, and the law there declared entirely fails to serve as a legal support to the judgment here rendered. It is intimated in both the Kerrigan and Grimmett Cases that, conceding the accused to be deprived of the right to a public trial. still the burden was upon him to show injury by reason of the deprivation. These intimations cannot be indorsed. A defendant charged with crime is entitled to certain rights under the constitution; and, when he has been deprived of any one of them, he has not had that fair and impartial trial to which he is entitled, however bad and degraded. This principle of law is in entire consonance with the views of the Michigan court, as declared in People v. Murray, supra. In the case of People v. Swafford, 65 Cal. 223, 3 Pac. 809, the court excluded all persons except the witnesses and persons connected with the case, and this action was sustained. It is there said that it does not appear that the accused objected to the order of exclusion, and non constat but that such order was made at his express request. Whatever may be the legal soundness of the court's conclusion, drawn from such a condition of the record, we think the compass of the order of exclusion too wide, and its limitations as to those allowed to be present at the trial entirely too restrictive. The trial should be "public," in the ordinary commonsense acceptation of the term. The doors of the court room are expected to be kept open, the public are entitled to be admitted, and the trial is to be public in all respects, as we have before suggested, with due regard to the size of the court room, the conveniences of the court, the right to exclude objectionable characters and youth of tender years, and to do other things which may facilitate the proper conduct of the trial. Section 125 of the Code of Civil Procedure, upon which the attorney general relies to support the action of the trial court, has no reference whatever to the question here involved. The application of the rule there stated is confined exclusively to civil cases.

The fact that the prosecutrix may have been a woman of unchaste character is no defense to the charge stated in the information. A defendant is equally guilty, under the law, regardless of the good or bad morals of the woman assaulted. It is ordered that the judgment be reversed, and the cause remanded.

We concur: VAN FLEET, J.; DE HAVEN, J.

4 Cal. Unrep. 684

PHILLIPS v. WINTER et al. (No. 15,177.) (Supreme Court of California. June 26, 1894.) RES JUDICATA.

A party to an action for partition, who acquires an independent title by deed pending the suit and before decree, and who does not assert such title in that action, will be concluded by the judgment therein from setting up such title in a subsequent action for the partition of the same property.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Abraham Phillips against Fanny M. Winter and others for partition. Judgment for plaintiff, and defendants appeal. Affirmed.

Daniel Titus and Henry Sears, for appellants. I. N. Thorne and Myer Jacobs, for respondent.

PER CURIAM. The plaintiff commenced this action to obtain a partition of certain blocks and lots of land situate in the city and county of San Francisco, and known as "outside lands." There were a large number of defendants, all of whom answered, and set out their respective claims to interests in the lands described in the complaint. Among the defendants were the minor heirs and the adult heirs, and the executrices of the will of, William Winter, deceased. The minor heirs answered separately by their guardian ad litem, and alleged that said William Winter, at the time of his death, was the owner and entitled to the possession of an undivided third part of all the lands and premises described; and they prayed that the said lands be partitioned, and that the shares and interests to which they were entitled might be determined by the court, and set off in severalty to them. The adult heirs and executrices, by their answer, denied that the plaintiff and defendants were the owners, as tenants in common, of the lands and premises described in the complaint; denied that the plaintiff or the defendants, other than themselves, had any interest in the said lands and premises, or any part thereof, as tenants in common or otherwise; and alleged that said William Winter, in his lifetime, and at the time of his death, was seized in fee, and was the owner in severalty, of all the said pieces and parcels of land mentioned and described in the complaint. Wherefore, they prayed that it be adjudged and decreed by the court that they were the owners and entitled to the possession of all the said lands and premises, and that the relief asked by the plaintiff be denied. The case was tried. and very full findings made, by which it was determined that each of the parties to the action had a certain stated interest in the said premises; and thereupon, in accordance with the findings, an interlocutory decree of partition was made and entered, from which, and from an order denying their motion for a new trial, the adult heirs and executrices appeal.

The appellants contend that the heirs, devisees, and representatives of the estate of William Winter, deceased, were shown to be the owners in fee and entitled to the possession of all the property involved in the action, and that the court erred in awarding and setting off portions thereof to the plaintiff and the other defendants. This contention is based upon the following facts: On November 20, 1869, an action was commenced in the district court of the twelfth judicial district

in and for the city and county of San Francisco, by Robert S. Randall against William Winter and others, for the partition between the parties, as tenants in common, of a tract of land described as "that certain tract of land situated in the city and county of San Francisco and state of California, known as and being the southeast quarter of section 13, township 2 south, range 6 west, according to the United States survey of the state of California, and being more particularly described as the same is delineated and shown on the map of the outside lands of the city and county of San Francisco, made under and by virtue of the provisions of order No. 800, as follows, to wit, 'All those certain blocks of land." etc., including the blocks and lots involved in this action. The answer of Winter was filed March 4, 1870. The trial of the action was commenced August 15, 1871, and on the next day the case was submitted to the court for decision. The interlocutory decree was entered October 13, 1871, and the final decree on December 8, 1875. By these decrees there were allotted and set off to the plaintiff, Randall, in severalty, all the blocks and lots of land described in the complaint in this action; and the said decrees are still in full force and effect, having never been set aside, vacated, or reversed, and under deeds from Randall the several parties to this action have acquired the interests in the property which were respectively allotted and set off to them. While the action of Randall v. Winter et al. was pending, and before the interlocutory decree therein was entered, seven deeds were executed by the city and county of San Francisco to said Winter and his codefendants, purporting to convey to them, in pursuance of the authority given by the statutes of the United States and of this state, and said order No. 800, the property involved in that action, and including that involved in this action. Two of the said deeds were dated May 6, 1870; two of them, July 8, 1870; one of them, October 20, 1870; one of them, October 7, 1871; and one of them October 9, 1871. But it does not appear what particular part of the lands was conveyed by either of the said deeds. Subsequently, his cograntees executed and delivered to said Winter deeds purporting to convey to him all their respective interests in the lands involved in this action. Under the several deeds above referred to, appellants claim that Winter, at the time of his death, was the owner and entitled to the possession of all the lands in controversy; and whether this claim can be sustained or not is the question to be decided. We do not deem it necessary to discuss the matter at length, for in Christy v. Waterworks, 68 Cal. 73, 8 Pac. 849, a like question arose, and was decided against the contention of appellants. That case grew out of the same partition suit of Randall v. Winter; and there, as here, a city deed, received by a tenant in common pending the partition proceedings, was set

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up as a defense to the action. It was held that the judgment in partition was conclusive upon all the parties thereto as to whatever title or claim they had to the land at the time of the rendition of the judgment, and on the second appeal of the case the same doctrine was announced and followed. 84 Cal. 541, 24 Pac. 307. Those decisions, we think, correctly declare the law applicable to this case; and we see nothing in Newman v. City and County of San Francisco, 92 Cal. 378, 28 Pac. 569, or in the other cases cited by appellants, that in any way conflicts with them. Appellants further contend that the decree in Randall v. Winter et al. is void on its face, and of no effect, but we fail to see any valid ground for this contention. The court had jurisdiction of the parties and of the subject-matter, and its judgment cannot now be attacked collaterally. It follows that the decree and order appealed from must be affirmed, and it is so ordered.

108 Cal. 144

HACKETT v. STATE. (No. 15,319.) (Supreme Court of California. June 16, 1894.) Construction of Contract — Erection of Sha Wall.

Plaintiff's assignor agreed to build for defendant a sea wall, whose dimensions were specified in the contract, and defendant agreed to pay 52 cents per ton for the stone and 29 cents per cubic yard for the earth used therein, and the contract stated: "The stone embankment will contain about 216,000 tons of stone; the earth embankment about 285,000 cubic yards of earth." Only 119,025 tons of stone and 272,499 cubic yards of earth were used in constructing the wall. Held, that plaintiff could recover only for the amount of the material actually put in the wall.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge. Action by John Hackett, as assignee of W. D. English and the Pacific Coast Dredging & Reclamation Company, against the state of California. Judgment for defendant, and plaintiff appeals. Affirmed.

Sullivan & Sullivan, for appellant. Garber, Boalt & Bishop, Geo. A. Johnson, and Dennis Spencer, for the State.

HAYNES, C. This action was brought in the superior court of the city and county of San Francisco against the state of California by John Hackett, as assignee of W. D. English and the Pacific Coast Dredging & Reclamation Company, pursuant to a statute enacted March 15, 1889, authorizing such suit to be brought. St. 1889, p. 221. Defendant's demurrer to the complaint was sustained, and, the plaintiff declining to amend, judgment was entered for defendant, and the plaintiff appeals therefrom.

The contract out of which this controversy arose was made by W. D. English with the board of state harbor commissioners on February 20, 1884, for the construction of section

5 of the sea wall and thoroughfare and wharf along the water-front line of the city and county of San Francisco. This contract was made by English for the Pacific Coast Dredging & Reclamation Company, a corporation, and on January 2, 1889, the corporation assigned the contract to plaintiff. The point of plaintiff's contention is that by said contract the contractor agreed to furnish, and the state agreed to pay for, 216,000 tons of stone at 52 cents per ton, and 285,000 cubic yards of earth at 29 cents per cubic yard; that the contractor was ready and willing, and offered to furnish the full quantities of stone and earth above named, but that the board would only accept 119,025.86 tons of stone and 272,499.2 cubic yards of earth. The difference between these quantities, eatimated at the prices named, amounts to \$55,000, and this amount plaintiff seeks to recover in this action.

Respondent contends that the contract was for the construction of the sea wall of a definite length, according to the specifications; that the quantities of stone and earth mentioned in the specifications and in the notice to contractors were mere estimates of the quantities which would be required to complete the work; that the contract required the board to take and pay for only so much of these materials as were necessary to complete the work, and were actually used therein; the complaint alleging that the work was fully performed, and that the engineer overestimated the quantity of stone required by 96,774 tons, and the quantity of earth by 12,-501 cubic yards; it being for these quantities of stone and earth so overestimated, and not used, or necessary to be used, that plaintiff seeks to recover. The complaint sets out in full the notice to contractors, under which bids were received, and also the contract and the specifications of the work to be done and the materials to be used, which are made part of the contract. The notice was for proposals to construct a section of the sea wall, thoroughfare, and wharf, the sea wall and thoroughfare to extend from the southerly end of section 4 1,000 feet southerly, and to have a surface width of 200 feet, the work to consist of a stone embankment, the character and dimensions of which are described. and to construct this, the notice stated, "It is estimated by the chief engineer of the board that it will take 216,000 tons of rock." The earth embankment to be the same length. "Its width on top, twelve feet above the mean of low tide, will be 189 feet; its width on the bottom (estimated) 165 feet, its average width 152 feet, and its average depth (estimated) 51 feet 6 inches." No question is made in regard to the wharf. Under the head of "General Conditions" the lotice specified, among other things, that "the work will not be accepted until the stone and earth embankments shall have been brought to grade, and maintained thereat for a period of three months. *

The whole of the material to be furnished and work to be done as required by the plans and specifications, to which special reference is hereby made. • • • The contract for the whole work will be let to one party, but each bidder must state: First. The price per ton of 2,240 pounds for which he will furnish and place the stone required for the stone embankment. The price per ton, multiplied into 216,000, the estimated number of tons required, will give the amount of his bid on the stone embankment. Second. The price per cubic yard, to be determined in the vehicle of transportation, for which he will furnish the material and build the earth embankment. The price per cubic yard multiplied into 285,000, the estimated number of cubic yards of material required, will give the amount of the bid on the earth embankment. Third. The sum for which he will furnish the material and build the wharf. The sum of these three bids, thus ascertained, will constitute the bid for the whole work. The contract will be awarded to the bidder, the aggregate of whose bid, determined as above, is the lowest." The bid of Mr. English, under which the contract was awarded, is as follows:

"San Francisco, February 20, 1884. To the Board of State Harbor Commissioners-Gentlemen: The undersigned hereby propose and agree to construct the work described in the annexed advertisement, according to the plans and specifications on file in your office, and within the time prescribed in the said advertisement, at the following rates:

\$112,320 00

82,650 00 29,000 00

The contract contained, among others, the following provisions: "That the party of the second part hereby covenants and agrees with the party of the first part to furnish the labor and materials and do the following work, to wit: The construction of section five of the sea wall and thoroughfare and wharf along the water front line of the city and county of San Francisco, state of California. • • • And the party of the first part covenants and agrees with the party of the second part to pay for the said work by drafts drawn on the San Francisco Harbor Improvement Fund in gold and silver coin of the United States in manner following. viz.: Upon monthly estimates of the value of the materials used and work performed to the extent of seventy-five per cent. of such values, said estimates to be made in writing by the chief engineer of the board, and the final payment of twenty-five per cent. when the work is completed and accepted by the

Total \$223,970 00"

board at the following rates, vis.: The stone embankment at fifty-two (52) cents per ton of two thousand two hundred and forty (2,240) pounds; the earth embankment at twenty-nine (29) cents per cubic yard (determined in the vehicle of transportation); the wharf (furnishing the materials and doing the work), twenty-nine thousand (\$29,000) dollars."

The material parts of the specifications affecting the question at issue follow closely the notice to contractors in the particulars above noticed. One or two extracts, however, may be pertinently made. "The work to be done under these specifications consists in furnishing all materials and erecting a stone embankment, an earth embankment, and a wharf. The stone embankment will contain about 216,000 tons of stone; the earth embankment about 285,000 cubic yards of broken stone, sand, or other suitable material; and the wharf will contain 501,320 feet B. M. of timber, and 802 piles, together with the requisite quantity of cast-iron mooring bits, wrought-iron spikes, bolts," etc. "The quantity of stone used in the stone embankment will be determined by weight. A ton is 2,240 pounds. The board will erect the necessary scales, and the weighing will be done under the direction of the chief engineer. The contractor must give every facility for the thorough and accurate determination of the quantity of stone used."

I think the court below did not err in sustaining the demurrer to the complaint, and rendering judgment for the defendant. What the board of harbor commissioners contracted for was the construction of a section of the sea wall of a defined length, and for which they agreed to pay a fixed price per ton for the stone, and a fixed price per cubic yard for the earth used in the construction of it; and not that they agreed to buy or pay for a fixed and definite number of tons and cubic yards of material, whether used in the work or not. If the "estimates" of the quantities required for the work, as made by the engineer and stated in the notice, bid, and specifications, be laid aside or disregarded, there could be no question as to the correctness of our conclusion. On the other hand, if the notice, bid, and specifications had been for furnishing and putting in place 216,000 tons of stone and 285,000 cubic yards of earth in a sea wall, under the direction of the engineer, there could be no question that the contractor would have been required to furnish those quantities of material, and that the board should have paid therefor, if such contract was within their powers. In such case, however, no estimates were necessary. Estimates became necessary only because the work to be done was restricted to definite and precise limits, the amount of material for which was difficult or, indeed, incapable of exact computation. This is apparent from the notice under which the bid was made, where it is stated that the average depth from the top of the embankment to hard bottom is (omitting inches) 61 feet, to stiff mud 39 feet, and average thickness of stiff mud 21 feet. "The average height of the embankment, as estimated by the chief engineer, will be 55 feet 4 inches." It is further provided that the contractor shall keep the stone embankment up to grade for three months. These facts contemplate a settling of the wall, but the extent of such settling is an uncertain quantity, and one that is continuous from the commencement of the work to its completion, and necessitates the provision for weighing the rock as it was used. Besides, it is not like solid masonry of given dimensions, which can be measured by the perch. The greater part of it is under water, and, to a certain height, the stone is simply "dumped" in, and allowed to form a natural slope, which introduces another element of uncertainty. Still another unknown quantity is involved in the estimation. The rock is not estimated by bulk, but by weight. All that is required by the specifications is that it shall be rock that will not disintegrate by the action of the water; and it is a matter of common knowledge that different kinds of rock vary greatly in weight. The lighter the rock the less number of tons are required, and vice versa. Similar considerations affect the estimate of the quantity of earth required for the earth embankment. This was to be measured in the vehicle of transportation in its loose state. How much of bulk it would lose in place by settling would depend on the material used and the weight of the embankment, and could not, therefore, be accurately calculated. These considerations were apparent, and open to the bidder. He saw precisely what work the state wished to accomplish, and must have known that the quantities of material necessary for its accomplishment were not, and could not be, accurately determined; and, therefore, that it was essential that his bid should specify the price per ton and cubic yard, as otherwise a bid of a lump sum for each of the embankments would have been all that could be required. Besides, the clause in the contract relating to payments was not that \$112,320 would be paid for the stone, nor \$82,650 for the earth, but the stone embankment was to be paid for at 52 cents per ton, and the earth at 29 cents per cubic yard; 75 per cent. of the value of the materials used and work performed to be paid upon estimates monthly, and the final payment of 25 per cent. when the work should be completed and accepted; thus clearly limiting the payments to the work and materials used.

The authorities cited by appellant do not conflict with this view. In Cabot v. Winsor, 1 Allen, 546, the contract was for the sale of 500 bundles, more or less, of gunny bags, at 10 cents per bag. The court, in construing the contract as affected by the words "more |

or less," said: "As applied to quantity, they are to be construed as qualifying a representation or statement of an absolute or definite amount, so that neither party to a contract can avoid it or set it aside by reason of any deficiency or surplus, occasioned by no fraud or want of good faith, if there is a reasonable approximation to the quantities specifically named as a subject of the contract,

or, as it is sometimes briefly expressed, it is an absolute contract for a specific quantity within a reasonable limit." case of Hardy v. U. S., 9 Ct. Cl. 244, was for the transportation of a given number of tons, "more or less," of government stores to certain military stations, and a similar construction was given. In neither of these cases was the quantity limited in any manner, except by the words "more or less," while in this case the quantity of rock and earth was capable of exact ascertainment upon the completion of the work, which was itself precisely defined. Another case, cited by appellant, illustrates this distinction. That is the case of Brawley v. U. S., 11 Ct. Cl. 522, where the court quoted with approval both of the cases above cited, and said: "In each of these cases which we have cited, it will be seen that the contract was for a definite quantity, with the words 'more or less,' added thereto without reference to any other method of determining and making certain what appeared to be rendered uncertain by the latter words. To give force to the words 'more or less' in such connection to the full extent of their literal meaning would be to allow either party practically to avoid the whole contract, except as to the price of the goods actually delivered and accepted. This would clearly be an unreasonable construction, and not in acordance with the plain intent of the parties." In the case last above cited, however, the quantity specifically mentioned was immediately followed by the words "more or less, as shall be determined by the post commander;" and the court held that the specified quantity was subject to his control, and that both parties agreed thereto by adopting that language. So, in the case at bar, the controlling words of the contract are that the contractor will "furnish the materials and do the following work, to wit, the construction of section five of the sea wall and thoroughfare and wharf;" and that the quantities named are only estimates of the material required for that work, the requirements of the work being the ultimate and controlling measure of the quantity. While an accurate computation of the amount or quantity of material required could not be made in advance of the work, so gross an error in the estimate of the quantity of stone required is incomprehensible. But the extent of the error does not affect the construction we have given to the contract. It is not true, as argued by appellant, that under this contract the contractor could have been compelled to furnish the estimated quantity of

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stone and earth, unless qualified by the further statement that the whole of such estimates were required for the erection of the section of the sea wall embraced in his contract. That contract he was bound to fulfill, whether it required more or less than the quantity of materials estimated, but for all that he used he would have received compensation at the contract rates.

Other points are urged with much force by appellant, but, in view of the conclusion reached as to the construction of the contract, it is not necessary to consider them, since if they were all determined in appellant's favor the result would not be changed. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

4 Cal Unrep. 691

MATTS et ux. v. BORBA. (No. 15,381.) (Supreme Court of California. June 26, 1894.) SLANDER-EVIDENCE-REMARKS OF COUNSEL.

1. In an action for slander, for calling plaintiff "valhaca," plaintiff and several witnesses (all illiterate Portuguese) testified that the word was in common use among the Portuguese, and meant "whore." Defendant's witnesses, some of whom were educated Portuguese, testified that the term "valhaca," did not mean "unchastity," but that it meant "knave, rogue, crafty," and that the word "puta" was in common use, meaning "whore." Held sufficient to support a verdict that defendant intended to impute unchastity to plaintiff.

reading whore. They such that defendant intended to impute unchastity to plaintiff.

2. After defendant had examined his witnesses, and rested, plaintiff gave evidence that the word "valhaca" meant "whore." Held that, if the evidence was improperly admitted, defendant was not prejudiced, there being already sufficient evidence to support the verdict.

3. It was agreed that the cause should be that the cause should be the company that plaintiffs at the cause should be the same as the cause should be the cause should be the cause should be the same as the cause should be the cause

3. It was agreed that the cause should be submitted without argument, but plaintiff's attorney said: "I want to make this statement to the jury: That plaintiffs, having commenced this case in the superior court, caunot recover any costs unless they recover \$300 damages." And the cour's said, "You must not make those statements. Held that, if defendant thought the court had not sufficiently informed the jury not to consider the remarks, he should have asked for an instruction to that effect, and that a new trial would not be granted on account of such remarks.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by Frank Matts and wife against Joseph Borba. From a judgment for plaintiffs, and an order denying a new trial, defendant appeals. Affirmed.

Wm. L. Gill, for appellant. W. B. Hardy, for respondents.

HAYNES, C. Action for slander. The plaintiffs had judgment, and this appeal is from the judgment, and from an order denying uefendant's motion for a new trial.

The parties plaintiff and defendant are Portuguese, and the slanderous words are charged to have been spoken of and concerning the plaintiff Catherine Matts, in the Portuguese language, in the presence and hearing of persons who understood that language, to wit: "'Valhaca! quando e que es meus homes foram enhar bariga de carne a tua casa.' Plaintiffs aver that said words signify, and are understood to mean, in the English language, 'You whore! when my men went and filled their bellies with meat at your house,' and the said Portuguese words were so understood by the said persons in whose presence and hearing they were spoken; that the defendant meant by said words so spoken to impute to the plaintiff Catherine Matts a want of chastity." The answer denied speaking the said words, or any of them, or any other words meaning to impute a want of chastity, or that said words, or any of them, signify, or are understood to mean, "you whore," or "whore," or were so understood by any person who heard them. Both the plaintiffs and several other witnesses testified to the speaking by defendant of the Portuguese words set out in the complaint, and that the word "valhaca" has the meaning attributed to it in the complaint, some of the witnesses defining it to mean a "private whore; that is, a married woman who is doing it on the sly;" that "the word is in common use among the Portuguese to express a woman who has fallen so low as to be common with every one, even without pay;" while the defendant, and about the same number of witnesses. testified that the words charged were not spoken. All the witnesses in chief on the part of the plaintiff were illiterate, and, with the exception of Mrs. Matts, could not read or write, and she only to a limited extent. The defendant, in addition to the witnesses who were present, and who testified, as positively as witnesses can to a negative fact, that the words were not spoken, called six intelligent Portuguese, two or three of whom had received a collegiate education in Portugal, who testified that "'valhaca' means knave, rogue, rascal, scamp, scapegrace, crafty, cunning;" that it never means "unchastity;" that they never heard it used to impute unchastity; that the word in common use, having the meaning of the English word "whore," is "puta;" and that "meretriz" and "prostituta" are also used to express the same meaning.

Appellant, in his statement on motion for a new trial, specified as one of the grounds thereof that the evidence was insufficient to justify the verdict as to the meaning of the words alleged to have been spoken. Respondents contend that this ground cannot be considered, for the reason that it was not included in appellant's notice of intention to move for a new trial. The only clause in the notice which could possibly authorize the specification in question is the follow-

ing: "Third. Insufficiency of the evidence to justify the decisions and rulings of the court, and that said rulings and Jecisions are against law." It is difficult to determine what was meant by this statement as a ground of motion for a new trial, nor do I think it necessary to determine it, as it will not affect our conclusions. That there was a conflict in the evidence as to whether the defendant spoke the Portuguese words charged in the complaint is beyond question, even if we add to the evidence upon this point the additional fact that Mrs. Matts, upon a former trial, based upon the occurrences which took place at the time the words are alleged to have been spoken; testified to different language used by defendant, to which she made the same response she now testifies she made to the language stated in the complaint, and in which she applied to defendant's wife the epithet "puta" to express the same meaning that was given by plaintiff's witnesses to the word "valhaca." Similar doubts may be expressed as to the meaning intended to be conveyed by the word "valhaca;" but doubts upon these questions of fact would neither justify the court below in setting aside the verdict of the jury, nor this court in reversing the order denying a new trial. Appellant insists, however, that the testimony of his witnesses as to the meaning of the word "valhaca" leaves no doubt; that, in effect, it is wholly uncontradicted. As to the primary meaning of the word, this is true. Standing alone, as a single word, it does not imply want of chastity, but, like many words in the English language, no definition of which, as found in the dictionaries, refer to chastity, or the want of it, are nevertheless used to imply a want of chastity. There are other words, however, corresponding very closely to the word "valhaca," which, in their ordinary use, do not refer to the subject of chastity, but yet imply qualities which embrace chastity. The word "dishonest," for example, corresponds very nearly, in its primary meaning, to the word "valhaca." The first definition given by Webster is: "Wanting in honesty; void of integrity; faithless; fraudulent; disposed to deceive or cheat," while the third meaning given is "dishonorable; disgraceful; shameful; wanton; unchaste." So Shakespeare used the word "honest" to denote chastity: "Wives may be merry, and yet honest too." Even the word "occupy" was formerly used to express sexual intercourse, though now never so used. That the word "valhaca" is capable, without greatly distorting some of the definitions given to it, of expressing the imputed meaning, is reasonably clear, and the evidence in this regard is sufficient to support the verdict.

It is also specified by appellant that the court erred in giving the first and second instructions requested by the plaintiffs. It is sufficient to say of these instructions that,

if they had been the only instructions given, they were too general to be of much aid to the jury. But the court, in other instructions given of its own motion, fully and very fairly instructed the jury that they must, in order to warrant a verdict against the defendant, not only find that the words charged were spoken by the defendant, but that they have a meaning imputing, and were intended to impute to Mrs. Matts, a want of chastity; that it was not sufficient to find that they were insolent and reviling or opprobrious, but that they had the meaning charged in the complaint; and that, in ascertaining the meaning of the speaker, reference must be had to the words used, and the circumstances under which they were spoken. These and other expressions used by the court must be taken with the more general statements in the instructions excepted to, there being no real inconsistency between them.

Plaintiffs offered in evidence a lease of the land where they resided, and where the alleged slanderous words were spoken. The lease was made to the husband, and had not expired. The difficulty arose from a new tenant going upon the premises with several teams, hauling lumber to erect a barn; one of the teams being driven by defendant, between whom and the plaintiffs ill feelings existed. Objection was made to the introduction of the lease, and, to the ruling of the court permitting its introduction, defendant excepted. We see no ground upon which it can be said that defendant was prejudiced, even if it be conceded that the evidence was immaterial.

After the defendant had examined his witnesses, and rested, the plaintiffs called several witnesses, who were permitted, against defendant's objection, to testify that the word "valhaca" meant "whore." The objection was that it was testimony in chief, and not in rebuttal. This evidence might have been properly received in chief, and indeed was of the same character, and given by witnesses having no better qualifications as to learning than those first examined. Appellant contends that the court erred in overruling his objections, no reason being given why they were not called in chief, and cites several cases in support of his contention. These cases were all where the testimony offered in rebuttal was in fact evidence in chief, and was excluded by the court, and the exclusion was sustained upon appeal. In this case, if the evidence offered in rebuttal had been excluded upon the ground urged by appellant, we see no reason why such ruling would not have been affirmed, for the same reason that the action of the court in receiving it should be affirmed. In Lux v. Haggin. 69 Cal. 414, 10 Pac. 674, it was said: "All agree that it is within the discretion of the trial court to admit additional evidence in support of the plaintiff's case after the defendant has rested. Of course, it is always safer to admit evidence claimed to be in reply, if the court entertains doubts of its admissibility." Section 2042, Code Civ. Proc., is as follows: "The order of proof must be regulated by the sound discretion of the court. Ordinarily, the party beginning the case must exhaust his evidence." And subdivision 3 of section 607 provides: "The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." Defendant's witnesses having testified to the meaning of the word as given in the dictionaries, and its primary meaning as used by educated people, it would have been competent for plaintiffs to rebut by showing that a secondary or corrupted meaning had been given it. If the evidence ostensibly introduced in rebuttal proved not to be properly of that character, the defendant still had recourse to a motion to strike out, when the court, with the evidence before it, could more accurately determine its character. The record does not show the ground upon which it was received; that is, whether it was regarded as properly in rebuttal, or whether the court, in the exercise of its discretion, and in the furtherance of justice, permitted the plaintiffs to strengthen their case by the admission of original testimony; nor do we think it necessary that it should appear. Upon the point in question there was already sufficient evidence to have supported the verdict, and hence we cannot say that the defendant was prejudiced, or that upon a new trial the evidence given by these witnesses could be disproved.

Upon the conclusion of the evidence, it was agreed that the cause be submitted to the jury without argument; that thereupon the attorney for the plaintiffs arose, and said to the jury: "I do not care to argue this case, but I want to make this statement to the jury: That, plaintiffs having commenced this case in the superior court, they cannot recover any costs unless they recover three hundred dollars damages." Defendant's counsel said: "I object to that statement." Court: "You must not make those statements." No request was made of the court to instruct the jury to disregard the statement of counsel, nor was any exception tak-The conduct of plaintiffs' counsel in this regard was highly improper, but it was at once met by a prompt and decided rebuke from the court. This the court no doubt considered sufficient to inform the jury that they must not be influenced by it. If defendant thought it not sufficient, he should have requested the court to give such instruction as he deemed proper, and, upon a refusal, to have taken an exception. Conceding that the verdict was for a sum suspiciously near the line (\$305), we cannot say that the improper remarks of counsel in fact influenced the jury. Such irregularities can usually be dealt with by the trial court so as to protect parties against injury, and in proper cases afford relief by granting a new trial. We do not think the court erred in refusing to grant a new trial upon this, nor upon any of the grounds assigned. We advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

DE HAVEN, J. I concur in the judgment.

FERCHEN v. ARNDT (E. W. BLISS CO., Intervener).

(Supreme Court of Oregon. July 5, 1894.)
RIGHT TO FOLLOW TRUST FUNDS—LIEN OF CESTUI QUE TRUST—PREFERENCE.

No lien exists on firm assets in the hands of a receiver for trust funds used by the firm in the payment of debts and operating expenses, and not shown to have gone to swell the specific fund sought to be charged.

Appeal from circuit court, Clatsop county; T. A. McBride, Judge.

Action by J. F. Ferchen against Samuel Arndt for the appointment of a receiver. E. W. Bliss Co. intervened, praying that their claim be adjudged a preferred lien, and from a judgment allowing the claim, but denying the lien, the intervener appealed. Affirmed.

Snow & McCamant, for appellant. C. W. Fulton, for respondent.

LORD, C. J. This is a suit to establish a preference and a lien upon the assets of the partnership of Arndt & Ferchen, in the hands of B. W. Robinson as receiver, for certain moneys alleged to have been received in trust by said firm. The facts are substantially these: The plaintiff and defendant were partners engaged in the foundry business under the firm name of Arndt & Ferchen, and, not being able to agree in regard to the management of the business, the plaintiff instituted a suit praying for an accounting, and for a dissolution of the partnership, and that in the interim the property of the partnership be turned over to a receiver, who should manage the same, subject to the orders of the court. ceiver, having been appointed, took charge of the property and business of the firm, and, after managing it several months, he was directed by the court to sell the property of the partnership in his hands, and turn into court the proceeds of such sale, together with such collections as he might make of partnership accounts. Under this order about \$2,000 was paid into court for distribution among the creditors of the firm. In the meantime the E. W. Bliss Company was permitted by the court to intervene in the suit, whereupon it filed its petition, praying for the allowance of a claim against the partnership for the sum of \$2,114, together with interest thereon from July 15, 1892; that it be decreed to have a preferred lien on all assets of the partnership for said sum, and that the receiver be directed to pay the same to the petitioner. The facts upon which the intervener bases its claim are substantially that the firm of Arndt & Ferchen had represented the Bliss Company in the sale of its goods on commission as its agents; that accounts were rendered from time to time to said company, but that without its knowledge it had been the custom of the firm to mingle the sums received from sales made for such company with other moneys of the firm; that the moneys so received were deposited in the bank to the credit of such partnership, and that the firm checked against it to pay the running expenses of the partnership, to purchase new machinery, to purchase merchandise afterwards sold by the partnership, to pay the salaries and wages of employes, * * and that the moneys of your petitioner so received by said Arndt & Ferchen have been so mingled with the funds of said Arndt & Ferchen that it is impossible to follow them into any specific property." The petition was attacked by demurrer, on the ground that it did not state facts sufficient to constitute a cause of suit, which demurrer was overruled, the court holding that the intervener was entitled to have any specific property or fund of the partnership into which it could trace its money impressed with a lien in its favor. The court then referred the case to Mr. C. E. Runyon for the purpose of ascertaining whether the firm had received any money from the sale of the goods or wares of the company as its factor, and, if so, what disposition was made of it. Thereafter the receiver filed an answer denying that the firm of Arndt & Ferchen, since the year 1884, or at any time, has been employed by the petitioner as its factor, or sold any goods or wares for or on its account, etc. This answer was deemed insufficient to constitute a defense, and, no other answer being interposed, and the intervener having failed to avail itself of the opportunity afforded by the court to show by evidence that its money was in the partnership fund, the court proceeded to pass upon the questions raised by the petition, and held that the amount claimed therein should be allowed, but denied the preference sought by the petitioner. From this decree the company has brought this appeal.

The facts show that, if the claim of the Bliss Company is preferred, it will absorb the entire assets of the firm, leaving nothing for its other creditors. The case is rendered important by the nature of the question involved and the number of other cases dependent upon its decision. Upon the ad-

mitted facts there is no pretense that the money derived from the sale of the intervener's goods forms any part of the fund now awaiting distribution at the hands of the court. It is conceded that the money so collected has been appropriated to the payment of debts, the purchase of stock, and the payment of the running expenses of the partnership while the firm was conducting its business. But it is claimed that, where an agent or trustee has wrongfully used or appropriated the property or funds of another, it creates an equitable charge upon the whole of his estate, or a preferred lien upon his assets. This is put on the ground that such estate is thereby increased, or that his assets would have been less but for the wrongful use or appropriation of the trust fund, and consequently that it cannot be supposed that such fund is wholly lost, but that it exists in a substituted form as a part of such estate or assets, although it cannot be pointed out, or directly traced. That there may be cases to which such argument is applicable may be conceded,-as where the trust fund has gone into and remains in the assets which are sought to be charged,-but its force is not perceived where such fund is dissipated, or used in the payment of debts or the expenses of business. The equitable right to follow and retake from the possession of a trustee property wrongfully appropriated by him, or from those in privity with him, who are not bona fide purchasers for value, so long as it can be traced, whether it remains in its original or in a substituted form, upon the ground that such property, in whatever form, is subject to the trust in favor of the owner, is well established. "Formerly," Mr. Justice Bradley says, "the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But, if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of This is as far as the rule has the possessor. been carried." Frelinghuysen v. Nugent, 36 Fed. 238. Mr. Pomeroy says: "Equity regards the cestui que trust, in all instances except that last mentioned in favor of creditors, although without any legal title, and perhaps without any written evidence of interest, as the real owner, and entitled to all the rights and consequences of such ownership. * * * No change in the form of the

trust property, effected by the trustee, will impede the rights of the beneficial owner to reach it and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated." 2 Pom. Eq. Jur. § 1058. This equitable doctrine is put upon the ground that the real owner has the right to retake and reclaim his property, through all its transformations and forms, so long as it may be traced, whether its identity is preserved or is merged into a mass of which it forms a To accomplish this end, when such trust property has been mingled into a mass of which it forms a part, but its identity is lost, equity affords relief by creating a charge or lien upon such mass for its ascertainable value. The right to such relief has its basis in the right of property, and "simply asserts," as Andrews, J., says, "the right of the true owner to his own property." Cavin v. Gleason, 105 N. Y. 262, 11 N. E. But, whether such owner seeks to recover specific property or to create a lien upon a mass or fund, he must trace such property, and show that it belongs to him, or that it has gone into and then remains in the mass which he seeks to impress with a lien or charge. In such cases the question to be determined always is whether the trust property or fund, or the proceeds thereof, is traceable into any specific property or fund. Before, therefore, one claiming to be a trust creditor can be entitled to a lien or preference over other creditors, he must make it appear that the fund or property of the debtor which he seeks to affect with such lien or preference includes the trust property, or the proceeds thereof. "If it appears," said Andrews, J., "that trust property has been wrongfully converted by the trustee, and constitutes, although in a changed form, a part of the assets, it would seem to be equitable, and in accordance with the equitable principles, that the things into which the trust property has been changed should, if required, be set apart for the trust; or, if separation is impossible, that priority of lien should be adjudged in favor of the trust estate for the value of the trust property or funds, or proceeds of the trust property, entering into and constituting a part of the assets." Gavin v. Gleason, su-See, also, Atkinson v. Printing Co., 114 N. Y. 168, 21 N. E. 178; Holmes v. Gilman, 138 N. Y. 369, 34 N. E. 205. Hence, so long as the trust property can be traced and followed into the hands of the debtor, his estate is subject to the trust; but when it has been dissipated, and is no longer traceable, there remains nothing to be the subject of the trust and the equitable right of the cestui que trust to follow it fails. "When trust money," said Allen, J., "becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust

ceases. The court will go as far as it can in thus tracing and following trust money; but when, as a matter of fact, it cannot be traced, the equitable right of the cestul que trust to follow it fails. Little v. Chadwick, 151 Mass. 109, 23 N. E. 1005. To the same effect are Englar v. Offutt, 70 Md. 78, 16 Atl. 497; Thompson's Appeal, 22 Pa. St. 16; Columbian Bank's Estate, 147 Pa. St. 422, 23 Atl. 625, 626, 628; Sherwood v. Bank, 94 Mich. 78, 53 N. W. 923; National Bank v. Insurance Co., 104 U. S. 54; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354; Bank v. Goetz, 138 Ill. 127, 27 N. E. 907; Goodell v. Buck, 67 Mo. 514; Story, Eq. Jur. §§ 1258, 1259; 1 Lewin, Trusts, 241. From these authorities we draw the conclusion that, when the trust property has been dissipated by the trustee, and forms no part of his estate, the cestui que trust has no longer any remedy in equity to fix a charge upon the estate of such trustee, but must come in and share with the general creditors. Nor do we find anything in Re Hallett's Estate, 13 Ch. Div. 696, to the contrary. In that case, Jessel, M. R., said: "The guiding principle is that a trustee cannot assert a title of his own to trust property. If he destroys a trust fund by dissipating it altogether, there remains nothing to be the subject of the trust; but, so long as the trust property can be traced and followed into other property into which it has been converted, that remains subject to the trust." Id. 719.

Within the principles announced by these authorities the petitioner is not entitled to relief upon the facts stated in his petition, because it is not shown that the fund paid into court by the receiver and awaiting distribution includes any of the proceeds of the trust property, or forms any part there-The admitted facts show that the moneys derived from the sale of the intervener's property has been used in the payment of debts and otherwise dissipated, so that such moneys can no longer be traced or shown to form any part of the fund which is sought to be charged with a preferred lien. The cases in conflict with this doctrine, and mainly relied upon in support of the intervener's contention, are McLeod v. Evans, 66 Wis. 401, 28 N. W. 173, 214; Francis v. Evans, 69 Wis. 115, 33 N. W. 93; Bowers v. Evans. 71 Wis. 133, 36 N. W. 629; Plow Co. v. Lamp, 80 Iowa, 722, 45 N. W. 1049; Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499; Harrison v. Smith, 83 Mo. 210; Stoller v. Coates, 88 Mo. 514; Smith v. Combs, 49 N. J. Eq. 420, 24 Atl. 9. It is enough to say that none of the Wisconsin cases received the consent of the entire court, and have recently been overruled in Silk Co. v. Flanders (Wis.) 58 N. W. 383. The recent cases of Slater v. Oriental Mills (R. I.) 27 Atl. 443, and Shields v. Thomas (Miss.) 14 South. 84, ably review and criticise the doctrine of the cases cited in support of the contention for the intervener, and reach conclusions adverse to it.

The distinction between funds remaining in the estate, and which go to swell it, and funds which have been dissipated, or used in the payment of debts, and do not remain in the estate, is made clear and applied. To the argument that the relation of debtor and creditor does not exist between the trustee and cestul que trust whose property he has wrongfully converted or appropriated, Stiness, J., in Slater v. Oriental Mills, supra, says: "The fact that the cestui que trust has not entered into the relation of debtor and creditor with the trustee does not affect the question. So long as he secks to recover what he can show to be his own he is in the position of an owner, but when he cannot do this, and seeks to recover payment out of the trustee's general estate, he is in the position of a creditor." Unless, therefore, he can show the specific property claimed is his, or that the trust fund has gone into, and forms a part of, the estate he seeks to charge, he is entitled to no lien or preference, but must prove his claim, and share with the other creditors. It results from these views that there was no error, and the decree must be affirmed.

McCAULEY v. LEAVITT et al.

(Supreme Court of Utah. June 4, 1804.) PROMISSORY NOTE-PLACE OF PAYMENT-SURREN-DER OF NOTE-INTEREST AFTER MATURITY.

DER OF NOTE—INTEREST AFTER MATURITI.

1. Where a note is made payable at a certain place, the maker, in order to avoid costs and interest after maturity, must deposit or tender the amount of the note at that place, though the note is not there.

2. Under section 2851, Comp. Laws 1888, which provides: "A negotiable instrument which does not specify a place of payment, is payable at the residence or place of business of the maker, or wherever he may be found."—a the maker, or wherever he may be found,"—a person liable on a note not specifying a place of payment, who cannot find the payee, and does not make a tender at the place of business or residence of the maker, is liable for interest after maturity, and costs.

Appeal from district court, Weber county; before Justice James A. Miner.

Action by C. A. H. McCauley against John Q. Leavitt and others to foreclose a mortgage on real estate. Judgment for defendants, and plaintiff appeals. Reversed.

Evans & Rogers, for appellant. A. R. Heywood and V. Gideon, for appellees.

BARTCH, J. This is an action to foreclose a mortgage on real estate, given as security for the payment of a note. As appears from the record, John Q. Leavitt and Cynthia Leavitt, his wife, made and delivered to the plaintiff, on the 13th of April, 1889, a promissory note for \$1,200, due in six months after date. This note was, by its terms, payable in United States gold coin, at the First National Bank of Ogden, Utah, and contained a provision for 10 per cent. additional, for collection, in case the note was not paid at maturity. The note was secured by mort-

gage on real estate, and the mortgage was placed on record. Afterwards, on August 13, 1889, Fred J. Keisel purchased the land, subject to the mortgage, but had no opportunity to examine the note itself; and the copy of the note, as it appeared from the record of the mortgage, designated no place of payment, nor did it contain the clause for payment in United States gold coin, or for the 10 per cent. additional for cost of collection. It also appears that the payee of the note was absent from the territory at the time of maturity, and until suit was brought. Keisel was able and ready to pay the note at maturity, and, it appears, used reasonable diligence to ascertain the whereabouts of the payee and the note, but was unable to do so. About six months after maturity he went to the bank, taking with him \$1,272, amount of the principal and interest, to date of maturity, intending to pay the note, but upon inquiry found it was not there, and then made no tender; nor did he make a tender at the place of residence of the maker. On this state of facts and circumstances the court rendered judgment against the defendants John Q. Leavitt and Cynthia Leavitt for \$1,200 and interest thereon to the date of the maturity of the note, and the plaintiff appealed from the judgment.

The first material question to be determined is whether under the circumstances of this case, the defendants, as is contended by their counsel, were excused from making a tender of the money at maturity, and, therefore, exempt from the payment of interest after maturity, and from costs of collection. The note was, by its terms, payable at the First National Bank of Ogden, and the makers must be held to have knowledge of the contents of the instrument. The place of payment was a matter of arrangement between the makers and payee for their mutual accommodation. The payee did not agree to have the note at the bank on the date of maturity, but simply that it should be payable there. Hence the mere failure to present it for payment there on the date of maturity did not exonerate the makers from their promise to pay according to the terms of the note. Nor would it prevent the payee from recovering his interest and costs, in the absence of a readiness on the part of the makers, at the time and place appointed, to pay the note. If on or before the day of maturity the makers would have deposited the money with the bank for the payment of the note in full on presentation, or if, on the day of maturity, they had called at the bank, and made a valid tender of the money. and demanded the note, then such deposit or tender, if it had been kept good, would have prevented the payee from recovering interest after maturity, as well as costs of suit. There being no such deposit or tender, and no valid tender after maturity, the payee was entitled to recover, in accordance with the terms of the contract, the amount due on the note at the time of suit. Story, Prom. Notes, § 228; Hills v. Place, 48 N. Y. 520; Wallace v. McConnell, 13 Pet. 136; Washington v. Bank, 1 How. (Miss.) 230.

Counsel for respondent insists that defendant Keisel, who purchased the land, subject to the mortgage given in security for the payment of the note, never having seen the note itself until about the time suit was brought, is only bound by the terms of the note as it appeared of record. Conceding that Keisel was ready, able, and willing to pay on the day of maturity, and that he made diligent inquiry, and put forth all reasonable efforts to ascertain the whereabouts of the payee and of the note, and considering the fact that the description of the note in the mortgage contained no place of payment, still the position insisted upon cannot be maintained, because, being unable to find the payee, and not knowing the place of payment, it was his duty, in order to stop interest and avoid costs, to make a tender at the places of business or residences of the makers. This follows from a provision of our statute found in section 2851, Comp. Laws 1888, which reads: "A negotiable instrument which does not specify a place of payment, is payable at the residence or place of business of the maker, or wherever he may be found." It is clear that the efforts which Keisel made to pay the note at maturity, though made in good faith, were not sufficient to excuse him from making a tender to the makers in the absence of the payee from the territory, and to release him from his liability, under the terms of the contract, as to the interest and cost of collection. It is not deemed necessary to pass on any other question raised in the record. The judgment is reversed, and the cause remanded, with directions to the court below to so modify it as to add interest and costs of collection thereto as prayed for in the complaint.

MERRITT, C. J., and SMITH, J., concur.

STATE v. WAUGH.

(Supreme Court of Kansas. July 6, 1894.) CONTEMPT-WHAT CONSTITUTES-LETTER TO JUDGE.

Such language as the following, written and sent through the mail by the plaintiff in an action to a trial judge, in a matter still pending before him: "I did not deem it necessary to go to you, with a body of friends and creditors, to impress upon you how important it was that I should have the money that was tied up by the garnishment, * * * and exact of you a promise to rule in my favor. * * * I supposed that surely we would get some chance for hearing. I did not think it possible that our judge could be so warped by such a procedure as to entirely overlook the interests of a poor man, and ride over him roughshod, and decide in favor of a corporation. * * * Will you kindly help me, and inform me what I can do, that I may know that you are not the unjust judge that would not give a poor man the same chance that a bank has, and you will lift a

load from my heart? And the most unkind act of all, when we had not even had a chance to be heard, was for you to allow an attorney to tax costs,"—is disrespectful, insulting, and contemptuous.

(Syllabus by the Court.)

Appeal from district court, Cowley county; A. M. Jackson, Judge.

F. D. Waugh was found guilty of contempt of court, and appeals. Affirmed.

On November 11, 1893, F. D. Waugh, of Arkansas City, Cowley county, filed in the district court of that county his petition, praying judgment against the Stauber & Uhl Building Company, a corporation, for the sum of \$255.28, upon account. On November 13, 1893, service of summons was made upon the corporation. On the date of the filing of the petition, F. D. Waugh filed in the court his affidavit in garnishment against F. M. Strong and the Home National Bank. On the same day, summons in garnishment was served on the garnishees. On November 23, 1893, the Home National Bank filed its answer in the district court, denying, under oath of its president and managing officer, that it was in any wise indebted to the Stauber & Uhl Building Company. Thereafter F. M. Strong, garnishee, filed in the court his answer in garnishment, denying he was indebted to the defendant corporation. but stating he was in doubt as to his liability to the corporation, and thereupon made a detailed statement under oath, and submitted the question of his liability to the court. On November 29, 1893, F. M. Strong, garnishee, filed in the district court his motion to make the First National Bank of Arkansas City, George W. Robinson, receiver of the First National Bank of Arkansas City, — Dingman, partners as Clum and -Clum & Dingman, of Washington, D. C., and H. P. Farrar, of Arkansas City, parties defendant in the main action, in order that the court might fully determine and adjudicate the matter as to whether the garnishee was indebted to the defendant corporation, or to the First National Bank of Arkansas City, or George W. Robinson, receiver of the First National Bank of Arkansas City, or H. P. Farrar, of Arkansas City, or Clum & Dingman, of Washington, D. C. On January 6, 1894, H. P. Farrar waived the issuance of summons as prayed for in the motion, and filed his disclaimer to any interest in the funds in the hands of F. M. Strong, garnishee, and claimed that all his prior interest in the funds in the hands of the garnishee, by virtue of the contracts mentioned in the garnishee's answer, had been transferred to the First National Bank of Arkansas City, and the receiver thereof, long before the service of the garnishment process in the action. On January 1, 1894, George W. Robinson, receiver of the First National Bank of Arkansas City, entered his appearance in the case as a defendant, and claimed under the answer of the garnishee, F. M. Strong, that he, as receiver, was entitled to the money and funds in the possession of F. M. Strong, garnishee, as disclosed by the answer of the garnishee, claiming the money was not the subject of garnishment, and praying for an order from the court directing F. M. Strong, garnishee, to pay the receiver the money in his hands, upon the grounds and for the reasons set forth and stated in the contract attached to and made a part of the answer of F. M. Strong. Notice of the motion being filed and set for hearing was served upon the attorney of F. D. Waugh. On January 8, 1894, Waugh took judgment by default against the Stauber & Uhl Building Company, and the court ordered the garnishment proceedings to be continued and preserved for the further order of the court. On the same day, Waugh filed his motion praying for an order directing F. M. Strong, garnishee, to pay into court, for his benefit, the amount of his judgment against the Stauber & Uhl Company. Notice of the motion being filed, the time for the hearing thereof was served upon F. M. Strong. On January 9, 1894, the motion of said Waugh, requiring Strong, garnishee, to pay into court the amount of plaintiff's judgment against the Stauber & Uhl Building Company, came on for hearing, and was overruled. At the time the motion of George W. Robinson, receiver of the First National Bank of Arkansas City, praying for the release of the funds in the hands of F. M. Strong, garnishee, came on for hearing, and upon consideration of the motion the court sustained the same. Thereupon, F. D. Waugh, by his attorney, asked the court to require the garnishee, F. M. Strong, to hold and retain in his possession the moneys then in his possession, as disclosed by his answer, for the purpose of settling the judgment of the plaintiff, and costs, together with such other costs as might accrue therein pending an appeal of the action to the supreme court. The court allowed this motion, and directed F. M. Strong, garnishee, to keep and hold in his possession, for the use and benefit of F. D. Waugh, until further order of the court, the sum of \$1,525. At the same time, by the consent of all parties, the sum of \$111.70 was ordered to be paid by F. M. Strong, garnishee, out of the funds in his possession, to Clum & Dingman, attorneys, of Washington, D. C., to satisfy their attorney's lien. Thereafter, on the 17th day of January, 1894, while the district court of Cowley county, was still in session, and Judge Jackson was presiding, F. D. Waugh wrote a letter to the district judge, of which the following is a copy: "F. D. Waugh, Dealer in Lumber and Building Material. Office, 111 Fifth Avenue, East of Home National Bank. Hon. Judge Jackson, Winfield, Kas.-Dear Sir: I have several times, while waiting in the court room, listened to your rulings, and had been very favorably impressed with your fairness; so much so that in the great and important case to me, in which almost life and death is meant to me, I did not deem it necessary to go to you, with a body of friends and creditors, to impress upon you how important it was that I should have the money that was tied up by the garnishment of the Stauber & Uhl fund in the hands of Mr. F. M. Strong, and exact of you a promise to rule in my favor, though it would be contrary to all rulings and the statutes on the points at issue. I supposed that surely we could get some chance for a hearing. I did not think it possible that our judge could be so warped by such a procedure as to entirely overlook the interests of a poor man, and ride over him roughshod, and decide in favor of a corporation, just because they pleaded that they must have the money to open the bank with. Now, the facts in my case are these: Had I not stood in the breach, and furnished my material to have finished that contract after the First National Bank could not do it, the contract would have been taken out of the contractor's hands, and finished by the government, and they would have thereby have used nearly if not all of the money that the said national bank now gets; and I would ask why I am not entitled to a chance to be heard, as well as the bank. The loss of this \$1,225.28 will ruin me. I am at an age that I cannot recover from it. Why must I be compelled, at great cost and long process of years, to go to the supreme court, to get back to where I can even get a hearing? Now, judge, for God's sake, is there not some way that this can be avoided, and I get a hearing in your court, and that I can get my money released, so that I can open up, and do business, and not be ruined? I ask this in the name of justice; I ask this for my creditors; and lastly, though not least, I ask it for my little ones dependent upon me. Will you kindly help me, and inform me what I can do, that I may know that you are not the unjust judge that would not give a poor man the same chance that a bank has, and you will lift a load from my heart? And the most unkind act of all was, when we had not even had a chance to be heard, was for you to allow an attorney to tax with costs. I cannot believe that you would have allowed all this, had you known anything at all of our rights in this matter. Hoping to hear from you, and that this matter can be fixed at an early date, I am, very truly, F. D. Waugh." On January 18, 1894, an information for contempt of court was filed in the district court of Cowley county by the county attorney of the county, charging F. D. Waugh with contempt of court. On January 18, 1894, a warrant was issued out of said court for his arrest, and on January 19, 1894, he was brought into court. The hearing of the case was continued to January 22, 1894. The defendant, waived arraignment and pleaded not guilty, and also waived the introduction of any evidence on the part of the state. He was then sworn on his own behalf. Thereupon, the court found him guilty of contempt,

and fined him \$50 and costs of case, and further ordered that he be committed to the jail of Cowley county until the fine and costs were paid.

Z. T. Armstrong, for appellant. John T. Little, Atty. Gen., Geo. W. Scott, and W. P. Hackney, for the State.

HORTON, C. J. (after stating the facts). The district judge, on the receipt of the letter sent to him on the 17th of January, 1894, by F. D. Waugh, construed it as a contempt, and, after a hearing upon an information filed by the county attorney, adjudged Waugh guilty of a contempt, fined him \$50, and ordered him to be committed until the fine and costs were paid. The contention is that Waugh was not guilty of any contempt; that he should have been discharged upon his statement "that he had no intention of contempt of the court, or any one else;" and that there was no case pending before the court, to which the letter referred, or was in any way connected. The rulings of the district court in the case of Waugh against the Stauber & Uhl Company were referred to in the letter, and the writer said, among other things: "I did not deem it necessary to go to you, with a body of friends and creditors, to impress upon you how important it was that I should have the money that was tied up by the garnishment, * * * and exact of you a promise to rule in my favor. * * * I supposed that surely we would get some chance for a hearing. I did not think it possible that our judge could be so warped by such a procedure as to entirely overlook the interests of a poor man, and ride over him roughshod, and decide in favor of a corporation. * * * Will you kindly help me, and inform me what I can do, that I may know that you are not the unjust judge that would not give a poor man the same chance that a bank has, and you will lift a load from my heart? And the most unkind act of all, when we had not even had a chance to be heard, was for you to allow an attorney to tax costs." The letter was evidently written for the purpose of complaining of the rulings of the trial judge, and of influencing the course of justice in the decision of a cause. It also contained severe imputations against the trial judge, and was an attempt, at least, to obstruct, prevent, and embarrass the administration of justice. Its language was disrespectful, insulting, and contemptuous. In re Pryor, 18 Kan. 72. It is true, when Waugh came into court, he disavowed any intentional disrespect to or contempt of the court, but admitted he wrote and sent the The trial judge might have disletter. charged Waugh, after his disavowal, upon the ground that, his disappointment being great over an adverse decision, he had written stronger than he had intended, in a momentary outbreak of anger. Generally, as was said in Re Pryor, supra, "A judge

will wisely overlook any mere hasty, unguarded expression of passion or disappointment, even though disrespectful, or simply notice it by a reproof." But the mere denying by Waugh of any disrespectful or insulting design in the letter reflecting upon the trial judge does not relieve him of responsibility for the language he actually used. It is not for him or his counsel to construe or state the effect of the language. U.S. v. Late Corporation of Latter Day Saints (Utah) 21 Pac. 524; McCormick v. Sheridan (Cal.) 20 Pac. 24. We cannot say it was the duty of the trial court, upon his mere disavowal, to order his discharge. The question of the advisability of the court's action is not the matter of our consideration. It is the question of power, and whether the letter was in fact a contempt. The matter referred to in the letter was still pending before the court. Evidently, Waugh so understood it, because his purpose in writing the letter seems to have been to obtain another hearing before the court. He testified, among other things, as follows: "Q. One of the objects you had in writing the letter was simply to ask if there was any way that the matter could be disposed of without going to the supreme court? A. That was my whole object. Q. You had been advised by your attorney, before this, that was the only thing left for you? A. At the meeting Monday night, that was the advice my attorney gave me. Q. You are anxious and desirous that an order should be made, whereby you would get your money? A. Yes, sir; I was very anxious. Q. It was not material to you how it was obtained, so long as it was done for you? A. Yes; I only wanted justice. I felt it was just that I should have it. I couldn't feel any other way." Again, it appears from the record that the case of Waugh against the Stauber & Uhl Company had not passed beyond the jurisdiction of the trial judge, that the term of the court had not expired, and that the order made by the court was subject to change or modification after the letter was received. Further, the fund in controversy, and concerning the disposition of which the etter was written by Waugh, was ordered by the court to be retained by the garnishee for further proceedings. The case was under the full control of the court, at least, until the final adjournment for the term. The judgment will be affirmed. All the justices concurring.

STATE v. KEYS.

(Supreme Court of Kansas. July 6, 1894.)
WITNESS—CREDIBILITY—INSTRUCTIONS.

1. An instruction that "it does not discredit a witness if he should voluntarily appear without the issuance of a subpoena" is not prejudical error, where the jury are also told that they may take into consideration any interest which the witness might appear to have, or any bias, prejudice, or unfairness manifested by him.

2. An error in charging the jury, which

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could not have affected the substantial rights of the defendant, affords no grounds for a reversal of the judgment.

(Syllabus by the Court.)

Appeal from district court, Brown county; J. F. Thompson, Judge.

C. N. Keys was convicted of selling intoxleating liquors, and appeals. Affirmed.

James A. Clark, for appellant. John T. Little, Atty. Gen., and W. F. Means, for the State.

JOHNSTON, J. C. N. Keys was charged, in an information containing three counts, with the unlawful sale of intoxicating liquors. He was convicted upon a single count, which charged a sale without having procured a permit; and the judgment was that he be imprisoned in the county jail for 30 days, and pay a fine of \$100. He complains of the charge of the court.

One of the principal witnesses had, since the institution of the prosecution, removed to Missouri; and, a subpoena having been sent to him by mail, he returned, and testified in the case. The fact that he had voluntarily returned from Missouri upon the subpoena sent to him was brought out in the testimony, and the court instructed the jury that "it does not discredit a witness, if he should voluntarily appear without the issuance of a subpoena." It is urged that the circumstance of his return tended to show the interest of the witness in the case, and that every fact affecting the credibility of the witness should have been submitted to the jury. It is true that every act and circumstance affecting the credibility of a witness may be considered by the jury, in order to determine the weight to which his testimony is entitled; but the court was correct in holding that the voluntary appearance of a witness without a subpoena is, of itself, insufficient to discredit him. The charge included the further instruction that the jury were the exclusive judges of the credibility of all the witnesses, and that they might take into consideration any interest that the witnesses might appear to have, or any bias, prejudice, or unfairness manifested by them. It thus appears that no fact affecting the credibility of the witness was taken from the jury.

In the course of the charge the court remarked that the giving away of intoxicating liquors to a boy under 21 years of age is a violation of the prohibitory liquor law. As the information does not charge the defendant with giving or selling liquors to a minor, this portion of the charge was inapplicable and improper. There is no testimony respecting a gift of liquor to any one, and it appears that the only liquor furnished, about which there is any testimony, was that which was sold and paid for at the time of sale. As all the testimony offered in the case related to the sale as charged in the information, the inadvertent reference to a gift of liquor could not have prejudiced the rights of the defendant. An error which does not affect the substantial rights of the defendant affords no ground for a reversal.

The court informed the jury that, under the statute, whisky was an intoxicating liquor, and that it was unnecessary for the state to prove that it was intoxicating. The making of this statement does not justify the claim that the court thereby assumed that the defendant had sold whisky, as in other portions of the charge the jury were expressly instructed that the state must prove the unlawful sale beyond a reasonable doubt, and, failing in that, there must be a verdict of acquittal.

We find no material error in the record, and therefore the judgment of the district court will be affirmed. All the justices concurring.

(58 Kan. 679)

STATE v. LEWIN.

(Supreme Court of Kansas. July 6, 1894.) Constitutional Law—Escape from State Penitentiany.

Section 28, c. 152, of the Laws of 1891, entitled "An act in relation to the state penitentiary," is void; being in violation, not only of section 16, art. 2, of the constitution, but of other constitutional provisions as well.

(Syllabus by the Court.)

Appeal from district court, Leavenworth county; Louis A. Myers, Judge.

Charles Lewin was indicted for an unlawful escape from the penitentiary. An information was quashed, and the state appeals. Affirmed.

John T. Little, Atty. Gen., and S. E. Wheat, for the State. N. E. Van Tuyl, for appellee.

ALLEN, J. The appellee was taken before the district court of Leavenworth county on an information signed by S. W. Chase, warden of the penitentiary, charging that on the 3d day of July, 1893, the defendant was lawfully confined in the state penitentiary upon a sentence of six years from the 11th day of October, 1892, by the district court of Sumner county, for the crime of burglary and larceny, and that on the 3d day of July he unlawfully escaped from the penitentiary. This information is filed under section 28, c. 152, of the Laws of 1891, entitled "An act in relation to the state penitentiary." The section reads as follows: "Sec. 28. That in case any convict shall escape from the penitentiary, or from the custody of any officer, or to make an attempt to so escape, or shall join in any mutiny, or shall make an attempt at mutiny, or in any manner do any act to cause others to mutiny, while in confinement in the state penitentiary, or while in the custody of any officer, the said convict shall be taken by the warden before the district court of Leavenworth county, on information filed by the warden; and if the charge be sustained, the time said convict had served in the penitentiary prior to such act as charged shall

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not be counted as any part of the term of his sentence, but the said convict shall be sentenced by the court to confinement in the state penitentiary for the full term for which he or she was sentenced by the court before whom he or she was convicted and undergoing sentence at the time of the violating the provisions of this section: provided, that no limitation shall bar proceedings under this section." A motion was made to quash the information, and this motion was sustained by the district court.

The question presented is as to the constitutionality of the provisions of section 28. And, first, do they come fairly within the scope of the title to the act? The title appears to be broad enough to cover any matter directly relating to the penitentiary, and the management thereof. Under it the legislature might undoubtedly provide rules and regulations governing the conduct of the inmates, and punishment for an infraction of them. But this section goes further, and provides, not merely punishment for escapes, mutinies, etc., but undertakes to establish a special procedure, by which jurisdiction is given to the district court of Leavenworth county alone, to proceed on an information filed by the warden of the penitentiary, instead of the county attorney, to hear complaints of violations of this section, and thereupon, if the charge be sustained, to pass sentence on the defendant. It is urged that the section does not authorize nor contemplate a trial by jury, and that it is therefore violative of another provision of the constitu-The section is entirely silent as to the mode of trial. It simply says, "If the charge be sustained the time said convict had served in the penitentiary prior to such act as charged, shall not be counted as any part of the term of his sentence, but the said convict shall be sentenced by the court to confinement in the state penitentiary for the full term for which he or she was sentenced by the court, for which the prisoner was con-No reference whatever is made to the Code of Criminal Procedure, under which parties charged with crime are ordinarily tried. It would only be by a strained construction, deemed necessary to uphold a wholesome enactment, that it could be said that such a section as this contemplated a trial by jury in the usual manner. We think the legislature had no such thought, in enacting this section, but intended a summary proceeding without a jury. If so, of course the section is void. We think it void under section 16, art. 2, of the constitution, because, under an act entitled "An act in relation to the state penitentiary," it attempts to establish a system of special criminal procedure in Leavenworth county, for a special class of offenses, and undertakes to confer on the warden of the penitentiary the functions of a prosecuting officer in that court. This is clearly outside of the scope and purview of branch of the law, clearly disconnected from the conduct and management of state institutions. Swayze v. Britton, 17 Kan. 625; Sedgwick Co. v. Bailey, 13 Kan. 600; State v. Barrett, 27 Kan. 213; Railway Co. v. Long, Id. 684. The section is open to other serious constitutional objections. Its provisions do not commend themselves to our sense of justice. The punishment required to be imposed is not to be measured by the offense committed, but is made to depend wholly on the date of the sentence under which the prisoner was confined in the penitentiary at the time he committed the act for which he is punished. The court is required simply to obliterate the time that he has been confined in the penitentiary for his original offense, and, as a punishment for the escape or mutiny, to reimpose the sentence given by the court for his prior crime. So it may happen under this section that two men attempting or effecting an escape from the penitentiary on the same day, in concert, under precisely the same circumstances, and with exactly equal guilt, would receive wholly different punishment. If one had been confined but for a day, his punishment would be increased but by one day, while the other, who might have been confined for 20 years, would be sentenced to a further confinement for that number of years. Is not this, in effect, not merely placing a defendant twice in jeopardy for the same offense, but in fact punishing him twice? Can this be said to be an impartial administration of justice? Can it be said to be affording to all individuals the equal protection of the laws? The inherent vice of such an enactment is not fully apparent until the fact is recognized that at the penitentiary, where there are no witnesses of what transpires but convicts and officers, the oath of a convict would have little weight against that of an officer, and a charge preferred and backed up by the oath of an officer would in most cases insure a conviction, thus unduly increasing the necessarily great power of the warden over the inmates under him. We are not disposed to strain our construction of constitutional safeguards to uphold such a statute. We think section 28 wholly void, and the order of the district court, quashing the information, is sustained. All the justices concurring.

STATE v. PRIOR.

(Supreme Court of Kansas. July 6, 1894.)
CRIMINAL LAW—MOTION TO QUASH—INFORMATION
—CHARGING TWO DISTINCT ACTS.

1. A motion to quash should precede arraignment.

2. An information may be amended on the trial as to all matters of form, at the discretion of the court, when the same can be done without prejudice to the rights of the defendants.

a prosecuting officer in that court. This is clearly outside of the scope and purview of the title. Criminal procedure is a distinct

3. Where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, and

no motion to quash before arraignment is presented, such information is not fatally defective because they are coupled in the same count. (Syllabus by the Court.)

PACIFIC REPORTER, Vol. 37.

Appeal from district court, Leavenworth county; Louis A. Myers, Judge.

Cody Prior was indicted for an assault with intent to kill, and was discharged. The state excepted, and appeals. Reversed.

The information in this case charged the defendant with a felonious assault with a deadly weapon on George Sims, with intent to maim and kill said Sims, under section 38 of the act in relation to crime and punishments. At the trial the defendant refused to plead, and thereupon a plea of not guilty was entered. A jury was called, and those called as jurors were examined as to their qualifications. The defendant took part in the examination of the jurors, and peremptorily challenged three persons. The jury was sworn to try the case; and after the county attorney had stated the case of the prosecution to the jury, and after the defendant's attorney had stated his case, a witness was called by the state, and, when the first question was asked, the defendant objected to the introduction of any testimony in the case, "because the information was bad for duplicity, in that it charged two distinct felonies in one count." The defendant then filed a motion to quash the information, on the ground that "it is bad for duplicity, for that in one count it states and charges two distinct felonies, to wit, an assault with a deadly weapon with the intent to kill, and assault with a deadly weapon with the intent to maim." The state objected to the hearing of the motion, for the reason that it was made too late. This objection was overruled. The state then applied to the coust for leave to amend the information, and to file an amended one, which application was refused. On the hearing of the defendant's motion, the state applied to the court for leave to elect upon which of the felonies it would proceed. application was also by the court refused and overruled. The defendant's objection to the introduction of testimony and his motion to quash were sustained. The court then discharged the jury from further consideration of the case, and discharged the defendant from custody. The state excepted to each of the rulings of the court, and reversed the respective questions whether such rulings and decisions were proper and should have been made.

John T. Little, Atty. Gen., and S. E. Wheat, for the State. J. H. Atwood, for appellee.

HORTON, C. J. (after stating the facts). A motion to quash should precede arraignment. State v. Otey, 7 Kan. 69; State v. Ruth, 21 Kan. 583; 4 Am. & Eng. Enc. Law. 764. The proper time to raise the question of the sufficiency of an information or indictment before a verdict is by a motion to

quash, after verdict by motion in arrest of judgment. It is not good practice to raise an objection to an information by objecting to the introduction of testimony. The question of the jurisdiction of the court may be presented at any time. State v. Ashe, 44 Kan. 84, 24 Pac. 72, and cases cited. If a person, when arraigned, refuses to plead or answer, a plea of not guilty must be entered, and the same proceedings are then had in all respects as if he had formerly pleaded not guilty. Code Cr. Proc. § 161. If the information was defective, the trial court ought to have permitted it to be amended. Id. § 72. It would not have prejudiced the rights of the defendant to have stricken out "to maim" or "to kill," as the prosecution might have elected. The general rule is that duplicity in criminal cases cannot be made the subject of a motion in arrest of the judgment. It is cured generally by a verdict of guilty as to one of the offenses charged. Whart, Cr. Pl. § 255. Therefore the importance of the sufficiency of the information or indictment being disposed of before arraign-

It is allowable to state in the same count of an information or indictment the successive gradations of statutory offenses conjunctively, when they are not repugnant. It is observed by Wharton that where a statute makes two or more distinct acts connected with the same transaction indictable, each one of which may be considered as representing a phase in the same offense, it has been ruled that they may be coupled in one count. Whart. Cr. Pl. § 251; Com. v. Miller, 107 Pa. St. 276; Wingard v. State, 13 Ga. 396. The judgment of the district court will be reversed, and the case remanded for further proceedings in accordance with the views herein expressed. In re Scrafford, 21 Kan. 735; State v. Ashe, supra. All the justices concurring.

STATE v. CROW.

(Supreme Court of Kansas. July 6, 1894.) SALE OF LIQUORS-EVIDENCE-LICENSE.

In a prosecution for selling intoxicating liquors without a permit, it is not necessary. since the enactment of chapter 149 of the Laws

of 1885, for the state, in the first instance, to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes.

(Syllabus by the Court.)

Appeal from district court, Decatur county; A. C. T. Geiger, Judge.

Timothy Crow was convicted of selling intoxicating liquors, and appeals. Affirmed.

Bertram & McElroy, for appellant. John T. Little, Atty. Gen., and J. C. Wilson, for the State.

JOHNSTON, J. Timothy Crow was convicted of the sale of intoxicating liquors without having a permit, and the penalty

adjudged was a fine of \$100 and imprisonment in the county jail for 30 days. He appeals to this court, and complains that the trial court erred in charging the jury. Most of the criticisms upon the charge are not sufficiently specific to require attention. It is said that the instructions are vague and indefinite, and that the definition given of the term "reasonable doubt" was incorrect. An examination of the charge, however, satisfies us that there is no cause for complaint, nor any objection raised that would justify comment.

It is insisted that it was the duty of the state, in the first instance, to prove that the defendant did not have a permit to sell intoxicating liquors for the excepted purposes, and that the court erred in refusing to charge the jury to that effect. Before the passage of chapter 149 of the Laws of 1885, the burden of proving a want of permit was upon the state. State v. Schweiter, 27 Kan. 499; State v. Nye, 32 Kan. 201, 4 Pac. 134, 136. By section 14 of the act mentioned, it was specifically provided that "it shall not be necessary in the first instance for the state to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes." It was competent for the legislature to provide that the prosecution is not bound to produce evidence in support of the negative allegation that the sale was made without a permit. Indeed, a great many of the courts of last resort in the country hold that, without such a statutory exception, the burden of proving such a permit or license is upon the defendant. The rule is justified by considerations of convenience and reasonableness, as the subject-matter of the averment lies peculiarly within the knowledge of the defendant, who can easily show a permit or license if he has one, while proof of the negative could only be made by the state with considerable inconvenience. Black, Intox. Liq. § 507. The grounds urged against the validity of the act of 1885 cannot be sustained. No other errors are specifically pointed out, and no sufficient reason is seen for disturbing the judgment that was rendered. It will be affirmed. All the justices concurring.

In re THOMAS.

(Supreme Court of Kansas. July 6, 1894.)

Intoxicating Liquors—Control of Sale by Cities—Ordinance—Validity.

1. The passage of the prohibitory liquor law by the state legislature does not prevent cities from enacting ordinances providing for the control of the liquor traffic within the limits of such cities

cities.

2. Where there is only one subject contained in the body of an ordinance, which is clearly expressed in its title, the fact that such title may contain surplusage will not render the ordinance obnoxious to that limitation providing that it shall not contain more than one subject, which shall be clearly expressed in its title.

3. An ordinance of the city of Lawrence prohibiting and restricting the liquor traffic is examined, and held to be valid.

(Syllabus by the Court.)

Application of George Thomas for a writ of habeas corpus. Denied.

H. B. Kelley, for petitioner. A. G. Huger, for respondent,

JOHNSTON, J. George Thomas was convicted of the violation of an ordinance of the city of Lawrence which was entitled: "An ordinance to prohibit the manufacture and sale of intoxicating liquors, except for medical, scientific, and mechanical purposes, and to regulate the manufacture and sale thereof for said excepted purposes." The punishment imposed was imprisonment in the jail of the city for 30 days, and the payment of a fine of \$100. He applies for a discharge from the custody of the jailer, contending that his imprisonment is illegal. The grounds of illegality alleged are that the ordinance embraces two subjects, and that the title thereto does not afford an index to the subjects contained therein. As will be observed, the title is broad, and substantially the same as the title to the prohibitory liquor law. Laws 1881, c. 128. It is contended that the ordinance and its title embraces both prohibition and regulation, and counsel for the petitioner ingeniously argues that these are independent and distinct subjects, and therefore in violation of the provision "that no ordinance shall contain more than one subject, which shall be clearly expressed in its title." Gen. St. 1889, par. 765. The fact that the terms "prohibit" and "regulate" are not synonyms does not prove that two independent subjects are embraced in either the ordinance or its title. The limitation upon subjects in municipal or state legislation should not be construed in any narrow or technical sense. In such a case the title may be as broad and comprehensive as the legislative body may choose to make it, and may embrace several minor subjects, providing all are so united as to form one comprehensive subject. It cannot be said that the ordinance in question embraces two independent subjects, having no connection with each other; but, in a broad sense, it is an enactment for the municipal control of the liquor traffic. State v. Barrett, 27 Kan. 213; State v. Curtis, 29 Kan. 384; Commissioners v. State, 36 Kan. 337, 13 Pac. 558; State v. Commissioners, 40 Kan. 65, 19 Pac. 362; State v. Sanders, 42 Kan. 228, 21 Pac. 1073; State v. Kansas City, 50 Kan. 521, 31 Pac. 1100; Blaker v. Hood, 53 Kan. —, 36 Pac. 1115. In the last case cited, an objection was made to the banking law upon the same ground. Its title is "An act providing for the organization and regulation of banks, and prescribing penalties for violations of the provisions of this act." It was held that this was an enactment concerning the business of banking, and that all the provisions with

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reference to organization, regulation, and prescribing penalties for violations of the act were fairly comprehended within that general subject. So here the general subject is the control and management of the liquor traffic, prohibiting the unlawful disposition of the same, as well as regulating that which may be lawfully disposed of. The fact that the state, by its legislature, has made provision prohibiting and restricting the liquor traffic, does not prevent municipalities from enacting provisions for the control of the traffic within the limits of the same. Gen. St. 1889, par. 806; Franklin v. Westfall, 27 Kan. 614; City of Topeka v. Myers, 34 Kan. 500, 8 Pac. 726; City of Topeka v. Zufall, 40 Kan. 47, 19 Pac. 359; Junction City v. Keeffe, 40 Kan. 275, 19 Pac. 735; Junction City v. Webb, 44 Kan. 71, 23 Pac. 1073; Monroe v. City of Lawrence, 44 Kan. 607, 24 Pac. 1113. A close examination of the ordinance in question shows that it contains no provisions which attempt to regulate the manufacture or sale of intoxicating liquors, and hence, if prohibition and regulation were interpreted as distinct subjects, the ordinance would not be subject to the objection made against it. The fact that the title may contain surplusage does not render it obnoxious to the limitation. The first part of the title, prohibiting the manufacture and sale of intoxicating liquors except for medical, scientific, and mechanical purposes, is sufficiently broad to embrace all that is contained in the ordinance; and, as the title indicates everything in the body of the ordinance, no one can be misled by the surplusage which it may contain. As before stated, however, we are inclined to the opinion that even the title does not contain two independent subjects. Having determined that the ordinance is valid, the prayer of the petitioner for release from custody must be denied. All the justices concurring.

STATE v. DOUGLAS.

(Supreme Court of Kansas. July 6, 1894.)

ASSAULT WITH INTENT TO KILL — INFORMATION —
ELECTION BETWEEN COUNTS — INSTRUCTIONS —
COMPETENCY OF WITNESS.

1. An information under section 42 of the crimes act, charging the defendant with having assaulted, maimed, wounded, and disfigured with a knife, S., is not fatally defective because the words "maliciously" or "willfully" are omitted, where the information charges that the defendant did "unlawfully and feloniously" make the assault upon S., and did "iclomously strike him" of

him," etc.

2. It is not error for a trial court to refuse to compel the state to elect on which count of the information it will proceed when such information contains two counts,—one under section 38 of the crimes act, and another under section 42 o. the same act.

3. Where a trial court, in charging the jury,

3. Where a trial court, in charging the jury, defines manslaughter in the third degree by giving substantially the statutory definition, except omitting the words "in the heat of passion,"

such omission is not prejudicial to the rights of the defendant.

4. A little girl of the age of nine years, who appears capable of receiving just impressions of the facts respecting which she is examined, and of relating them truly, is a competent witness. Her competency may be shown to the court during her examination as a witness.

5. The instructions and evidence complained of examined, and held not to be misleading or prejudicial, in view of the facts admitted upon the trial by the defendant.

(Syllabus by the Court.)

Appeal from district court, Republic county; F. W. Sturgis, Judge.

Ben Douglas was convicted of assault with intent to kill. Affirmed.

T. M. Noble and N. T. Van Natta, for appellant. John T. Little, Atty. Gen., and Jay F. Close, for the State.

HORTON, C. J. Ben Douglas was convicted of wounding Frank Scroggins under such circumstances as would have constituted manslaughter in the third degree if death had ensued. Crimes Act, § 42. He was sentenced to the penitentiary of the state at hard labor for the term of one year, and also adjudged to pay the costs of the prosecution. He brings his case here by appeal.

The information contained two counts-one under section 38 of the crimes act, and the other under section 42 of the act. A motion was made to quash the information, and compel the state to elect upon which count it would proceed to trial. These motions were overruled, and properly so. The provisions of sections 38 and 42 of the crimes act, concerning assaulting or stabbing another with intent to kill, maim, or disfigure, are so simflar, and the evidence to sustain the separate counts so nearly alike, that it could not have been prejudicial to the defendant to refuse an election, even if one were necessary. State v. Burwell, 34 Kan. 312, 8 Pac. 470. But no election was necessary.

As the defendant was found guilty under the second count only, it is not necessary to refer further to the first count. It is urged that the second count is fatally defective, because it did not state that the act was done "maliciously or willfully," or that like words were used. The information charged the assault was made "unlawfully and feloniously," and that the defendant "feloniously struck" S. with a knife, being a dangerous weapon. The words "maliciously" or "willfully" are not found in section 42, and the count is not open to the objection made. "Feloniously," in a legal sense, means "done with intent to commit a crime." A felonious intent is "an unlawful and wicked intent." State v. Fisher, & Kan. 208; State v. White, 14 Kan. 538. That it was not necessary to describe more minutely the knife, which was the weapon used, and that the indictment was sufficient in form, see State v. Miller, 25 Kan. 699; Kelley, Cr. Law, § 539; State v. Freeman, 21 Mo. 481; State v. Burwell,

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supra. The verdict was not defective. State v. Fisher, supra.

It is insisted that the court erred in its definition of manslaughter in the third degree. The court defined manslaughter in that degree substantially in the words of the statute, except it omitted "in the heat of passion." This made the instruction more favorable to the defendant than he was entitled to, and therefore the omission was not harmful.

It is next insisted that the court committed error in the definition of self-defense. The only criticism to be made upon this instruction is that the court connected with it, by "or," an instruction of the circumstances under which the assault and wounding were excusable. Crimes Act, §§ 9, 10. But the claim that the part of the instruction as to what acts are excusable in the heat of passion, or upon sudden combat, modified or destroyed the definition of self-defense as given, is not tenable.

It is further insisted that the court erred in allowing Ionia Walters to testify until the state showed affirmatively she understood the nature of an oath. At the time she gave her evidence, she was nine years old. During her examination she testified, among other things, as follows: "Q. Do you know the nature of an oath? A. Yes, sir; [to] tell the truth. Q. Who told you that? A. The Bible. Q. Well, now, supposing you should tell a lie,—supposing you should not tell the truth,-do you know what would be done with you? A. Be shut up in the state prison. Q. Who told you that? A. Read it in the Fourth Reader." Section 323 of the Civil Code reads: "The following persons shall be incompetent to testify: * * * Second. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly." The witness was an exceedingly bright child for. her age, and her evidence must have impressed the trial court, as it does us, that she. was "not only capable of receiving just impressions of the facts respecting which she was examined, but also of relating them truly." The witness was fully competent. Her competency was shown to the court during her examination.

Again, it is insisted that the trial court committed error in allowing Artie Walters to testify: "Q. Did your mamma know that Frank had been stabbed until you came and told her? A. No, sir." Also, in permitting Mrs. Walters to be asked and answer the following question: "When you started down to the field, had you been informed that Frank was stabbed? A. Yes, sir; I had." And in allowing David McMullen to testify: "Q. Where were you going when you met him [Douglas]? A. Some one had sent the little girl up to tell me to go down, that Ben had stabbed Frank, and he was bleeding to death; and I started to go down there, and

went out on the section line, and I heard a horse coming down from around north, and I turned in that way, and met Ben there." The evidence shows that Frank Scroggins was stabbed by the defendant, and no denial is made of this, the defendant claiming he acted in self-defense. Under all the circumstances, none of this evidence was so objectionable as to demand a reversal. Artie's statement was more in the nature of a fact than an opinion. Surely, this statement was not offered to corroborate her other evidence. It could not have had that effect. Mrs. Walters did not testify who told her Frank had been stabbed. The hearsay testified to by McMullen was of no importance, because he also testified in the same connection that, "when he met the defendant, he [the defendant] reached out his hand, and, as he did so, he said: 'I have ruined myself. I have stabbed Frank.' I said, 'What did you do it for?' and he said he didn't know; 'something come over me.' I said, 'Come and go back, and help get him up.' 'No,' he said, 'I am going for the doctor,-for Doctor Stewart;' and I asked him the second time, and he said, 'I am going for Doctor Stewart,' and I went on." The defendant testified: "I started to throw off my coat, and as I throwed my coat off from one shoulder, and reached around to pull the other sleeve off, he [Scroggins] struck me on the side of the head, and then kicked me in the side. Q. Kicked you in the side? A. Yes, sir. Q. And then, what happened next? A. Why, as I was down, I turned around, and I looked up, and saw him advancing towards me with his knife. I was down on one arm and one knee. Q. Down on your elbow, were you? A. I can't state exactly how I was. I was on the ground. Q. He was coming at you with his knife? A. Yes, sir. Q. Did he have it open? A. Yes. sir. Q. Then what did you do?' A. I jerked out my knife, as I was getting up. "Q. And you jerked your knife out? A. He was coming at me and says, 'God damn you, I will kill you.' Q. Did he do that while you were on the ground, or after? A. I was getting up. Q. What did you do? A. He came at me, and struck at me, and I knocked his lick off. Q. And then you pushed the knife into him? A. Yes, sir. Q. Did you hit him? A. I think I did. Q. How many times did you strike at him with the knife? A. Only one. Q. You know you hit him? A. Yes, sir; I know I hit him."

In the case of State v. Petty, 21 Kan. 54, the identity of the person committing the shooting was in doubt; therefore the evidence in that case, which was erroneously received, was very damaging. The claim of the defendant was that, at the time the wound was inflicted, Scroggins was approaching him in a menacing attitude, with a knife in his hand; that he had reasonable grounds for believing Scroggins intended to use the knife; that his life or person was in imminent peril; and, therefore, that he was fully

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justified in defending himself. The following instruction embraced sufficiently the law constituting this defense: "It is not every killing of a human being that is murder or manslaughter. A killing or homicide may be justifiable or excusable. In this case, even if Scroggins had died, and from the effects of the wound inflicted by defendant,-that is, if he inflicted any,-whether defendant would have been guilty of murder or manslaughter, or neither, depends upon all the circumstances attending the infliction of the wound. If it was in self-defense, under the definition of justifiable homicide, as above mentioned,that is, if Scroggins was attempting, without being attacked by defendant, to do the defendant some great personal injury, and there was immediate danger of such attempt being accomplished, or, even if there was not, the defendant honestly believed there was,-defendant had the right to defend himself, and, in so doing, to do what to him seemed reasonable and necessary, and, if he only so did, the injury, if any, by defendant to Scroggins, would be justifiable, and not criminal." "A party assailed is justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they are." State v. Howard, 14 Kan. 175.

The jury were the judges of the credibility of the witnesses and the weight of the evidence, and, upon a mere conflict of evidence, a verdict is conclusive, when approved by the trial court. We have examined all of the other alleged errors, and find nothing therein to justify a reversal of the judgment. The judgment will be affirmed. All the justices concurring.

STATE ex rel. LITTLE, Atty. Gen., v. SPEN-CER, Road Overseer.

(Supreme Court of Kansas. July 6, 1894.)
Constitutional Law—Section Lines as Highways.

Chapter 229 of the Session Laws of 1889, declaring section lines in Gove and other counties public highways, is constitutional, as a proper tribunal is constituted by the provisions of the act, so that the landowners can claim and receive damages for the land taken for highways.

(Syllabus by the Court.)

Application by the state of Kansas, on the relation of John T. Little, attorney general, against John Spencer, road overseer, for mandamus. Granted.

John T. Little, Atty. Gen., and E. A. Mc-Math, for plaintiff. I. T. Purcell, for defendant.

HORTON, C. J. This is an original proceeding in this court to obtain a peremptory writ of mandamus compelling the defendant, John Spencer, as road overseer of road district No. 2, Grainfield township, Gove county, to open up certain highways, and remove obstructions therefrom. The principal and

only question involved in this case is the constitutionality and application of chapter 229 of the Session Laws of 1889, entitled "An act declaring all section lines in the counties of Seward, Meade, Haskell, Grant, Garfield, Gray, Gove, Logan, Wallace and Stevens, public highways," which took effect March 27, 1889. The legislature has the power to declare section lines public highways, provided compensation is allowed to the landowners for the land taken. The questions of utility, convenience, and practicability have all been considered and decided by the legislature, as well as the location of the highways, and the limits of their extent and width. Hughes v. Milligan, 42 Kan. 396, 22 Pac. 313; Kent v. Board of Com'rs, 42 Kan. 534, 22 Pac. 610. The provisions of the act provide for a tribunal before whom the landowners may make their claim for damages. It is not necessary, where the state or a municipal corporation takes private property, that the compensation shall be first paid, if provision is made for its payment, and a proper tribunal constituted, so that the landowner may make his claim for, and receive, damages. Hughes v. Milligan, supra; Kent v. Board of Com'rs, supra. Section 12 of the general road law (paragraph 5485, Gen. St. 1889) provides that "it shall be the duty of each and every road overseer to open or cause to be opened, all county and state roads and highways which have been, or may hereafter be laid out or established through any part of the district assigned to such overseer, first giving notice to the owner or owners, or their agent or agents, if residing in the county, through whose enclosed or cultivated lands such road is laid out or established, notifying such owners aforesaid to open said oad through their lands within ninety days after service of such notice." See, also, section 27, par. 5500, Gen. St. 1889. The decisions of this court ruling that the statutes declaring section lines to be public highways are unconstitutional, because no provision was made for compensation to the land owners, do not apply to this case. as provisions for the payment of damages are contained in chapter 229, Sess. Laws With the wisdom or policy of the statute, we have no concern. Presumably, the statute was passed at the instance of members of the legislature from Gove and other counties referred to therein. The peremptory writ will be awarded, as prayed for. All the justices concurring.

STATE v. REED.

Supreme Court of Kansas. July 6, 1894.)
HOMICIDE — EVIDENCE — DYING DECLARATIONS—DISCHARGE OF JURY—EFFECT AS
ACQUITTAL—COMPETENCY OF JURORS—PAYMENT OF TAXES.

1. The discharge of a jury before the completion of a trial, without the consent of the accused, and without sufficient reason, will ordinarily bar a further trial; but where, after

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the trial was begun, a juror was reported sick, and where the sickness and incapacity of the juror to proceed with the trial was heard and determined by the court by judicial methods, and a finding made, based upon testimony, which is not preserved, that a discharge was absolutely necessary, the appellate court cannot say that there was not good cause for the discharge, nor that the discharge should operate as an acquittal.

2. A motion to indorse the names of several witnesses upon the information was filed two months before the day of trial, and subsequently the names were irregularly indorsed upon the information. Afterwards the indorsement was stricken off, when the motion was renewed, and an order made upon the day of trial permitting an order made upon the day or trial permitting the county attorney to indorse the names of the same witnesses upon the information. It appears that the attention of the defendant and his attorneys was called to the witnesses, and, further, that inquiry had been made of some of them as to what their testimony would be. Held, under the circumstances, it cannot be said that the court abused its discretion in allowing the indorsement. the indorsement.

3. The mere showing that persons called as jurors did not pay taxes on personal property in the preceding year does not prove that they were disqualified as jurors, especially where it does not appear but what they may have been upon the assessment rolls made in the listing of

real and personal property.

4. Declarations made in the belief of impending death are admissible in evidence up-on the trial of a charge of homicide, and the fact that death did not immediately ensue after the declaration was made, or that a hope of recovery was subsequently entertained, will not affect its admissibility.

5. In such a trial, where the theory of the prosecution is that the homicide was committed by the defendant because of the passion which he entertained for the wife of the deceased and of the criminal intimacy which existed between them, of which the deceased had knowledge, testing the deceased had knowledge, testing the deceased had knowledge. timony of the criminal intimacy is admissible in evidence, in order to show motive in defendant for killing the deceased, and also to show the degree or grade of the crime that has been committed.

6. As a general rule, testimony tending to show the commission of another offense than the one charged is not admissible, but, where such other offense is intimately connected with the one charged, important proof, tending to establish the latter, cannot be excluded, because it may tend to prove the defendant guilty of the other offense.

7. The admission of testimony of the manner and conduct of the deceased some time previous to the killing, which was not known to the defendant, nor connected with the homicide, and which is of such character as to prejudice

the defendant, is error.

8. Statements were given of a paper and of its contents, which related to the difficulty between the deceased and his wife, and which were of a prejudicial character as against the defendant. The paper itself was not produced, nor were the statements with reference to the same made in the presence of the defendant. Held, that the admission of the testimony was prejudicial error.

9. An extended cross-examination of the defendant with reference to his conduct 15 years before the occurrence of the homicide, and which tended to prove previous acts of adultery that had no connection with the offense charged,

was not permissible.

10. The court must decide as a preliminary question whether a dying declaration was made under a sense of impending death, and the admissibility of the same is exclusively for the consideration of the court; but, after the evidence is admitted, its credibility is entirely with the previous of the intro who are at liberty. in the province of the jury, who are at liberty

to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give such testimony only such credit as, upon the whole, they might think it deserved.

11. A party who is unlawfully attacked by another, may stand his ground, and use such force as at the time reasonably appears to him to be necessary. He is justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they actually are.

(Syllabus by the Court.)

Appeal from district court, Cowley county; A. M. Jackson, Judge.

Isaac G. Reed was convicted of murder in the second degree, and appeals. Reversed.

Chas. E. Elliott, C. J. Peckham, and Isaac Reed, for appellant. John T. Little, Atty. Gen., C. J. Garver, and W. W. Schwinn, for the State.

JOHNSTON, J. Isaac G. Reed was charged in an information filed in the district court of Sumner county with shooting and killing Isaac Hopper, in Sumner county, in such a manner and with such an intent as to constitute murder in the first degree. The information was filed on August 31, 1892, and on October 10, 1892, upon application of the defendant, a change of venue was granted, and the cause transferred to the district court of Cowley county for trial. The trial was begun in the latter court on January 10, 1893, and, after the impaneling of the jury, the production of the evidence for the state and for the defendant, the charging of the jury, after the opening argument in behalf of the state and the argument in favor of the defendant, and before the closing argument for the state had been completed, on January 20th, one of the jurors became sick, and was unable to attend at the trial. The cause was continued from time to time for five days, and on January 26th, after an examination, and without the consent of the defendant, the court determined that it was impossible for that jury to conclude the trial, and thereupon it discharged the jury. At the next term of the court the plea of former jeopardy was interposed, and attached to it was the evidence taken by the court when the first jury was discharged; but the court sustained a demurrer, and ruled that, the discharge of the jury having been made necessary by the sickness of a juror, it did not operate as a bar to a further trial. The trial then proceeded, and the defendant was convicted of murder in the second degree, from which conviction he appeals to this court, alleging numerous grounds of error. We will only notice those which seem to be material or require attention at this time.

The first contention is that the discharge of the jury first impaneled is equivalent to a verdict of acquittal. It is true that the jeopardy of the defendant began when the jury were impaneled and sworn and the reception of evidence was commenced; and it is also true that the discharge of the jury

without the consent of the defendant, and without sufficient reason, will ordinarily bar a further trial. The statute prescribes the grounds which will warrant the court in discharging a jury before the completion of a trial. It reads as follows: "The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing." Civ. Code, § 281; Cr. Code, § 208. In this case the sickness of a juror was the cause for discharge, and whether that sickness was of such a character as to make a discharge absolutely necessary was the subject of inquiry and decision by the court. A court cannot arbitrarily determine such a question, but the incapacity of the juror, and the necessity for discharge, are to be heard and determined by judicial methods. State v. Smith, 44 Kan. 75, 24 Pac. 84. That course was pursued in the present case, and the finding made by the court that such a necessity existed was based on the testimony of a physician and other evidence, some of which is not preserved. In the absence of that evidence, we cannot say that there was not good cause for the discharge. From what appears, we think that the court did not act capriciously, nor without a due regard for the rights of the defendant. After the illness of the juror was reported, the court postponed the trial from day to day in the expectation that the juror would recover sufficiently to complete the trial. Several inquiries were made as to his condition, and the prospect of recovery. At the end of five days he was still seriously sick, and his recovery was a matter of great uncertainty. It is said that the near approach of the end of the term influenced the court to some extent in reaching the conclusion which it did. Of itself, this might not be sufficient to justify a discharge, but, as the real inquiry was whether the sickness of the juryr required the jury to be discharged, the finding of the court made upon this inquiry is necessarily binding upon us. As the testimony taken at the time of the discharge was made a part of the plea, and a demurrer thereto sustained, the question raised upon the reply to the plea is not deemed material.

Upon leave of the court, obtained without notice to the defendant, the state was permitted, at the time of the trial, to indorse upon the information the names of eight witnesses who gave material testimony in the case. This indorsement was made just before the trial, on April 5th, and it is contended that, as the testimony given by these witnesses was important, the action of the court in permitting the indorsement was an abuse of discretion, which resulted in prejudicing the rights of the defendant. It appears that on the 3d day of February a motion was made to indorse the names of the

new witnesses, which motion was sustained by the court. Afterwards the names of these witnesses so indorsed were stricken from the information, and it was said that it was done upon the ground that the order for indorsing the names of witnesses was made in the absence of the defendant. It thus appears that the attention of the defendant and his attorneys was called to these witnesses; and, further, that inquiry had been made of them as to what their testimony would be. Under the circumstances it cannot be said that the court exercised its discretion without due regard for the rights of the defendant, or that he was prejudiced by the ruling.

Three jurors were challenged on the ground that they did not possess the requisite qualifications of jurors. The objection urged is that their names did not appear on the tax rolls of the county, and hence that they should have been excluded from the panel upon the objection of the defendant. The showing made upon this point is not satisfactory. While it appeared that these jurors did not pay any personal taxes for the preceding year, it was not shown that they did not pay taxes on real estate, nor that their names did not appear on the assessment rolls of their respective townships. It appears that two of them were listed for personal taxes, but that the value of the personal property which each had for taxation did not equal the exemption allowed to him; and, in the case of the third, he stated that he had made a return for a stock company as its manager and agent, but that he had not been assessed for personal taxes. Whether he was upon the tax roll is not shown. No inquiry was made as to whether they had real estate listed in their names in the respective townships in which they lived, and nothing to show that they did not pay taxes on real estate for the preceding year. The statute provides for listing both personal and real estate in the name of the owner. Gen. St. 1889, pars. 6889, 6911. It is further provided that in making a list of persons to serve as jurors the jury commissioners shall select from those assessed on the assessment rolls of the several townships and cities of the preceding year. Id., pars. 3567, 3601. The evident purpose is to obtain the service of jurors who are substantial citizens and the owners of property, and the assessment rolls referred to in the jury law are evidently those made in the listing of both real and personal property. As it does not appear that they were not upon the personal property assessment rolls, nor that they did not own and pay taxes on real estate, this objection must be overruled. State ex rel. Kellogg v. Commissioners, 44 Kan. 528, 24 Pac. 955. Other objections were made with reference to the jury, but an examination discloses that they are not material.

pears that on the 3d day of February a motion was made to indorse the names of the the court in admitting what was received as STATE o. RCED.

the dying declaration of the deceased. Hopper was shot by Reed about 5 o'clock on the evening of May 21, 1892, and soon afterwards was carried to his home, where an examination of his wound was made by physicians and surgeons, who informed him that his injury was fatal, and admonished him that, if he had any business matters which required attention, he should attend to them, as he could not live long. He repeatedly expressed the opinion that he was about to die. A minister of the gospel was called in. He requested a neighbor to act as guardian for his children, gave information about insurance on his life, and directed how it and his property should be applied. He suffered intense pain, and at times cried out, "I am dying now." A stenographer was sent for, and a dying statement as to the shooting, and the cause of it, was taken down, which was afterwards introduced in evidence. Some time after the statement was given he rallied some, and used language which indicated that he was then not without hope of recovery; but soon afterwards he expired. It is claimed that under the circumstances the statement should not have been received in evidence. It is clear that the statement was made in the belief of impending death, and the fact that there was an interval of several hours between the time the statement was made and his death does not make it inadmissible. Nor will the fact that at times after the statement was made he entertained or expressed a hope that he might get well render his declarations incompetent. The controlling question is whether the declarations were uttered under a sense of impending dissolution; and the fact that death did not immediately ensue, or that a hope of recovery was subsequently entertained, will not affect their admissibility. 6 Am. & Eng. Enc. Law, 117.

The admission of testimony showing the relations existing between the defc dant and the wife of the deceased, and which tended to show a criminal intimacy between them, is assigned as error. The defendant admits that proof of a criminal intimacy between the defendant and the wife of the deceased is admissible to show the existence of a motive for the killing, at least in cases where the killing has to be established by circumstantial evidence; and he insists wat, as the killing was admitted, the motive of the defendant could be shown in a general way, but that a detailed inquiry would coate new issues, and tend to divert the minds of the jury from the consideration of the principal issue; the theory of the prosecution being that the homicide was committed by the defendant because of the passion which he entertained for the wife of the deceased, of which the deceased had knowledge, and that, as he stood in the way of defendant carrying out his desires and purposes, testimony of the relations which existed between

them was competent upon the question of motive. Counsel for the state say that it has been "universally conceded, since David wrote to Joab, 'Set ye Uriah in the forefront of the hottest battle, and retire ye from him, that he may be smitten and die,' that the man who coveted his neighbor's wife had a motive for desiring the death of his neighbor." The evidence is not only competent as tending to show the motive which induced the crime, but it is important also in determining the degree or grade of the crime that has been committed. As a general rule, testimony tending to show the commission of another offense is not admissible, but, where such offense is intimately connected with the one charged, important proof to establish the latter cannot be excluded because it may tend to prove that the defendant is guilty of another offense. State v. Folwell, 14 Kan. 105. There may be some cause for complaint at the very extended inquiry that was made as to the relations between the defendant and Mrs. Hopper. A detailed inquiry was made, and a large volume of testimony was taken. It may be said, however, that this was due to a large extent to the fact that an undue intimacy between these parties was denied by the defendant. The testimony of the illicit relation, however, if it existed, was receivable in evidence as tending to show the motive of the defendant in killing the deceased. Johnson v. State (Fla.) 4 South. 535; Pierson v. People, 79 N. Y. 424; Com. v. Merriam, 14 Pick. 518; State v. Lawlor, 28 Minn. 216, 9 N. W. 698; State v. Hinkle, 6 Iowa, 380; 9 Am. & Eng. Enc. Law, 714; 15 Am. & Eng. Enc. Law, 936.

A more serious objection is made to interviews and conversations held with the deceased some time prior to the shooting, when the defendant was not present, and of which he had no knowledge. A witness was permitted to detail at length a meeting between himself and Hopper on the day before the shooting; the taking of a long drive with the deceased, during which he related to the witness his troubles at Wellington, and his plans for leaving that place and going to Missouri. He was allowed to testify what the mood and manner of the deceased were on that day, and to relate the reason given by the deceased for leaving Wellington. The reason stated was the interference in his family, and the trouble made by the defendant. Another witness, over objection, related that he had met the deceased on the next day, and had a conversation with him, in the absence of the defendant, in which the deceased informed hlm, among other things, that he had determined to go to Missouri, and the reason given was "that if he could get his wife away from where Judge Reed was, they could get along all right together." The acts and conduct of the deceased previous to the fatal encounter which formed a part of the res gestae, or which tended to throw light upon the question of motive or malice, might be admitted in evidence; but the acts or conduct of the deceased which are not a part of the res gestae, and which could not have influenced the defendant in the commission of the homicide, cannot be shown. The manner and conduct of the deceased on the day previous to the killing was not known to the defendant, and was not connected with the homicide, and therefore the defendant could not be affected thereby. Anything that would throw light on the homicide, and everything that would operate on the mind of the defendant, can be shown: but evidence of the acts or manner of the deceased which never came to the knowledge of the defendant, could not be proved.

There was introduced in evidence a paper, identified by Mrs. Hopper, in which the deceased declared that he believed his wife to be a woman of honor, integrity, and high moral character, and that any accusations to the contrary were false. To meet the introduction of this evidence by the defendant the state was permitted to offer a witness who related an occurrence between himself and the deceased on May 1st,-the day upon which the other paper was executed, -in which the deceased presented to him a paper which he said was prepared by Mrs. Hopper. He then gives a conversation between the deceased and himself with reference to the paper and its contents. After reading it over, the witness told the deceased that he would be a fool to sign it; that the paper was not prepared by Mrs. Hopper, but was prepared for the purpose of getting a divorce from him. A long conversation ensued, in which it was intimated or would bear the construction that a trap was being laid by the defendant and the wife of the deceased, so that, if trouble occurred, or a divorce was asked for, the mouth of the deceased would be closed; and much of the contents of the paper was disclosed in the conversation. This testimony was wholly incompetent, and the objection of the defendant should have been sustained, and the motion to strike it out should have been allowed. If the testimony had been competent as an explanation of why the paper signed by the deceased came to be executed and delivered to his wife, it was still secondary evidence, and, if competent at all, the letter itself should have been produced, or its nonproduction accounted for. The paper itself, however, if in existence, was not competent proof, and the introduction of its contents was prejudicial error.

There is just ground for the complaint made by the defendant in permitting the state to cross-examine the defendant in regard to his early life. A great part of the testimony in the case was devoted to the question of whether the defendant sustained adulterous relations with the wife of the deceased, and on cross-examination he was required to relate the marital relations be-

tween him and his first wife, having been married in 1868; that he was divorced from her in the spring of 1877; and to state the grounds upon which the divorce was granted. The inquiry was pressed so far that he. was required to state that cruelty and adultery were charged against him, and an effort was made to show that his present wife was the co-respondent in that divorce suit with whom adultery was charged, and that he was engaged to his present wife prior to the granting of the divorce from his first wife. Some of these direct questions were not required to be answered, but the inquiry was pushed sufficiently far to leave the inference with the jury that the defendant had been guilty of another adultery with a person other than the wife of the deceased 15 years before the occurrence of the homicide with which he was charged. A full cross-examination should be allowed upon anything connected with the homicide, or which would affect the credibility of the defendant as a witness; but it is not competent to prove previous acts of adultery, which have no connection with the offense charged; nor can evidence of improper conduct with other parties than those charged in the information, which happened in his early life, be given in evidence to sustain the present charge. We think there was an abuse of discretion in this extended crossexamination of the defendant.

Another ground of complaint is the instruction given by the court with reference to the effect of the dying declaration which was admitted in evidence. The court charged that: "Such declaration, when made in the belief that death was imminent, and the deceased had abandoned all hope of recovery, is admissible; and in this case, if you should find from the evidence that the deceased made a declaration as to the encounter with defendant before his death, then the court instructs you as a matter of law that such declaration was made when the deceased thought death was imminent, and he had abandoned all hope of recovery." The court further advised the jury that the weight to be given to the declaration and the credibility of the witness making it, ought to be governed by the ordinary rules of evidence, and to determine the weight and credit to be given to the same the jury can consider all the circumstances under which the declaration was made. The objection is that the court withdrew from the jury all considerations as to whether the declaration was made when the deceased thought death was imminent, and after he had abandoned all hope of recovery. The court must decide, as a preliminary question, whether the declaration was made under a sense of impending dissolution, and the admissibility of the same is exclusively for the consideration of the court; "but, after the evidence is admitted, its credibility is entirely within the province of the jury,

who, of course, are at liberty to weigh all the circumstances under which the declarations were made, including those already proved to the judge, and to give the testimony only such credit as, upon the whole, they might think it deserves." 1 Greenl. Ev. § 160. While the court instructed the jury that they might take into consideration the circumstances under which the declaration was made, in another part of the charge the question of whether the deceased made the statement under the apprehension of speedy death was, in effect, excluded from their consideration. In passing upon the credibility of the statement the jury are entitled to consider whether, as a matter of fact, the deceased had lost all hope of recovery, and the instruction should have been modified in accordance with this view. Starkey v. People, 17 Ill. 17; North v. People, 139 III. 102, 28 N. E. 966; State v. Cameron, 2 Pin. 490; Varnedoe v. State, 75 Ga. 181; State v. Banister (S. C.) 14 S. E. 678; Lambeth v. State, 23 Miss. 355; Nelms v. State, 13 Smedes & M. 506; People v. Green, 1 Parker, Cr. R. 11; Walker v. State, 37 Tex. 366; Jones v. State, 71 Ind. 66; State v. Nash, 7 Iowa, 347, 384.

Another complaint is with reference to an instruction given upon the subject of selfdefense, in which the court told the jury that, if one is unlawfully attacked by another, he may stand his ground, and use such force as reasonably appears necessary to repel the attack and protect himself. The criticism is that the instruction given leaves the jury to infer that the appearances were to be judged by them, and not by the defendant. "A party assailed is justified in acting upon the facts as they appear to him, and is not to be judged by the facts as they are." State v. Howard, 14 Kan. 175. While the instruction is not as explicit as it should have been, it is evident from other portions of the charge that the court meant that he might use such force "as at the time reasonably appeared to him to be necessary." Although the instruction is defective, we would hardly think that the error of itself was sufficient to require a reversal. In any future trial of the cause this omission can be corrected.

There is a further complaint that the court failed to submit an instruction upon manslaughter in the second degree. As the instruction complained of related to a degree of crime inferior to that of which the defendant is convicted, this objection becomes immaterial. State v. Dickson, 6 Kan. 209; State v. Potter, 15 Kan. 302; State v. Rhea, 25 Kan. 576; State v. Yarborough, 39 Kan. 588, 18 Pac. 474. Further than that, however, we think the testimony was not such as to justify the court in submitting an instruction as to that grade of offense.

Other criticisms are made upon the charge of the court, but in them we find no error, nor anything which requires further comment. For the errors referred to, the judgment will be reversed, and the cause remanded for another trial. All the justices concurring.

STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS v. HOUSER. (No. 19,366.)

(Supreme Court of California. July 17, 1894.) CHANGE OF VENUE—CONVENIENCE OF WITNESSES.

It is no abuse of discretion to refuse plaintiff a change of venue for the convenience of witnesses, when defendant files a stipulation admitting the truth of the facts alleged in the complaint.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by the Stockton Combined Harvester & Agricultural Works (a corporation) against Daniel Houser on a stock assessment. Plaintiff's notice for a change of venue denied. Plaintiff appeals. Affirmed.

Nicoll & Orr, for appellant. Stanton L: Carter and Anderson & Anderson, for respondent.

BELCHER, C. This is an appeal by the plaintiff from an order of the superior court of Los Angeles county denying its motion for a change of the place of trial of the action from that county to San Joaquin county. The motion was made upon the ground that the convenience of witnesses and the ends of justice would be promoted by the change. The plaintiff was a corporation organized under the laws of this state, and having its principal place of business at the city of Stockton, in San Joaquin county. Its capital stock was \$300,000, divided into 3,000 shares, of which about 2,800 had been actually subscribed for and taken. On October 4, 1892, the defendant was the owner and holder of 400 shares of the said capital stock, and at that time \$50 on each share of the subscribed capital stock had been fully paid up. The action was brought to recover an assessment of \$25 per share, levied on October 4, 1892, on the stock held by defendant. The complaint averred that the plaintiff was indebted to divers persons, companies, and corporations in sums aggregating \$150,000, and was unable to meet its liabilities and satisfy the claims of its creditors, and that to meet such liabilities an assessment in the sum of \$25 per share on the subscribed capital stock was necessary; that the assessment was duly levied as required by statute, and notice of the order, in the form prescribed, was published, and copies of the notice were sent through the mails, addressed to each of plaintiff's stockholders, including the defendant, at his place of residence; that the defendant had not paid the assessment on his stock, or any part thereof, and that before the time fixed for the sale of the delinquent stock the board of directors of the

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plaintiff corporation, by resolution duly adopted, elected to waive further proceedings, under chapter 2, tit. 1, pt. 4, of the Civil Code, for the collection of delinquent assessments, and elected to proceed by action to recover the amount of said assessment due from defendant. The only issues raised by the answer were as to the indebtedness of the plaintiff, its inability to meet its liabilities, the necessity of the levying the assessment, the adoption of the resolution levying the assessment, the publication by the secretary of the corporation of the notice of the assessment set out, the sending a copy of such notice through the mails to each of the said stockholders, and the adoption by the board of directors of plaintiff of the resolution electing to waive further proceedings, ander the chapter of the Civil Code above referred to, for the collection of said alleged assessment, and ordering an action commenced to collect the same.

The motion to change the venue was based upon an affidavit of the plaintiff's president, which stated that all the transactions referred to in the complaint occurred in the county of San Joaquin; that all the officers and agents of the plaintiff resided in that county, except one, who resided in the county of Butte: that the affiant and certain other persons would be material and necessary witnesses at the trial of the action, and were the only ones by whom the plaintiff could prove the necessary facts; and that no witness except the defendant, whose testimony would be material or needful, resided in the county of Los Angeles. The affidavit also set out what the plaintiff expected to prove by each of its said witnesses. When the motion was called for hearing, counsel for defendant produced and filed a stipulation, signed by them, which admitted, in substance, that all the facts alleged in the complaint were true, and thus practically rendered it unnecessary for the plaintiff to call and examine any of its said witnesses. After the stipulation was filed, and upon due consideration, the court denied the motion. and the plaintiff excepted to the ruling. In support of the appeal it is claimed that, as no counter affidavits were filed, it was, in effect, admitted that the convenience of witnesses and the ends of justice would be promoted by the change asked for, and that, under the circumstances shown, plaintiff had a statutory right to have the motion granted. This claim cannot be sustained. Applications like this are addressed to the sound legal discretion of the trial court, and its action cannot be disturbed on appeal unless it clearly appears that there was an abuse of that discretion. Hanchett v. Finch, 47 Cal. 192; Avila v. Meherin, 68 Cal. 478, 9 Pac. 428; Clanton v. Ruffner, 78 Cal. 268, 20 Pac. 676; People v. Vincent, 95 Cal. 427, 30 Pac. 581. Here we are unable to see that the court in any way abused its discretion in denying the motion. The stipulation admitted the facts, and obviated the necessity of proving them. No counter affidavits were necessary. The order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the forgeoing opinion, the order appealed from is affirmed.

FIELD v. ANDRADA et al. (No. 19,461.) (Supreme Court of California. July 16, 1894.) BOND ON APPEAL.

A bond on an appeal from an order denying a motion to dismiss, and an order denying a new trial, must state that an appeal has been taken from both orders.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Field against Andrada and others. From an order denying their motion to dismiss the action, and from an order denying a new trial, defendants appeal. Dismissed.

R. Dunnigan, for appellants. Wells, Munroe & Lee and E. A. Meserve, for respondent.

PER CURIAM. Upon the authority of Berniaud v. Beecher, 74 Cal. 617, 16 Pac. 510; Schurtz v. Romer, 81 Cal. 244, 22 Pac. 657; Crew v. Diller, 86 Cal. 554, 25 Pac. 66; and Paving Co. v. Bolton, 89 Cal. 154, 26 Pac. 650,—the appeal from the order denying defendant's motion to dismiss the action, and the appeal from the order denying a new trial, are dismissed.

(4 Cal. Unrep. 701)

SAVINGS & LOAN SOC. v. BURNETT et al. (No. 14,553.)1

(Supreme Court of California. June 27, 1894.)
TRUST DEED—SECURITY FOR FUTURE ADVANCES—
CONVEYANCE BY GRANTOR—SALE BY TRUSTEES
— TITLE OF PURCHASER—QUIETING TITLE—
PLEADING.

1. A deed of trust to secure \$20,000, and also all further indebtedness of the grantor to the third party that might be contracted during the continuance of the trust, not exceeding \$35,000, provided that on payment the trustees should reconvey to the grantor, his heirs or assigns, and contained a power of sale on default. *Held*, that where such grantor afterwards made an absolute conveyance to B., and paid the original debt secured, such deed of trust afforded no security for other sums advanced by such third party to the grantor for the purposes stated therein, with actual notice of such conveyance, and that a purchaser at the trustee's sale made on default in payment of such advances held the title in trust for B.

2. In an action by such purchaser to quiet title, the court found that the grantor was seised in fee originally, that he executed the deed of trust, and that default was made, and the property sold to plaintiff. Held, that such findings did not establish a full fee-simple title

1 Reversed in banc. See 39 Pac. 323.

in plaintiff, where it appeared that such default in payment was of sums not secured by the deed of trust.

of trust.

3. Even if \$2,000 of the original debt secured was unpaid, a sale of the property regarded by plaintiff as sufficient security for \$35,000 did not give an absolute legal title to the purchaser having knowledge of all the facts.

4. The complaint in an action to quiet title alleged that the grantor was holding the property against his own deed, and that plaintiff was seised of and holds all the estate, right, title, and interest, at law or in equity, which such grantor ever had or could acquire. The answer specifically denied such allegations, and alleged the execution of a deed to one B., but asked no affirmative relief. Held, that the pleadings warrant findings and sustain a judgment for defendants. for defendants.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by the Savings & Loan Society agninst John M. Burnett and others to quiet title. From a judgment for defendants, and from an order denying its motion for a new trial, plaintiff appeals. Affirmed.

A. N. Drown, for appellant. Jarboe & Jarboe and Robt. H. Countryman (Robt. Y. Hayne, of counsel), for respondents.

HAYNES, C. This action was brought by the Savings & Loan Society against Denis Mahoney, John M. Burnett personally, and also as trustee, and the nine children of Mahoney, for the purpose of quieting the title of the plaintiff to certain real estate in the city of San Francisco, and determining the adverse claim of the defendants thereto. The defendants had judgment, and the plaintiff appeals therefrom, and from an order denying its motion for a new trial.

On May 22, 1868, Mahoney, being then the owner of the land in question, borrowed \$20,-000 from appellant, and gave his promissory note therefor, and also executed a deed of trust of the premises described in the complaint to E. W. Burr and B. D. Dean to secure said sum, and also "all further indebtedness of the party of the first part to the party of the third part [appellant] that might be contracted during the continuance of the trust, not exceeding \$35,000 at any one time, whether evidenced by promissory notes or otherwise, whether for interest, insurance, or for moneys expended in and about said premises for repairs, taxes, liens, or incumbrances," etc., and provided that upon full payment of all existing and accruing indebtedness the trustees should reconvey to Mahoney, his heirs or assigns. It also contained a power of sale upon default in the repayment of the sum borrowed and the interest thereon, "or in the reimbursement of any amounts herein provided to be paid, or of any interest thereon, and all future advances, disbursements, accounts, balances, and dues,"-the power to be executed, on the application of appellant, by sale at public auction, and by conveyance to the purchaser,-and further provided that such deed of conveyance, with its recitals of default and notice of sale, should be conclusive proof thereof, "and effectual and conclusive against the party of the first part, his heirs and assigns, and all other persons." On December 28, 1881, the premises in question (the same as described in said deed of trust) were sold thereunder by the trustees in the manner provided, and appellant became the purchaser, its bid being \$17,250 (that being the amount then claimed to be due appellant, and secured by the deed of trust); and on the next day the trustees executed a deed in due form to appellant, and under this deed it claims title. Respondents answered, taking issue upon appellant's seisin and ownership, and claimed and alleged title to the land in question in John M. Burnett, as trustee under a deed executed to him by said Denis Mahoney on March 6, 1869, declaring certain trusts in favor of Mahoney's nine children, a copy of which deed is attached to the answer. The trusts declared in this deed were "to receive the issues, rents, and profits of said premises, and apply the same, or such portion thereof as shall be necessary, for the support, maintenance, and education of the nine children of Denis Mahoney," until the youngest of said children should arrive at age; that any surplus profits should be invested, and, when the youngest child should arrive at majority, to convey to them the said lands,-each taking an equal undivided interest, and a like interest in the accumulations. It was also provided that no estate should vest in the trustee, directly, contingently, or otherwise, except for the purposes of the trust. Said deed of trust also "And in contained the following clause: case it should become advisable, in the judgment of the said Denis Mahoney and Burnett, to make improvements upon said property, the said trustee is hereby authorized to raise money, by mortgage or otherwise, on said property, or such part thereof as may be necessary for that purpose, and to pay the same, and all charges and interest thereon, out of the rents and profits of the whole of said property, after the application of so much thereof as may be necessary for the support, maintenance, and education of said children, in place of investing the said surplus as hereinbefore provided.'

The point of the controversy is this: Appellant claims that the amount for which the property was sold to it under said first deed of trust was due to it for moneys loaned and advances made for taxes, street assessments, and other purposes, directly connected with the property, including part of the original loan, and that all these sums, whether loaned or advanced before or after the execution of the trust deed to Burnett, were secured by said first deed of trust, and that, the sale being in all respects regular, the entire title to the premises passed to it by the sale and conveyance thereunder, while respondents claim that the original loan, and the interest thereon, and all advancements made by appellant

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prior to the execution of the trust deed to Burnett, were paid and discharged; that the sum for which the property was sold by appellant consisted of loans and advancements made after the conveyance in trust to Burnett, and with knowledge of such conveyance, and therefore were not secured by said first deed of trust; that the sale was therefore without authority, and the deed to appellant pursuant to said sale conveyed no title.

The findings state the facts very fully, and, in addition to the general facts above stated, other facts found by the court are essential to a consideration of the points made by appellant. The original loan of \$20,000 was to be paid in 72 monthly installments, commencing in September, 1868, and at the date of the trust deed to Burnett, March 6, 1869, the amount of that loan remaining unpaid was \$19,754.49. Appellant paid the taxes on the property covered by the deed of trust for the years 1869-70, 1870-71, and 1871-72, and also a considerable sum for insurance. On May 25, 1871, money was required for repairs and improvements on the property; and, on that day, appellant, at the request of Mahoney and of Burnett, claiming to act as trustee, loaned or advanced \$500 for that purpose, and on March 5, 1872, for some purpose connected with the property, and, at the like request, loaned the further sum of \$650. For these sums, respectively, Mahoney and Burnett gave their promissory notes payable at one year,—the latter signing the notes as trustee,—and in each of these notes it was recited that they were secured by the deed of trust made by Mahoney to Burr and Dean, reciting its date, and where recorded. Prior to the execution of these notes the insurance above mentioned, and the taxes for 1869-70, had been repaid; and on June 11, 1870, all of the original loan had been paid, except the sum of \$2,000. On November 13, 1873, there remained unpaid said balance of \$2,000 and the said two promissory notes above mentioned, together with interest and two years' taxes paid by appellant; and Mahoney and Burnett then desired to obtain the further sum of \$249, with which to pay a street assessment charged upon the property. Upon a statement of these several matters, with accrued interest, it was found that they amounted to \$4,565; and thereupon Mahoney and Burnett-the latter claiming to act as trustee-executed a promissory note for that sum, payable to appellant, at one year, with interest, and this note also recited that it was secured by said deed of trust made by Mahoney to Burr and Dean; said Burnett signing the note, "John M. Burnett, Trustee of Mahoney Estate." this connection the court, after finding the indebtedness for which said note was given. and setting out the note in full, proceeded to find as follows: "And that the said note last above referred to was taken and re-

ceived by the said Savings & Loan Society, as and in payment and satisfaction and extinguishment of all sums of money then due to it by said Denis Mahoney or the said John M. Burnett, and of all claims and demands which it then had against the said Mahoney or the said Burnett, or either of them; and that at the time of the execution of the note last herein referred to the said plaintiff stamped, and marked as paid and canceled, and surrendered up and delivered up to the said Denis Mahoney, the promissory note for the sum of \$20,000, hereinbefore referred to, and marked and entered the same as satisfied and canceled upon the books of record kept by it; and that the note last above referred to was taken in payment and satisfaction of all the sums of money hereinbefore above referred to." After this transaction, appellant paid the taxes on the property up to and including the fiscal year 1881-82, and certain insurance on buildings, and also paid several street assessments, at the request of Mahoney and Burnett, which had become liens upon the property in question; and these payments. together with said promissory note of November 13, 1873, for \$4,565, and accrued interest on all said sums, made up the amount of the claim for which said property was sold by the trustees, Burr and Dean, to appellant, after deducting certain payments of interest on said note, which payments were continued to August, 1878. It is also found that the sale of the property was several times postponed, at the request of Mahoney and Burnett, upon payment by them of the cost of publishing the notices of sale.

Appellant's first point is that the findings do not support the judgment, inasmuch as they show that plaintiff was seised in fee of the land at the commencement of the suit. It is not claimed that there is an express finding of title in fee in the plaintiff, but that it is found that Denis Mahoney was seised in fee originally; that he executed the deed of trust to Burr and Dean; that default was made, and the property sold and conveyed to the plaintiff. And these facts, it is argued, "establish irresistibly and completely an absolute and full fee-simple title in appellant at the dates alleged." But this argument assumes either that such title was vested in the trustees, Burr and Dean,-that they could, under any and all circumstances. convey a good title,-or that a default was in fact made, under which the trustees were authorized to sell and convey. The deed of trust specified the only condition upon which the trustees could sell and convey; and unless that condition existed the sale and conveyance were each void, under section 870 of the Civil Code, which provides: "Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees, in contravention of the trust, is absolutely

void." By the express terms of the deed of | trust, the power to sell depended upon Mahoney's default in the payment of moneys secured thereby, and upon payment they were bound to reconvey to Mahoney. It may be conceded that their deed to appellant vested a prima facie title in appellant; but, as this is a suit in equity to quiet title, appellant must have something more than an apparent title. But, in this connection, appellant insists that no title was vested in Burnett by the trust deed to him; that, by the deed of trust to Burr and Dean. Mahoney "emptied himself of his whole estate, and there was nothing left in him to be conveyed to Burnett." The learned counsel is mistaken. There was left in Mahoney the right of possession, carrying with it the rents and profits, and the right, upon payment of his indebtedness to the Savings & Loan Society, to have the entire estate and title as he had held and enjoyed it before; and this right to the possession and use of the property, and the right to have again the unincumbered estate and title upon payment of his debt, he could and did convey to Burnett. Whether the deed of trust to Burr and Dean vested in them the legal title to the land is controverted by respondent; but, assuming that it did, upon payment or satisfaction of the debt thereby secured the trustees had, at the most, the dry legal title, without any interest or ownership in the land. "When the purposes for which an express trust was created cease, the estate of the trustee also ceases." Id. § 871. And for that reason, if the purposes of the trust here created had ceased by payment of the debt, the subsequent deed of the trustees to appellant conveyed no estate or interest in the land; and whether such payment had been made before such conveyance is therefore a vital question in the case, unless it shall be held that the deed of trust to Burr and Dean was a valid security for all advances made by appellant,-as well those made after knowledge of the conveyance to Burnett as of those made before.

1. All the advances made by appellant after the original sum of \$20,000 were optional. The terms of the deed of trust did not require it to make further advances. Assuming that appellant had actual notice of the conveyance to Burnett in trust for the children of Mahoney, it had notice that Mahoney no longer had power to deal with or incumber the property. To the extent the terms of the contract between them, expressed in the deed of trust, required them to make loans or advancements, if any, the Savings & Loan Society might safely go, as any conveyance Mahoney might make would be subject to its requirements. Mahoney not only conveyed all the interest he had in the property to Burnett, but he reserved no power or right over it. It is obvious that those cases cited by counsel as to the rights of a subsequent mortgagee, where advancements have been made by a prior mortgagee after notice of the second mortgage, involve quite different facts, for in those cases the mortgagor remained the owner of the property mortgaged, with full power to create additional liens upon it, so that the question there was not as to the validity of the liens, but as to which had priority. The principles involved are applicable here, however, with even greater force. In such cases the great weight of authority seems to establish the following propositions: (1) A mortgage for obligatory advances is a lien from the date of its execution, and will therefore secure such advances, although other incumbrances are put upon the property before such advances are in fact made, and such advances are not affected by the mortgagee's knowledge of the subsequent incumbrances. (2) But where the mortgagee is not bound to make the advances, and has actual notice of a later incumbrance, such later incumbrance will take precedence of the first mortgage, as to all advances made after such notice. For a discussion of these propositions, see 1 Jones, Mortg. §§ 369-371, and the numerous cases there cited, and also Tapia v. Demartini, 77 Cal. 387, 19 Pac. 641. If, therefore, Mahoney had mortgaged the property in question to Burnett, and appellant, with actual notice of such mortgage, had made these advances to Mahoney, such advances would have been postponed, and, as to Burnett's mortgage, would have taken the place of a junior mortgage. Much more, then, would an absolute conveyance by Mahoney cut off the lien of future advances to Mahoney which appellant was not obliged to make. If, therefore, the further advances made with actual notice of the deed to Burnett were secured by the deed of trust to Burr and Dean, it must have been because of Burnett's relation to these advancements, or because of the purposes to which the money advanced was applied. It cannot be questioned that both Burnett and the beneficiaries under the deed of trust to him were charged with notice of the deed of trust to Burr and Dean, and of all sums of money loaned or advanced thereunder prior to the date of the deed to Burnett, and that the property was liable therefor, and for all moneys thereafter advanced (if any were advanced) prior to actual notice to appellant, of such conveyance. But, after such notice to appellant, the deed of trust, which operated as security for moneys theretofore loaned or advanced, could not be extended to further advances unless Burnett had the power, as trustee, to bind his cestuis que trustent, not only for moneys borrowed, but by a security to which he was not a party.

The powers of trustees are thus defined: "A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter, and none other. His acts, within the scope of his authority, bind

the trust property to the same extent as the acts of an agent bind his principal." Civ. Code, § 2267. The only clause in the deed of trust of Burnett, empowering the trustee to raise money, has been hereinbefore quoted. No reference is made in any manner to the deed of trust to Burr and Dean as a means of securing money for improvements, nor of any reservation of a power in Mahoney to secure further advances thereunder for any purpose; and, as Burnett did not execute a mortgage or other instrument pledging the trust property, a discussion of his power to do so under the terms of the trust deed is not necessary, for if it be conceded that he had the power to procure all these advancements, and to secure the same by a mortgage with a power of sale, or by a deed of trust such as that in question, which ordinarily creates a strict legal right which may be enforced without the aid of a court of equity, no such legal right was created by Burnett, and the advancements could only be made a charge upon the trust property by the aid of a court of equity. The deed of trust given to secure appellant did not restrict the use of the money loaned to any particular purpose, except as to the payment of taxes, insurance, etc., which the appellant or the trustees were empowered to pay of their own volition; and if, instead of taking the note of November, 1873, for \$4,-565, the bank had loaned to Mahoney at that date the difference between that sum and \$35,000, to which the security was limited, and had taken the note for the last-named sum, and this sum had been used by Mahoney for his individual purposes in no way connected with the property, it would hardly be contended that Mahoney or Burnett, or both jointly, could charge the estate of the children with such a liability: and, if not, it is apparent that appellant's claim is based upon an equity arising from the fact that the moneys so advanced were used to relieve the trust estate from liens which endangered the estate of the beneficiaries, and not because of the deed of trust under which appellant claims they were made, and such equity could not be enforced through or under the terms of a dry legal contract to which Burnett was not a party. The sale to appellant, therefore (assuming the facts found by the court to be sustained by the evidence), did not vest in appellant an absolute estate in the land. Burr and Dean were not only trustees for the bank, but were also trustees for Mahoney, and were bound to reconvey to him or his assigns upon the condition expressed in the deed; and unless the facts existed, authorizing a sale, appellant took the conveyance subject to the same trust imposed upon them. It is true the deed of trust under which the sale was made contained a provision that the recitals in the deed to be made by them to the purchaser "shall be conclusive proof of such default, and of the due publication of such notice [of sale], and any such deed or deeds, with such recitals therein, shall be effectual and conclusive against said party of the first part, his heirs, assigns, and all other persons." But such recitals could only avail for the protection of an innocent purchaser without notice of any want of authority in the trustees to sell, and could not be invoked by appellant for its protection. Ine deed of trust to Burr and Dean was not an absolute deed of trust, but a deed of trust in the nature of a mortgage. The distinction between these instruments is clearly stated in the recent case of Powell v. Patison, 100 Cal. 235, 34 Pac. 676, and in Perry, Trusts, § 602d. Speaking of mortgages with power of sale and deeds of trust, it is said: "At law, both kinds of deeds purport to convey the legal title to the grantee or creditor or trustee; but in equity the land, the title, and deeds stand for security of the debt. The debt is the principal thing, and the conveyance of the land is collateral to the debt. The mortgagor in both cases has an estate in the land, called an 'equity of redemption.' If he fails to pay the debt, his equity of redemption is barred upon due proceedings had; but, if his debt is paid at any time before his equity is defeated by the steps appointed to be taken, it becomes absolute, and he is entitled to a reconveyance. or a discharge of the mortgage, as the case may be." Courts do not favor constructions that confer upon trustees absolute and uncontrollable powers. Burr and Dean were not the absolute owners of the property, but were the donees of a power over it for the benefit of appellant; and, if the debt legally secured by the deed of trust to them had been satisfied before the sale, they could convey no greater interest in the property than was then vested in them, and appellant in such case holds the legal title in trust for respondents.

2. Appellant contends, however, that the finding that the note for \$4,565, dated November 13, 1873, was taken and received by appellant in payment and satisfaction of all claims and demands which it then had against Mahoney or Burnett, or either of them, is not justified by the evidence; that, if said note was not so taken, at least the \$2,000 remaining unpaid of the original loan of \$20,000 was a valid lien upon the property, and sufficient to sustain the validity of the sale by the trustees to appellant. We think the evidence sufficient to support the finding. At the time the note for \$4,565 was given, there was a balance of \$2,000 due upon the original note for \$20,000, for which Mahoney alone was liable. In addition to that, some taxes had been paid by appellant, and two small notes for moneys loaned had been given by Mahoney and Burnett, the latter signing as trustee.

The note for \$4,565 covered the amount of these several items, and the accrued interest, and upon its execution the \$20,000 note was

canceled and surrendered; and the note then taken represented the entire claim of appellant at that date, and this note purported to be secured by the deed of trust. There does not appear to have been, in words, any express agreement as to the effect of this transaction in relation to the question of payment. Nothing was said upon that subject. Mr. Burr testified, in substance, that the whole balance was made into one note, instead of having three notes upon which to carry the interest every month, and to that extent the \$4,565 note was made at his instance; that the consolidation was merely to facilitate the bookkeeping of the bank. It is conceded that the mere fact of the acceptance of a note for a pre-existing debt does not extinguish it, or that one simple executory contract does not extinguish another for which it is substituted, unless such be the agreement of the parties. Whether such was the agreement of the parties is a question of fact, which the court, in the absence of a jury, was required to determine. Griffith v. Grogan, 12 Cal. 324. In Brown v. Dunckel, 46 Mich. 32, 8 N. W. 537, it was said: "The giving of a note for the debt did not, as a matter of law, operate as a payment of the debt, unless it was so expressly agreed; but it should be understood to be so expressly agreed if the jury could ascertain from the facts and circumstances that it was so mutually understood between the parties." In Stanley v. McElrath, 86 Cal. 455, 25 Pac. 16, it was said: "The payment of money is not necessary to the extinguishment of an obligation. A debt may be paid by the giving of a note, if it be offered and accepted as payment." The facts that, as to the balance of the \$20,000 note, a new party was added as a joint maker; that the old note was surrendered; that there was not at any time an offer to return the new note, nor any demand for the redelivery of the former; that the new note was set down in the statement of the items comprising the sum for which the property was sold as constituting part of the appellant's claim; that the new note, upon its face, purported to be secured by the deed of trust, which provided for securing other sums besides the \$20,000 note,—tend strongly to show such understanding. The giving of a new note is at least a conditional payment, and suspends the first obligation until the maturity of the new note, when the creditor may suspend or cancel the new obligation, and proceed upon the original. Brewster v. Bours, 8 Cal. 506. "When suit is brought against a defendant upon a debt. whether evidenced by a note or otherwise, and it appears that he has given a bill or note for the same debt, which has become mature and is unpaid, while it does not operate as a bar to the suit, it is essential to the plaintiff's recovery that it be produced and surrendered up, or otherwise satisfactorily accounted for at the trial. This is necessary as a safeguard to the defendant,

for, if the plaintiff should have passed it off before maturity to a third party, the defendant might be compelled to pay the debt a second time." 2 Daniel, Neg. Inst. \$ 1275. See, also, Burdick v. Green, 15 Johns. 247; Rayburn v. Day, 27 Ill. 47; Morrison v. Welty, 18 Md. 176. We think there is such evidence as forbids us to set aside the finding that the new note was given and received in payment of the balance due upon the original note. But, even if it were otherwise, we think a sale of the whole property, which was regarded by appellant as sufficient security for \$35,000, should not be held to give an absolute legal title to a purchaser having knowledge of all the facts, but that, in such case, appellant, by the purchase, became a trustee, and held no other or better title than that held by Burr and Dean.

3. Appellant further excepts to the findings, in that it is there said that Burnett "claimed to act as trustee," while appellant contends that the evidence shows that he "did act as trustee." What Burnett did, and how he did it, are fully set out in the findings. Whether these acts were the authorized and valid acts of a trustee is a conclusion of law. That he "claimed to act as trustee" is the finding of a pure matter of fact.

4. The finding that the \$20,000 note was canceled upon appellant's books is amply sustained by the evidence. Mr. Burr testified that the new note was taken to simplify or facilitate the bookkeeping of the bank, as the monthly interest would be computed upon one note, instead of three. The plain inference is that the account of the \$20,000 note was balanced, closed, or canceled. If it had not been closed, the books of the bank would have shown the debt to be \$2,000 more than is claimed. Besides, no mention is made of any balance of that account in the statement under which the property was sold.

5. E. W. Burr, a witness on behalf of the plaintiff, was asked by counsel for the plaintiff the following question: "To what extent, if at all, was it the intention of the bank, or of yourself acting for the bank, at the time of taking this \$4.565 note, to receive it in extinguishment or satisfaction of the existing obligation or indebtedness?" An objection was sustained, and the same question, varied somewhat in form, was several times repeated, and objections sustained to each. It is not necessary to consider whether the court erred in these rulings, since the final question of the series was not objected to, and in response to that, as well as in the testimony of the same witness to preceding questions, the witness stated all that could be properly said upon the subject, even to including the "purpose" for which, as well as the circumstances under which, it was taken.

6. The finding that appellant had full knowledge of the deed to Burnett from and after the time it was recorded is sustained by the evidence. It is clear that on May 25,

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1871, appellant required Burnett, as trustee, to sign the \$500 note. Some small amounts had been advanced for taxes and insurance; but these sums were all repaid prior to the making of this note, except the taxes for 1870-71, amounting to \$415.37, which was included in the note of November 13, 1873, which the court found was received in payment of all sums then unpaid. While there is no direct evidence of actual knowledge or notice of the Burnett deed prior to May 25, 1871, there was evidence tending to show that such actual notice was obtained from the record presumably at or about the date at which the deed was recorded.

7. The objection that the pleadings do not warrant the findings nor sustain the judgment is not maintainable. The complaint alleged that Denis Mahoney was holding the same against his own deed, and "that plaintiff is seised of, and now holds, all the estate, right, title, and interest, at law or in equity, which said Denis Mahoney ever had, or could at any time acquire, of, in, or to said real property, or any part of the same," and that defendants wrongfully claim, etc. The answer specifically denied all these allegations, and alleged the execution of the trust deed to Burnett. No affirmative relief was prayed for by defendants, and none was given. The issue was upon the title of the plaintiff,whether, as against the defendants, it had such title as would authorize a decree in its favor,-and the judgment was upon that is-

The conclusions reached have not been arrived at without difficulty. It has been impossible to notice in detail the very extended and able arguments of counsel, or to close our eyes to the hardship of appellant's situation. Whether any relief may yet be obtained has not been considered, and any language used which might be construed as an intimation upon that point must be disregarded. I think the judgment and order appealed from should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 280

RYAN et al. v. JACQUES et al. (No. 19,250.) (Supreme Court of California. June 27, 1894.) STOCKHOLDERS IN CORPORATION — LIABILITY FOR UNPAID SUBSCRIPTIONS—ACTION BY CORPORATE CREDITOR—PLEADING.

1. The complaint in an action by judgment creditors of a corporation alleged that defendant stockholders were the original subscribers for stock, and had only paid a certain amount on the shares, and that a certain amount was yet "due" thereon, for which the stockholders were "liable." Defendants simply denied that any sum was due, and that they were liable for any sum. The court found that no sum was due from defendants, and that they were not liable.

ble for any sum. *Held*, that as the allegations "due" and "liable" in the pleadings and findings were mere allegations of law, and as the allegation that only a certain amount had been paid by the stockholders on the share was not denied, judgment for defendants was erroneous.

2. The complaint is not subject to a general demurrer on the ground that it merely alleges that only a certain sum has been paid on the subscriptions by defendants, when it also alleges that defendants were the original subscribers, as it cannot be presumed that defendants sold the stock to persons who made additional payments thereon, and then resold to defendants.

3. In an action by judgment creditors of a corporation for the unpaid balances of stock subscriptions, the defense that defendant stockholders purchased their shares in open market and in good faith, without notice that any amount was unpaid thereon, must be pleaded.

4. A complaint in an action by judgment creditors of a corporation to compel stockholders to pay the unpaid balance on their stock, which, after alleging that the defendants were the owners of the capital stock as original subscribers thereto, and stating the amount held by each, alleges that only a certain sum has been paid on each share held by them, is not demurrable, on the ground that it joins a joint liability of defendants with a several liability, as the complaint shows that the latter allegation was used merely to show the amount paid on the shares, and not the manner in which they were held by defendants.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Henry L. Ryan against Burkill Jacques and others, and Oscar Trippett intervenes. From a judgment for defendants, plaintiff and intervener appeal. Reversed.

Trippett, Boone & Neale, for appellants. J. E. Deakin, James E. Wadham, and Hunsaker, Britt & Goodrich, for respondents.

HAYNES, C. This action was brought against several stockholders in the Santa Rosa Land & Improvement Company by appellant Ryan, to subject an alleged balance remaining unpaid to the corporation upon the stock held by the defendants in satisfaction of a judgment recovered by him against the corporation. Trippett, the other appellant, is also a judgment creditor of the corporation, and came in as an intervener, and sought similar relief. All the defendants had judgment, and this appeal is upon the judgment roll from the judgment in favor of four of the defendants, viz. Burkill Jacques, William H. Anderson, J. E. Deakin, and T. C. Stockton. The appeal as to Anderson was dismissed.

The principal question is as to the sufficiency of a certain allegation of the complaint. Certain other allegations should be stated, however, in order to a proper construction of the clause more particularly in question. After alleging that the capital stock of said corporation is \$600,000, divided into 6,000 shares of \$100 each, all of which were subscribed for, it is alleged as follows: "On information and belief, plaintiff alleges that the following are the owners of said stock of the said corporation, as original

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subscribers thereto, and were such owners at the time of the commencement of this action, excepting the defendant George Neale, who is a transferee of an original stockhold-"Burkill Jacques is the owner of three hundred shares of said capital stock, and was such owner at the time this action was commenced." Then follows a similar allegation as to the number of shares held by each of the defendants, and immediately succeeding these allegations is the following: "Upon information and belief, plaintiff alleges that only the sum of \$9.50 has been paid by said stockholders upon the capital amount of each and every share of said stock of said corporation held and owned by them, and the present holders thereof are, and each of them is, liable for the balance due upon said stock, to wit, the sum of \$90.50 upon each and every share of said capital stock held and owned by them." After alleging that the corporation had failed and refused to levy an assessment to pay plaintiff's judgment, the complaint further alleges: "On information and belief, the plaintiff alleges that there is remaining due to said Santa Rosa Land and Improvement Company from the defendant Burkill Jacques the sum of \$27,150, upon the capital stock of said corporation held and owned by him." Allegations in the same language, except as to names and amounts, were made as to each of the other defendants. complaint in intervention of appellant Trippett was in the same form. The defendants severally demurred to each complaint for misjoinder of parties defendant; also for misjoinder of causes of action, in that a several cause of action against each defendant was joined with a several cause of action against each of the other defendants; and also that the complaint did not state facts sufficient to constitute a cause of ac-The demurrers were overruled, and the defendants answered severally. The only denials necessary to be noticed are the following, taken from the answer of respondent Jacques, the denials of the other respondents being in the same form: "Denies upon and according to his information and belief that the present holders of any or all of the stock mentioned in the said amended complaint are liable, or that any of them is liable, for the sum of \$90.50, or any other sum, upon each or any share of the said capital stock." "This defendant denies that there is remaining due the Santa Rosa Land and Improvement Company from this defendant, upon the capital stock of said corporation, now or ever held or owned by him, the sum of \$27,150, or any other sum." court found that plaintiff obtained judgment against the corporation, as alleged; that it remained unreversed and in full force; that execution was issued thereon, and returned wholly unsatisfied; that respondent Jacques, at the time suit was commenced, was the owner of three hundred shares of said stock,

Anderson of four hundred shares, Stockton of forty shares, and Deakin of five hundred shares. Then follows this general finding: "(12) That the sum of \$90.50 is not, nor is any sum, due upon each and every or any share of stock of said corporation, held or owned by the defendants, from said defendants, or either or any of them, to the Santa Rosa Land and Improvement Company, or any other person. (13) That the sum of \$27,150 is not, nor is any other sum, due from said defendant Burkill Jacques to the Santa Rosa Land and Improvement Company, or any other person, upon the capital stock of said corporation." The same finding is made as to each of the other defend-As conclusions of law, the court found that none of the defendants were indebted to said corporation or to plaintiff or to the intervener, Trippett, in any sum on account of subscriptions to the capital stock or otherwise, and that defendants judgment for costs.

If the complaint is sufficient as against a general demurrer,-and we think it is,-the findings do not support the judgment. There was no misjoinder of parties or causes of action. There are in the complaint several matters stated which are purely conclusions of law, and some of the facts are not stated with the clearness and precision which good pleading requires. Whether a demurrer for ambiguity would have been sustained, it is not necessary to consider, as no such objection was taken. If, however, facts are stated showing the liability of the defendants, the complaint must be sustained, notwithstanding they are imperfectly stated. Brown v. Weldon, 71 Cal. 393, 12 Pac. 280; Tehama Co. v. Bryan, 68 Cal. 57, 8 Pac. 673; Harnish v. Bramer, 71 Cal. 155, 11 Pac. 888.

There is no finding as to the amount that had been paid or remained unpaid upon each share of the subscribed capital stock, but it is alleged that the par value of the shares is \$100, and that only \$9.50 had been paid thereon; and neither of these allegations was denied. No finding was therefore required of either fact. Under such circumstances, the court was bound to draw the conclusion that \$90.50 remained unpaid upon each share. Any other conclusion would contradict admitted facts. But respondents contend that the allegation in question was of a "joint" ownership and holding, while the other allegations are of a several holding. The references in the clause in question to the preceding allegations by the word "said," and the whole frame of the complaint, show that this clause was not intended to allege how the stock was owned or held, but to show how much had been paid on each share, and how much remained unpaid. It is also contended that this allegation pleads evidence only; that "it might be admitted that the defendants had paid only \$9.50 per share on the stock held by them, and yet some precedent owner may have paid the remainder upon each share necessary to complete payments in full, or that defendants may have purchased the stock in open market in good faith, and without notice that any part was unpaid." But, if the defendants had purchased the stock under such circumstances as to relieve them from liability for the amount unpaid, it was matter of defense, to be pleaded and proved by them, and the plaintiff was not bound to anticipate and negative such defense; and, as to the objection that others than the defendants may have paid the \$90.50 not paid by them, it is sufficient to say that it was alleged that the stock held by each of the defendants, except Neale, was held by them as original subscribers, and it will not be presumed that they sold their stock after paying \$9.50 per share, that the purchasers paid the remainder, and then sold the stock back to the defendants. The allegation that the defendants were the subscribers, that they only paid \$9.50 on each share, required them, if they admitted they had only paid that amount, and claimed that they were not liable for the remainder of the subscription price, to plead the facts which exonerated them from such liability. If they still held the stock subscribed for by them, no one else had the right to pay therefor; and if payment had been made by a third party, under such circumstances as entitled the defendants to credit for such payment, it was a payment by them, and might be proved under a proper denial of the averment that only \$9.50 had been paid. If defendants had demurred upon the ground of ambiguity or uncertainty, there would be much force in respondents' objections above noticed; but they do not show that a cause of action is not stated, though they point out its imperfections. If a complaint, or any allegation of a complaint, is capable of different constructions, that which the plaintiff gives it or which the court finds necessary to support the action will be given, in the absence of a special demurrer. In other words, a pleading must be construed, for the purpose of determining its effect, with a view to substantial justice between the parties. Civ. Proc. § 452.

The allegation of the complaint that defendants are "liable for the balance due upon said stock, to wit, \$90.50 upon each and every share," is but a conclusion of law, and the denial by the defendants of their "liability" for that or any other sum raised no issue; and the finding "that the sum of \$90.50 is not, nor is any sum, due" is a conclusion of law also, and not the finding of a fact, nor is any fact found from which that conclusion could be drawn. Respondents contend that the word "due," in the finding, is equivalent to "unpaid;" but it must have the same meaning in the complaint, and, if we substitute "unpaid" in the complaint in the place of "due," we have a fact which is not denied in the answer, and is therefore admitted, and hence the finding, as construed by re-

spondents, would contradict the admission. In the absence of a special demurrer, that is pleaded with sufficient certainty which is capable of being certainly ascertained from the complaint. It was so said of findings in Ward v. Clay, 82 Cal. 512, 23 Pac. 50, 227. And that which is sufficiently certain in findings must be sufficiently certain in a complaint. The obligation being to pay \$100 on each share, and it being alleged that "only \$9.50" had been paid thereon, it is certain that \$90.50 remains unpaid. Nor will it help respondents to treat the conclusion of law drawn by the court that defendants are not "indebted" as a finding of fact, for such finding would be contrary to the admission that only \$9.50 had been paid, no fact being averred or found which discharged them from liability to pay the remainder of the par value of the stock. The cases cited by respondents to this proposition merely hold that a common count that "defendant is indebted to the plaintiff for goods sold and delivered," etc., was sufficient as a complaint; but it has not been held that an answer to such complaint was sufficient which only denied the "indebtedness." How these so-called "issues," involving only conclusions of law, were treated upon the trial, we cannot know. the appeal being upon the judgment roll alone; but, as the conclusions of law are inconsistent with the facts found, taken with the admission, for want of a denial, that only \$9.50 had been paid on each share, the judgment is wrong. I advise that the judgment be reversed, with leave to the parties to amend their pleadings.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, with leave to both parties to amend their pleadings.

108 Cal. 106

GREEN et al. v. GREEN et al. (No. 15,380.) (Supreme Court of California. June 18, 1894.) DEED—AFTER-ACQUIRED TITLE—RECORDING—Assignment of Errors.

1. A deed purporting to convey a fee-simple estate, and also all the after-acquired interest of the grantor, causes any after-acquired interest of the grantor to inure to the benefit of the grantor

grantee.
2. Where, at the time of the execution of a deed, the land conveyed was situated in a county which has been subsequently divided, the deed is properly recorded in the county it is in at the time of the recording.

 An assignment that a certain finding is contrary to the evidence cannot be considered if not raised on motion for new trial.

Commissioners' decision. Department 2. Appeal from superior court, San Mateo county; W. G. Lorigan, Judge.

Action by Lulu Green and another against Jasper N. Green and another. There was a judgment for plaintiffs, and defendants appeal. Affirmed. Z. N. Goldsby, for appellants. Edw. F. Fitzpatrick, for respondents.

VANCLIEF, C. Action to quiet plaintiffs' alleged title to 160 acres of land situated within the present boundaries of the county of San Mateo. The action was tried and judgment rendered in favor of the plaintiffs, except as to a life estate in the defendant Delana Green, in October, 1888. The defendants moved for a new trial on a statement of the case, which was settled and allowed by a succeeding judge on January 21, 1803. This appeal by the defendants is from an order denying their motion for a new trial, made January 11, 1893.

The land in controversy was pre-empted in 1863 by Havilah Green, husband of the defendant Delana Green. He declared a homestead upon the premises January 2, 1865, and died July 21, 1865. After his death, the land was entered by his heirs, and a United States patent was issued to them on January 10, 1868, pursuant to Rev. St. U. S. § 2269. On December 28, 1867, the defendant Jasper N. Green, and his brother John R. Green, two of the sons and heirs of the deceased, Havilah Green, executed a grant, bargain, and sale deed of the land to their brother Henry H. Green, under whom the plaintiffs claim title by descent, as his heirs. This deed purported to convey absolute title to the land, and also all present and future interest of the grantors therein. On March 12, 1883, Delana Green, widow of Havilah, conveyed the land to defendant Jasper N. Green, reserving a life tenancy in herself. On June 11, 1883, the superior court set the premises apart as a homestead for the use of the widow, Delana, and on July 9, 1883, she conveyed the land to William H. Bias, subject to her life estate therein; and on January 31, 1884, Bias conveyed all his rights to Jasper N. Green. The judgment quieted the title of plaintiffs as against Jasper N. Green, and also against Delana Green, excepting her life estate, as to which the judgment quieted her title as against the plaintiffs.

1. Upon these facts, which are principally taken from the answer of the defendants, I think the judgment is clearly right. The conveyance by the defendant Jasper N. Green, on March 28, 1867, to Henry H. Green, being of a title in fee simple absolute, and expressly purporting to convey all after-acquired interest of the grantor, operated upon all the interest thereafter acquired by him, causing it to inure to the benefit of Henry H. Green, and of his heirs, the plaintiffs. Hitchens v. Nougues, 11 Cal. 28; Clark v. Baker, 14 Cal. 613; Quivey v. Baker, 37 Cal. 465; Dalton v. Hamilton, 50 Cal. 423; Clv. Code, § 1106.

2. Appellants contend that a certified copy of the record of the deed of March 28, 1867, was not competent evidence of the contents or execution of that deed, for the reason that the deed was not recorded in Santa Cruz county, in which the land was situated at the

time that deed was executed. The land was situated in Pescadero township, in Santa Cruz county, at the time the deed was executed and acknowledged, and the execution thereof was acknowledged before Robert Knowles, a justice of the peace in that township, on the day the deed was executed. In March, 1868, Pescadero township was severed from Santa Cruz county and annexed to San Mateo county. The deed was not recorded until June 20, 1872, when it was recorded in San Mateo county. The acknowledgment is in due form; and besides, Knowles, who took it, also signed as a witness to the execution, and testified at the trial that the deed was executed in his presence. The deed was properly recorded in the county in which the land was situated at the time of recording (Civ. Code, § 1169), and a certified copy of the record was prima facie evidence of the execution of the deed, since it was proved that the original was not in the possession or under the control of the plaintiff. Code Civ. Proc. § 1951, as approved March, 1874 (in force at the time of trial); Anthony v. Chapman, 65 Cal. 73, 2 Pac. 889.

3. Appellants contend that the finding by the court that plaintiffs' cause of action was not barred by the statute of limitations is not justified by the evidence. But there is no specification in the statement on motion for a new trial of any deficiency of evidence in respect to that finding.

Other points made are so obviously untenable that they merit no special consideration. I think the order should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

DIMOND v. SANDERSON. (No. 15,359.)
(Supreme Court of California. June 13, 1894.)
NOTE BY HUSBAND TO WIFE—PRESUMPTION—UNDUE INFLUENCE—BURDEN OF PROOF.

Oiv. Code, § 158, provides that husband or wife may enter into any transaction with the other, respecting property, which either might, if unmarried, subject "to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts." Section 2235 provides that all transactions between a trustee and his beneficiary, by which the former obtains any advantage, "are presumed to be entered into by the latter without consideration and under undue influence." Sections 1614, 1615, provide that a written instrument imports a consideration, and that the burden of showing want of it lies with the person seeking to avoid it. Held that, in an action on a note given by a husband to his wife, the burden was not on plaintiff to show sufficient consideration and absence of undue influence, and that no presumption of undue influence could arise until defendant showed want of consideration, or that an unfair advantage was obtained by plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, city and coun-

ty of San Francisco; Eugene R. Garber, Judge.

Action by Lydia E. Dimond against Lemuel A. Sanderson on a promissory note. From a judgment for plaintiff, defendant appeals. Affirmed.

Jacob Samuels, for appellant. Andrew Thorne, for respondent.

HAYNES, C. This action was brought upon a promissory note made by the defendant June 1, 1888, whereby he promised to pay Lydia Emma Sanderson \$6,000 at 24 months after date, with interest payable monthly. The complaint is in the usual form, except that it alleges "that Lydia Emma Sanderson was the name of the plaintiff prior to her marriage with Henry P. Dimond on the 25th day of June, 1890; that the name of the plaintiff is now Lydia Emma Dimond; and that the subject-matter of this action concerns and is the separate property of the plaintiff." Defendant's answer contained three defenses: (1) Admitted the making and delivery of the note, but denied that anything remained unpaid, due, or owing thereon, or that he was indebted thereon. (2) That he received no consideration for the note. And (3) that at the time the note was made the plaintiff and defendant were husband and wife; alleged certain misconduct of the wife; that her affections were alienated by another; that he gave the note under certain promises made by the plaintiff, which were not kept, and with a view to regain her affections, and upon no other consideration; that she remained with him but a short time; that he procured a divorce in December, 1889; and that plaintiff and Dimond intermarried in June, 1890. Upon the trial the plaintiff testified in chief that defendant was her former husband, and that certain payments, and no other, had been made upon the note. Upon crossexamination she stated her maiden name; that she was married to defendant in 1877; and that she and defendant were husband and wife until December 29, 1889. Plaintiff put the note in evidence and rested, and the defendant offered no evidence. Findings and judgment were in favor of plaintiff, and the defendant appeals from the judgment upon the judgment roll, and a bill of exceptions setting out the evidence above stated.

Appellant insists that the plaintiff failed to make out her case, because it appeared that she and defendant were husband and wife at the time the note was given, and that that fact threw upon her the burden of proving a sufficient consideration for the note, and that it was not given under undue influence. This contention he bases upon the following provisions of the Civil Code:

"Sec. 158. Either husband or wife may enter into any engagement or transaction with the other, or with any other person, respecting property which either might, if unmar-

ried, subject, in transactions between themselves, to the general rules which control the actions of persons occupying confidential relations with each other, as defined by the title on trusts."

"Sec. 2235. All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence of the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration and under undue influence."

The only cases cited by appellant, involving the confidential relation of husband and wife, are Brison v. Brison, 75 Cal., at page 528, 17 Pac. 689, and Jackson v. Jackson, 94 Cal., at page 461, 29 Pac. 957. It is conceded, however, that neither of these cases decides the very point at issue, and that this court has never expressed an opinion upon the question here presented. In each of the cases above cited the husband had conveyed real estate to the wife, and sought to compel a reconveyance, and of necessity assumed the burden of proving the circumstances under which the conveyance was made, and which entitled them to a recon-Laying aside the distinction bevevance. tween the subject of those actions and of this, if the action here had been brought by the husband to have the note canceled upon the ground that it was without consideration, or had been obtained fraudulently or by undue influence, these cases would have been in point. Appellant's contention would destroy the effect of another presumption declared by the Code, as well as an express provision as to the burden of proof. Section 1614 of the Civil Code declares that "a written instrument is presumptive evidence of a consideration;" and section 1615 provides that "the burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it." These, it is said, are general provisions, while sections 158 and 2235 of the Civil Code are special, and therefore control. But all these provisions should be harmonized and given effect, if possible, and this, we think, may be accomplished. tion 2231, Civ. Code, is as follows: "A trustee may not use the influence which his position gives him to obtain any advantage from his beneficiary." And the transactions referred to in section 2235, to which the "presumption" there mentioned attaches, are those by which the trustee "obtains any advantage from his beneficiary." The relation of husband and wife is not that of trustee and beneficiary, though it is a confidential relation, and transactions between them are to be considered in the same light and controlled by the same general rules affecting the confidential relation of trustee and beneficiary; but whether any particular transaction between husband and wife creates a trust, and, if so, which is the trustee and

which the beneficiary, must depend upon the facts of the particular transaction involved in the controversy. The giving of the promissory note in question does not indicate a trust. It is an ordinary contract. Being in writing, the law presumes a sufficient consideration, though it may be in fact wholly without consideration. If it had been given in consideration of \$6,000 then loaned by the wife, or for the amount of a debt then owing to her, no presumption of undue influence could arise to defeat the obligation, because it would not appear that she had obtained any "advantage" over the defendant; and the presumption arising from the written obligation that the consideration is sufficient repels the assumption that plaintiff obtained any advantage by the transaction. The moment it appears, however, that "an unfair advantage" has been obtained, the presumption that it was procured by undue influence arises out of the existence of the confidential relation of husband and wife; but this cannot appear until the presumption of a sufficient consideration, arising from the written obligation, has been overcome by proof. "Undue influence consists: (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him." Civ. Code, § 1575, subd. 1. In Brison v. Brison, 90 Cal. 336, 27 Pac. 186 (second appeal), in speaking of the above provision of the Code, it was said: "Such influence the law presumes to have been undue whenever this confidence is subsequently violated."

We think, therefore, that it must appear upon the face of the transaction, or by proof, that there was no consideration, or that the marital confidence was used to take an unfair advantage, or that this confidence was subsequently violated, before the burden is cast upon the plaintiff of sustaining the fairness and the consideration of the transaction against the presumption invoked by appellant. It is manifest that there may be a fair and honest transaction between husband and wife upon a good and sufficient consideration, and this may be one of them, while it is also true that the use of a confidential relation to obtain an unfair advantage is a fraud upon the other party to the transac-Civ. Code, § 2234; Brison v. Brison. 75 Cal. 525, 17 Pac. 689; Id., 90 Cal. 336, 27 Pac. 186; Jackson v. Jackson, 94 Cal. 461, 29 Pac. 957. In the notes to the leading case of Huguenin v. Baseley, under the title "Husband and Wife" (2 White & T. Lead. Cas. Eq. pt. 2, p. 1215), it is said: "The relation of husband and wife obviously admits of an influence that may be carried beyond just bounds, but it seems that either of the parcies to it may accept a benefit from the other without the necessity of proving that it was not obtained by undue influence. In Hardy v. Van Harlingen, 7 Ohio St. 216 (one of the

cases cited in the above note), it was said: "The transaction will be viewed with a jealous eye, on account of the peculiar facilities enjoyed by the husband for the exercise of an improper influence. At the same time, undue influence is not to be presumed from the mere relation of the parties. It must be chown, either by direct proof, or by circumstances from which it may fairly be inferred." This quotation possibly states the rule more broadly than a fair construction of the Code provision requires; but we think that, before the presumption contended for can apply, it must appear that plaintiff, in obtaining the note sued upon, obtained some advantage over the defendant, and that the possession of the note is not of itself evidence that any advantage had been obtained. Upon appellant's theory, a sufficient answer in this case would have consisted merely of the allegation that at the time said note was made and delivered the plaintiff and defendant were husband and wife. Such answer would have been clearly insufficient. however, in addition to this relation, defendant sets out facts tending to show that the obligation was unfairly obtained, and was without consideration. The true issue was therefore upon the implied replication to the answer setting up the new matter; but how the pleader could expect these affirmative allegations to aid the defense, without evidence in support of them, we do not understand. It may be that in this case defendant's error in relying absolutely upon the presumption insisted upon may prove to be a serious one, but that cannot change the law. For the purpose of shifting the burden of proof, or creating a presumption, his answer cannot take the place of evidence. We think the judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. 124

BRODER et al. v. SUPERIOR COURT OF MONO COUNTY. (No. 15,512.)

(Supreme Court of California, June 15, 1894.)
WRIT OF PROBIBITION.

A writ of prohibition will not be granted to restrain a court from proceeding in a cause of which it has jurisdiction of the parties and the subject-matter.

In bank.

Application for a writ of prohibition by R. C. Broder and others to restrain the superior court of Mono county (W. H. Virden, judge) from proceeding with a cause. Denied.

Rich. S. Miner, for petitioners. P. Reddy and W. H. Metson, for respondent.

HARRISON, J. This is an application for a writ of prohibition, and is the counterpart

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of a proceeding between the same parties (No. 15,513, this day decided), 37 Pac. 143. At the same time that the superior court denied the petitioners' motion to enter judgment upon the findings that had been filed therein, it granted a motion of the defendants, and fixed a day for the trial of the cause, in accordance with its previous order of May 13th. Thereupon, the plaintiffs made application here for a wrlt of prohibition restraining the superior court from proceeding in the trial of the cause. That application must be denied, for the reason that the order of the court was made in a cause then pending before it, in which it had jurisdiction over the subject-matter and the parties thereto, and which had not been fully tried. If the court committed any error in the order, or should commit any error in its further proceedings during the trial of the cause, the plaintiffs have a complete and perfect remedy by an appeal from the judgment that may be rendered therein. The application for the writ is denied.

We concur: McFARLAND, J.; GAR-OUTTE, J., FITZGERALD, J.

(103 Cal. 111) WESTERN GRANITE & MARBLE CO. KNICKERBOCKER et al. (No. 15,196.)

(Supreme Court of California. June 15, 1894.) EASEMENTS—PASSAGE OF LIGHT AND AIR—DI-VISION FENCES—CONSTITUTIONAL LAW— RIGHTS OF ADJOINING OWNERS.

1. A landowner cannot acquire by user an easement over adjoining land for the passage of

2. Act March 9, 1885, regulating the height of division fences and partition walls in cities and towns, is a general law.
3. Act March 9, 1885, forbidding the erec-

tion of division fences and partition walls more than 10 feet high, in cities and towns, without the consent of the adjoining proprietor, relates solely to fences and walls erected on the boundary line resting partly on the adjoining land, and is constitutional.
4. The phrase "partition wall," as used in

such act, means a wall used as a fence.

Commissioners' decision. Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

Action by the Western Granite & Marble Company against Eugene Knickerbocker and others to enjoin the erection of a fence. From a decree granting the injunction, and from an order denying a new trial, defendants appeal. Affirmed.

William L. Gill, for appellants. D. W. Burchard and Francis E. Spencer, for respondent.

TEMPLE, C. The defendants appeal from the judgment, and from a refusal of a new trial. The appellants and respondent own adjoining lots in the city of San Jose. The complaint contains two counts. The first describes plaintiff's lot, and avers that it has erected a building thereon for its offices,

which building has six win lows in the northerly wall, through which, only, light and air are or can be admitted nto that portion of the building, ana. if such light and air be materially obstructed, said portion of plaintiff's building will become useless. Plaintiff has been using the building and office for more than six months. Defendant owns the adjoining lot which he occupies as a residence, but, until the grievances complained of, has never obstructed the passage of light and air over that part of his premises to plaintiff's building, and has no use whatever for that portion of his premises whereby said light and air would be obstructed. Nevertheless, on the 19th of June, 1891, defendant commenced to build along the division line a solid board fence, 20 feet high, in such manner as to prevent the passage of light and air into said windows. That the defendant has not obtained the permission of the city council to build such sence, nor has plaintiff ever consented thereto. That defendant will build the fence unless enjoined, and plaintiff will suffer irreparable injury therefrom. The second count adds an allegation that the building of the fence is wanton and mali-The court found the facts as stated cious. in the first count of the complaint, but did not find that defendant was acting wantonly or maliciously.

The doctrine that a proprietor may by user acquire an easement over adjoining land for the passage of light and air does not prevail in this country, and, if it did, the facts stated in the complaint would be insufficient to show such easement. Indeed, no facts are averred or found which would give plaintiff any right whatever in the lands of defendant. The sole ground, therefore, upon which the judgment is based, is that the proposed structure is unlawful, and, as it interferes with the comfortable enjoyment of plaintiff's property, it is a private nuisance, which may be enjoined or abated. It is claimed to be unlawful because it violates the provisions of the act of the legislature passed March 9, 1885, entitled "An act regulating the height of division fences and partition walls in cities and towns." The act consists of three sections, the first two of which read as follows:

"Section 1. It shall be unlawful for any owner of real property in any city or town in this state, or any person having possession thereof, to construct, erect, build, permit or maintain upon such premises any fence or partition wall which shall exceed ten feet in height, without first obtaining a permit to do so from the board of supervisors or city council of the city or town in which said fence or wal, is to be erected and maintained.

"Sec. 2. No permit to construct or maintain any fence or division partition wall having a greater height than ten feet, shall be granted by the board of supervisors or city council of any city or town in this state, unless the person applying therefor, and to whom such permit is granted, shall first obtain and present

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to such board of supervisors or city council; the written consent of the person or persons having ownership or possession of the adjoining premises affected thereby: provided, that where such fence or wall is constructed around a public garden, or place of public resort where an admission fee is charged, no signature or consent of adjacent owners shall be required."

The third section declares that a violation of section 1 shall be a misdemeanor, and provides a penalty.

It is contended that this act is unconstitutional.

1. It violates section 11 art. 11, of the constitution, which confers upon counties, cities, and towns the power to make and enforce such police regulations as are not inconsistent with general laws. This position must be that the act is not a general law. This position cannot be maintained. It operates alike upon all who are within the reason of the act. There are reasons in the nature of things why it should not affect some property.

2. It is claimed that it is unconstitutional, because it gives the owner of the adjoining property the power to prevent such a structure. If the act must be construed as rendering it unlawful for the owner to erect such a structure upon his own land, although along the line, I think it is obnoxious to this objection. Merely owning the adjoining lot does not give the proprietor an easement over the property of another for the passage of light and air; nor is it competent for the legislature to vest in such proprietor the power to prevent his neighbor from building such structures as he pleases, provided it is not a nulsance, and it is not such merely because it obstructs the passage of light and air. The legislature cannot thus create an easement in favor of certain proprietors over the lands of another, nor declare the usual and ordinary use of property a nuisance when such use infringes upon the legal rights of no one. The court found in this case that the plaintiff's windows open towards defendant's lawn. That this portion of his premises shall be secluded and private may be a matter of great importance to defendant. That he has the right to secure such privacy, if he can, by building obstructions on his own land, has always been recognized by the courts. In Chandler v. Thompson, 3 Camp. 80, Le Blanc, J., said "that, although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action * * * and that the only maintained, remedy was to build on the adjoining land, opposite to the offensive window." Washburn lays down the rule as follows: "And the cases are uniform that such adjacent owner may deprive his neighbor of the light coming laterally over his land by the erection of a wall, for instance, upon his land, within the for the mere purpose of darkening his neighbor's windows." It is well settled that he may build upon his property, although the effect may be to entirely close the windows of his neighbor. But, if the statute is capable of a construction which will bring it within the legislative power, it should be so construed, rather than in a way to render it unconstitutional. The power has been conceded to the legislature to provide for and regulate the construction of division fences. It may authorize their construction upon the boundary line; that is, resting partly upon the land of the adjoining proprietor. It may provide for the character of the fence which may be thus built, so as to make it certain that the adjoining proprietor, who may be compelled to contribute to the expense, thereby secures something of value. While there are expressions in the statute that might well be understood as prohibiting a structure inclosing defendant's lot more than 10 feet high, although not on the boundary line, still the language is entirely consistent with the other view; and we should therefore presume that it was the intent of the legislature to do that which it had the power to do.

It is said that the act forbids a partition wall as well as a fence, and that, under the statute, one may not build a house on his land extending to his boundary line without the consent of his neighbor. But understanding the law as simply applying fences or walls built upon the line, and so resting partly upon the land of the adjoining proprietor, it takes nothing from the owner, for he could build no such wall upon his neighbor's land without his consent. But I think the phrase "partition wall," in the first section, and "division partition wall," in the second, must be understood as applied to a wall which is merely a fence. "Partition wall" is not a phrase which in legal technology is used to designate a wall used by adjoining owners as a party wall. A party wall is always, at least in this state, such by agreement. A division fence is provided for in our Code (section 841, Civ. Code). Confining the operation of the statute to division fences, I see no objection to a requirement that they shall not be of such a character as to injure the neighboring proprietor. If my neighbor enjoys the privilege of resting his fence upon my land, he may justly be prevented from inflicting special injury upon me by the structure which partly belongs to me, and to the expense of building which I may be made to contribute. The finding is to the effect that plaintiff's building is about 18 inches from the line; that defendant Knickerbocker commenced the construction of the fence "upon his said premises and upon said boundary line." The evidence shows that there was already upon the boundary line a division fence, and that defendant cut into this old fence to let in the frame work of his new structure, which is period of prescription, although he may do it therefore upon the old fence, and partly upon the land of plaintiff. By the decree, defendant is enjoined from erecting or maintaining any fence more than 10 feet high "on the division line," and is required to remove all that portion of the "division fence which is more than ten feet high," and he is enjoined from "obstructing the light and air coming from his said premises into the windows of said granite and marble company by any division fence or wall more than ten feet high." This shows how the trial court regarded the statute. The judgment has no effect upon the right of defendant to erect any kind of a structure upon his own land. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

103 Cal. 118 SOUTHERN PAC. R. CO. ▼. PIXLEY. (No. 15,105.)

(Supreme Court of California. June 15, 1894.)

Contract for Sale of Land-Suit to ForeCLOSE-Venue.

Plaintiff alleged a contract to sell land in another county to defendant, whereby the latter was put in possession, and it prayed judgment against him for the sum due on the contract, and asked that, in case defendant failed to pay the same within a certain time, all his rights in said land by virtue of said agreement be foreclosed. Held that, as Const. art. 6, \$5. provides that all actions for the recovery of real estate or the enforcement of liens thereon shall be brought in the county in which the land is situated, the court had no jurisdiction of the action.

Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by the Southern Pacific Railroad Company against Frank M. Pixley. There was a judgment for plaintiff, and defendant appeals. Reversed.

Robert Harrison, for appellant. Joseph D. Redding, for respondent,

McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff. The action was brought in the superior court in and for the city and county of San In the complaint it is averred Francisco. that on September 17, 1887, plaintiff was the owner of certain described tracts of land situated in the county of San Diego, and that on said day plaintiff entered into certain contracts with defendant, by which the former agreed to sell and the latter agreed to buy said tracts of land. All of said contracts were alike, except that each referred to a different tract of land; and it is averred that the terms of each were that a certain part of the purchase money should be paid on the execution of the contract (which was done), and the balance, with interest annually, in manner as provided in said contract. The contracts provide that defendant may take possession of the lands therein mentioned, and averred that he did so take possession, and continues in possession. The complaint was filed in September, 1891, and it is averred that defendant has wholly failed and refused to make any of said deferred payments, although requested so to do. The prayer of the complaint is that it be adjudged that there is due from defendant to plaintiff a certain sum of money,—being the amount of said deferred payments; and that it be decreed that, if said amount be not paid within 30 days after the judgment, "then, and from that time, the defendant, and all persons holding said premises under said defendant shall be forever barred and foreclosed of all claim, right, or interest in said land and premises by virtue of said agreement, and be forever barred and foreclosed of all right to a conveyance thereof, and that plaintiff be let into the possession of said premises, and that said contracts be declared null and void." Defendant demurred to the complaint upon the ground, among others, that the court had no jurisdiction of the subject-matter of the action. The demurrer was overruled, and defendant filed an answer, and also a cross complaint, to which plaintiff answered. The judgment was substantially in accordance with the prayer of the complaint.

There is no necessity of discussing the questions which arose after the overruling of the demurrer to the complaint, for it is quite clear that the court had no jurisdiction of the subject-matter of the action. It is provided in section 5, art. 6, of the state constitution that "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated." Taking respondent's own view of the nature of the action, to wit, that it is for a "strict foreclosure," still it is clearly an action "for the enforcement of liens upon real estate," leaving out of view the prayer for the "recovery of the possession" of the lands. Moreover, the question has been decided adversely to respondent in Urton v. Woolsey, 87 Cal. 38, 25 Pac. 154, which was a case precisely like the one at the bar, except that the judgment in that case decreed a sale of the lands covered by the contract. See, also, Pacific Yacht Club v. Sausalito Bay Water Co., £8 Cal. 487, 33 Pac. 322; Fritts v. Camp, 94 Cal. 393, 29 Pac. 867. The jurisdiction of the action was therefore in the superior court of San Diego, and there was no jurisdiction thereof in the superior court of the city and county of San Francisco. The demurrer to the complaint should have been sustained. And, as the cross complaint was a mere dependency of the original complaint, it falls

with the original. The judgment is reversed, with directions to the superior court to dismiss the action.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

103 Cal. 104

WAGNER v. HANSEN et al. (No. 15,403.) (Supreme Court of California. June 13, 1894.) MECHANIC'S LIEN-NOTICE OF CLAIM — ENFORCE-MENT-VARIANCE.

1. Code Civ. Proc. § 1187, requires the statement for a mechanic's lien to be essentially true. *Held*, that a notice of lien was insufficient where it stated that the claim was for labor and materials, while only labor was furnished.

2. Where the complaint and claim of lien state that the work was done for an agreed price, and the evidence shows no price was agreed on, there is a fatal variance.

Commissioners' decision. Department 2. Appeal from superior court, San Francisco county; John Hunt, Judge.

Action by Ferdinand Wagner against Margaret Hansen and another to enforce a mechanic's lien. Judgment for plaintiff, and defendants appeal. Reversed.

Morrison & Foerster, for appellants. Henry H. Davis for respondent.

TEMPLE, C. This action was brought to enforce a mechanic's lien. Plaintiff had judgment, and defendant M. Hansen appeals from the judgment and from an order refusing a new trial. In his complaint plaintiff avers that he agreed with defendants "to furnish, and did furnish, the labor, at their special instance and request, in completing the foundation of said premises, build the chimneys, laying wall plates, laying out building, underpinning walls, building scaffolding, carrying brick, completing brick walls and brick foundation upon said dwelling house, upon said lot of land, and for all which said work, labor, and materials said defendants agreed to pay said plaintiff the sum of \$163." It is again alleged that plaintiff agreed with defendants to perform the work and labor, and defendants "agreed to pay plaintiff the sum of \$163 in the gold coin of the United States, but that no time was specified for the payment other than that said defendants were to pay plaintiff when said work was completed." In the notice of lien which is set out in the complaint, plaintiff, to show compliance with section 1187 of the Code of Civil Procedure, states the terms, time given, and conditions of his contract, as follows: "I, Ferdinand Wagner, am the contractor for the brick work and foundation and extra work, who, on the 9th day of April, 1889, as such contractor for the brick work and foundation, entered into a contract with said M. Hansen and Margaret Hansen, under and by which I completed said foundation and brick work and extra work, and the following is a statement of the terms, time given, and condition of said contract, to wit: 'I, Ferdinand Wagner, was to furnish the labor and materials in completing the foundation of said premises, build the chimneys, laying wall plates, laying out building, underpinning wall, building scaffolding, carrying brick, completing brick walls and brick foundation, for which I was to receive upon said completion of said work the sum of \$163 in United States gold coin for said extra work,'"

The complaint was demurred to for insufficient facts and as being uncertain, also for ambiguity, and under each head it was specified that it could not be ascertained from the complaint whether plaintiff was to be paid \$163 for work and materials or for work only, nor for what work he was to be paid; also, that the complaint averred that he was to be paid \$163 for work only, while his claim of lien stated that he was to be paid \$163 for work and materials furnished. The demurrer was overruled, and that ruling is now complained of. I think the demurrer should have been sustained. Such a notice and claim of lien does not contain a true statement of the terms of the contract, as required by section 1187 of the Code of Civil Procedure. There was no other statement as to the nature of plaintiff's demand in the There was no account of claim of lien. services rendered. The purpose of the record and statement must be to inform the owner, in case of a contractor and laborers rendering service under such contract, as to the extent and nature of a lienor's claim, to facilitate investigation as to its merits. Such a statement as the above would be misleading. The lienor is required to verify the statement. In all essential particulars it must be true. See, on this point, Frazer v. Barlow, 63 Cal. 71; Malone v. Mining Co., 76 Cal. 578, 18 Pac. 772; Eaton v. Malatesta, 92 Cal. 75, 28 Pac. 54. Respondent's only reply to this objection is that it is a mere technicality. Plaintiff's claim to a lien is a mere technicality. He is given a right upon condition that he complies with the statute, and there must be a substantial compliance with all these conditions to the right. Wood v. Wrede, 46 Cal. 637.

On the trial, plaintiff testified that, except as to one item, amounting to only \$18, there was no agreed price for any work done; that there was no agreement to pay for plaintiff's labor, or for labor and materials, \$163, or any other specified sum. No other evidence was given upon the subject. Defendants moved for a nonsuit on the ground that there was a fatal variance between the evidence and the statement in the complaint and in the claim of lien, in both of which it was stated that the work was done under a contract by which he was employed to do specified work at a price agreed upon. The nonsuit should have been granted. This was not only a variance, but it showed that the statute had not been complied with, and that plaintiff had acquired no lien. It is difficult to conceive of any terms of the contract of employment more material than this. In the case of a laborer employed by a contractor, the owner might well venture to pay a claim, where the amount had been agreed upon as between the laborer and the contractor, without further evidence than the lienor's oath. Had the statement shown that the value of the service was left open, the owner would be compelled to agree with the contractor, and perhaps with other lienors, as to the amount, or to pay such sum only as he could undertake to show was reasonable. There was no contractor here between the lienor and the owner, but the statute has made one rule for all, and that must be determined in view of all cases likely to arise under the statute. I think the judgment and order should be reversed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

103 Cal. 132

HART V. CARNALL-HOPKINS CO. (No. 15.467.)

(Supreme Court of California. June 16, 1894.) JUSTICE OF THE PEACE - JURISDICTION-TITLE TO LAND-WHEN PUT IN ISSUE - CONSTRUCTION OF PLEADINGS-APPEAL TO SUPERIOR COURT.

1. Plaintiff alleged that defendant agreed to locate him on vacant government land, which it failed to do. Defendant admitted the contract, and alleged that it did locate plaintiff on vacant government land; "that defendant is informed and believes that plaintiff claims that agid lands were not vecent government land; informed and believes that plaintiff claims that said lands were not vacant government lands, but that they were in the possession of some other person; and that defendant alleges that they were not in the possession of some other person at the time of the location of plaintiff thereon." Held, that the title and possession of real property was not necessarily put in issue by the pleadings, so as to deprive a justice of the peace of jurisdiction.

2. On appeal from a justice of the peace to the superior court, the latter court, on determining that the justice had no original jurisdiction, because title to land was involved, may properly try such question of title as a court of

properly try such question of title as a court of original jurisdiction.

3. If the issue of title or possession of land is so involved that it must be decided in order to determine the case, although only "inciden-tally" involved, the superior court has original involved, the superior court has original jurisdiction.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by James D. Hart against the Carnall-Hopkins Company for damages for nonperformance of a contract. Judgment for plaintiff, and defendant appeals. Affirmed.

Wm. H. Chapman, for appellant. Edwin L. Forster, Fisher Ames, and S. V. Costello. for respondent.

VANCLIEF, C. This action was commenced in the court of a justice of the peace

to recover damages consequent upon the alleged nonperformance of an agreement. It was alleged in the complaint that, in consideration of \$100, the defendant agreed "to locate the plaintiff on certain vacant government land in the county of San Benito, state of California; but this plaintiff avers that said defendant failed to carry out and fulfill said contract and agreement, in that they [it] failed and neglected to locate this plaintiff on said or any lands pursuant to their said contract." A copy of the contract is set out in the complaint as follows: "San Francisco, July 22, 1892. Received of J. D. Hart, Esq., one hundred (\$100) dollars, in full payment for ten (10) shares of the capital stock of the San Carlos Oil Company, and our services for locating the said J. D. Hart, Esq., on the limit of the number of acres allowed by the homestead law, not to exceed one hundred and sixty (160) acres. Said location to be on vacant government land in San Benito county, California. The Carnall-Hopkins Co., by Gibbs and Zimmerman, Mngs. C. A. Dep.'

Those parts of the verified answer of the defendant pertinent to the questions raised on this appeal are substantially as follows: (1) Defendant alleges "that the determination of this action will necessarily involve the question of title and possession to real property, to wit, the title and possession of the northwest quarter of section 27, township 16 S., of range 10 E., county of San Benito, state of California." (2) Admits the execution of the instrument of July 22, 1892, above set out, and the receipt of \$100 therein mentioned; and alleges "that defendant did locate plaintiff on vacant government land in San Benito county, Cal., and said location was on the northwest quarter of section 27, township 16 S., R. 10 E., in said county, and said property was at said time open to location, and no other person had any valid claim thereto. • • • That defendant is informed and believes that plaintiff claims that said lands were not vacant government lands, but that they were in the possession of some other person; and defendant alleges that they were vacant government lands, and not in the possession of any other person at the time of the location of plaintiff thereon; and, in consequence thereof, the determination of this action involves the title and possession of real property. * Wherefore defendant asks that judgment be rendered and entered in favor of defendant for its costs, that plaintiff take nothing herein, and that this court suspend all further proceedings herein." The docket of the justice of the peace shows that the action was tried January 3, 1893, the parties being represented by their attorneys; that three witnesses testified on behalf of plaintiff, and that no evidence was offered on behalf of the defendant; and that the cause was submitted by the parties, and that judgment was rendered in favor of the plaintiff for

the sum of \$165 damages and for costs. From this judgment the defendant appealed to the superior court of the city and county of San Francisco "upon questions of both law and fact." The cause was tried de novo in the superior court, where plaintiff again recovered judgment against the defendant for the sum of \$168.85 and costs, from which, and from an order denying its motion for a new trial, the defendant appealed to this court.

Respondent moved in department 1 of this court to dismiss the appeal on the ground that the judgment of the superior court was final. On this motion an opinion denying it was written by Mr. Justice Paterson, concurred in by Mr. Justice De Haven. 85 Pac. 633. Mr. Justice Harrison concurred in the order denying the motion, but, after alluding to the averments of the complaint and answer above set out, said: "From these averments we cannot determine whether the title or possession of real property is necessarily involved. What significance must be given to the term 'locate' must depend upon the sense in which it was used by the parties to the agreement, and whether the property upon which the defendant claims to have 'located' the plaintiff in purported performance of its agreement was 'open to location,' or whether any person had a 'valid claim' thereto, may present questions involving the title or possession of real property. Upon the present motion we are limited to the averments in the pleadings, and cannot look at the evidence introduced in support thereof. If, upon the hearing of the appeal on its merits, it shall appear that the case before the court below did not involve the title or possession of real estate, we can then dismiss the appeal. But upon the matter as now presented the motion should be denied." Upon the whole record, including the evidence brought up in the bill of exceptions on which the motion for a new trial was made, the sense in which the word "locate" was used, understood, and acted upon by the parties is quite apparent. It is that the defendant was to lead or direct the plaintiff to, and point out to him, public land of the United States, which was subject and open to be settled upon and entered as a homestead by any person having the qualifications required by law to settle upon and enter such land. Of course, the settlement and entry were to be made by the plaintiff himself, according to the laws of the United States, which will not permit these acts to be done for him by another, and so the plaintiff understood and acted upon the contract. After the northwest quarter of section 27, township 16 S., had been pointed out to him by defendant, the plaintiff applied at the United States land office "to file upon" that quarter section under the homestead laws, and paid the requisite fees, etc., for that purpose; and it appeared from the evidence on the trial in the superior court that his only complaint was that the land was not subject or open to a homestead settlement or entry, for the reason that one Benvenga had made a prior settlement thereon, and was in possession thereof at the time the land was pointed out to him by defendant, and at the time he applied to the land office to file his application. On the trial in the superior court, it having been proved and admitted that the land had been selected and pointed out to plaintiff by defendant, and that it was government land, the question arose whether or not Benvenga was a settler upon and was entitled to the possession at the time the land was pointed out to plaintiff by defendant; and this question was material for the purpose of determining whether the defendant had complied with its contract to point out vacant public land, and was the principal question contested in the superior court, although it does not appear to have arisen or to have been tried in the justice's court; and I think, as suggested by Mr. Justice Harrison, that the pleadings do not show that title or possession of real property was or would be necessarily involved in the trial. The allegation of the complaint is that the defendant failed to point out ("to locate the plaintiff on") any land pursuant to the agreement; and, had the proof shown that defendant had failed to point out to plaintiff any government land, such proof would have disposed of the case in plaintiff's favor, regardless of any question of title or possession of real property; and, for aught that appears, such may have been the proof in the justice's court, where, as shown by the record, the defendant introduced no evidence whatever. Nor did it appear by the answer of the defendant that title or possession of real property was necessarily involved, but only that it would become involved upon the happening of certain contingent events, namely, if, in case of proof that defendant pointed out to plaintiff government land, the plaintiff should then claim, as defendant was informed and believed he would, that such land was not vacant government land, but was in the possession of some other person. Besides, the answer contained no prayer for a transfer of the cause to the superior court, nor does it appear that either of the contingent events above mentioned happened in the justice's court.

For aught that appears on the face of the record here, the justice of the peace did not exceed his jurisdiction in proceeding to try the case, nor in rendering final judgment, since it does not appear that the predicted contingent events occurred on the trial in the justice's court. Had they occurred during that trial, however, the justice, in obedience to section 838 of the Code of Civil Procedure, should have declined to hear evidence touching the question of possession pleadings (both written and oral). with a thereby raised, and should have certified the

eopy of his docket, to the superior court; and, if he had failed or refused to do so, the defendant might have appealed on questions of law alone, whereupon, by a statement according to section 975 of the Code of Civil Procedure, he could have shown the occurrence of the contingent events predicted in his answer, and that evidence had been admitted upon the question as to whether the land "was in the possession of some other person;" but in no other way could he have made it appear to the appellate court that the right of possession of real property became involved on the trial in the justice's court, since it did not so appear on the face of the pleadings, nor from the copy of the docket, or any other paper which the justice was required to transmit to the superior court. It is true, however, that if the pleadings had shown that the right of possession of real property was necessarily involved, or if the docket or other papers properly sent up by the justice had shown a want of jurisdiction for any other reason, there would have been no necessity for a statement (Southern Pac. R. Co. v. Superior Court, 59 Cal. 474); but in the case at bar no error appears in the docket or other papers sent up by the justice. Besides, instead of appealing on questions of law alone, the defendant appealed upon questions of both law and fact, thereby necessitating a trial de novo in the superior court; yet, when the case was called for trial in that court, and the plaintiff proceeded to offer evidence, defendant objected to any trial de novo on the alleged ground that the superior court had no jurisdiction, for the reason that the justice's court had not jurisdiction of the subject-matter originally, claiming that it appeared by the answer that a question as to the possession of real property was necessarily involved. The court overruled this objection, and proceeded with the trial, to which the defendant excepted.

The principal point urged here by appellant is that the superior court erred in overruling this objection, and in trying the case de novo, whereas it should have reversed the judgment of the justice's court, and remanded the cause, with instruction to certify a transcript thereof back to the superior court in the mode provided by section 838 of the Code of Civil Procedure. Conceding, for the sake of the argument, that the justice's court had not jurisdiction of the subject-matter, and that the superior court had no appellate jurisdiction to try the issue as to the possession of real property, yet the superior court had original jurisdiction of all questions pertaining to possession of real property, and, having jurisdiction of the parties, properly tried the issue as to whether Benvenga was entitled to possession of the land; that being the only material issue contested in the superior court. City of Santa Barbara v. Eldred, 95 Cal. 378, 30 Pac. 562. The defendant cannot be heard to deny that the superior court had jurisdiction of the parties, since it not only appealed the case to that court to be there tried on questions of both law and fact, but it voluntarily appeared and moved for judgment of reversal on the record which it had procured to be transmitted to that court, and also made its defense on the merits by offering evidence on the trial; and all this, without even suggesting that its appearance was limited to any special purpose. Nor, as before remarked, did it appear on the face of the transcript transmitted to the superior court that the right of possession of real property was necessarily involved, nor that any issue relating to such possession had been tried in the justice's court. For aught that appears, that issue was first developed in the course of the trial in the superior court, by proof that defendant had pointed out to plaintiff government land, representing it to be vacant, and by evidence on the part of plaintiff tending to prove that the land so pointed out was not vacant. When this issue was thus developed, the superior court was not obliged, as contended by appellant, to reverse the judgment of the justice of the peace, and to remand the case for the purpose of having it transferred to the superior court, according to section 838, Code Civ. Proc., in order to obtain original jurisdiction to try it, since the superior court had such original jurisdiction without this circuitous, dilatory, and vain process. Yet the relief asked here by appellant requires a still more circuitous and dilatory proceeding, which is that this court reverse the judgment and order of the superior court, and remand the cause, "with instructions to vacate the judgment of the justice's court, and order the papers certified to the superior court in accordance with section \$38, Id.;" and all this, it is claimed, is necessary to give the superior court original jurisdiction of the subiect-matter.

From the foregoing considerations it follows that the superior court obtained original jurisdiction of the issue as to the possession of Benvenga, and did not err in trying the case de novo; and, from this conclusion that the superior court properly exercised original jurisdiction, it further follows that this court has appellate jurisdiction, and should deny respondent's motion to dismiss the appeal. In opposition to this second conclusion, however, it is urged by respondent that possession of real property was only incidentally involved, and, therefore, the superior court had not original jurisdiction, and to this point respondent cites the case of Shroeder v. Wittram, 66 Cal. 636, 6 Pac. 737, in which the opinion of Mr. Justice McKee (in bank) seems to countenance his contention. But that opinion was concurred in by only one of the other justices, while two justices concurred in the judgment only, upon other grounds, and the chief justice wholly dissented. Therefore the opinion of Mr. Justice McKee on this point cannot be regarded

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as authoritative, and was not so considered in the later case of Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256. It is clear that it was developed by the plaintiff's evidence on the trial in the superior court that Benvenga's prior settlement and right of possession were conditions upon which plaintiff's right to recover depended, and that the court must have decided whether or not these conditions existed, in order to determine the case; and it appears that evidence tending to prove them was introduced by plaintiff. It follows that the possession of real property was necessarily involved, in the sense of section 4, art. 6, of the constitution, which gives this court appellate jurisdiction "in all cases at law which involve the title or possession of real estate," without excepting cases in which the title or possession is only incidentally involved. If the issue of title or possession is so involved that it must be decided in order to determine the case, the superior court has original, and this court appellate, jurisdiction, whether the involution may be said to be merely incidental or not. Copertini v. Oppermann, 76 Cal. 181, 18 Pac. 256; Holman v. Taylor, 31 Cal. 341; Code Civ. Proc. § 838; Const. art. 6, §§ 4, 5, 11.

On the hypothesis that the superior court did not err in trying the case de novo, counsel for appellant contend that the judgment should be reversed for errors occurring at the Only two of these points are sufficiently plausible to merit consideration, one of which is that the court erred in sustaining plaintiff's objection to the introduction in evidence of the following letter, offered by defendant: "San Benito County, July 24, 1892. Gentlemen: I have located upon the N. W. quarter of section 27, T. 16 S., R. 10 E., and am well pleased with my location, and have found everything as represented to me by your agent. James D. Hart." ceding that the court should have admitted this letter, I think the error was harmless. Plaintiff filed his application in the land office August 1, 1892, 6 days after writing this letter, and 23 days before Benvenga filed his application for the same land and gave notice of his contest, which he did on August 24, 1892. Before the letter was offered by defendant, plaintiff had repeatedly testified that until he received notice of Benvenga's adverse claim he was well pleased and fully satisfied with the land, and there was no evidence to the contrary. The proffered letter would have added nothing to plaintiff's testimoney and admissions on the trial.

It is also contended that there is no finding upon the issue tendered by the answer "as to the land being open and vacant." The finding is: "But that said defendant failed to carry out and fulfill its contract and agreement, in that it failed and neglected to locate this plaintiff on said land, or any land or lands, pursuant to its said contract; nor has said defendant, since the date of said contract and agreement, ever offered to locate said plaintiff on any vacant, unoccupied government land, in said San Benito county or elsewhere." This is a finding that no land upon which defendant located the plaintiff was vacant, and fully disposes of the issue. I think respondent's motion to dismiss the appeals should be denied, and that the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion respondent's motion to dismiss the appeals is denied, and the judgment and order are affirmed.

DE HAVEN, J. I concur in the judgment.

108 Cal. 157

MARTIN v. EDE. (No. 15,360:)

(Supreme Court of California. June 18, 1894.) STATUTE OF FRAUDS — AUTHORIZATION TO SELL LAND—REAL-ESTATE BROKERS—RIGHT TO COM-MISSIONS-INTEREST.

1. An authorization in writing to sell land,

sized by the party to be charged, is valid under Civ. Code, § 1624, subd. 6.

2. A broker's right to commissions for procuring a purchaser for land under an agreement therefor is not affected by the fact that he knew the principal had title to only five-sixths of the land

3. One who is entitled to certain fixed damages, the right to recover which is vested in him on a particular day, is entitled to interest thereon from that day, except during such time as the debtor is prevented by law or by the creditor's act from paying the debt. Civ. Code,

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Wheeler Martin against William Ede. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

J. C. Bates, for appellant. Sullivan & Sullivan, for respondent.

SEARLS, C. This is an appeal from a judgment in favor of the plaintiff, Wheeler Martin, for \$905.45, and from an order denying a motion by defendant for a new trial. The action was brought to recover the sum of \$750 for commissions due to the plaintiff (who is respondent here) as a broker in effecting the sale of certain property belonging to appellant. The authorization under which the former acted is in writing, and in the following language: "San Francisco, August 3, 1887. Mr. Wheeler Martin: As you stated you could get thirty thousand dollars for the place you occupy on Market street, and if you can, we will sell at that price any time before the 1st day of September, 1887, and allow you two and one-half per cent. on said price, and, if no sale is made, no expenses Yours, truly, William Ede." made to us.

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This authorization was never revoked by defendant. Subsequent to the execution of said paper, and on the 22d day of August, 1887. plaintiff found a purchaser for said lot of land, who was willing and able and offered to pay to said defendant said sum of \$30,000 for said property. At the date of said agreement the legal title to said property stood in the name of defendant, but one Josephine Cory owned an equitable interest therein to the extent of one-sixth thereof, and was, at the date of the agreement, willing to sell. Plaintiff had heard that said Cory had an interest in the property, but was ignorant of the nature or extent of her claim. The testimony showed that Charles Grant was the party offering to purchase the property, and that he afterwards commenced an action for the specific performance of the contract to convey against the defendant Ede, which action was decided in favor of said defendant, appealed to this court, and the judgment affirmed. Grant v. Ede, 85 Cal. 418, 24 Pac. 890. Defendant set up two counterclaims to this action,-one for \$261.50, on account of expenses incurred in the defense of the action of Grant v. Ede, which was not allowed; the other for \$120, on account of four months' rent of a house, which was allowed by the

Appellant assigns the following errors as cause for reversal: (1) The court erred in ruling out the testimony of appellant proving his counterclaim of \$261.50 on account of money expended in Grant v. Ede. (2) That plaintiff exceeded his authority in agreeing to sell the whole of the property, and is therefore liable for damages suffered by his principal by reason thereof. (3) Plaintiff exceeded his authority in agreeing to sell the whole of the property, and is not entitled to compensation. (4) The authorization, if valid, would only entitle plaintiff to recover fivesixths of \$750, less counterclaims. (5) The alleged agreement authorizing plaintiff to sell the real estate was invalid, because not signed by both the parties to be charged. These contentions are so intimately connected and blended that they may properly be considered together.

The authorization by defendant was in writing, signed by him who is the party charged, and is not, therefore, obnoxious to the provision of subdivision 6 of section 1624 of the Civil Code. The contention of appellant upon which the first error is assigned is founded upon the theory that the plaintiff knew that defendant owned only five-sixths of the property, and exceeded his authority in agreeing to sell the whole property, and is consequently liable for the damages sustained by defendant. A reference to the authorization will show the authority to plaintiff to get a purchaser for the land at

\$30,000, and, in the language of the agreement, "if you can, we will sell at that price any time before the 1st day of September. 1887, and allow you two and one-half per cent.," etc. As said on the appeal here in Grant v. Ede, 85 Cal., at page 420, 24 Pac. 890: "It does not say that Martin is authorized to sell and convey for the price named, nor is any form of deed or time of payment, or of delivery of possession specified. Martin was authorized simply to find a purchaser who would pay thirty thousand dollars, and if he should succeed in finding such purchaser he was to receive a commission of two and one-half per cent.;" citing Duffy v. Hobson, 40 Cal. 244; Treat v. De Celis, 41 Cal. 202; Armstrong v. Lowe, 76 Cal. 616, 18 Pac. 758. To entitle plaintiff to recover his commissions under the agreement, it was only necessary to show that in pursuance of his employment, and within the time specifled therein, he found a purchaser ready and willing to purchase the property on the terms specified in the authorization. This he did beyond dispute. With the title or ownership of the property he had nothing to do, and his knowledge as to the title or the equitable estate of Josephine Cory therein was of no consequence. These were questions for the defendant to determine when he made the agreement. It is matter of common knowledge that, in the business world, men do frequently obtain what are termed options upon real property,-that is to say, the right to purchase,-and then employ brokers to negotiate a sale at an enhanced price, the title being all the while in others. Brokers sell tons of wheat for future delivery on account of principals who do not or may not own a kernel of that commodity, yet, in the absence of law prohibiting such sales, they are entitled to their commissions, and knowledge of the nonownership of their principals does not defeat their right to recover. A. may possess such knowledge as justifies him, in his judgment, in contracting to sell, or in contracting with a broker to sell for him, or to find a purchaser for, property which he does not own. If he does so without so guarding his agreement as to save himself in case of failure to secure title to the thing he has authorized to be sold, he cannot be heard to complain of the result of his own folly or lack of foresight. If A. is employed by B. to labor at a monthly stipend upon land which they both know B. does not own, and the services are performed in consonance with the contract, a recovery cannot be defeated by such knowledge on the part of A. As was said in Gonzales v. Board, 57 Cal. 225: "The plaintiff did all he was bound to do, under his contract, to entitle him to the remuneration agreed on. He procured a purchaser ready and willing to buy the property at the price for which the defendant proposed to sell it, which purchaser was acceptable to The plaintiff could do no the defendant. more. His right to compensation did not in

¹ Civ. Code, § 1624, subd. 6, provides that an agreement authorizing a broker to sell land for commission must be in writing, and signed by the party to be charged.

any way depend, according to the contract, on the validity or invalidity of the defendant's title to the property." Phelps v. Prusch, 83 Cal. 628, 23 Pac. 1111; Phelan v. Gardner, 43 Cal. 311; Smith v. Schiele, 93 Cal. 149, 28 Pac. 857,—as well as many other cases in this court, are to like effect.

If it be affirmed that the plaintiff acted in excess of his power by giving to Grant an agreement for the sale of the property, the answer is: (1) There is no evidence of such agreement in the record or statement from which its contents can be divined. (2) If we may look to the case of Grant v. Ede, as reported, for its contents, it is there apparent that it was not of such a character as to bind defendant. It follows that plaintiff did not exceed his authority, and was not legally liable for the expenses incurred in Grant v. Ede, and hence that the exclusion of the record in that case and the evidence of those expenses on the part of defendant was proper.

The foregoing reasoning applies equally to the other errors mentioned, except as to the point made that the defendant was entitled to interest on the sum of \$120 due him August 1, 1891, on account of rent. When that sum fell due the defendant, there was due to plaintiff, on account of interest on his demand of \$750, a sum in excess of \$120, hence the court properly applied the \$120 on the interest then due the plaintiff. Plaintiff's demand was due September 1, 1887, and was capable of being made certain by computation. It therefore drew interest under section 3287 of the Civil Code. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 100

WATSON v. SUTRO et al. (No. 15,213.) (Supreme Court of California. June 19, 1894.) REVIEW ON APPEAL.

Where there is a substantial conflict in the evidence the findings of the trial court will not be disturbed.

Department 1. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by William C. Watson against Adolph Sutro and others for partition. From that part of the judgment that allows plaintiff \$5,000 attorney's fee, defendant Sutro appeals. Affirmed.

Lloyd & Wood and B. McKinne, for appellant. Stanly & Hayes, for respondent.

GAROUTTE, J. This is an appeal by Adolph Sutro from that portion of a judgment in partition proceedings that awards to the plaintiff in the action an attorney's fee of \$5,000. In the trial of the action of partition the amount of the respective equitable interests of plaintiff and appellant, Sutro, to the realty involved in the litigation was warmly contested, and as to such matters the litigation resulted adversely to this appellant. At the hearing the report of the referees was acquiesced in by all the parties in interest, and the only contest that was made was as to the amount which should be allowed to plaintiff, under section 796 of the Code of Civil Procedure, for reasonable counsel fees expended by him for the common benefit. The court, after hearing the testimony of 19 witnesses, fixed the fee at \$5,000, and determined that defendant Sutro's proportion was \$4,828.25, and the propriety of this order is the sole question involved in this appeal.

Section 796 of the Code of Civil Procedure provides that: "The costs of partition, including reasonable counsel fees expended by the plaintiff, or either of the defendants, for the common benefit, fees of referees and other disbursements must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein. * * * When, however, litigation arises between some of the parties only, the court may require the expenses of such litigation to be paid by the parties thereto, or any of them." The fees of the referees, and all other costs in the case, except the counsel fee of plaintiff, have been adjudged without dispute, to be paid in proportion to the several interests of the parties. There is a sharp conflict in the evidence as to what would be a reasonable attorney's fee for the labor performed, and under these circumstances we will not disturb the judgment. The amount of the attorney's fee was a question of fact, essentially within the province of the trial court to determine from the evidence; and to disturb the trial court's finding in this regard, where, as in this case, there is a substantial conflict in the evidence, would be a trespass upon well-settled principles long recognized by this court. Thomas P. Stoney, attorney for plaintiff, stated in detail the character and amount of the services he had performed as attorney for plaintiff in the action, and he further testified that such services were reasonably worth \$10,000; and this testimony was corroborated by various other eminent members of the bar, as to the value of the services rendered. We think this evidence is amply sufficient to support the judgment. While it is true the witness Stoney did not segregate the value of the services rendered by his firm in furtherance of the personal interests of his client in contesting the claim of title from the value of the

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²Civ. Code, § 3287, provides that every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

services rendered for the common good in the matter of the partition proceedings proper, still the amount and character of labor performed for the common benefit was in evidence before the court; and upon that evidence alone, without the advice of experts, the court had the power to fix the amount of the fee, and we are not prepared to say from the record before us that the amount awarded is too large. It was said in Pennie v. Roach, 94 Cal. 520, 29 Pac. 956, and 30 Pac. 106: "It is true three witnesses for the plaintiff, equally eminent in the profession, testified that his services were worth only \$75,-000; but it was for the court to decide the conflict, and in such cases its ruling will not be interfered with by the appellate court unless there is a clear abuse of discretion;" citing Stuart v. Boulware, 133 U. S. 78, 10 Sup. Ct. 242. We see no abuse of the court's discretion in this case. For the foregoing reasons, it is ordered that the judgment be

I concur: VAN FLEET, J.

HARRISON, J. I concur in affirming the judgment. I do not, however, consider that the fact that there was a conflict of evidence upon the subject of compensation is a reason for its affirmance. The court below was authorized to ascertain what services had been rendered by the plaintiff for the common benefit, including those of his counsel, and to determine the compensation which would be proper to allow him therefor. This is a matter, however, which the court is to determine in the exercise of its judicial discretion, and not necessarily in accordance with the testimony of witnesses. It may fix the compensation to be allowed, in accordance with the practice of the court, and its own knowledge of the usual compensation for such services, without calling to its aid the views and experience of other attorneys, or it may ask their aid, as expert witnesses, for its enlightenment. Yet, if it does call them to its assistance, it is not required to make its decision in accordance with their testimony, but may disregard their testimony entirely. Like determining the amount to be allowed for counsel fees in the foreclosure of a mortgage, or in a suit for divorce, the court is called upon to exercise a judicial discretion in consideration of all the circumstances in the individual case; and, even though the testimony of the witnesses whose opinion it may ask will sustain it in the amount which it allows, yet, if it should appear that it had abused the discretion intrusted to it, its action should be disregarded in this court as readily as an abuse of its discretion in any other respect. The action of a trial court in any matter depending upon its discretion is not conclusive, though it is approved by bystanders, or even by witnesses under oath. Judicial discretion-"discernere per legem"is only the application of rules of law to the circumstances of the case in which the discretion is exercised; and, whenever a question depends upon the exercise of this discretion, it is as open to review as any other question. As error, however, is never to be presumed, the action of the court in the exercise of its discretion must be assumed to have been correct, and the burden is always upon the appellant to make it clearly appear that the court committed error; otherwise, its action must be affirmed. In the present case the court was called upon to determine the amount of labor that had been rendered by the plaintiff's counsel for the common benefit of all parties to the action, and fixed the amount of compensation to be allowed therefor at the sum of \$5,000. While this would appear to be an unusual compensation to be allowed in an ordinary action of partition, and while the amount estimated by the several witnesses as proper to be allowed varied from \$2,000 to \$15,000, it cannot be said, in view of the character of the action, the time occupied in its trial, the questions presented in the case, the value of the property involved, and the services shown to have been rendered by the plaintiff's attorney, that the sum fixed by the court is so grossly disproportionate to its value as to constitute an abuse of its discretion.

COBURN v. TOWSEND et al. (No. 15,246.)
SAME v. BROOKS et al. (No. 15,247.)
SAME v. JOSSELYN et al. (No. 15,248.)
(Supreme Court of California. June 26, 1894.)
CONDEMNATION PROCEEDINGS — ACTION ON BOND
—COUNSEL FEES.

 No action lies against the sureties on a condemnation bond for damages already recovered in an action of trespass against the principal.

Counsel fees cannot be allowed on a general judgment for defendant in condemnation proceedings.

Department 2. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Actions by Loren Coburn against M. D. Towsend and others on bonds. From a judgment for defendants, plaintiff appeals. Affirmed.

Thornton & Merzbach, for appellant. Fox & Kellogg, for respondents.

McFARLAND, J. These cases are substantially alike, and will be considered together. Each action was against the defendants as sureties upon a bond in certain condemnation proceedings. The bond was given in pursuance of an order of the court in the condemnation proceedings that the plaintiff therein might, at the commencement of said proceedings, take possession of lands claimed by plaintiff in these present actions and sought therein to be condemned, upon giving an undertaking as provided by section 1254 of the Code of Civil Procedure

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as it stood prior to 1880. The court in each case rendered judgment for defendants, and plaintiff appeals in each case from the judgment, upon the judgment roll alone.

The judgments must be affirmed. In the first place, the provision of the Code, and of the statute which preceded the Code, under which the orders for possession were made in the condemnation proceedings, was held to be and was unconstitutional, and the bonds or undertakings here sued on were Water Works v. Sharpstein, 50 Cal. void. 284; Sanborn v. Belden, 51 Cal. 266; Vilhac v. Railroad Co., 53 Cal. 209. In the second place, it is found by the court that plaintiff commenced a certain action against Charles Goodail and others, in which he recovered damages in the sum of \$10,000, which was paid; and "that the said damages so recovered by the said plaintiff, Coburn, and so paid as aforesaid, cover all the alleged damages sued for in this action and other damages (except the counsel fees hereinbefore stated), and that the alleged possession and trespass in said action of Coburn vs. Goodall covers and includes all the alleged possession and trespass for which recovery is sought to be had in this suit, and that said damages were recovered by the said plaintiff upon the claim that the said alleged use and possession named in the complaint herein as being held against said Coburn was really and in fact the possession of said defendants in said suit of Coburn vs. Goodall." This being so, appellant cannot again recover from the sureties what was paid by the principals. As to the counsel fees, in the first place, it does not appear that they were withdrawn or were not litigated and determined in the case of Coburn v. Goodall; and, in the second place, we do not know of any law that allows counsel fees in a general judgment for a defendant in a proceeding for condemnation. Mitchell v. Hawley, 79 Cal. 301, 21 Pac. 833. We see no reason for a reversal of the judgment. The judgment appealed from in each of the above cases is affirmed.

DE HAVEN and FITZGERALD, JJ. We concur in the judgment on the second ground discussed in the opinion of Mr. Justice McFARLAND.

103 Cal. 264

McDOWELL'S ESTATE v. HIS CREDIT-ORS. (No. 18,227.)

(Supreme Court of California. June 26, 1894.)

HOMESTEAD-WHAT CONSTITUTES.

A building used primarily as an hotel cannot be regarded as a homestead, though the owner and his wife reside there for the purpose of carrying on the business. 35 Pac. 1031, affirmed.

In bank. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

In the matter of the estate of J. E. Mc-Dowell, an insolvent debtor. From an order

refusing to set apart to him an hotel as a homestead, he appeals. Affirmed.

For prior report, see 35 Pac. 1031.

Warren & Taylor (T. M. Osmont, of counsel), for appellants. L. F. Coburn, for respondent.

PER CURIAM. Upon further consideration of this cause in bank, we are satisfied with the conclusion reached by department 1 in its opinion filed March 2, 1894 (35 Pac. 1031), and, for the reasons stated in said opinion, the judgment and order appealed from are affirmed.

103 Cal. 228

PEOPLE et al. v. MARIN COUNTY et al. (No. 15,426.)

(Supreme Court of California. June 26, 1894.) DEDICATION OF HIGHWAY — EVIDENCE—EASEMENT AND SERVIENT ESTATE—MERGER IN STATE—DI-RECTORS OF STATE PRISON-POWERS.

1. The fact that the board of directors of the state prison have, by the constitution, charge of the prison, does not authorize them to close a public highway passing through the prison grounds because it facilitates the escape of prisoners.

2. Evidence that the owner of land petitioned the county supervisors to declare a road over his land a highway; that the board did so, though without following the statutory requirements; and that the road was used and worked by the public for 25 years as a public highway,—will sustain a finding that there was a dedication and acceptance of the road.

3. The easement which the public has in a highway does not merge in the fee of the servient estate when accuired by the state. 2. Evidence that the owner of land peti-

ent estate when acquired by the state.

Department 2. Commissioners' decision. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by the people of the state of California on the information of the attorney general and others against the county of Marin and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Atty. Gen. Hart (Aylott R. Cotton, of counsel), for appellants. Jas. W. Cochrane and Hepburn Wilkins, for respondents.

SEARLS, C. This action is brought by the people of the state of California upon the information of the attorney general, and by W. E. Hale, warden of the state's prison at San Quentin, Cal., and the board of state prison directors, as plaintiffs, against the county of Marin, the supervisors of said county, and J. Edwards, as road master, defendants, to restrain them from interfering with certain gates and obstructions placed by plaintiffs upon a certain road running to, upon, and across the state prison grounds, and alleged to be a private road. A restraining order issued in the case. Defendants answered, averring that the road from San Rafael to Point San Quentin is a public highway, and runs across and over the premises described in the complaint, viz.

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the state prison grounds, and admit their intention to remove gates and obstructions therefrom. The cause was tried by the court without the intervention of a jury, written findings filed, and judgment entered thereon in favor of the defendants, from which judgment, and from an order denying a motion for a new trial, plaintiffs appeal.

The court found, among other things, that the state of California is, and ever since the 25th day of August, 1869, has been, the owner in fee of the tract or parcel of land described in the complaint, subject, however, to the easement or right of way in the public of the public road and highway known as the "County Road," leading from San Rafael to Point San Quentin, which said road runs across said tract of land, and which said road is now, and has been for over 35 years last, a public road and highway of the county of Marin, and during all of said times has been used and traveled by the public as a public road and highway by all persons traveling from the town of San Rafael to the village of San Quentin, in the county of Marin, except that in the year 1891 and January, 1892, when W. E. Hale, warden of the state prison at San Quentin, Cal., placed gates and obstructions across the same; that the said county road is not, and never was, a private road, but that the same has been, ever since the year 1854, one of the public county roads of Marin county.

The first point made by the learned counsel for the people seems an extraordinary one. It is, in substance, that, conceding the road in question a public highway, running through the prison grounds, still, as the state prison is, by virtue of section 1573 of the Penal Code, under the charge, control, and superintendence of a board of directors, consisting of the governor, lieutenant governor, and secretary of state, which board, under section 2 of article 10 of the constitution, it is provided shall have charge of the state prison, they may, when they deem it expedient in the control of the prison, authorize the closing of the road; and the board having, by resolution, ordered the highway closed, it ceased to be a public road. The record shows that the state is seised in fee of a tract of land consisting of say 150 acres, bounded in part by the Bay of San Francisco, upon which the state prison is constructed, with necessary buildings and walls for the detention of prisoners, and with dwellings, guard houses, etc., for the accommodation of officers, guards, and attachés, across which tract of land the highway in question runs. Under the allegations of the complaint there was evidence tending to show that a portion of the prisoners perform labor and render services outside the prison walls, and that the proximity of the highway, and the right of the public to travel thereon, enables evil-disposed persons to secrete arms, ammunition, citizens' clothing, opium, etc., upon the grounds, where there are procured by prisoners, and by means whereof the escape of prisoners is facilitated, and the good order and discipline of the prison endangered. Conceding all these objections, and it is not perceived how it strengthens the case of the appellant. If the road in question is a public highway, it is so by virtue of having been dedicated to the public, and abandoned as such by B. R. Buckelew, the owner of the land (under whom, by sundry mesne conveyances, the state holds title), about 1854, and by reason of having been accepted by the public and used as a highway long before any title vested in appellant. The authority to close up, and alter public highways outside of municipalities is conferred upon the board of supervisors of the several counties of the state, and can only be exercised through the instrumentalities and in the mode prescribed by The easement of the public in and to a public highway is as sacred as any other property right, and cannot be divested by the action of the owner of the servient tenement in which it exists. No power is given, either by our constitution or laws, to the board of prison directors, to abolish public highways. The Bay of San Francisco and the highway in question may each afford opportunities for evil-disposed persons to come within proximity to the prison for nefarious purposes; and the prison authorities had as much authority to interdict travel upon the one as the other; in other words, it can do neither. It follows that the judgment is supported by the findings. We think the motion for a new trial was properly overruled.

The only question of practical importance relates to the sufficiency of the evidence to sustain the findings of dedication of the road as a public highway by B. R. Buckelew, the owner of the land over which it passed, and its acceptance by the public, or by the constituted authorities of Marin county. Dedication is the setting apart of land for the public use, and an essential requisite to its validity is that it must be of such a character as to conclude the owner. There are two kinds of dedication, viz. statutory and common-law dedication. Of statutory dedication nothing will be said beyond stating the general rule, which is that; in order to constitute a valid statutory dedication, the provisions of the statute, whatever they may be, must be substantially complied with. Common-law dedications are, for convenience of description, frequently subdivided by law writers into two classes,—express dedications and implied dedications. The substantial difference between the two consists in the mode of proof. In the former case the intention to appropriate the land to public use is manifested by some outward act of the owner manifesting his purpose, while in the latter it is usually by such acts or conduct not directly manifesting the intention, but from which the law will imply the intent.

In Waugh v. Leech, 28 Ill. 488, it was said: "The authorities show that dedications have been established in every conceivable way by which the intention of the party could be manifested." And it may be said generally: "If the donor's acts are such as indicate an intention to appropriate the land to the public use, then, upon acceptance by the public, the dedication becomes complete." Elliott, The question of intent Roads & S. p. 92. is paramount, and, without such intent expressly appears, or can be fairly inferred from the acts of the donor, there is no valid dedication. Turning to the evidence set out in the record, and it appears that in 1854 B. R. Buckelew owned the land described in the complaint, and had a sawmill at Point San Quentin; that he needed a road to get to it, and that this road was laid out and graded from the town of San Rafael to Point San Quentin in 1854 or earlier, and was the only traveled road between the two points, and was used by the public generally. widow of B. R. Buckelew testified as follows: "My husband always intended it for a public road. He said so before the year 1855." And again: "He always intended a road there, and he was obliged to have one to get to the sawmill. • • • He wanted it as a public road, so that every one could travel on it." William Patton testified, in substance, that in 1858 the road was a good wagon road, over which the stages from Point San Quentin ran to San Rafael; that it was graded so that two teams could pass, and was called the "County Road." A number of other witnesses had known the road since 1870 as a public highway in charge of the county officers, who kept it in repairs, built bridges, culverts, etc. Convicts from the prison worked on it under the road overseer, working out the poll tax of the officers and attachés of the prison. There was also evidence tending to show that prior to August 6, 1855, B. R. Buckelew filed with the board of supervisors a petition asking that the road be declared a public highway. This petition was lost or mislaid. On the 6th day of August, 1855, an order appears in the record of the board of supervisors reciting the petition of Buckelew for this road from Point San Quentin to San Rafael as being presented. On February 4, 1856, the board of supervisors of Marin county entered an order in their records, which recites that, in pursuance of the petition of a large number of the citizens of Marin county, praying for a public road between the town of San Rafael and the state prison in said county, etc., it appear-. ing that a public road is necessary and important for the convenience of the citizens of said county, "it is hereby ordered by said board of supervisors that the "oad now leading from San Rafael to said state prison be and the same is hereby declared to be one of the public roads and highways of said county." The order required the county surveyor to survey the road, and appointed viewers;

also that a copy of the order be served upon said Buckelew forthwith, "to ascertain whether he has any objections to the above road." The road was surveyed by the county surveyor, who shortly afterwards saw Buckelew, and told him what he had done, whereupon the latter said it was all right. field notes of this survey were recorded in the office of the county surveyor, but, so far as appeared, no plat was ever recorded. That the general public used the road as a public highway is established by the evidence beyond reasonable doubt. It is said that all of this testimony fails to establish a statutory dedication of the highway. This may be conceded, but "in many instances a dedication invalid as a statutory one will be a good common-law dedication." Roads & S. pp. 85, 86. When Buckelew petitioned the board of supervisors to declare the road a highway, it was evidence of an intent on his part to dedicate it to the public use; and when the board of supervisors so declared it, although the proceeding was not accompanied by all the forms required by the statute to constitute it a highway in a statutory sense, still it was evidence of an acceptance by the board for the public as such highway; which evidence, coupled with its uses for a highway, and its improvement as such by public authority, is ample to support an acceptance. Elliott, Roads & S. pp. 115-Section 2619 of the Political Code, as it existed prior to February 28, 1883, provided that "all roads used as such for a period of more than five years are highways." In Bolger v. Foss, 65 Cal. 250, 3 Pac. 871, this court said, alluding to the section quoted supra: "This is more than a declaratory law to the effect that the fact of use of a road as a public road for more than five years shall be evidence, prima facie or conclusive, of dedication by the owners of the lands through which it runs. It is in the nature of a statute of limitations, which gives to the public the right to use the road as a highway, in case it has been so used." Since 1883, section 2618 of the Political Code reads as follows: "In all the counties of this state public highways are roads, streets, alleys, lanes, courts, places, trails and bridges, laid out or erected as such by the public, or if laid out or erected by others, dedicated or abandoned to the public, or made such in actions for the partition of real property." In any view we take of the case, the evidence in support of the findings establishes the fact that the road in question, as early as 1856, was dedicated as a public highway and accepted by the public as such, and by their agents, the supervisors of the county of Marin, and ever since has remained, and now is, a public highway.

The objection that it is not shown to have any specific width is without force in this action, which involves no question as to its width, or of encroachment upon it as a highway, but the simple question whether it is in fact a highway. It may be said, however, that where the right of the public is acquired by user, the boundaries of the road are generally ascertained by reference to the user. Where there is a statute fixing the width of all highways, it has been said that the dedication to the purpose of a highway will be presumed to be the width fixed by the statute; and, where discretion is given to certain officers to determine the width of a highway, such discretion will not be interfered with, except in cases of fraud or oppression. Humboldt Co. v. Dinsmore, 75 Cal. 604, 17 Pac. 710.

So, too, the theory is advanced that when in 1869 the state became the owner of the land over which the road is located, the easement, if any, which previously existed therein being in the state, was merged in the estate which the state acquired to the land. As applied to the law of real property, it may be stated as a general rule that where a greater estate and a lesser coincide and meet in one and the same person in the same right, without any intermediary estate, the lesser is immediately annihilated, or, in the law phrase, is said to be merged—that is, sunk or drowned-in the greater. In equity the rule is different. Rumpp v. Gerkens, 59 Cal. 496. If a trustee holds a leasehold estate in a piece of land in trust for A., or in trust for a specific purpose, and should receive a conveyance of the reversion in the same land in his own right or in trust for B., it could not be said the leasehold estate was merged, because they would not vest in the same right. In the present case, if it can be said the state holds the easement to all the highways within its boundaries, which, under our statutes, cannot, we think, be upheld, still, if it does so hold, it is as the representative of the people, and in trust for the objects of their creation, viz. to enable the people to pass and repass over such roads at will; and such easements are not held in the same right as the title of the state to lands which it has purchased. To attempt to apply the doctrine of merger to such a case is to wrest it from the objects of its creation and existence. In strictness, all public highways belong to the state, which holds them for public use subject to legislative control. In this commonwealth their custody and control outside of municipalities is confided to the supervisors of the several counties in which they are located. The legislature may, by general statute, legislate in reference to them. It has provided, by section 2621 of the Political Code, that "a road laid out and worked, and used as provided in this chapter, shall not be vacated or cease to be a highway until so ordered by the board of supervisors of the county in which said road may be located." This statute is binding upon the state as well as individuals. The general rule is that "whoever takes an estate upon which a servitude has been imposed holds it subject to the same servitude, and in the same manner, as it was held by his grantor." Washb. Easm. p. 7. In Flagg v. Flagg, 16 Gray, 175, it was said that a private way, established under a Massachusetts statute for the use of one or more individuals of a town or proprietors therein, is not discontinued by the unity in one person of title to and possession of all the land through which the road is located. The reasons for a like doctrine in case of a public highway in which the general public has an interest are even stronger.

The objections to evidence are either untenable or relate to testimony which, upon the finding that the road in question was and is a public highway, are wholly unimportant.

The question of costs need not be considered, for the reasons: (1) The record fails to show any objection to costs, if any were allowed by the court, either before or after judgment; and there is no bill of exceptions showing any ruling upon the question of costs. (2) While the court below found as a conclusion of law that the defendants were entitled to costs, the judgment does not include costs, and it may well be that defendants waived the recovery thereof. The judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(108 Cal. 355)

In re HUNT. (No. 21,143.) (Supreme Court of California. July 8, 1894.)

(Supreme Court of California. July 8, 1894.)

Custody of Children.

The father and mother being the natural guardians of a child, can only be deprived of the custody of its person by a proceeding under Civ. Code, § 203.

In bank.

Application for habeas corpus by Henry Hunt in behalf of Henry Hunt and Lizzie Hunt, his minor children. Granted, and children discharged from custody.

John R. Aitken, for petitioner. Mr. O'Grady, for respondent.

PER CURIAM. The children above named having been brought before the court by writ of habeas corpus, and, the court being fully advised as to the matter, it is hereby ordered that said minor children be discharged from the custody of krank Kane, and restored to the custody of the petitioner. The father and mother, being the natural guardians of a child, can be deprived of the custody of its person only by a proceeding under section 203 of the Civil Code. The proceeding by which the superior court has committed these children to the custody of a stranger is wholly unauthorized.

GAROUTTE, J. I concur in the judgment, but am not prepared to coincide with the ma-



jority of the court upon the important question stated in the last clause of the foregoing opinion without an opportunity for further examination.

103 Cal. 357

DULIN v. PACIFIC WOOD & COAL CO. et al. (No. 19,251.)

(Supreme Court of California. July 6, 1894.)

Corporations—Election of President.

Since Civ. Code, §§ 307, 312, provide that in a corporation election every stockholder must vote his shares in person, or by proxy in writing, a president of a corporation cannot enforce a verbal agreement by the stockholders that he shall continue as president for two years longer, the agreement providing no way for its enforcement. Beatty, C. J., dissenting.

In bank. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by E. G. Dulin against the Pacific Wood & Coal Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

For opinion in department, see 35 Pac. 1045.

D. L. Withington and Works & Works, for appellants. V. E. Shaw and Conklin & Hughes, for respondent.

PER CURIAM. Upon further consideration of this case in bank, we are satisfied with the opinion rendered in department (35 Pac. 1045), and, with the conclusion therein reached, and for the reasons given in said opinion, the judgment is affirmed.

BEATTY, C. J. I dissent.

103 Cal. 67; 4 Cal. Unrep. 676

LANCASTER et al. v. MAXWELL et al.
(No. 15,017.)

(Supreme Court of California. June 12, 1894.)
NOTICE OF APPEAL.

Under Code Civ. Proc. § 940, providing that notice of appeal must be served on every "adverse party," an appeal (in an action by a subcontractor against the original contractor and the landowner to enforce a mechanic's lien) by the landowner from a judgment ordering the sale of the land (any deficiency to be docketed as a personal judgment against the contractor) will be dismissed where no notice thereof is served on the contractor.

Department 2. Appeal from superior court, city and county of San Francisco; Eugene R. Garber, Judge.

Action by J. R. Lancaster and others against Thomas Maxwell and C. B. Gregory. There was a judgment for plaintiffs, and defendant Gregory appeals. Dismissed.

Ash & Mathews, for appellant. Wickliffe Matthews and A. D. Lemon, for respondents.

McFARLAND, J. This is an action to foreclose certain mechanics' liens. Defendant Gregory is the owner of the buildings involved, and defendant Maxwell was the

original contracter. Both defendants suffered default. The liens sued on grew out of labor and materials done for and furnished to the contractor, Maxwell. By the judgment it was decreed that the land, buildings, etc., of Gregory be sold, and the porceeds appropriated to the payment of the amounts found due upon the liens, and that if such proceeds should not be sufficient to pay all the liens "the deficiency thereof shall be docketed as a personal judgment against said defendant Thomas Maxwell." The defendant Gregory appeals from the judgment, and also from an order denying her motion to set aside her default, made upon the grounds of surprise, excusable neglect, etc. The notice of appeal was not directed to or served upon the codefendant, Maxwell, and, for that reason, respondents move to dismiss the appeal.

The court did not abuse its discretion in refusing to set aside the default; and while we have looked through the transcript and briefs, and see no reason why the judgment should, under any view, be reversed, it is not necessary to discuss the other points suggested, because we think that the appeal should be dismissed. A notice of appeal must be served on every "adverse party." Section 940, Code Civ. Proc. And adverse parties are those who are "interested in the judgment, and would be affected by its reversal." "Every par-O'Kane v. Daly, 63 Car. 319. ty whose interest in the subject-matter of the appeal is adverse to, or will be affected by, the reversal or modification of the judgment or order from which the appeal has been taken, is, we think, an 'adverse party' within the meaning of these provisions of the Code, irrespective of the question whether he appears upon the face of the record in the attitude of plaintiff or defendant or intervener." Senter v. De Bernal, 38 Cal. 637. And it is quite clear that in the case at bar the interest of Maxwell would be "affected by the reversal" of the judgment. Appellant seeks particularly a reversal of that part of the judgment which decrees her property to be sold to satisfy the liens, and it is apparent that such reversal would be adverse to the interest of Maxwell. The appeal

We concur: DE HAVEN, J.; FITZGER-ALD, J.

is dismissed.

108 Cal. 193

PEOPLE v. STOKES. (No. 21,068.) (Supreme Court of California. June 23, 1894.)

CRIMINAL JURISDICTION — DIVISION OF COUNTY —
EFFECT ON PENDING PROSECUTION—MISCONDUCT
OF JURY—READING NEWSPAPER ARTICLES.

1. Where, after a prosecution is commenced, the part of the county in which the offense was committed is organized into a new county, such new county has jurisdiction of the offense, the prosecution in the old county having hear dismissed.

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2. Where the jury, after retiring to delib-

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erate on a verdict, read newspaper statements that two men will hang the jury, that their identity is known to the public, and that attemps were made to corrupt the jury, the verdict will be set aside.

In bank. Appeal from superior court, Kings county; Justin Jacobs, Judge.

Elta Stokes was convicted of grand larceny, and appeals. Reversed.

Horace L. Smith, for appellant. W. H. H. Hart, Atty. Gen., and M. L. Short, Dist. Atty., for the People.

GAROUTTE, J. The defendant was charged with robbery, alleged to have been committed at Armona on March 2, 1893. He was convicted of grand larceny, and appeals from the judgment and order denying his motion for a new trial. Upon March 2, 1893, the date of the alleged crime, Armona was in Tulare county. On May 29, 1893, the county of Kings was organized out of a portion of Tulare county, and Armona is now, and has been since that time, in the county of Kings. The defendant contends that the superior court of Kings county had no jurisdiction over the alleged offense, and for that reason the judgment of conviction is void. He raised the question in the court below upon motion to dismiss the prosecution for want of jurisdiction, and, on the hearing of his motion, supported it by evidence showing that before the organization of Kings county there was commenced in the superior court of Tulare county a prosecution for the identical offense charged in this case, which prosecution was pending in said court at the date of the organization of said Kings county. The prosecution in Tulare county was dismissed prior to the inception of criminal proceedings against the defendant, upon which he was subsequently convicted in Kings county. Has the accused been tried and convicted in the proper county? We find no case directly in point upon the question here involved. The authorities all agree that the newly-created county has jurisdiction of a defendant charged with the commission of an offense prior to the creation of the new county, and upon territory within its boundary lines. But the question of jurisdiction seems never to have arisen where a prosecution was actually pending at the time the new county was created. As supporting the general principle above stated, see McElroy v. State, 13 Ark. 708; Murrah v. State, 51 Miss. 675; State v. Bunker, 38 Kan. 737, 17 Pac. 651; State v. Jones, 9 N. J. Law, 357; State v. Donaldson, 3 Heisk. 48; Bish. Cr. Proc. § 49. We do not think that the fact of an existing prosecution against the defendant in Tulare county at the date of the creation of the new county of Kings causes any exception to the general rule declared in the foregoing authorities. At the time the accused was tried and convicted, no proceedings were pending against him in Tulare county, and

we are unable to see that he occupied any different position than if there had never been any prosecution begun in that county. Possibly, a judgment of conviction under the first prosecution would have been a valid and legal judgment. U.S. v. Dawson, 15 How. 467, but, even conceding such to be the fact, it does not follow that the mere circumstance of the existence of a pending prosecution at the date of the creation of the new county (which was subsequently dismissed) is a bar to a second prosecution. Why should it be? In the absence of the first prosecution, it is conceded that the new county was the proper county for trial; yet, under the first prosecution, it is not claimed that the defendant was either acquitted or convicted, for it is perfectly apparent that jeopardy did not attach. He now stands before the court exactly as if no proceedings were ever taken against him in Tulare county. If the superior court of that county had no jurisdiction to try the defendant, then, beyond question, the prosecution and conviction were properly had in Kings county; and, if the superior court of Tulare county had jurisdiction of the offense and the defendant, it had jurisdiction for all purposes, and consequently it had the power to dismiss the prosecution and discharge the defendant. The fact that the court may have made the order upon insufficient grounds, and thus have committed error in so doing (which is not conceded), is foreign to the question. The dismissal of the case was a matter within the power of the court, and the order of dismissal, as far as the defendant is concerned, was as effectual as though made upon the most incontestible ground. We see no cause of complaint upon his part. He has been deprived of no constitutional right. He has had a speedy and public trial by an impartial jury selected from the county including the territory upon which the crime was committed. Indeed, the defendant is favored in this respect, for he has been tried by a jury selected from a vicinage much more restricted than if the trial had been had in the county where the original prosecution was begun.

2. It is insisted that a new trial should have been granted because of misconduct of the jury after they had retired to deliberate upon their verdict. The misconduct charged consisted in the jury reading from a local newspaper an article containing a report of some of the evidence in the case, given at the trial, which included a matter of evidence the court had rejected as inadmissible, and also contained intimations that two of the jurors had been corrupted. The evidence bearing upon the question was given by the officer in charge of the jury. No contrary showing was made by the affidavits of jurors or otherwise. Indeed, conceding that the article was read by them, they could make no showing that would relieve them of the effects of their own misconduct.

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A juror is not allowed to say: "I acknowledge grave misconduct. I received evidence without the presence of the court. But those matters had no influence upon my mind when casting my vote in the jury room." The law, in its wisdom, does not allow a juror to purge himself in that way. It was said in Woodward v. Leavitt, 107 Mass. 466: "But where evidence has been introduced tending to show that without authority of law, but without any fault of either party or his agent, a paper was communicated to the jury which might have influenced their minds, the testimony of the jurors is admissible to disprove that the paper was communicated to them, though not to show whether it did or did not influence their deliberations and decisions. A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind." There are intimations in the cases of People v. Goldenson, 76 Cal. 328, 19 Pac. 161, and People v. Murray, 85 Cal. 350, 24 Pac. 666, tending to oppose the foregoing views, but they do not express the law. The article of which complaint is made had the following heading: "The Stokes Case-Third Day of the Armona Robbery Trial-Undersheriff Hall Testifies about the Fifty-Dollar Silver Certificate-A Condensed Report of the Trial-A Hung Jury Intimated - Colonel Mazuma's Presence." The article concludes as follows: "It is currently reported on the streets that the jury will fail to bring in a verdict, and that two men will hang the jury. It is also believed that the two men are known, and that the whereabouts of 'Colonel Mazuma' are also known." It is exceedingly unfortunate that a newspaper should publish such an article pending the trial of an important criminal Newspaper comments of this character are well calculated to interfere with the due and proper administration of justice. The jurors should not have read the article. The newspaper should not have published it. The publication of such articles during the pendency of important trials serves no good purpose, but, on the contrary, tends to impede and adulterate the stream of justice. This article results in giving a defendant a new trial in an important case, for we discern no other ground for a reversal of the cause, save the one now under consideration.

We will now pass to an examination of the law. In speaking to this question, Mr. Hayne, in his very valuable work upon New Trials and Appeals, after an exhaustive review of both principle and authority, at section 27, says: "The rule laid down by the foregoing cases, viz. that, where an irregularity is shown which may have influenced the result, it is for the successful party to show that as a matter of fact it did not, rests upon sound principles. Corrupt and other improper actions are usually done in

secret, and are carefully covered up; and it would always be difficult, and in many cases impossible, for the moving party to show that the irregularity was in fact followed by some corrupt or otherwise improper influence, while it is comparatively easy for the juror to explain an apparently doubtful act, if it be innocent. * * * The rule above stated is sustained by high authority. The views of such jurists as Shaw, Sharkey, Field, and Clifford are not to be lightly put aside. In California the cases of People v. Backus, 5 Cal. 276, and People v. Brannigan, 21 Cal. 337, and People v. Turner, 39 Cal. 370, seem to conclusively settle the mat-The rule, however, like every other rule, is to have a reasonable, and not a forced, application. It does not apply where there is only a bare possibility of the result having been affected. The case must be such that the court cannot determine with any reasonable certainty whether the result was affected or not." As directly supporting the author's text and the views of this court, we cite Com. v. Roby, 12 Pick. 519; Hare v. State, 4 How. (Miss.) 193; McCann v. State, 9 Smedes & M. 468; Keenan v. State, 9 Wis. 138; Wormley's Case, 8 Grat. 714; State v. Prescott, 7 N. H. 288; People v. Backus, 5 Cal. 276; People v. Brannigan, 21 Cal. 337; People v. Turner, 39 Cal. 370; People v. McCoy, 71 Cal. 395, 12 Pac. 272.

The remaining question presented is, was the article not calculated to prejudice the result of the trial? Is it apparent that it could have had no influence upon the verdict? If not, the defendant should be awarded a new trial, for he has not yet had that fair and impartial trial to which he is entitled by constitution and statute. It is said in People v. McCoy, supra: "There is no doubt, however, that the reading of newspapers by jurors while engaged in the trial of a cause is an inattention to duty which ought to be promptly corrected; and, if the newspaper contains any matter in connection with the subject-matter of the trial which would be at all likely to influence jurors in the performance of duty, the act will constitute ground for a motion for a new trial. * * * If it be proved as a fact, or may be presumed as a conclusion of law, that the verdict may have been influenced by information or impressions received from sources outside of the evidence in the case, such a verdict is subject to be set aside on a motion for a new See, also, Carter v. State, 9 Lea, 440. Without considering that portion of the article containing a misrecital of the evidence, we pass to the extract quoted above. That extract, in effect, states that two men will hang the jury, and that their identity is known to the public. If there were men upon the jury who were wavering as to the character of their verdict, it is impossible for this court to say that this article, when read in the jury room, did not have the effect of directing their final action. We cannot

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say from an inspection of the record that the reading of it by the jurors had no effect upon the character of the verdict rendered. We cannot say that the verdict of guilty is based wholly upon the evidence introduced at the trial. The article goes to still greater lengths, and intimates that attempts are being made to corrupt the jury. It appears that the term "Colonel Mazuma" not only does not indicate some gentleman with a military title, but it does not even refer to a person at all. We fail to find the term mentioned by our lexicographers, but understand it to be a modern provincialism, probably emanating from the daily press, and used when referring to the corrupt application of money in the accomplishment of certain ends. If these jurors understood this term with the signification thus attached to it, it of itself furnished ample material to demand a retrial of the case. We see no other error in the record. As was said in People v. Mitchell, 34 Pac. 698: "It is unfortunate for the jury system, and for the cause of justice, that such episodes should occur in the trial of causes; but the evil will be soonest suppressed by wiping out verdicts rendered under such circumstances." It is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: FITZGERALD, J.; HARRI-SON, J.; McFARLAND, J.; VAN FLEET, J.

103 Cal. 71
CASTLE et al. ▼. SIEGFRIED et al. (No. 15,092.)

(Supreme Court of California. June 13, 1894.)

Trade-Mark-Infringement.

The labels on packages of tea imported by plaintiffs stated that their firm was the importer, and this was followed by an X-mark with the firm's initials in the angles, and a statement of the kind of tea, and that it was imported from Japan, where the packages were put up. Defendants' tea was put up in the same size packages, and the labels were identical, except that the name of the importing firm and the initials in the X-mark were different. It appeared that this kind of a label had been used by tea importers for 20 years, and it did not appear that plaintiffs invented it. The quality of defendants' tea was the superior, and it appeared that persons purchasing tea were influenced merely by the initials in the X-mark. Held, that there was no infringement of plaintiffs' trade-mark.

Department 1. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by Michael Castle and others, partners under the firm name of Macondray & Co., against John C. Siegfried and Max Brandenstein, partners under the firm name of Siegfried & Brandenstein. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirmed.

Galpin & Zeigler, for appellants. Mastick, Belcher & Mastick, for respondents. HARRISON, J. Action for the infringement of a trade-mark. The plaintiffs, a mercantile house in San Francisco, under the name of Macondray & Co., have been for many years engaged in importing teas from Japan, which are put up for them in that country in pound and half-pound packages, on each of which is affixed a label, the lines of which are printed in different colors, designating them as the importers, and containing also a characteristic mark or brand, as follows:



-the whole surrounded with a gold border. The defendants are also importers of teas into San Francisco from Japan, and have for many years imported teas put up in pound and half-pound packages, marked with labels containing an X-shaped character similar to that used by the plaintiffs, but with different initial letters in the angles thereof. The plaintiffs brought this action, alleging that the acts of the defendants are an infringement of their right to a trade-mark, and praying that they be enjoined from its further use. The court below held that the marks used by the defendants do not infringe upon any trade-mark of the plaintiffs, and are not a colorable or any imitation of any trade-mark of the plaintiffs, and rendered judgment in favor of the defendants, dismissing the complaint. The plaintiffs moved for a new trial, upon the ground that the decision of the court was not sustained by the evidence. This motion was denied, and the plaintiffs have appealed.

A trade-mark may be appropriated by any one dealing in an article of commerce, "to designate the origin and ownership thereof," but such dealer cannot exclusively appropriate any designation or part of a designation which relates only to the name, quality, or the description of the thing or business, or the place where the thing is produced or the business is carried on. Civ. Code, § 991. There is a marked distinction between the appropriation by an individual of some mark or symbol, coined or invented by him, to designate an article or proprietary compound which he manufactures, and his appropriation of a mark to designate an article of commerce dealt in by him in common with oth-There can be no exclusive right to put up or sell tea in packages of any particular form or size, or to designate the packages by any particular arrangement of words, which indicate no more than the name or amount or quality of the tea, or the place where it is produced or sold. The plaintiffs did not give any evidence in the court below tending to show that they had invented or devised the trade-mark called by the witness the "sawbuck" or "cross-bar" mark or brand, but merely that they had made use of it,

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with their initials in the angles, for many years; nor did they show that they were the first who had made use of this brand as a distinguishing mark for their goods; and there was evidence before the court that this mark had been used by dealers in tea long anterior to the time when the plaintiffs claim to have first made use of it, and that it had been used in San Francisco as a brand or mark upon packages of tea for upwards of 20 years by other persons who were dealing in tea in San Francisco and on the Pacific slope. The court finds that the only parts of the labels which were invented or designed or solely used by the firm of Macondray & Co. are the combination of the Xshaped character with the letters "M. M. & Co.," and the name "Macondray & Co." This is, indeed, all of the label that could be appropriated by the plaintiffs as a trade-mark, and is what is claimed by them in the complaint to be their trade-mark, and to which the evidence at the trial was directed. It was also shown that the packages in which both the plaintiffs and the defendants, as well as other importers, are accustomed to have the tea imported, are of the shape and size in which it is usually put up and sold; that the paper in which it is wrapped is manufactured in Japan, and that the labels thereon are printed there; that these labels are in the usual form of type used upon tea labels, and are printed in alternating colors, such as are commonly used in that country, and are surrounded with a gold border; that the only distinguishing mark of the several importers is their own name printed upon the label, or their initials in the angles of the X. It was also shown, and the court found, that the defendants had sold to dealers tea put up in packages marked with labels containing the names of such dealers, instead of the names of the plaintiffs, and having their initials in the angles of the X, instead of the initials "M. M. & Co.," and having also the same descriptive name of the tea; that the size and shape of the packages and the labels thereon were similar to those on the packages of tea sold by the plaintiffs, and were of the form and character in common and general use in the tea trade, and used by most importers and dealers in tea; that all of these teas were so packed and marked at the direction of the dealers to whom they were sold, and the initial letters placed in the angles of the X were in each case the initials of the name or firm name of such dealer. The teas thus put up and sold by the defendants were of a quality equal, if not superior, to those put up and sold by the plaintiffs; and the court finds that the defendants acted in good faith, and were free from any fraudulent intent, in their dealings in the teas. It was also shown that persons wishing to buy ten were governed by the initials within the X, or by the name of the in porter stamped upon the packages, and that the different colored letters on the labels

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had no significance with those purchasing teas; and the court found that no person had been, or was likely to be, deceived by any resemblance between the packages of tea sold by the defendants and those sold by the plaintiffs. We are of the opinion that the evidence fully sustains the findings of the court, and that its judgment is correct. The judgment and order appealed from are affirmed.

We concur: GAROUTTE, J.; McFAR-LAND, J.

108 Cal. 125

RUGGLES v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,682.)

(Supreme Court of California. June 15, 1894.) CONTEMPT—WHAT CONSTITUTES — EFFECT OF APPEAL.

Where the superior court makes an order for family allowance from which an appeal is taken, an administrator is not guilty of contempt for not paying said allowance pending an appeal. Beatty, C. J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by James Ruggles for a writ of prohibition against the superior court of the city and county of San Francisco, and J. V. Coffey, judge thereof. Writ allowed.

M. T. Moses and Chas. A. Sumner, for petitioner. Garret W. McEnerney and Stanley, Hayes & Bradley, for respondents.

VAN FLEET, J. Application for prohibition. Petitioner is the administrator of the estate of one Henry Welch, deceased, in course of administration in the department of said respondent superior court presided over by said Hon. J. V. Coffey, judge thereof. On February 16, 1894, an order was made and entered in said estate directing petitioner, as such administrator, to pay to the widow of said deceased \$7,375, as accrued and unpaid family allowance. From this order the administrator on February 20, 1894, perfected an appeal to this court. Thereafter the widow moved this court to dismiss said appeal, which motion was subsequently, on the 5th day of March, denied, and the appeal is still pending and undetermined. Subsequent to the denial of said motion, the respondent judge, on the 7th day of March, at the instance of the widow, caused a citation to be issued and served upon petitioner, requiring said petitioner to show cause before the respondent superior court, on the 8th day of March, 1894, why he should not be punished for contempt in failing and refusing to obey the order of February 16th requiring him to pay said family allowance. On the last-mentioned date petitioner, in obedience to the citation, appeared before said court, and in response thereto brought properly to the attention of the court

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the said appeal and the order of this court denying the motion to dismiss the same, and then objected that neither the superior court nor the judge thereof had any power or jurisdiction to proceed with or hear said matter of contempt, or to enforce said order for the payment of family allowance, by reason of the pendency of the appeal. But notwithstanding the showing so made by petitioner, and disregarding his objections, said superior court and the judge thereof, respondents, threatened to proceed in said matter, and to punish petitioner for his refusal to obey said order; whereupon this application for prohibition was made.

The sole question arising is as to whether the superior court is acting in excess of its jurisdiction in the premises. Under the facts stated, we are constrained to hold that it is. The appeal from the order in question operated as a supersedeas, and stayed all further proceedings in the court below in the particular matter involved in the order appealed from. By the appeal the order or decree is set at large, and the subject-matter removed from the jurisdiction of the lower court until the appeal has been determined and the matter remitted back from the appellate court. In the case of Pennie v. Superior Court, 89 Cal. 31, 26 Pac. 617, the lower court made an order for family allowance, from which an appeal was taken. Pending the appeal, the lower court made an order directing the administrator to pay the money allowed by the previous order. The latter order was annulled by this court on certiorari, upon the ground that the appeal had removed the subject-matter of the order from the jurisdiction of the superior court, and it had not authority to further proceed with its enforcement pending the appeal. And in the recent case of Ex parte Orford (opinion filed in department 2 of this court, June 8, 1894), 36 Pac. 928, the same question arose. An administratrix of an estate in probate had been ordered to pay a certain claim against the estate; she appealed from the order, but, notwithstanding her appeal, the lower court proceeded against her as for a contempt in refusing obedience to its order, and punished her by imprisonment until she should comply with the order. This court discharged her on habeas corpus, holding that "the petitioner, having appealed and stayed all proceedings upon the order which she is charged with violating, cannot, pending her appeal, be punished for a failure to obey it." It is urged here by the respondents, however, as it was on the motion to dismiss the appeal, that the appeal attempted to be taken by petitioner herein is ineffectual to stay the hand of the lower court, because no appeal lies from an order such as the one under consideration. But that question does not arise in this proceeding. An appeal from the order has been taken to this court, and this court has refused to dismiss it; this determination is as effectual for the purposes of this case as if determined for all purposes. Its effect is that this court is thus far entertaining the appeal, and while it does so the respondents are not at liberty to proceed in the matter. Whether the order in question shall be ultimately held appealable is a question that will properly arise in the matter in which the appeal is pending, but, for the reason stated, it is not involved here.

The proceedings complained of being in excess of the jurisdiction of respondents, a peremptory writ should issue as prayed. It is so ordered.

We concur: BEATTY, C. J.; DE HAVEN, J.; GAROUTTE, J.; HARRISON, J.; McFARLAND, J.; FITZGERALD, J.

On Rehearing. (July 17, 1894.)

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, and, having concurred at the time in the decision heretofore pronounced by the court, I desire to state the grounds of my present conviction that said judgment was erroneous. When the superior court has made an order or judgment from which there is no appeal, and which is therefore a final adjudication of the rights of the litigants, the prevailing party is entitled to demand the enforcement of such order or judgment; and it is not only the right but the duty of the superior court to accord the proper relief by the appropriate process. That court is not relieved of such duty by the fact that the defeated party has attempted to appeal to this court, and thereby to stay the proceedings. When asked to enforce its order, and the fact is brought to its knowledge that an appeal has been taken or attempted, a question is then presented as to its jurisdiction to proceed, dependent for its solution upon the further question whether the order is final and unappealable or not; and this question it must decide. If it should erroneously decide that the order is not appealable when it is appealable, then alone has this court the power to interpose by prohibition and arrest its process. No one denies the truth of this proposition, as applied to a case where there has been no motion made in this court to dismiss the appeal upon the ground that the order is nonappealable; but because in this case the prevailing party in the superior court raised the question here by a motion to dismiss, which was disposed of without any decision of the question involved, a distinction is made, and it is held that the superior court is exceeding its jurisdiction in enforcing the order in question, whether it is final and nonappealable, or not; in other words, that it is exceeding its jurisdiction in enforcing an

order which it holds to be final, and which we have never held, do not now hold, and may never hold to be appealable. For it should be understood—a fact which does not clearly appear from the opinion of the court -that the order overruling the motion to dismiss the appeal was made expressly without prejudice, which, whatever else it may or may not mean, certainly does mean that the question involved in the motion was left open and undecided. That is to say, the motion was disposed of, and taken as completely out of the case, for all purposes, as if it had never been made, but the question whether the order of the superior court is final or appealable was left at large; neither party was estopped; nothing was foreclosed. Such being the case, the party claiming the benefit of the order, having been turned out of this court without a decision of a question which undoubtedly he could have presented in the first place to the superior court, returned to that tribunal and demanded the enforcement of its order, a right to which he is clearly entitled if it is final. I can see nothing in the proceedings here which relieved the superior court of the duty of hearing and determining the question so presented. The fact that we were "entertaining the appeal" is no answer to this proposition. It might just as truly, and with as much meaning, have been said that we were "entertaining the appeal" if no motion to dismiss it had ever been made. We are always entertaining appeals in cases in which no motion to dismiss has been made, and in which there is a question whether the order or judgment of the lower court is appealable or not. In all such cases, the question of our jurisdiction is pending and undetermined in the same sense and to the same extent that it is pending and undetermined in this case. But no one would contend for a moment that in such a case we could properly prohibit the enforcement of the order appealed from without determining that it was appealable, for unless we did hold it appealable we could not say that the lower court was exceeding its jurisdiction. If a proposition so plain needed authority to support it, such authority is found in the case of Tyler v. Connolly, 65 Cal. 28, 2 Pac. 414.

In every appeal in which a question may be raised as to the finality of the order or judgment of the lower court, that question must be ultimately decided here, but, upon the question of enforcing the order or judgment pending the appeal, the lower court not only can, but must, decide in the first instance whenever its decision is properly invoked. This court may decline to decide the question upon a preliminary motion, and in the absence of a full record, as was done in this case, but when it chooses to take that course (disposing of the motion, but reserving the right upon the final submission of the cause to consider the question of jurisdiction then, and meantime leaving it undetermined) the case is put in precisely the same condi-

tion as if the motion had not been made, and no valid distinction can be raised by the suggestion that we are "entertaining the appeal."

For these reasons I am of the opinion that, until we are prepared to say that an appeal lies from the order of the superior court, we have no right to prohibit its enforcement.

WARNER ▼. F. THOMAS PARISIAN DYE-ING & CLEANING WORKS. (No. 15,-266.)

(Supreme Court of California, July 9, 1894.) Motion to set aside judgment, and to reinstate cause. Granted.

For original opinion, see 37 Pac. 153.

PER CURIAM. The appellant's brief in this cause having been heretofore stricken out by the court, by reason of objectionable matter contained therein, and appellant having been thereafter, upon application, granted permission to file a brief in said cause, omitting such objectionable matter, and the opinion in said cause having inadvertently been filed, and judgment entered, before appellant had opportunity to file said brief, it is ordered that the judgment herein, and the submission of said cause, be, and the same are hereby, set aside, and said cause restored to the calendar; that appellant have 10 days from this date within which to file brief; and that, thereupon, said cause stand submitted.

108 Cal. 187

VALLENS et al. v. TILLMAN et al. (No. 15,-458.)

(Supreme Court of California. June 23, 1894.)
Breach of Contract—Damages.

Defendants, being indebted to plaintiffs, agreed to buy from them 50,000 cigars per month until the profits thereon paid the debt; cigars to be of specified brands, and to correspond to samples. After defendants received a part of the cigars, they wrote plaintiffs they were not according to sample, and that they would take no more. Plaintiffs replied that if the cigars were not according to sample they would send them some that were, which defendants refused to accept. Held, plaintiffs could recover the debt, less the profits on the cigars accepted by defendants.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Eugene Vallens and another against Frederick Tillman and others for damages for breach of contract. Judgment for defendants, and plaintiffs appeal. Reversed.

Edmund Tauszky, for appellants. Daniel Titus, for respondents.

PER CURIAM. The plaintiffs are manufacturers of cigars at Chicago; the defendants, wholesale dealers at San Francisco.

Prior to February 4, 1889, defendants had purchased goods from plaintiffs, and, differences having arisen between them, a compromise was made through an agreement in writing of that date. In that agreement, among other things, it was stipulated that the plaintiffs claimed to have lost in the settlement \$2,983.75, which defendants were willing "to assist in making up to them," and therefore agreed to purchase from plaintiffs 50,000 clgars per month for two years, "or until said party makes up said loss." The contract then proceeds to specify the brands to be furnished, which were to correspond to samples, and it was agreed "that the goods shall be equal in size, shape, and quality to said samples." The profit per 1,000 upon each brand was fixed in the agreement. It then states: "Should said party of the second part [defendants] conclude to go out of business of vending cigars at any time hereafter, or for any other reason, it may be released from its agreement to buy 50,000 cigars per month by paying to the said party of the first part the said sum of \$2,983.75, or such part thereof as may remain unpaid at the time of so electing to discontinue such purchases." It is alleged by plaintiffs in their complaint that, since this agreement, the defendants have purchased from plaintiffs 180,000 cigars, the profits on which amount only to \$380, and that defendants have refused to purchase any more, wherefore plaintiffs demand judgment for the sum of \$2,603.75, which is the said sum of \$2,-983.75, less the said profits. The answer admits the contract; denies that plaintiffs have performed its conditions, that defendants have failed to perform, or have refused to purchase any more cigars from plaintiffs, or that plaintiffs have been willing to sell cigars in accordance with said agreement. Defendants aver that they performed the conditions of said contract in good faith until the plaintiffs committed a breach thereof by sending goods inferior in quality to the samples; that the defendants bought 180,000 cigars, but the goods were not like the samples, nor equal in size, shape, or quality; that defendants called plaintiffs' attention to the breach of the contract, and required them to furnish goods of the quality, size, and shape of the samples, which plaintiffs refused to do. The cause was tried with the aid of a jury, and the verdict and judgment were for defendants. Plaintiffs appeal from the judgment, and from an order refusing a new trial. Appellants contend that the court erred in admitting certain testimony over their objections, in giving instructions asked for by defendants, in refusing instructions asked for by plaintiffs, and in the instructions given of its own motion. Also, that the verdict is against the evidence.

It appears from testimony which is not disputed that, under the contract, defendants continued to take cigars from plaintiffs until July 18, 1889. At that time they had

received 160,000 and had paid for 120,000. There had been no complaint in regard to the goods furnished. On that day, however, they sent a telegram to plaintiffs, as follows: "Do not ship any more cigars. Will write particulars." July 29th plaintiffs received at Chicago a letter from defendants explaining the telegram. They complained of the cigars sent as not being like the samples in quality or shape, and say they had suffered heavy loss, and add: "Although by rights we should hold the goods subject to your order, we will keep them and bear the loss ourselves, rather than have any more trouble with you; but at the same time positively withdraw from the contract, and terminate it right here, and will not receive any more cigars from you. Our transactions with you thoroughly satisfy us not to have any more to do with you whatsoever. Our statement as regards the quality of the goods can be substantiated by any reliable and square dealer or manufacturer of cigars who understands his business. Please return contract on receipt of this, and we will withhold payment of bill of June 25th until we hear from you." Two days later Tillman wrote another letter, reiterating the complaints in regard to the goods, and concluding: "Under the circumstances will not receive or purchase any more goods from you, as I certainly shall not deal with parties that I cannot trust." July 27, 1889, plaintiffs replied to the two letters, asserting that the goods sent were according to contract, but admitting that defendants had a right to retire from the contract upon paying the sum of \$2,983.75. upon which they admitted defendants were entitled to a credit of \$380. They demanded payment of the bill acknowledged to be due and the balance of the \$2,983.75. August 7th plaintiffs received a reply to this letter from defendants, in which defendants say that they wish no further argument in the matter, and that they hold the goods not paid for subject to plaintiffs' order. November 29th plaintiffs replied, saying: "If you have any goods which you claim we did not make in accordance with the contract now existing between us, you can return them to us, and we will make others in place of them. We firmly insist upon the completion of this contract, and will either furnish the goods to you as specified in said contract, or you may pay us the amount in cash which is due us on the contract." December 13th defendants replied. taunting the plaintiffs for not having sued, but at the same time consenting to pay for all the cigars they had received, and also to accept 20,000 others which had been stopped in transitu, although not up to the contract. They add: "In withdrawing from the contract which you did not keep we are fully justified, and think that in paying for all the goods that you sent us, at your own price, we are treating you with liberality." This must be held a refusal to accept more

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goods, even though they were like the samples. Respondents' counsel admits here that the fact that plaintiffs had furnished cigars which did not come up to the samples, which defendants had taken and paid for, did not justify defendants in abrogating the contract and in declining to accept goods thereafter, provided plaintiffs would furnish such goods as were called for in the contract; but he contends that plaintiffs should have tendered other goods, which did come up to contract standard, and that defendants would have been liable only when they declined to accept and pay for such goods. He says defendants have never declined to accept and pay for any goods which were in accordance with the contract. In this, however, defendants' counsel is clearly in error. correspondence above quoted shows that defendants declined to take any goods from plaintiffs, and notified them that they would receive no more. There were no conditions in this notice. Besides, there were a number of brands, and defendants had the privilege of ordering any of them, and in the absence of such orders plaintiffs could not furnish the goods. The evidence shows that none were ordered. Furthermore, plaintiffs did offer to furnish other goods, and the defendants declined to receive them. And yet, further, under the contract, defendants had the right to discontinue taking the goods upon paying the \$2,983.75. Plaintiffs therefore could not force them to accept and pay for goods, even if they had corresponded with the samples. Their remedy was to bring suit, as they have done, for the balance of the \$2,983.75.

The evidence was not conflicting upon any material point, but the court instructed the jury, at request of the defendants, as follows: "If you should find from the testimony that the cigars furnished by the plaintiffs were not of the size, shape, and quality of the samples left by them with the defendants, then the defendants were not bound to continue buying cigars of plaintiffs, nor were they bound to pay the amount sued for, nor any part thereof, and your verdict should be for the defendants." The court also refused to instruct the jury, at the request of plaintiffs, in accordance with the views of the law which are now admitted to be correct. This was, of course, error. In fact, as the evidence was not conflicting, or the inference from it doubtful, the court should, if requested, have instructed the jury to find for plaintiffs. The court also gave further instructions of its own motion, and at the request of the jury. These instructions are not excepted to in such way that they can be reviewed here, but may be referred to for the purpose of determining if the errors above alluded to were there corrected. If a different view of the law had been there laid down, it would only have been in conflict with the instruction given at the request of defendants. But, referring to it, we find that the jury were

then told: "I think it was an entire contract; that is to say, it was a contract with plaintiffs to purchase cigars. If any portion of them were not up to sample, my instruction to you is that it is a defense, and that defendants need not take them or pay for them." In the oral charge this idea is repeated again and again. There was no question as to whether defendants should take and pay for any cigars which had been furnished. They had all been paid for. The instruction could have had no bearing upon any other question than whether the defendants had a right to abrogate the contract because the cigars furnished, and which had been paid for, were not like the samples. It is now admitted that they had no such right. It is true some portions of the oral charge seem to favor the present contention of the appellants, but the errors in giving the instructions asked for by defendants and refusing the instructions asked for by plaintiffs, which correctly stated the law, are not cured by these confusing and contradictory statements. It is not necessary to consider other alleged errors. The order and judgment are reversed.

PEOPLE v. VITAL. (No. 20,957.)
(Supreme Court of California. June 23, 1894.)
In bank. Appeal from superior court, Santa Barbara county; W. B. Cope, Judge.
Antone Vital was convicted of murder in the first degree, and appeals. Affirmed.

A. D. Splivalo and J. A. Spinetti, for appellant. W. H. H. Hart, Atty. Gen., and A. E. Putnam, Dist. Atty., for the People.

PER CURIAM. The defendant, Antone Vital, has been convicted of the crime of murder in the first degree, and sentenced to be executed. No motion for a new trial was made in the lower court, and the case is now before us upon a direct appeal from the judgment. We have given the record a very careful examination, and find nothing there that would justify a reversal of the judgment. There is not only no substantial and prejudicial error disclosed by the record, but we perceive nothing that borders upon technical error.

Counsel who appear for defendant upon this appeal complain bitterly because counsel who represented the defendant in the trial court did not make a motion for a new trial. The record is entirely silent as to the reasons why such a step was not taken, and such a course, in the exercise of the greatest care for a client's interests, would certainly have been proper, especially in a case involving such grave consequences. But, as far as this court knows, the course adopted may have been pursued for the best of reasons. Counsel do not make any showing, even informally, as to any events or circum-

stances occurring during the progress of the trial which would justify the granting of a motion for a retrial, if one had been made in the regular course of procedure, and the case was now before us upon a record involving that question. We have examined with great care all the matters discussed in counsel's brief, regardless of the question as to whether they were properly before us or not, and find them without merit. On the appeal from the judgment we can only say that the information is full and complete, and that the charge of the court to the jury as to the law of the case is such as to be without legal exception or objection. The defendant, by his notice of appeal, states that he appeals from an order denying a motion for a new trial; but no motion for a new trial is found in the record; neither is there any order found therein denying the same. His counsel, in their briefs, concede that no such motion was ever made; hence his appeal in that regard is of no avail, and must be dismissed. The judgment is affirmed.

TAYLOR v. KELLY. (No. 15,218.)

(Supreme Court of California. June 23, 1894.) CONSTRUCTIVE TRUST—AGREEMENT AS TO LAND—ACTION TO COMPEL CONVEYANCE—RULINGS ON EVIDENCE—REVIEW ON APPEAL.

1. Plaintiff verbally contracted with defendant to join him in the purchase of certain land which defendant had contracted to purchase by a certain time. On plaintiff's failure to pay his share of the money, defendant purchased the land in his own name. Held, that defendant could not be compelled to convey half the land to plaintiff on the ground that there was a constructive trust in favor of plaintiff.

2. In such case, evidence that a demand

2. In such case, evidence that a demand by defendant's son on plaintiff to pay his share of the purchase price was made by defendant's authority, and that plaintiff then refused to pay, is sufficient to show that plaintiff was given an opportunity to carry out his agreement.

3. Evidence of the value of the property at the time of the property at

the time of the purchase is inadmissible in an action to compel defendant to convey to plaintiff half of the land.

4. Where, from the question, it is not apparent that a witness' answer will be material, the exclusion of the same will not be ground for reversal, unless the facts which are expected to to show the made a part of the record, so as to show the materiality of the evidence.

5. A doubt whether a finding by the court was justified by the evidence is not sufficient cause for setting it aside.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.
Action by J. W. Taylor against Annie A.

Kelly. There was a judgment for defendant, and plaintiff appeals. Affirmed.

J. C. Bates, for appellant. Dorn & Dorn and Joseph P. Kelly, for respondent.

HAYNES, C. This action was brought by Taylor against Michael Joseph Kelly to compel the conveyance to him of an undivided interest in certain real estate situate in the city and county of San Francisco. M. J. Kelly died before the cause was tried, and Annie A. Kelly, to whom he had conveyed the land after the commencement of the action, was substituted as defendant. The defendant had judgment, and the plaintiff appeals from an order denying his motion for a new trial. A brief outline of the facts, as found by the court, is as follows: That on April 9, 1887, Michael J. Kelly entered into an agreement in writing with one Driscoll to purchase the lands in question for the sum of \$6,100, and paid thereon \$25; the purchaser to have 30 days for examination of the title. That on or about April 15, 1887, Kelly made a verbal agreement with the plaintiff, whereby the plaintiff should pay one-half of the purchase price on or before the expiration of the time allowed for examination of the title, and thereupon should be equally interested with Kelly in the purchase. That on May 7, 1887, the title being satisfactory, Kelly demanded from Taylor the payment of onehalf the purchase money, but Taylor neglected to pay it. On May 9, 1887, Kelly paid in full for the land, and took a conveyance in his own name, and on the same day had the deed recorded. On August 29, 1887, the plaintiff inclosed in an envelope a check payable to Kelly or order for \$3,050, and caused the same to be delivered to Kelly, who refused to accept it. That at the time the check was drawn, and offered to Kelly, plaintiff had in the bank on which it was drawn \$2,947.46, and no more, and that this was the only offer of payment he ever made. The court further found: That certain allegations of the complaint, viz. that plaintiff had paid \$10 for a search of the title; that the deed was taken by Kelly for the mutual benefit of both; that he reposed confidence in Kelly; and that by reason of such confidence, and the promises of Kelly, the contract and deed were taken in Kelly's name,—were untrue. That Kelly did not at any time admit that the purchase was for their mutual benefit. That he did not act in bad faith, or fraudulently, towards the plaintiff. And that plaintiff neither paid nor gave any consideration for the verbal agreement made by Kelly with him. Appellant specifies several particulars in which he claims that the findings are not justified by the evidence. Several of these may be considered together.

It is insisted that the verbal agreement mentioned in the findings was made before the written agreement between Kelly and Driscoll was made; that the purchase was in fact made for the joint benefit of Kelly and the plaintiff; that, therefore, it was not a subsequent agreement by Kelly to share his purchase or to sell to plaintiff a half interest in the property, and that the plaintiff negotiated the purchase from Driscoll pursuant to the verbal agreement: that "there is no evidence that it was only on Taylor's payment on or before the time the purchase money would become due

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and payable that Taylor should become equally interested in the property." The only finding, about which there is any doubt as to its being justified by the evidence, is the one which finds that the verbal agreement between appellant and Kelly was made on or about April 15th, which was after the date of the contract between Kelly and Driscoll. But a doubt will not authorize us to set aside the finding. But, if the finding was that the verbal agreement was made with Kelly before the date of the contract with Driscoll, it would not avail the appellant.

Defendant, as one of her defenses, pleaded the statute of frauds. It is also conceded that appellant did not pay for his interest, and, treating his check as a tender, did not tender payment until some three months after the purchase had been consummated and the whole of the purchase price paid. The agreement alleged in the complaint was that plaintiff and Kelly should purchase: not that Kelly should purchase, and upon payment by Taylor to Kelly of one-half the purchase money, at some time in the future, Kelly would convey. It is not claimed by plaintiff that Kelly agreed to purchase for their joint benefit, though it is claimed that he did so purchase. The only agreement alleged in the complaint, and which appellant, by his exception to the findings, insists was made before the contract of sale between Driscoll and Kelly, required appellant to join in the purchase (not necessarily in the contract of purchase), by furnishing his porportion of the purchase money at the time the purchase was consummated. This was not done. The contract with Driscoll having been made by Kelly alone, he was bound to fulfill it, whether Taylor kept his verbal agreement to join in the purchase or not. If Taylor declined to join in the purchase, and pay his proportion of the purchase money, it was not in Kelly's power to compel him to keep his verbal agreement. A tender of a deed to Taylor for an undivided half of the property, and a demand of payment of one-half the purchase price, the whole of which Kelly was obliged to pay, would have been fruitless, as Taylor could have successfully pleaded the statute of frauds to any action brought to compel payment. Certainly, Taylor is in no better position, for he must rely upon a verbal contract, and that contract one that he had himself failed to comply with.

It is insisted by appellant that Kelly became a trustee of the interest in the land in question for his benefit; that "a trust arises when personal confidence is reposed in one, and accepted by the other." But there was no relation of trust or confidence between these parties, unless the verbal agreement itself created such relation. Here there was no trust or confidence, other than that which is manifested in all business affairs in which the honor or ability of the party is relied upon for performance. There was in this case

no reason for the confidence reposed, other than the opinion entertained by appellant that he could rely upon Kelly. "It is not every case where parties trust each other that the law recognizes as confidential." Brison v. Brison, 75 Cal. 528, 17 Pac. 689, and cases cited. Appellant, however, states his proposition in another form, thus: "A person who gains a thing by fraud, * * * in violation of a trust (that is, confidence reposed), or other wrongful act, is an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." In support of this proposition, he cites Civ. Code, § 2224, and Greiner v. Greiner, 58 Cal. 122. The section of the Civil Code referred to is as follows: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or confidence or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." We have seen that there was no violation of a trust or confidence; nor is it alleged, found, or claimed that Taylor made the verbal agreement with Kelly through the fraud or other wrongful act or the undue influence of the latter, or that it was the result of accident or mistake. Taylor never asked or suggested that the agreement be reduced to writing; nor is there any finding, or any evidence upon which a finding could be based, that Taylor was in any manner prevented from joining in the purchase, or that Kelly, at the time the verbal agreement was made, or the time when the contract was made with Driscoll, did not intend to perform that agreement with Taylor. The whole basis of appellant's contention is that Kelly did not, after he had been compelled to pay the whole of the purchase price, instead of one-half, accept payment from appellant, and convey to him the interest in question. The case of Greiner v. Greiner, supra, is not in point. There the husband redeemed certain notes and mortgages belonging to him from a pledgee, with his wife's money, which he had in his possession, and, with intent to defraud the wife, assigned them, without consideration, upon a secret trust in favor of himself; and it was held that, by using her money to redeem the notes and mortgages from the pledgee, he became a trustee for his wife, and that she was entitled to be subrogated to the lien of the pledgee. Comment upon the distinction between that case and this is unnecessary. In Pomeroy's Equity Jurisprudence (section 1056), the learned author says: "In order that the doctrine of trusts ex maleficio with respect to land may be enforced under any circumstances, there must be something more than a mere verbal promise, however unequivocal; otherwise, the statute of frauds would be virtually abrogated. There must be an element of positive fraud accompanying the promise, and

by means of which the acquisition of the legal title is wrongfully consummated. Equity does not pretend to enforce verbal promises in the face of the statute. It endeavors to prevent and punish fraud by taking from the wrongdoer the fruits of his deceit, and it accomplishes this object by its beneficial and far-reaching doctrine of constructive trusts." In Sandfoss v. Jones, 35 Cal. 488 (a case cited by appellant), it is said: "Doubtless, the general current of authorities upon this subject is that a dry, verbal promise to purchase lands for the benefit of another is within the statute of frauds, and cannot, therefore, be proved by parol." The facts of that case, however, took it out of the statute, upon well-settled equitable principles, and it is therefore not an authority for appellant. Rose v. Hayden, 35 Kan. 106, 10 Pac. 563, cited by appellant, was where an agent, employed to purchase for his principal, bought in his own name, and paid with his own money; and it was held that the weight of authority was, he could not retain the property so purchased. That, however, is not this case. A parol agreement that another shall be interested in a purchase, or parol declarations by a purchaser that he buys for another, without an advance of money by that other, will not raise a resulting trust, but will be inoperative under the statute of frauds. Bland v. Talley, 50 Ark. 71, 6 S. W. 234.

Appellant further contends that there is no evidence that a demand was made upon him to furnish his part of the purchase price to be paid to Driscoll; that the only evidence of such demand was that of Joseph P. Kelly, who had no power to convey any interest in the property. Joseph P. Kelly testified that his father, M. J. Kelly, left the city a few days before the time expired for the performance of the contract with Driscoll, and instructed him to attend to the payment and securing a conveyance, and for this purpose gave him a check for his part of the purchase money and instructed him to call on Taylor for the remainder; that he did call upon Taylor and asked him to put up his half of the money; that Taylor replied, "Well, there was an arrangement of that kind, but that he would not do it: that he did not propose to go into the thing at all, and did not propose to have anything to do with it." This was denied by Taylor. The fact that Joseph P. Kelly could not make a deed to him did not affect Taylor's duty to pay the money, nor, indeed, was any demand upon Taylor necessary, as Taylor was one of the purchasers under the terms of the agreement, as alleged by him. The conflict between these witnesses will not permit the appellate court to interfere with the findings objected to; and it is clear that, if Joseph P. Kelly's testimony is true, M. J. Kelly gave Taylor a full opportunity to carry out the agreement, and that Taylor declined to do so. Whatever merit there might be in appellant's specifications of insufficiency of the evidence to justify the findings (and I think there are none), if the findings were changed to meet his suggestions, the judgment was right, and the order denying a new trial should be affirmed, unless the court erred in matters of law to the prejudice of appellant.

Appellant was a witness in his own behalf, and was asked by his counsel the following question: "State the fact,-the reason the transaction was done in Mr. Kelly's name, and not in your joint names?" Defendant's objection was sustained. If, by the question, it was intended to call from the witness a statement of the mental operation by which he concluded to have the contract in the name of Mr. Kelly alone, it was clearly incompetent. That this was what he called for is, I think, quite clear from the record. All the facts appear to have been fully testified to by the witness. It is not alleged or claimed that any fraudulent devices or means were resorted to by Mr. Kelly to induce appellant not to appear in the contract with Driscoll. It is not apparent, therefore, that the answer to the question would have been material; and in such case counsel should have stated the fact he expected to prove, and made an offer to prove it by the witness, and thus put in the record the facts which would show whether it was material. In the absence of such statement in the record, we cannot say that the facts expected to be stated in answer to the question were material, or, if material, that appellant was prejudiced by the ruling.

Appellant was also asked the value of the lots at the time of the purchase. Defendant's objection was properly sustained. The value of the property could not in any way affect the validity of the agreement upon which appellant sought to recover.

The other alleged errors of law are covered by what has been said on the principal question. The order appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

McFARLAND and FITZGERALD, JJ. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

, DE HAVEN, J. I concur in the judgment.

108 Cal. 204

EDWARDS v. HELLINGS et al. (No. 15,230.) (Supreme Court of California. June 25, 1894.) JUDGMENT BY DEFAULT — ENTRY BY CLERK — GROUNDS FOR SETTING ASIDE—ACTION AGAINST PARTNERS.

1. Where defendant was personally served with summons, a judgment by default will not be set aside because the attorney he requested to defend the action, after a demurrer to the complaint was overruled, failed to answer, especially when defendant states that he did not

read the complaint, and does not state that he told the attorney of facts which would be a defense, and it appeared that he left the state two days after the service of summons, and did not communicate further with his attorney.

2. An execution on a default judgment will not be quashed because the complaint was defective, as the remedy therefor is by appeal.

3. Code Civ. Proc. § 414, provides that when an action is against two or more liable on

when an action is against two or more liable on a contract, and the summons is not served on all, the plaintiff may proceed against those served as if they were the only defendants. Section 585 provides that, if the defendant fail to answer, the clerk may enter judgment against one or more of several defendants in the cases provided for in section 414. Section 636 provides that on the overruling of a demurrer the plaintiff may proceed as in section 585. Held, that on the failure of defendant to answer after the overruling of a demurrer in a action against the overruling of a demurrer in an action against copartners, he being the only one served, judgment may be entered by the clerk against him.
4. Under Code Civ. Proc. \$ 585, providing that, in case of defendant's failure to answer,

"the clerk, on application of plaintiff, may enter the default, and immediately thereafter enter judgment," the clerk may enter judgment eight years after entry of default, as the word "immediately" is merely directory.

5. The statute of limitations begins to run on a judgment by default from the entry of the judgment, and not from the entry of the default.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by T. C. Edwards against W. B. Hellings and Edward Hellings, traders under the name of W. B. Hellings & Co. was a judgment of default against W. B. Hellings, and from a judgment denying his application to set aside the same, and quash an execution issued thereon, he appeals. Affirmed.

Henry I. Kowalsky and T. J. Crowley (T. M. Osmont, of counsel), for appellant. H. C. Firebaugh, for respondents.

HARRISON, J. The plaintiff commenced an action against the appellant and another defendant February 16, 1884, for the purpose of recovering from them the amount of a judgment that had been previously rendered in the fifteenth district court for the city and county of San Francisco. The summons in the action was served upon the appellant alone, and was given by him to an attorney, with instructions to defend the ac-This attorney filed a demurrer to the complaint, which was afterwards overruled for want of prosecution. Notice of such overruling was served upon the appellant's attorney, and, no answer having been filed, his default was entered by order of the court March 14, 1884. Judgment was not entered against him upon this default until January 18. 1892. An execution was issued upon this judgment March 19, 1892, and levied upon certain real property of the appellant, which was advertised by the sheriff to be sold on the 21st of April, 1892. On the 18th of April, upon the application of the appellant, the court in which the judgment had been entered made an order that the plaintiff show cause why the order of default and judgment theretofore made and entered therein should not be set aside, and the defendant allowed to file an answer; and also made an order staying proceedings in the mean-Upon the hearing of this order to show cause the court denied the application, and at the same time denied a motion by the appellant to recall and quash the execution that had been issued. From these orders he has appealed, bringing the matters here by a bill of exceptions.

The court properly exercised its discretion in denying the application to set aside the default and judgment against the appellant, and refusing to relieve him therefrom. summons in the case had been regularly served upon the appellant, and the appearance of the attorney in his behalf was authorized by him. His instructions to the attorney to defend the action were of no avail to relieve him from the judgment, even if his attorney had failed to carry out his instructions. Although he says in his application that he firmly believed that his attorney would defend the action upon its merits, he also says that he did not examine the complaint to ascertain the exact nature of the action; nor does he say that he gave his attorney any statement of the facts in the case, or which would constitute any defense thereto, or that he ever from that time communicated with him in reference to the ac-That within two days after the service of the summons upon him he left the state, and it does not appear that he returned to it until December, 1891.

Neither did the court err in refusing to recall and quash the execution. The judgment upon which the execution was issued was regular in form, and was rendered after the appellant's default had been taken for failure to answer in a case in which he had been personally served with the summons, and his demurrer to the complaint had been overruled. The judgment was not void, and the execution had been regularly issued thereon within a few months after its rendition. The defendant did not claim that anything had transpired since its entry to authorize the court to suspend or prevent its execution. the court had erred in overruling the appellant's demurrer thereto, or if there was any infirmity in the judgment by reason of a defective complaint, the remedy of the appellant was by an appeal from the judgment, and upon such appeal he could have caused a stay of the execution; but these reasons would not authorize the court to stay the execution of the judgment, so long as it remained in force and of record.

The entry of judgment against the appellant, without at the same time entering judgment against his codefendant, who had not been served, was in accordance with the stat-Section 636, Code Civ. Proc., provides that upon the overruling of a demurrer the plaintiff may proceed as prescribed in sec-

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tion 585, upon the failure of the defendant to answer; and in section 585 it is provided that, if the defendant fail to answer, the clerk may enter judgment against one or more of several defendants in the cases provided for in section 414; and section 414 provides that when the action is against two or more defendants, jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. The provision that the clerk must enter the judgment "immediately" after entering his default is merely directory. His failure to do so may render him liable to an action by the judgment creditor, but does not render void the judgment subsequently entered upon such default; nor can the defendant against whom the judgment is entered invoke such failure for the purpose of annulling a judgment to which he has no other defense. The statute of limitations upon the judgment runs from the time of its entry, and not from its rendition. v. Farrington, 54 Cal. 273. See, also, Franklin v. Merida, 50 Cal. 289. If the appellant had desired to set the statute of limitations running, he could himself have caused the judgment to be entered at any time after its rendition. The orders are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

103 Cal. 208

SPENCE v. SCHULTZ. (No. 15,137.) (Supreme Court of California. June 25, 1894.) NEGLIGENCE—DANGEROUS PREMISES—EXCAVA-TIONS.

Where a building is being constructed on a city lot, and the excavation in the side-walk is not protected as required by ordinance, the owner of the lots is liable to persons injured by falling therein, though the work is being done by an independent contractor.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Andy T. Spence against Louis Schultz. From a judgment for plaintiff, defendant appeals. Affirmed.

Alex. D. Keyes, for appellant. Henley, MacSherry & Herrmann, Henley & Swift, and J. W. Oates, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial. This is an action to recover damages for personal injuries sustained by respondent, and caused by his falling into a deep excavation in a sidewalk on a lot and premises owned by appellant, and situated on the corner of Washington and Kearney streets, in the city and county of San Francisco. At the time of the accident appellant was constructing a

building on said lot, and an excavation about 14 feet deep had been made in the sidewalk, and left unprotected by any barricades or lights around it. About 10 o'clock p. m. of the evening of November 19, 1889, the respondent, a stranger in the city, while walking along Washington street, fell into said excavation and was seriously injured. He was not guilty of contributory negligence. The main ground upon which appellant contends for a reversal is that he had made several different contracts with several different parties, by which each of said parties was to do the work and to furnish materials necessary to the completion of particular parts of said building; that said parties were independent contractors, and not servants of appellant; and that, therefore, the doctrine of respondent superior does not apply, and the parties who made said excavation under said contracts are alone answerable for any injury which respondent may have sustained in the manner alleged in the complaint. Counsel on both sides have argued the case in their briefs with great industry and ability, and have cited many authorities. This was highly commendable in counsel, and has aided the court to see the case from many points of view; but damage cases of this class come here quite frequently, and we cannot be expected in each case to elaborately review the whole field of authorities applicable to such cases.

Counsel for respondent argues with much force that the contracts relied on by appellant have so many conditions and reservations, and give to appellant so much revisory and controlling power over the contractors as to the employment of workmen, choice of materials, etc., as to take the case entirely out of the rule invoked by appellant as independent contractors. But, without passing upon that point, we think that the contention of appellant must be decided against him, upon the authority of the cases of Colgrove v. Smith (Cal.) 36 Pac. 411, and Barry v. Terkeldsen, 72 Cal. 254, 13 Pac. 657. In the first place, the maintenance of the excavation was unlawful, because there was no compliance with a certain ordinance of the city on that subject, and appellant could not relieve himself of the duty of complying with said ordinance by shifting it onto a contractor. Colgrove v. Smith, supra. In the second place, an excavation like the one in the case at bar in the sidewalk of a populous street in a city is "so dangerous a pitfall as to be, in its character, of the nature of a nuisance;" and he who causes it to be done, knowing beforehand its nature and character, cannot escape liability to one who innocently falls into it, upon the ground that he let out the job of creating the nuisance to a contractor. Barry v. Terkeldsen, supra. Most of the specific points made by appellant are involved in the above propositions. We think there was sufficient evidence upon the point

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of the nature of respondent's injuries to warrant the court in instructing the jury that they might consider "how far permanent and lasting his injuries may be in their character;" and we see no error in the instructions to the jury in any other respect. It was not error to admit the ordinance of the city, offered by respondent. There are a number of minor points made by appellant under the head of "Miscellaneous Exceptions," but we do not think that either of such exceptions was well taken, or that either of them needs special mention. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

CITY AND COUNTY OF SAN FRANCISCO v. WANGENHEIM et al. (No. 15,537.)

(Supreme Court of California. June 25, 1894.)
TAXABLE PROPERTY — SEAT IN STOOK RECHANGE.

A seat in a stock exchange, which is a personal privilege of being and remaining a member of a voluntary association, with the assent of the associates, is not taxable property. City and County of San Francisco v. Anderson (Cal.) 36 Pac. 1034, followed.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the city and county of San Francisco against S. Wangenheim & Co. From a judgment for defendants, plaintiff appeals. Affirmed.

J. E. O'Donnell and Jones & O'Donnell, for appellant. Garber, Boalt & Bishop, for respondents.

PER CURIAM. This is an action to recover money alleged to be due from defendants for city and county and state taxes which were assessed for the fiscal year ending June 30, 1890, upon personal property of defendants, to wit, a seat in the San Francisco Produce Exchange. The court below found as a conclusion of law that the said "seat" was not such property as is subject to taxation under the revenue laws of this state, and gave judgment for the defendants, from which the plaintiff appeals on the judgment roll. The case is in all material respects like that of City and County of San Francisco v. Anderson (just decided) 36 Pac. 1034, and upon the authority of the decision in that case the judgment is affirmed.

4 Cal. Unrep. 682

ADAMS v. FARNSWORTH et al. (No. 15,312.)

(Supreme Court of California. June 25, 1894.)

REVIEW ON APPEAL—HARMLESS ERROR—RECEPTION OF EVIDENCE.

1. Findings by the court will not be disturbed on appeal where there is evidence to justify them. 2. Error in refusing to permit the maker of a note to testify on cross-examination as to the circumstances under which he signed the note—the witness having been called by plaintiff for the purpose simply of proving his signature—is cured by his testifying in his own behalf in regard thereto.

Department 2. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge. Action by Charles Adams against A. D. Farnsworth and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

W. C. Kennedy, for appellants. Wm. H. Jordan and S. F. Leib, for respondent.

PER CURIAM. This action was brought by plaintiff to recover on the following promissory note: "\$2,000.00. San José, Feb. 4, 1888. Thirty days after date, for value received, we, jointly or severally, promise to pay Chas. Adams the sum of \$2,000 (two thousand dollars), with interest thereon from date until payment at the rate of --- per centum per annum, payable in thirty days, and, if not so paid, then to be added to, and become a part of, the principal, and bear a like interest; said principal and interest to be paid in United States gold coin only. If any interest on this note be not paid within a month after it becomes due, then the whole of the principal and interest shall, at the option of the payee, become and be immediately due and payable. A. D. Farnsworth. D. R. Martin. G. Wendt." The defendants Martin and Wendt, in their answer, deny that they executed the note for value received, and aver that their signatures thereto were procured by fraudulent and false representations made to them by plaintiff and their codefendant Farnsworth. It is further averred that plaintiff duly released them from all liability on said note, and that the same has been fully paid and discharged. Plaintiff had judgment against the defendants Martin and Wendt. Farnsworth, the other defendant, who was never served with process, made no appearance. From which judgment, and the order denying their motion for a new trial, the defendants Martin and Wendt appeal.

The court, in its decision, found that all the allegations of the complaint were true, and also found adversely to the defendants upon all of the defenses set up in their answer; and, as these findings are fully justified by the evidence, they will not, under the well-established rule of this court, be disturbed.

It is claimed by appellants that the court erred in sustaining plaintiff's objection to the following question propounded on cross-examination by counsel for the defense to the defendants Martin and Wendt, while upon the stand as witnesses for plaintiff, who introduced them as such solely for the purposes of proving the signatures to the note: "Q. State under what circumstances you signed that paper" (referring to the note in question). Conceding, for the purpose of

this case only, that the court erred in making the ruling complained of, the error was cured by these witnesses subsequently testifying in their own behalf as to the circumstances under which they signed the note.

As the remaining errors complained of are either untenable or immaterial, it follows that the judgment and order should be affirmed, and it is so ordered.

103 Cal. 200

PEOPLE v. LEONARD. (No. 21,096.) (Supreme Court of California. June 25, 1894.) CORPORATIONS - FALSE RECORD ENTRIES-INDICT-MENT.

- 1. An indictment of a corporation officer, under Pen. Code, § 563, for making false entries in a record with intent to defraud, if it set out the entries in hace verba, and allege them to be false, need not state wherein they are
- false.

 2. The indictment alleging that the entries were made with intent to defraud the corporation need not set out how they could have effected the result, if they are such that the court cannot say from their face that they could have done as a second to the second the second to the second t not possibly have done so.

Department 1. Appeal from superior court, Santa Clara county; John Reynolds, Judge.

Indictment of H. M. Leonard, under Pen. Code, \$ 563, for making false entries on the books of a corporation with intent to defraud it. Demurrer to indictment sustained. The state appeals. Reversed.

V. A. Scheller and E. E. Cothran, for the State. Morehouse, Tuttle & Richards, for respondent.

GAROUTTE, J. This is an appeal by the people from an order of the superior court sustaining defendant's demurrer to the indictment. The indictment charged that the defendant was a director, officer, manager, and servant of the Bank of Santa Clara County, a corporation, etc., and as such officer, etc., "there then and there came and was under his control and possession a certain record known as a 'note register,' which said record was then and there the property of and kept by the said corporation; and the said H. M. Leonard, while said record was so in his possession and under his control by virtue of his trust as such director, etc., then and there, to wit, on the 31st day of October, 1892, with intent in him, the said H. M. Leonard, to defraud the said corporation in the sum of three thousand dollars, did willfully, unlawfully, and feloniously make in the said record the following false entries, to wit:

Number.	Date.	Maker.	Amount.
275	Oct. 31, 1892.	Sloan.	\$3,000.00.

Section 563 of the Penal Code provides: "Every director, officer or agent of any fraud, * * * makes any false entries in any book of accounts, or other record or document kept by such corporation or association, is punishable by imprisonment in the state prison not less than three nor more than ten years. * * *" The indictment in this case was framed under the foregoing section, and we see no objection that can be made to it. It is urged by respondent that nothing is shown by its face indicating wherein the entry is false. There is no merit in this contention, for the indictment sets out in haec verba the entries made by the defendant, and alleges that they were false entries. If they were false, that is, unauthorized by any existing facts, then they were each and all false, and the allegation is exactly in line with the statute. It is claimed that, conceding the entry to be false, still it was not such an entry as could result in defrauding the bank. The indictment clearly shows that no honest man guided the pen that made these entries. They were made through no mistake of fact. They were not only false, but criminally false, for they were made with intent to defraud. It is not necessary to set out how these entries could have resulted in defrauding the bank. That is purely a matter of evidence. In all penal statutes, where the offense is one requiring the act to be done with a certain intention, as burglary, forgery, and obtaining property by false pretenses, it is only necessary in the accusing paper to set out what the defendant actually did, and that he did it with a certain intent. It is not necessary, therefore, to state facts showing how he could have successfully carried out his nefarious schemes and intentions of defrauding some one. If those matters are material to the case, they are only material as evidence tending to support the charge made.

The case of People v. Ah Woo, 28 Cal. 211, is in direct support of these views. That was a case of forgery, and the court said: "So far as it is claimed that the indictment fails to show in what manner Ah Woo was or could be defrauded by the transaction, it is sufficient to say that all that is matter of evidence. The charge is direct. transfer was made with intent to defraud Ah Woo, which is sufficient, so far as the indictment is concerned. It may have been passed as security for a loan. All this is to be proved, but need not be alleged." In People v. Palmer, 53 Cal. 615, if the indictment had stated in terms the false entry made by the defendant, it then would have been similar to the one here involved, and would have been sustained by the court, as is clearly evidenced by the opinion in that case. If it was apparent from the face of this indictment that these entries were such that under no possible state of circumstances could they have resulted in a fraud upon the corporation, respondent's contencorporation * * * who, with intent to de- | tion would have force; but such is not the

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fact. If these entries were quotations of scripture or poetry, it would be evident the indictment could not stand, for the case would then be in the same position as if it had been attempted to make a nudum pactum the subject of forgery. But by inspection of these false entries we cannot say that they could not have resulted in defrauding the bank, and hence we cannot say they are not sufficient to form the basis of a charge of the character here involved. This question is quite fully discussed in People v. Monroe, 100 Cal. 664, 35 Pac. 326. In conclusion, we say the defendant has no cause of complaint against the indictment. He cannot be misled by it, for it is so direct and certain that he knows exactly the charge he will be called upon to meet at the trial of the case. The indictment charges him with falsely making certain entries in the books of the corporation with a fraudulent intent. The entries are set out in terms. He knows exactly what the prosecution will be required to prove, and what defense he should be prepared to make. We think the indictment sufficient to put him upon his trial.

For the foregoing reasons, the order sustaining the demurrer is reversed, and the cause remanded.

We concur: HARRISON, J.; VAN FLEET, J.

103 Cal. 249

TEVIS et al. v. BUTLER. (No. 15,031.) (Supreme Court of California. June 26, 1894.)

REVIEW ON APPEAL—REMOVAL OF TRUSTEE.

In an action for the removal of a trustee under Civ. Code, § 2283, granting the superior court jurisdiction when the trustee is unfit, where the trial court did not abuse its discretion, a judgment removing such trustee will not be disturbed.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Lloyd Tevis and others against C. C. Butler. From a judgment for plaintiffs, and an order overruling a motion for a new trial, defendant appeals. Affirmed.

Arthur Rodgers, for appellant. Pillsbury, Blanding & Hayne, for respondents.

McFARLAND, J. This is an action brought by three trustees to obtain a judgment for the removal of defendant as a fourth trustee. Judgment went for plaintiffs, and defendant appeals from the judgment and from an order denying a motion for a new trial.

A corporation called the San Francisco & Point Lobos Road Company went out of existence in 1882 by expiration of the term of its charter, and, by the statute under which it was organized, its directors at the time of its

dissolution became trustees for the purpose of collecting and paying its debts, settling all its affairs, and dividing its assets among its stockholders. Comp. St. 1850-53, p. 290. It had five directors, and at the time of its dissolution the directors were the three plaintiffs and the defendant herein, and one Alpleus Bull, who died before the commencement of this action. In the complaint certain acts and conduct of the appellant are alleged, which, it is contended by respondents, constituted a violation by appellant of the trust, and show his unfitness to execute it; and this action was brought to have him removed under section 2283 of the Civil Code, which provides that "the superior court may remove any trustee who has violated or is unfit to execute the trust." Findings were waived, and the court entered two decrees. The first decreed that appellant be removed as trustee, and that he account for any moneys and property in his hands; and the second, after reciting the first decree, and also the fact that a referee had been appointed to take an account of the moneys, etc., in appellant's hands, and had made his report, confirmed said report and the former decree, and again decreed that said appellant be removed as trustee, etc., and that he pay over a certain sum of money found to be due, and also deliver a safe and certain books of account. Appellant appeals from both judgments.

Appellant contends for a reversal upon the ground that the evidence is insufficient to sustain the judgment, and argues that it is insufficient to show either that he violated the trust, or that he is unfit to execute it. As findings were waived and no facts were found, a discussion of the question whether the evidence, upon any theory, was sufficient to sustain the judgment, would open a wide field of inquiry, and would make necessary a statement of nearly all of the testimony. We do not deem it needful to enter upon that discussion here; nor do we think that it would subserve any useful purpose to state what facts may be considered sufficiently proved, or to detail the evidence tending to prove them. It is sufficient to say that we have carefully examined the evidence contained in the transcript, and that, in our opinion, the court below did not abuse its discretion in coming to the conclusion, from the evidence, that the appellant should be removed as trustee. There are no other questions involved in the case. Respondents contend that the first decree was interlocutory, and that the appeal from it should be dismissed; but we apprehend that, in this case, it is of no consequence whether such appeal be dismissed, or the judgment affirmed. The judgment appealed from, and also the order denying the motion for a new trial, are affirmed.

We concur: DE HAVEN, J.; FITZGEL-ALD, J.

(4 Cal. Unrep. 697)

SUTLIFF V. CLUNIE. (No. 15,346.)¹
(Supreme Court of California. June 26, 1894.)
Assignment for Creditors — Attorney of Assignee — Purchase of Claims Below Par — Payment by Assignee—Notice.

1. Where an attorney, employed by an assignee to settle claims with the creditors, compromises the claims, giving his own notes in settlement at the rate of 50 cents on the dollar, with the understanding that the estate is to pay them when due, he cannot, on failure of the estate to do so, and after seeing that the estate is in fact solvent, have the claims assigned to a third person, who advanced to him the money to pay the notes, and collect the full amount of the claims for the benefit of such third person.

2. Where, in such case, the attorney is the law partner of the assignee, the latter will be chargeable with constructive notice of all the facts in the transaction coming to the knowledge of the former, so as to render him liable for payments in excess of what the attorney paid for

the claims.

3. Where an assignee employs counsel to uphold the validity of an unjust claim against the estate, which he paid, he cannot, in case of defeat, charge the estate with the counsel fees.

Department 2. Appeal from superior court, city and county of San Francisco; C. W. Slack, Judge.

Action by Henry Sutliff against Andrew J. Clunie to compel an accounting by defendant as assignee. From a judgment denying defendant credits for certain items, he appeals. Affirmed.

James G. Maguire and Robt. Y. Hayne, for appellant. Ben Morgan, for respondent.

PER CURIAM. In this case defendant appeals from the final judgment, and from an order denying a motion for a new trial. Plaintiff also appeals from the final judgment. The two appeals are presented upon a single record, consisting of the judgment roll and a bill of exceptions prepared and filed by defendant in support of his motion for a new trial.

Henry Sutliff, the plaintiff herein, was a retail tobacconist in the city and county of San Francisco. On the 1st day of July, 1887, supposing himself to be insolvent, and unaole to pay his debts, plaintiff consulted the aw firm of Clunie, Young & Clunie, of which the defendant, A. J. Clunie, was a member, and on the advice of Thomas J. Clunie, who was also a member of said law firm, and a brother of the defendant herein, he made and executed to the defendant an assignment of ail his property, real and personal, for the benefit of his creditors, which assignment defendant accepted, filed a bond for the faithful performance of his duties as such assignee, upon which bond Thomas J. Clunie was a surety, and thereupon entered upon a discharge of his duties as such assignee. On the 20th day of July, 1887, plaintiff filed his inventory and schedule of his creditors, etc., as required by section 3461 of the Civil Code, in the office of the county recorder. This action was brought to compel an accounting by the defendant of his transactions as assignee, etc. An account was rendered by the defendant, and the main controversy on this appeal relates to the action of the court below in disallowing portions of two items in the account with which defendant had credited himself. Soon after the assignment, the plaintiff and Thomas J. Clunie, his attorney and friend, conceived the idea of settling with the creditors of plaintiff at 50 cents on the dollar, and with that object in view arranged with Rosenbaum Bros., who held a claim for \$5,-558.80, and Joseph Brandenstein, who had a claim for \$9,156.27, to accept 50 cents on the dollar for their claims, to be paid by said Clunie, and the further sum of 10 cents on the dollar to be secured by plaintiff's notes, payable when the whole estate was settled. Clunie gave his note to Rosenbaum Bros. for 50 per cent. of their claim. Brandenstein was satisfied with the verbal promise of said Thomas J. Clunie. These agreements, the court finds, were made for the benefit of plaintiff, and, as is apparent, with the expectation that he would raise the funds to pay the demands. Defendant professed to have found a man who would advance sufficient funds to pay off all demands due from plaintiff if the latter would pay a bonus therefor of \$2,500. Plaintiff revolted at this. but offered to pay \$2,000, which was rejected. About this time plaintiff discovered that upon a settlement of his estate he would be able to pay all his creditors in full, and so represented to Rosenbaum Bros. and Brandenstein, and requested them to cancel the note and promise of Thomas J. Clunic, and assured them he would pay them dollar for dollar. They declined to do so. Clunie had taken assignments of these claims against plaintiff to his friends. Before Thomas J. Clunie paid either of the claims, it was arranged between plaintiff, defendant, and Thomas J. Clunie that defendant should deposit with Thomas J. Clunie all the moneys of the estate as realized by defendant, which was done from that time forward. Thomas J. Clunie paid his 50 per cent. obligation to Rosenbaum Bros. about July 30, 1887, and the like obligation to Brandenstein on or about August 26, 1887. Up to the date of payment to Brandenstein, Thomas J. Clunie had received and had in his hands funds of the estate, say \$6,000. Subsequently, and by January, 1888, there had come into the hands of said Thomas J. Clunie funds of said estate more than sufficient to pay both of said claims at their face value, viz. \$14,715, and thereupon the defendant authorized him to pay himself from said funds the whole face value of said two claims, which was done, and the amount thereof charged by defendant in his account against the estate of plain tiff. There are some other points bearing upon the case, but it is not deemed necessary to set them out here.

The court below decided the case upon the theory that Thomas J. Clunie was the agent of the defendant in the transaction of the

¹ Rehearing granted.

business, and that, as defendant could not, in his fiduciary capacity, make a profit inuring to himself out of the administration of the trust estate, so he could not, by the appointment of an agent, accomplish a result which, as a principal, he was precluded from attaining. Appellant's counsel concede, in effect, that the settlement of the claims below their par value was at the date thereof in the interest of and for the benefit of the plaintiff. Their contention, however, is that plaintiff, having failed to raise the money to meet the obligations which Thomas J. Clunie had incurred on his behalf, the latter was at liberty to borrow the money of Turtin to meet his obligations, take an assignment of the claims to Turtin, or for his benefit, and to collect from the assignee the full face value thereof; and hence that the defendant was authorized to make such payment, and to charge plaintiff with the amount thereof. Thomas J. Clunie was a member of the law firm of Clunie, Young & Clunie, and was attorney for plaintiff. He knew, before he took an assignment in favor of Turtin, that the estate of plaintiff was solvent, and able to pay in full all it owed. Under such circumstances he had no equitable right to purchase demands against his client at a reduced rate, and then charge the latter, or, what is the same thing, his estate, with the par value of the claims. When, under such circumstances, an attorney purchases a claim against his client at less than its face value, he cannot be permitted to make a profit thereby against the principal whose agent he is, and more especially where, as in this case, he has in his custody funds in which the client has a beneficial interest to an amount nearly equal to the amount paid out, with an almost certain prospect of receiving the balance in a short Thomas J. Clunie was, it is true, the agent of the assignee, A. J. Clunie, who is defendant here. As such agent he received all the moneys of the estate, and paid its debts so far as they were paid. It is also true that this action is against A. J. Clunie, the assignee. But he was the law partner of Thomas J. Clunie, and as such is chargeable with constructive notice of all facts in relation to the transaction coming to the knowledge of his copartner. It is also quite apparent that he had actual notice of most of the facts, and, whether we treat him simply as a principal authorizing his agent, Thomas J. Clunie, to pay himself in full from the funds of the estate, or as the copartner of Thomas J. Clunie, and hence as the attorney of the plaintiff, seems to make little difference. In either situation he had no right, as against plaintiff, to pay or authorize the payment to Thomas J. Clunie of a greater sum on account of the claims than the amount advanced by the latter on account thereof.

The claim of a counsel fee by defendant was properly denied. The main use which defendant appears to have had for counsel in the proceeding was to contest the two items

in question, and, as the decision is against him, he is not entitled to counsel fees for setting up an unjust claim in his own behalf and against the estate.

The appeal by the plaintiff is, so far as appears from the record, without merit. The judgment appealed from by the plaintiff and the defendant, and the order appealed from by the defendant, are affirmed.

103 Cal. 207

TAPSCOTT v. LYON. (No. 18,239.) (Supreme Court of California. June 27, 1894.) CONVERSION BY RECEIVER—WHAT CONSTITUTES—

1. Where a receiver is directed by the court to take possession of property in the possession of a third party, and he demands possession thereof as receiver, and possession is given to him as receiver, he is not personally liable for conversion.

ACTION FOR DAMAGES.

2. In an action for conversion, where defendant claims possession of the property as receiver, and a disposition thereof by order of the court, defendant may introduce the petition for a receiver, the petition for permission to sell, the order of sale, the report of the sale, and the order approving the sale, even though plaintiff admits the receivership.

3. Where an insolvent, with the intent to prefer one creditor over another, sells his property, a few days before filing a petition in insolvency, to one who knows such intent, the sale is void, though the purchaser pays full value, and the proceeds are applied to the payment of an honest debt.

Commissioners' decision. In bank. Appeal from superior court, Tehama county, E. A. Davis, Judge.

Action by Ernest N. Tapscott against D. B. Lyon for conversion. Judgment for plaintiff, and defendant appeals. Reversed.

L. V. Hitchcock and L. T. Hatfield, for appellant. N. P. Chipman and Jackson Hatch, for respondent.

TEMPLE, C. Action for the wrongful taking and conversion of personal property. The complaint contains two counts charging distinct trespasses. The answer, besides general denials, sets up affirmative matter in defense of each cause of action. It shows that on the 10th day of December, 1889, J. T. Wight & Co., a firm composed of J. T. Wight and J A. Wight, was engaged in trade at Kirk wood, Tehama county, as retail dealers in general merchandise; that they owed diverv persons \$15,000 in the aggregate, and were irsolvent; that to prevent their property from coming into the hands of an assignee in irsolvency, and to prevent the proceeds of the same from being ratably distributed to their creditors in accordance with the provisions of the insolvent act, and to delay and hinder the operation of that act, they secretly and fraudulently, in the nighttime, transferred to plaintiff their whole stock of goods, which was reasonably worth \$5,000, and, except their book accounts and notes taken in their business, was their entire assets, all of which together were not worth more than \$8,000;

that the goods were sold in bulk, and not in due course of business, to plaintiff for \$2,000, plaintiff at the time well knowing of the insolvency of the vendors, and that their purpose was to defraud their creditors and prevent their assets from being distributed ratably to their creditors, as required by the insolvent act. The answer then shows, by proper averment, the institution of proceedings in insolvency by the creditors of J. T. Wight & Co. to force them into insolvency, and that in such proceedings a receiver was appointed to take charge of the assets of said insolvents, under the sixty-third section of the insolvent act of 1880. The receiver was authorized to bring, prosecute, maintain, and defend all actions and legal proceedings necessary to take and hold possession of such property, money, and effects, and "especially relating to that certain stock of goods, wares, and merchandise alleged to be the property of the said J. T. Wight & Co., and heretofore forming and constituting the stock in trade of the said J. T. Wight & Co. at Kirkwood, Tehama county, state of California, and the proceeds thereof." The answer avers the due appointment and qualification of defendant as receiver, and that as such receiver he proceeded to demand from plaintiff. -who was in possession, claiming as vendee of J. T. Wight & Co.,-said goods, exhibiting to him the order showing his appointment and proof that he had qualified. That thereupon said plaintiff voluntarily surrendered and delivered to defendant the goods, wares, and merchandise described in the first count of plaintiff's complaint. That defendant took said goods in his capacity of receiver as and for the property of the insolvents and held the same by virtue of his said office as receiver. That plaintiff thereafter served upon defendant, as receiver, a written notice as follows: "To L. V. Hitchcock and C. A. Garter, attorneys for petitioning creditors: You are hereby notified that Ernest Tapscott will, on the 27th day of December, 1889, at 10 o'clock a. m., move the superior court of Tehama county for an order directing D. B. Lyon, receiver, to deliver to him all the stock of goods, wares, and merchandise situate at the town of Kirkwood, in this county, and by the said receiver taken into possession on the 19th day of December, 1889. Said motion will be made on the following grounds: (1) That said afflant was, prior to the commencement of these proceedings, the owner of and in possession of all of said property. (2) That at the time said receiver took possession of the same this affiant was the owner of and in possession of all of said property, claiming the same adversely to said firm of J. T. Wight & Co., and to all the world. (3) That said receiver was never authorized by this court to take possession of said property. (4) That this court had no power to authorize or order said receiver to take possession of said property. (5) That said receiver is not entitled

to the possession of said property, and this affiant is entitled to such possession. motion will be made upon all the papers on file in this proceeding, upon affidavit, copy of which is herewith served, and upon oral testimony to be adduced at said hearing. Yours, etc., N. P. Chipman and John F. Ellison, Attorneys for Ernest Tapscott." That on the 27th day of December, 1889, the application of plaintiff, according to said notice, came on to be heard in the superior court, when evidence was taken on the part of plaintiff, and also for the receiver representing the creditors of the insolvents, and after a full hearing the court made an order denying the application, which order is still in force, unreversed, and is a final adjudication of the rights of said plaintiff in the matter. That afterwards, to wit, January 20, 1890, said J. T. Wight & Co., and the individuals composing the firm, were adjudged insolvent, and on March 7th an assignee was appointed, who duly qualified. In the meantime the goods had been sold by defendant, as receiver, under the express order of the court. After the appointment and qualification of the assignee, all the property and money in the hands of the defendant as receiver were turned over to the assignee, under the direction of the court, and all of such funds had been distributed to the creditors of such insolvents, under the orders of the court, except fees, costs, and commissions duly allowed prior to the commencement of this suit, and, except such fees and commissions. the defendant had in his hands no part of the goods sued for, nor the proceeds thereof. That plaintiff delayed bringing his action for more than one year after his said demand for a redelivery, and until the property had been sold and the proceeds distributed to the creditors.

The second count is to recover for goods which were not in the store when the receiver took possession, and which, therefore, were not then delivered to the defendant as receiver. In answer to this count, defendant avers that, finding that a portion of the merchandise received by plaintiff from J. T. Wight & Co. had been removed, he demanded possession of it, and, upon a refusal, instituted against plaintiff, in his, defendant's character as receiver, an action of replevin, in which he caused a provisional writ to be issued as authorized by law, by virtue of which such goods were taken by the sheriff and eventually delivered to defendant as receiver; that the plaintiff-defendant in the action of replevin-filed an answer in that action in which he denied the receiver's right to the property, but did not claim a return of the property or its value, but simply asked to recover his costs, and thereupon this defendant as receiver-plaintiff in that action—dismissed the action and paid the costs; that the judgment of dismissal is still in force, unreversed, and is a bar to this action. The case was tried by

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a jury, which rendered a verdict for plaintiff, and defendant appeals from the judgment and from an order denying him a new trial.

It can hardly be said that appellant has filed his points as required by the rules of this court. He has put in, however, an elaborate brief, in which he discusses certain legal questions, but generally without specifying any rulings to which his argument is applicable. Sometimes, however, the application is sufficiently obvious, and such I propose to notice.

1. It is contended that the defendant, holding the goods as receiver, is not responsible as a trespasser, and that the order refusing to direct the defendant as receiver to deliver the property to plaintiff is conclusive as to plaintiff's right. Naturally, the first consideration in regard to this matter is as to the nature of defendant's possession. Did he take the property from the plaintiff as a trespasser? Was his possession personal or official only? Were the goods in the custody of the court? The order did not expressly direct him to take these specific goods. It did direct him to take into possession all the assets of the insolvents, and authorized him to institute suit to recover these specific goods. It is well settled that under such circumstances he had no right, as receiver, to seize the goods in the possession of the plaintiff, however manifest the fraud through which they were acquired. His duty was to demand them, and upon a refusal to bring suit for their recovery. If he takes the property from one not a party to the proceedings in which he received his appointment, against the will of such party, he does so at his personal risk. He is not acting for the court, and will not ordinarily be protected by it. But if he is lawfully in possession of property claimed to belong to the insolvent, he will be regarded as the servant of the court, and even adverse claimants will not be justified in disturbing his possession without leave of the court. Nor can he be made responsible in an action for the value of such property by such person. The custody is that of the court. The receiver has no right to deliver such property to an adverse claimant without leave of the court, and therefore cannot be held responsible for not doing so. The receiver, contemplating an action to recover these goods, made due demand, expecting a refusal, which would place him in a position to sue. He showed his authority, and the plaintiff, fully advised as to the facts, although, as he claims, misunderstanding the nature of the proceeding, surrendered possession to the receiver. The receiver could not refuse to accept them. He would have had no right of action if he had, provided he was rightly advised that a demand was required, for there must be a demand and a refusal. Probably he would have been liable on his bond had he refused. He was expressly authorized—perhaps it should be said directed—to sue for the recovery of these very goods. Plaintiff, with a knowledge of this fact, voluntarily gave them up. Had the receiver sued for and recovered them, he would then have held them as custodian of the court. I think he did, as it was.

I think the cases cited by both parties are upon questions not here involved. They are cases where it is sought to recover the goods in the possession of the receiver, or to establish some right or interest in the property, as the property of a party to the action, or they are claims arising against the receiver in his management of the property or a business by the receiver. Here it is not sought to interfere with the property. The purpose of the receivership had been accomplished, and, according to defendant's allegations, the property all sold and the proceeds distributed. The defendant is sued as a trespasser, and his plea is that in taking the goods he acted as receiver; his acts were lawful, and that he cannot therefore be held as a trespasser. As he did not take the goods as a trespasser, and has disposed of them under express direction of the court, I think this position must be sustained. He was then but a servant, executing the commands of the court. The possession of a receiver has been likened to that of a sheriff who has levied upon goods by virtue of an execution, and in many important respects the cases are similar. High, Inj. § 2. But the case of a sheriff in possession of goods under a writ of attachment, and a receiver of goods which he is expressly ordered to take, are not in all respects analogous. If the sheriff, under a writ, seizes property which is in the possession of the defendant in the suit, and therefore presumptively his, third persons claiming such property can ordinarily, after demand, sue the sheriff and recover it if they can show title. But when a receiver is in possession of property which he is specifically directed by the court to take, and which is claimed to belong to the party whose goods are sequestered, and such possession has been acquired without the commission of a trespass, the receiver cannot be held personally responsible as a trespasser by a third party upon demand and refusal to give up the property. The sheriff is the agent of the creditor. He commits no contempt if he refuses to levy upon goods which he has reason to believe do not belong to the debtor. He may release them to a claimant without being guilty of a contempt. He simply takes the responsibility. The receiver has no such discretion. If the goods are described and are in the possession of the party whose property he is directed to take into possession, or are voluntarily delivered to him by the person having them, he must take them, on pain of incurring a

contempt, and, having thus taken them, he cannot surrender them to an adverse claimant without leave of the court, which is the real custodian. High, Rec. §§ 139-145; Gluck & B. Rec. § 92; Beach, Rec. 304. Parker v. Browning, 8 Paige, 388, was an appeal by the receiver from an order allowing an action against him for taking, as receiver, goods belonging to third persons. The complaint was that the receiver had forcibly taken goods from the claimants which did not belong to the defendant, whose goods he was directed to take. The chancellor says the receiver is not required to place himself in the position of a wrongdoer, and need not take property from third persons unless under an express order to that effect; that suit should be brought to recover property in the possession of adverse claimants, but, "where the property is legally and properly in the possession of the receiver, it is the duty of the court to protect that possession, not only against acts of violence, but also against suits at law, so that a third person claiming the same may be compelled to come in and ask to be examined pro interessee suo, if he wishes to test the justice of such claim." In that case, it will be seen, the suit was by permission brought against the receiver in his official character. That is the usual and proper mode of presenting such claims, and permission can always be given on such terms as will protect the receiver, while affording full opportunity to the claimant to test his right. Furthermore, it brings the claimant into a court of equity, where he will be required to present his claim without unnecessary delay. In such case the claim of the plaintiff here would have been lost by laches, if the facts alleged in the answer were established. Barton v. Barbour, 104 U.S. 126, is a case in which a receiver was sued for an alleged tort while acting within the scope of his duties as receiver, to wit, operating a railroad. The whole subject is reviewed, and it is held that, while a receiver will be liable as a trespasser if he goes outside of his authority as receiver, still all claims of adverse parties against him arising out of his acts within his authority must be first submitted to the court from which he receives his appointment, and that such court may either try the matter itself or authorize a suit against the receiver. The judge answers the objection which had been urged by some state courts that parties are thereby deprived of trial by jury in cases in which such right is guarantied. The case is all the more decisive because of a vigorous dissenting opinion by Justice Miller, in which he very graphically describes the enormous power which a judge draws to himself by appointing a receiver for a railroad, which may be operating thousands of miles of road and having transactions with thousands of people every day, who in case of disagreement are compelled to submit their suits to the chancellor or seek relief under such conditions and limitations as he may impose. I think these cases and others cited by the respondent are all consistent with the views above expressed, and that the defendant cannot be held responsible for the goods surrendered to him by the plaintiff. This being so, it does not appear to be necessary to hold that the order refusing to direct a redelivery of the property to plaintiff is a bar to plaintiff's right. The court undoubtedly had the power to grant the relief sought in that proceeding. Hulme v. Superior Court, 63 Cal. 240. Whether conclusive or not, the proceeding inaugurated by plaintiff was a recognition and admission that defendant then held the property as receiver.

2. The first point has reference only to the first cause of action, and to the goods found in the store formerly occupied by the insolvents. The second cause of action was for goods not then delivered to the receiver. As stated in the answer, the purport of which has already been set out, these goods were the subject of a further demand, and for them it is charged the defendant, as receiver, brought his action of replevin, which was dismissed, as stated. At the trial the judgment roll in that action was offered in evidence by defendant, and was ruled out on the objection of plaintiff. This ruling is assigned as error. Defendant contends that the judgment of dismissal is a bar to plaintiff's claim. After carefully reading appellant's brief upon this point, I am still at a loss to comprehend upon what this contention is based. Certainly there was no pretense of an adjudication. Appellant says that, as the defendant in the replevin suit set up no claim, the plaintiff had a right to dismiss the action. Conceding that he had such right, he then elected to dismiss without obtaining an adjudication upon his right. He obtained a provisional remedy on condition that he would prosecute his suit and obtain a final adjudication determining his right. Section 512, Code Civ. Proc. He failed to perform this condition. He thereby made himself a trespasser from the beginning, unless he can show title. True, it was a breach of the condition of his undertaking, and the defendant might then have sued upon the bond for such damages as he sustained by the taking. Manning v. Manning, 26 Kan. 98. But that remedy was not exclusive. Plaintiff was not compelled to sue on the undertaking. As to the second cause of action, therefore, the defendant must be considered a trespasser if plaintiff succeeds in establishing his title. Defendant, however, was in fact a receiver, and author ized to represent creditors. As to them, it has often been held in this state that a sale made to hinder, delay, or defraud them is absolutely void, and not merely voidable. Grum v. Barney, 55 Cal. 254; Humphreys v. Harkey, Id. 284; Mason v. Vestal, 88 Cal. 30%, 26 Pac. 213. It is therefore necessary to consider some other alleged errors.

3. The defendant was allowed to put in evidence the proceedings in insolvency up to and including the adjudication, but the court excluded: (1) The petition upon which defendant was appointed receiver; (2) the petition of the receiver for permission to sell the property and the order of the court directing the sale; (3) the report of the sale; (4) an order approving the sale; (5) the appointment of an assignee and orders directing payment to creditors. To each ruling the appellant excepted. There can be no question that all this evidence should have been admitted, at least down to and including the appointment of the assignee. It was necessary, to show the jurisdiction and power of the court to appoint a receiver, that a proper petition should have been presented. Of course, the defendant could not show that his acts were all official unless he could show his official character. The court recognized this, and suggested that the plaintiff admit that a proper petition was presented. This admission plaintiff's counsel made, but defendant refused to accept it. The court, however, insisted upon it, and persisted in its ruling. A party legally entitled to certain evidence cannot be compelled to accept an admission in lieu of the evidence to which he is entitled unless the admission be as good for him as the evidence. Here it evidently was not. The petition explained the duties and power of the receiver by showing why he was appointed and what he was expected to do, and especially it showed that the reason why a receiver was appointed was to pursue these very goods, the value of which plaintiff seeks to recover. It explains the language of the order, and shows to what it applies. It was important and proper for defendant to show that he was directed to pursue these very goods, as showing that in taking them he was acting under the direction of the court. It was also proper to show that the property was disposed of under the direction of the court, and that the defendand did not apply it, or any portion of it, to his own use. To do this all the evidence above alluded to was material. A radical mistake of the learned judge of the trial court was that the only question involved was as to the title of the plaintiff. This is not so. Though plaintiff's title be admitted. still the defendant cannot be held in this proceeding as a tort feasor for any act within the scope of his duties as receiver and done under the express order of the court.

4. Appellant complains of the instructions that they are conflicting and confusing, and says: "The defendant, appellant, instead of receiving the benefit of doubts, was treated as an offender, and the fact of his being the 'hand of the court' pretty thoroughly

ignored." He says the specifications in his statement sufficiently indicate the instructions objected to, and he will not repeat them in his points. The statement contains 72 specifications of errors which occurred at the trial. I do not think this a compliance with the rule which requires an appellant to file and serve his points. In his points the appellant should at least specifically point out the errors he relies upon, and briefly state why he deems the rulings erroneous. The instructions are numerous and voluminous, and we cannot be expected to hunt through them to find those which the general discourse of appellant may apply to. A reading of the instructions given at the instance of the respondent shows failure to make one distinction in a matter material to appellant. For instance, the fifteenth is: "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." Now the property in question here was taken by a receiver appointed to aid proceedings against J. T. Wight & Co. as insolvent debtors under the insolvent act. The transfer was made only seven days before the petition by the creditors. It was contended that the plaintiff, when he purchased, knew of the insolvency, and that the sale was made to enable J. T. Wight to pay a debt due his wife, in preference to the other creditors, and to prevent the property from going to an assignee in insolvency and being ratably divided among the creditors of J. T. Wight & Co. The insolvency was admitted. Granted the intent to prefer one creditor over another, and knowledge on the part of the vendee, the law is exactly the converse of that stated. If it can be said that the defendant also contended that the sale was void because made to hinder, delay, and defraud creditors, the instruction would still be erroneous, for it is not so qualified as not to have application to both questions. In several instructions this failure to discriminate between a claim that the sale was void because made to hinder, delay, and defraud creditors, and a fraudulent preference under the fifty-fifth section of the insolvent act, is manifest. The instruction is sound law as applied to one case, but is almost the opposite of sound law as applied to the other. Defendant's claim was founded almost if not entirely upon the proposition that the sale was a fraudulent preference under the insolvent act. In such case the insolvent cannot within one month before filing the petition prefer one creditor to another; and if he makes a sale for the purpose of doing so, and the vendee is aware of the intent, the sale is void as against the operation of the insolvent act, even though the purchaser paid full value for the property and the proceeds were applied to the payment of an honest debt. Furthermore, the sale to plaintiff was not in the usual and ordinary course of business, and this fact appeared from the testimony of plaintiff himself. When a retail merchant, while he is engaged in business as such, and has a large stock of goods exposed for sale in that mode, transfers the entire stock in one trade, such transfer is not, and cannot be, in the usual and ordinary course of his business. The above fact, taken in connection with the other circumstances in proof, was sufficient to bring the case within the rule laid down in the insolvent The evidence on the subject was not conflicting. But one rational conclusion could be drawn from it upon this point, and there was no question as to the credibility of Thereby, on the question of fraud, the burden was shifted from defendant to plaintiff, and it was misleading, without explanation or qualification, to tell the jury that the burden was upon the defend-Under the circumstances, the court would have been justified in charging the jury that the defendant had prima facie made out his defense.

Other instructions I do not deem it necessary to discuss, because of the failure of sufficient specifications. I think the judgment and order should be reversed, and a new trial had.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed and a new trial granted.

103 Cal. 213

WYMAN v. MOORE et al. (No. 15,223.)
(Supreme Court of California. June 26, 1894.)
GAMBLING CONTRACTS BY AGENT—RIGHTS OF
PRINCIPAL.

Where a principal engages an agent to purchase wheat, who, instead, employs a broker to buy "futures," and the principal, with knowledge of the transaction, accepts the benefits, she thereby ratifies the agent's act, and cannot recover the money from the broker in case of subsequent losses, as she is in pari delicto.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Cora B. Wyman against James Moore and others. There was a judgment for defendants, and plaintiff appeals. Affirmed

George D. Collins, for appellant. W. S. Goodfellow and Otto Tum Suden, for respondents.

McFARLAND, J. This action is, substantially, to recover money alleged to have been given by plaintiff to defendants, who were brokers, to be used by the latter for the former in buying and selling wheat. The business seems to have been profitable for a while, but afterwards ended in a loss. The court found that all of the allegations of the complaint were untrue, and all the allegations of

the answer true, and rendered judgment for the defendants; and plaintiff appeals from the judgment, and an order denying her motion for a new trial.

We think that the judgment and order should be affirmed. Waiving the question of the alleged illegality of the transactions about wheat,—upon which illegality appellant rests her claim to a recovery,—it appears that the appellant was not an innocent party to such transactions, but took part in and ratified them. Being, therefore, a party in pari delicto, the law leaves her where it finds her. The judgment and order are affirmed.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

103 Cal. 352

Ex parte CLARKE. (No. 21,085.) (Supreme Court of California. June 30, 1894.) EXAMINATION OF INSOLVENT—PRIVILEGE OF WITNESS—FRAUD.

Const. art. 1, § 13, provides that no one shall be compelled, in any criminal case, to be a witness against himself. Section 154, Pen. Code, provides that every debtor who fraudulently sells or conceals his property with intent to defraud or delay his creditors is punishable by fine or imprisonment, or both. Petitioner was adjudicated an insolvent, and was cited to appear before the court and be examined regarding his disposition of his property. Held, that he was not obliged to answer questions relating to his fraudulent disposition of his property.

In bank. Petition by Alfred Clarke for habeas corpus. Prisoner discharged.

Frank M. Stone, for petitioner. Warren Olney, for respondent.

BEATTY, C. J. The petitioner having been duly adjudicated an insolvent debtor, his assignee in insolvency filed a petition charging him with having concealed, smuggled, conveyed away, and disposed of property which should have been turned over to said assignee for the benefit of his creditors, upon which a citation was issued commanding him to appear before the superior court to be examined touching the matters alleged in the petition. In obedience to the citation, the petitioner came into court and was sworn, but declined to answer the questions put to him upon the ground that his answers might be made the foundation of a criminal action against him. Section 154 of the Penal Code reads as follows: "Every debtor who fraudulently removes his property or effects out of this state, or fraudulently sells, conveys, assigns, or conceals his property, with intent to defraud, hinder, or delay his creditors of their rights, claims, or demands, is punishable by imprisonment in the county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both." It is evident that any answers the petitioner might have made tending to support the allegations of the peti-

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tion upon which he was cited for examination would also have had a tendency to convict him of the crime or public offense defined in the section quoted, and therefore he could not be subjected to compulsory examination. No person can be compelled, in any criminal case, to be a witness against himself. Const. art. 1, § 13. To bring a person within the immunity of this provision it is not necessary that the examination should be attempted in a criminal prosecution against the witness, or that such a prosecution should have been commenced and actually pending. It is sufficient if there is a law creating the offense under which the witness may be prosecuted. If there is such a law under which the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, unless the law absolutely secures him against any use in a criminal prosecution of the evidence he may give; and this can only be done by a provision that, If he submits to the examination, and answers the questions, he shall be exempt from any criminal prosecution for the offense to which the inquiry relates. All these propositions are decided by the supreme court of the United States, upon an exhaustive review of the authorities in the case of Counselman v. Hitchcock, 142 U.S. 547, 12 Sup. Ct. 195, -a case in every essential particular identical with this. There is no law of this state which would have exempted the petitioner from a criminal prosecution for fraudulent concealment of his property if his answers to the questions put to him had tended to convict him of the offense, and therefore we repeat he could not be compelled to answer. But the superior court held otherwise, ordered him to answer the questions, and, upon his persistent refusal to answer, committed him to the county jail for contempt of court. The imprisonment is illegal, and the prisoner must be discharged. It is so ordered.

We concur: McFARLAND, J.; VAN FLEET, J.; FITZGERALD, J.; GAROUTTE, J.

102 Cal. 633

HOLLAND v. ZOLLNER. (No. 15,281.) (Supreme Court of California. July 7, 1894.) Mental Capacity—Opinion Evidence.

Testimony of one who is neither an expert nor an intimate acquaintance (Code Civ. Proc. § 1870, subd. 10), that a person's appearance was "irrational," though of doubtful competency, is not necessarily prejudicial when the witness also details the facts on which said conclusion was based. 36 Pac. 930, affirmed.

In bank. Appeal from superior court, city and county of San Fracisco; John Hunt, Judge.

Action by Augusta Holland, administratrix, etc., against Alfred Zollner. Decree for plaintiff affirmed in department. See 36 Pac.

930. On petition for hearing in bank. Petition denied.

Naphtaly, Freidenrich & Ackerman, J. W. Jellett, and A. Ruef, for appellant. Lloyd & Wood and A. Heyneman, for respondent.

PER CURIAM. The petition for hearing in bank is denied. Conceding that the last question asked of the witness Mrs. French on direct examination, and the answer given thereto, were erroneous under the decision of this court in Estate of Carpenter, 94 Cal. 406, 29 Pac. 1101, still, considering the cross-examination of the witness, and all the other evidence in the case, we do not think the error of sufficient importance to warrant a reversal of the judgment. The same may be said of the witness McKisick, and, furthermore, his testimony was not of a character to prejudice appellant.

GAROUTTE, J. (concurring). While concurring in the order denying a rehearing in this case, I am unable to concur in the views of the department holding that the question addressed to the witness upon the appearance of Holland, as to his being rational or irrational, was unobjectionable. At common law any one was entitled to give his opinion as to the mental condition of a party, while under the Code of Civil Procedure only intimate acquaintances are allowed to so testify. At the same time this provision should have a liberal construction, and a wide discretion as to such matters is vested in the trial court. In the present case a week's acquaintance and association of the character indicated in this record, in my opinion, furnished a foundation sufficient to support the admission in evidence of the witness' opinion as to Holland's mental soundness; and for this reason the evidence of which complaint was made was properly placed before the jury. But upon any other hypothesis the question addressed to the witness, to wit: "From the appearance of Mr. Holland at that time, with reference to his being rational or irrational, what is your opinion?" is objectionable. It is held in Marceau v. Insurance Co. (Cal.) 35 Pac. 856, that only experts and intimate acquaintances are entitled to give opinions upon this ultimate fact. And from whatever standpoint of vision you view this question it calls for the opinion of the witness. Indeed, it calls for it in direct terms. A witness who is neither an expert nor an intimate acquaintance may testify as to the acts and language of the party, and no further. To say that in your opinion a party appears to be a rational or irrational, sane or insane, is but saying in another form that, from what you have seen of him, you think his mind sound or unsound. The distinction between the two forms of expression is too refined and attenuated to be discovered, even by the most powerful search light. It is but a play upon words, and, if the practice of ask-

ing a question of this character be approved, all persons who have met the party, however unsatisfactory and fleeting that meeting, will be allowed to give their opinions as to his sanity, and thus the provision of the Code will become useless legislation upon the statute books. It is said in Estate of Carpenter, 94 Cal., at page 416, 29 Pac. 1101, that the form of question we are here considering is even more objectionable than if the ordinary and direct interrogatory had been addressed to the witness. It is perfectly apparent to my mind that it is but doing indirectly (and the indirection is hardly perceptible) what the statute and the decisions declare cannot be done directly. People v. Lavelle, 71 Cal. 351, 12 Pac. 226, is the only case, to my knowledge, since the adoption of the Codes, that supports a contrary view. The case is not well considered, and no authority of any court is there cited to support the principle declared.

103 Cal. 372

SMITH v. WAITE. (No. 19,362.)

(Supreme Court of California. July 17, 1894.)

ACTION ON NOTE — ALLEGATION OF DELIVERY —

ACTION FOR SERVICES — COMPLAINT — SUFFICIENCY.

1. In an action on a note, an averment that defendant "duly made" the note implies a delivery, and is sufficient as against a general demurrer.

2. In an action for services, a complaint which alleges that defendant is indebted to plaintiff in a certain sum on account of work, labor, and services performed at the request of defendant, and that he has not paid therefor, is sufficient as against a general demurrer.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Clark, Judge.

Action by S. M. Smith against R. P. Waite on a promissory note and for services performed for defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

H. H. Appel and A. M. Stephens, for appellant. R. G. Adcock and Wm. A. Ryan, for respondent.

BELCHER, C. This is an appeal by the defendant from a judgment entered against him by default, after a general demurrer to the complaint had been overruled; and the only question is, did the complaint state facts sufficient to constitute a cause of action? The complaint contained two counts,-one upon a promissory note, and the other for work, labor, and services performed for defendant. In the first count it is alleged that on a certain day "the defendant duly made a certain promissory note in writing, bearing date on that day, which said promissory note was in words and figures following." A copy of the note is then set out in haec verba, showing that it was payable to the order of the plaintiff. It is further alleged that plaintiff is now the owner and holder of said note, and that no part thereof has been paid. In the second count it is alleged that the defendant is indebted to the plaintiff in a certain sum of money "on account of work, labor, and services • • • performed at the request of the defendant," and that the defendant has not paid the same nor any part thereof. The objections are: (1) That there is no averment that the note was ever delivered by the defendant to the plaintiff, or that the defendant made it to the plaintiff; and (2) that it is not stated by whom the work was performed,-whether by plaintiff or some other person. And it is said: "If it was performed by another person, then there should be an allegation of the assignment of the account. The demurrer was properly overruled. Each count in the complaint sufficiently stated a cause of action, when tested only by a general demurrer. The averment that the defendant "duly made" the promissory note implies a delivery. "It is not necessary to aver the delivery of a bill or note, for the averment that a bill was drawn or note made includes the idea of a delivery, without which the drawing or making is not complete." Daniel, Neg. Inst. § 63. And see Churchill v. Gardner, 7 Term R. 596; Russell v. Whipple, 2 Cow. 536; Prindle v. Caruthers, 15 N. Y. 425; Hook v. White, 36 Cal. 302. The judgment should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. 268
COSGROVE v. PITMAN et al. (No. 15,189.)
(Supreme Court of California. June 26, 1894.)
INJURY TO EMPLOYE — INCOMPETENCY OF FELLOW
SERVANT—DRINKING HABITS — EVIDENCE — ADMINISTRATRIX—DISQUALIFICATION BY MARRIAGE.

1. In an action for personal injuries resulting from the negligence of a fellow servant, on the ground that his habit of using intoxicating liquors was of such notoriety that defendant must have known it, a recovery cannot be had where there is no evidence that he was intoxicated when the accident happened.

2. An instruction that if the fellow servant's habits of drinking had impaired his "standing" among engineers of his class, and among em

2. An instruction that if the fellow servant's habits of drinking had impaired his "standing" among engineers of his class, and among employers of engineers, and defendant knew or should have known thereof, plaintiff should have a verdict, is erroneous, as the engineer's "standing" among engineers or employes is immaterial if he did not have the habit of drinking.

if he did not have the habit of drinking.

3. Occasionally taking a drink or occasionally being under the influence of drink does not constitute such a habit of drinking as would authorize a finding that one was thereby rendered incapable of managing an engine.

4. The marriage of an administratrix does not of itself deprive her of authority to sue as such.

In bank. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Action by Helen Cosgrove as administra-

trix of the estate of James Cosgrove, against H. C. Pitman and another for damages for the death of her husband. Judgment for plaintiff, and defendants appeal. Reversed.

Pringle, Hayne & Boyd, for appellants. Henry E. Highton, for respondent.

HARRISON, J. The defendants are stevedores, and in August, 1885, were engaged in discharging a cargo of coal from the vessel Henry Hyde, then lying at one of the wharves in San Francisco. The plaintiff's intestate was in their employ, and, while so engaged, a tub of coal, which was being hoisted from the hold of the vessel, swung around so that it might be emptied into another vessel alongside, and struck him with such force as to cause injuries from which he The plaintiff, as the administratrix of his estate, brought this action against the defendants to recover the damages sustained by his death, alleging that it was caused by reason of their negligence. The coal was hoisted by means of a donkey engine on the wharf, which was in charge of an engineer named Murphy, who, at signals from another employe, started and stopped the engine; and it is claimed by the plaintiff that the injury to the deceased was caused by the negligence of this engineer; and, in order to avoid the rule of law which exonerates the employer from liability to an employe for an injury resulting from the negligence of a fellow servant, the plaintiff sought to show that Murphy was addicted to the habit of drinking intoxicating liquors, and that this fact was of such notoriety that it must have been known to the defendants, and that therefore they were guilty of negligence in having him in their employ. The cause was tried by a jury, and a verdict rendered in favor of the plaintiff. The defendants have appealed.

Murphy's capacity as an engineer, aside from the impairment of such capacity by reason of this alleged habit, does not seem to have been questioned by the plaintiff, and there was ample evidence of such capacity shown at the trial. The plaintiff did not attempt to show that Murphy was intoxicated at the time of the accident, nor was there any evidence of that purport before the jury. Murphy himself testified, and there was no evidence tending to contradict his statement, that he was not intoxicated on the day of the accident, and had not taken any intoxicating liquors either on that day or for a year prior thereto. The testimony of Nagle that in the morning of that day, while Murphy was fixing his engine, and seemed to be in a hurry, some one remarked, "I guess he is drinking a little," is not entitled to any consideration as evidence that he had in fact been drinking. Upon the theory of the plaintiff that the injury resulted from the negligence of Murphy, if she would charge the defendants with the results of this negligence. by reason of their having him in their employ, with knowledge of his intemperate habits, it was necessary for her to show that the injury was in some respect the result of such intemperate habits. Unless the accident was in some way connected with such habit, or resulted from intemperance, the habit was not the cause of the negligence, and the defendants could not by reason of this habit be rendered liable for the negligence of Murphy produced by any other cause. If the fact of Murphy's habit of intemperance at or about the time of the accident had been shown, the jury might have inferred that he was in that condition at the time of the accident, and that his negligence was the result of this condition. Proof of his being under the influence of liquor at the time of the accident would be presumptive of his negligence, and, if it had appeared by direct evidence that he had a habit of intemperance, it would throw upon the defendants the burden of showing that he was not then in that condition; but proof that he had at some previous time the reputation of having the habit is not proof of the fact that he did have the habit. To allow the proof of his reputation for drunkenness to be equivalent to establishing the fact that he was addicted to drunkenness, and from that to make the further inference that from his habit he was so at this time, would be to draw an inference from a presumption. Unless facts are shown from which negligence may be reasonably inferred, a jury should never be permitted to infer, arbitrarily and without evidence, that there was negligence. When a fact is established, some other fact may be justly inferred therefrom, but when the plaintiff, instead of presenting a fact or facts from which the negligence of the defendant may be reasonably inferred, gives to the jury only a presumption drawn from other facts, the jury are not to be allowed to infer negligence from such presumption. An inference cannot be drawn from a presumption, but must be founded upon some fact legally established. See Douglass v. Mitchell's Ex'r, 35 Pa. St. 443.

For the purpose of establishing this habit in Murphy, the plaintiff offered evidence of his reputation in the matter of drinking, and also the testimony of certain witnesses that they had at times seen him "under the influence" of liquor. None of the witnesses testified that they had ever see him intoxicated, or that he was in fact accustomed to habitual drinking. It was shown that he would occasionally drink, "to be sociable and pleasant," and also that it was quite common for engineers to drink. One witness, when asked about his habits with respect to drink prior to the day of the accident, said: "I have seen him take a drink once in a while. I have seen him when he was pretty full." And when asked how frequently said: "Well, not very often. It might be once a week, or something like that." Another witness, when asked with reference to his habits of drink. said that "for some months prior to 1885" he

would take a drink frequently, and that quite a number of times he had known of his drinking to excess; that for four, five, or six years before the trial (March, 1891) he had not conducted himself so well with respect to drink, and a great many would not employ him. The witness did not, however, state when or how frequently he had known of his drinking to excess. Another of the plaintiff's witnesses testified that the "standing" of Murphy "along about 1885" was bad, on account of drinking, and that among the pile drivers for four or five years prior to the trial he was not thought to be a "safe" man. Another, who had seen him drink in 1883, said that since that time "I have considered that he drank too much whisky to take care of an engine." He does not, however, state that he had had any knowledge of Murphy's habits or conduct for two years prior to the accident. This was substantially all the evidence that was given by the plaintiff for the purpose of showing that Murphy was addicted to the habit of drinking.

When the evidence was offered, the defendants reserved the right to move to strike it out, if the plaintiff failed to bring it home to them, or should fail to show that Murphy was under the influence of liquor at the time of the accident; and at the close of the plaintiff's case they made this motion, and it was denied by the court. This motion should have been granted. It cannot be said that to take an occasional sociable drink, or even to be occasionally "under the influence" of drink, constitutes a habit of drinking, or that a jury would be authorized to infer from such evidence that the man had been rendered incapable of properly managing his engine, when he had not been drinking for a year prior thereto. Proof of specific acts is not equivalent to proof that Murphy had either "Character for this reputation or the habit. care, skill, and truth of witnesses, parties or others, must all alike be proved by evidence of general reputation, and not of special acts. 1 Greenl. Ev. §§ 461-469. Character grows out of special acts, but is not proved by them, though, indeed, special acts do very often indicate frailties or vices that are altogether contrary to the character actually established, and sometimes the very frailties that are proved against a man may have been regarded by him in so serious a light as to have produced great improvement of character." Frazier v. Railroad Co., 38 Pa. St. 110. The instruction of the court upon this proposition, given at the request of the plaintiff,-that "if an engineer should be proved skillful and competent to run a dummy engine by reason of his intelligence, skill, and experience, and yet should be unsteady and unreliable on account of a habit of drinking intoxicating liquors to excess. he would not be a competent engineer, within the meaning of the law,"-should not have been given. There was no evidence before the jury from which they were authorized to find that Murphy had the habit of drinking intoxicating liquors to excess, or that he was unsteady or unreliable at the time of the accident. While proof that Murphy had a general reputation for drunkenness might be held to impute to the defendants knowledge of such reputation, and, consequently, impose upon them the necessity of making inquiry with reference to the fact, and charge them with the consequences of not doing so, yet such proof would not establish the fact that he was in reality so addicted, and it might be that the inquiry by the defendants, after being informed of the reputation, would show that the reputation was without foundation; otherwise, the defendants would be charged with the consequences of a trait that never existed. Upon this proposition the court instructed the jury as follows: "If you believe from the evidence that, under the law as explained to you by the court, James Cosgrove was injured without contributory negligence on his own part, through the negligence of the engineer, James Murphy, and that the said James Murphy was a man whose habits of drinking had impaired his standing among engineers of his class, and among the employers of such engineers, and was not a safe man to be employed to run a dummy engine in connection with stevedoring work in discharging ships, and that the defendants knew, or by reasonable inquiry might have known, these facts, and that, nevertheless, they employed him on August 25, 1885, to run the engine in discharging coal from the Henry Hyde, and that said James Cosgrove did not know, and had no means of knowing, of the engineer's drunkenness and unfitness, then your verdict should be for the plaintiff." This instruction should not have been given. Aside from the statement implied therein that the drunkenness and unfitness of Murphy was a fact in the case, the "standing" of Murphy among engineers or employers was an immaterial element in determining his capacity or negligence. was relevant only for the purpose of putting the defendants upon notice that such was his reputation, and they were bound by the consequences, if the reputation was founded upon fact. The knowledge by the defendants of Murphy's standing among engineers did not charge them with any negligence, if he did not in reality have the habit of drinking, and, as we have seen above, there was no evidence before the jury of any drunkenness of Murphy at the time of the accident, or from which they could draw the inference that at that time he had a habit of drinking.

It appeared at the trial that the plaintiff was the wife of the deceased, and that after the commencement of the action, and before the trial, she had remarried. The defendants objected that by her remarriage her authority as administratrix was extinguished, and she could no longer maintain the action. It has been held, however, that the marriage

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of an executrix does not, eo instanti, deprivener of her power to act, but is merely ground for a proceeding for her suspension and removal. Schroeder v. Superior Court, 70 Cal. 343, 11 Pac. 651; McMillan v. Hayward, 94 Cal. 357, 29 Pac. 774. The same principles apply in the case of an administratrix as an executrix, and there was therefore no error in this ruling of the court. As the case is to be remanded for a new trial, we do not deem it proper to indicate any opinion concerning the weight of evidence upon the issues of negligence or contributory negligence. The judgment and order are reversed.

McFARLAND, J. I concur.

FITZGERALD, J. I concur in the judgment.

GAROUTCE, J. It is claimed that the accident occurred by reason of the negligence of the engineer, a servant of the defendants and a fellow servant with the deceased. support plaintiff's case under this state of facts, it was not only necessary to prove that the engineer was intoxicated at the time of the accident, but that defendants were guilty of negligence in employing him. It was proven that his general reputation for sobriety was bad, and it may be conceded, for the purposes of this case, at least, that defendants were lacking in the exercise of due and proper care in hiring such a man. But there is no evidence in the record that he was intoxicated at the time of the accident, and nothing therein from which we are justified in drawing an inference to that effect. I concur in the judgment.

DE HAVEN, J. I concur in the opinion of Mr. Justice GAROUTTE.

4 Cal. Unrep. 714

MILLBRAE CO. ▼. TAYLOR et al. (No. 15,039.)

(Supreme Court of California. June 27, 1894.)
Use of Trade Name—Injunction.

Defendant, the owner of land known as "Millbrae Station," formed a copartnership with plaintiffs to keep cows on said land, and sell the milk therefrom under the trade name of "Millbrae Dairy." Afterwards the partnership was dissolved, plaintiffs taking the milk routes and business of selling milk, and defendant, who remained the owner of the land, agreeing to supply them with milk therefrom. Later plaintiffs terminated the contract with defendant, and took no more of his milk, but still conducted a milk business under the name of the "Millbrae Dairy," and formed a corporation under the name of the "Millbrae Company," to carry on the business. Held, that plaintiffs could not ask for an injunction to restrain defendant from using the name "Millbrae" in a competing business, since their own use of the name was a fraud on the public.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; Wm. T. Wallace, Judge.

Action by the Millbrae Company against. H. H. Taylor and others to enjoin the use of a trade name and for damages. Judgment for defendants. Plaintiff appeals. Affirmed.

Wheaton, Kalloch & Kierce, for appellant. Maxwell & McEnerney, for respondents.

HAYNES, C. Action to enjoin the defendants from using a "trade name," which it is alleged belongs to the plaintiff (a corporation), and for damages. Findings and judgment were against the plaintiff, and this appeal is taken from the judgment and an order denying its motion for a new trial. An outline of the facts, condensed from the findings, may be thus stated: Some time prior to 1865, the defendant D. O. Mills became and still is the owner of a tract of land in San Mateo county, at the railroad station now, and ever since 1865, known as Millbrae station. From 1865 until August, 1883, A. F. Green and defendant Mills were copartners, engaged in the business of raising and keeping cows of superior quality and breed upon said land, and selling the milk therefrom in the city of San Francisco, said business being conducted, at least since 1875, under the trade name of "Millbrae Dairy;" the word "Millbrae" being compounded of the name of the owner of the ranch (omitting the "s") and the Scotch word "brae." In August, 1883, F. H. Green purchased a onethird interest in the cows and other personal property and business, and the firm as thus constituted continued the business until September 1, 1886, under the same trade name. At the date last named the copartnership was dissolved by mutual consent, and in the settlement A. F. and F. H. Green took the milk routes and business of selling the milk in San Francisco, with the wagons, horses, and appurtenances, and defendant Mills, who was at all times the sole owner of the land, took all the dairy implements, supplies, cows, and other personal property at the ranch, and on the same day entered into an agreement with said A. F. and F. H. Green whereby he agreed to sell to them and they agreed to buy, not less than 270 nor more than 390 gallons of milk per day, at a price therein specified, the milk to be thus furnished by defendant Mills to be exclusively from his own dairy, and this agreement was to continue for at least one year. A similar agreement was made each year, the last being dated September 1, 1889, the quantity named therein being not less than 360 and not exceeding 410 gallons per day. This contract stipulated that it should be in force for at least one year, and thereafter until one of the parties should give the other three months' notice of his intention to terminate About July 1, 1890, A. F. and F. H. Green organized a corporation under the name of the Millbrae Company (the plaintiff herein), and conveyed to it their said busi-

ness, property, and good will, they being the principal stockholders therein, and practically owning and carrying on said business through said corporation, and on the 1st of August, 1890, ceased to take milk from defendant Mills under said contract, and thereafter the plaintiff procured from Marin county the milk with which it supplied its cus-Until the formation of the corporation, the business continued to be conducted by A. F. and F. H. Green under the name of the "Millbrae Dairy," and their delivery wagons were so marked, and that name was printed upon their bills and receipts, upon which it was also stated that the milk was "produced on Millbrae farm, San Mateo county." After the organization of the corporation, the name on the wagons and bills was changed to "Millbrae Company," and on the bills it was stated simply "pure country milk, produced from rich pasture, wholesome feed, healthy cows;" without any indication as to the locality except the word "country." On September 1, 1890, the defendant D. O. Mills commenced the business of selling milk from his said dairy in the city of San Francisco, and engaged defendant Taylor as agent for that purpose, and employed defendant Cole to manage the sale and distribution of the milk in the city; and in this business adopted and used upon his wagons and upon his bills the original trade name, "Millbrae Dairy," but specified upon his bills and advertisements that the milk sold was from the Millbrae dairy, in San Mateo county, and added: "Do not confound it with the Millbrae Company." At the time of the dissolution of the copartnership, a valuation was put upon all the property, and among other items of the city branch of the business, which was taken by A. F. and F. H. Green, was "100 cans' trade, \$4,000."

The foregoing facts are not disputed, and are sufficient to present the principal question in the case. There are several specifications of the insufficiency of the evidence to justify certain findings, but these can be more briefly disposed of after deciding the principal question, since if the findings excepted to were framed as appellants suggests they would not change the result. It is insisted by appellant that the "trade name" is a part of the good will sold by defendant Mills to Green & Green, and for which they paid a large sum of money; that such name is an important element in such good will, and that plaintiff has the exclusive right to its use. Appellant is in error as to the facts to which he applies the law, and hence is wrong as to his conclusions. The findings apon this subject are not only supported, but are made clear by the testimony of F. H. Green, who was one of the parties to the contract under which it is claimed the good will of the business and the right to use the trade name was sold by defendant Mills. He said: "Prior to that time (referring to his

had been carried on by D. O. Mills and my father, under the name of the Millbrae Dairy.' I think they gave it the name of the Millbrae dairy in 1875 or 1876. In 1883 the business was in the name of the Millbrae dairy. I continued in business with them ome three years. In 1886 we entered into an agreement to divide the business up. Mr. Mills took the interest in the country, and my father and myself took the interest here. Since that time my father and myself conducted the business under the name of the Millbrae dairy." It will also be observed that on the day of the dissolution of the partnership the contract was entered into for the sale by Mills to the Greens of the milk produced at Millbrae, and by which the Greens agreed to sell the same in San Francisco, and that defendant Mills has ever since continued the business of keeping cows and producing milk at the same place and under the same name. There was nothing said in the contract about the sale or transfer of the good will, or of the use of the name under which the business had been conducted. It was not a sale of the entire business with which the name was connected, but a "division" of the business, and the name was equally applicable and equally important to each part. So long as the Greens or their successors continued to sell Millbrae milk, there was no conflict of interest in the use of the name, nor was there any agreement, covenant, or obligation that the Greens should have the right to use it longer than they continued to sell Millbrae milk. On the contrary, the fair and reasonable implication was that the name should only be used in connection with the sale of milk produced by the owner of the ranch and dairy familiarly known by that name, and which name was even more important to be retained by the owner of the ranch than by one whose right to sell the milk depended upon a yearly contract. Nor was this contract terminated by defendant Mills, but plaintiff, for its own advantage, voluntarily terminated it by a threemonths notice, under the terms of the contract, and now insists that it may deprive defendant Mills of all use and benefit of the well-established name in disposing of his milk, while using the false name of "Mill-brae" for selling the milk of a competing producer.

It is not necessary to review the cases cited by appellant, for the question involved is no longer an open one. In the case of Joseph v. Macowsky, 96 Cal. 521, 31 Pac. 914, it was said: "A person who comes into a court of equity for an injunction in a case of this kind must come with clean hands. He cannot be granted relief upon a claim to the exclusive use of a trade-mark which contains a false representation, calculated to deœive the public as to the manufacturer of the article and the place where it is manufactured. Browne, Trade-Marks, §§ 71, 474; purchase of an interest in 1883) the business. Palmer v. Harris, 60 Pa. St. 156; Fetridge v.

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Wells, 13 How. Pr. 385; Hobbs v. Francais, 19 How. Pr. 571; Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436. In Siegert v. Abbott, 61 Md. 284, the court said: 'It is a general rule of law in cases of this kind that courts of equity will not interfere by injunction where there is any lack of truth in the plaintiff's case; that is, where there is any misrepresentation in his trade-mark or labels." If, at the time the partnership was dissolved, D. O. Mills had sold to his copartners the ranch and dairy, as well as his interest in the business of selling the milk there produced, the property in the trade name and the exclusive right to use it would have passed to the purchasers, and Mills could not have applied the name to another ranch or dairy and used it in the like business to the injury of the plaintiff. By the division of the partnership property and business, coupled with the contracts for the sale of the same milk, the Greens acquired the right to use the trade name so long as they sold Millbrae milk; but they could not rightfully use it after they ceased to sell that milk. without wronging both Mills and the public. It does not aid the plaintiff's case that Marin county milk, which it now sells, is as good or even better than Millbrae milk. As was said in a similar case, "the privilege of deceiving the public, even for their own benefit, is not a legitimate subject of commerce." Prince Manuf'g Co. v. Prince's Metallic Paint Co., 135 N. Y. 24, 31 N. E. 993. For a full discussion of the questions principally involved in the case at bar, see the case last above cited, and, also, Pepper v. Labrot, 8 Fed. 29, and Huwer v. Dannenhoffer, 82 N. Y. 499. In Atlantic Milling Co. v. Robinson, 20 Fed. 217, it was held that the right to the symbol is inseparable from the right to make and sell the commodity which it has been appropriated to designate. Pierce v. Guittard, 68 Cal. 68, 8 Pac. 645, is entirely consistent with Joseph v. Macowsky, supra, and is against appellant.

It is claimed that the second finding is, in effect, that defendant Mills first used and adopted the name "Millbrae" before his partnership with A. F. Green, and that this is not justified by the evidence. Whether this name was adopted before or after is wholly immaterial. It had certainly been used many years before the dissolution, and was well known. It was the name of a locality, and attached thereto, no matter by whom nor when it was originated. Whether Millbrae farm is or is not shown by the evidence to be "peculiarly" fitted and adapted to the purpose of producing milk, or that it is not shown to produce better milk than other farms or dairies, is also immaterial. The name used to indicate milk produced on that farm had become valuable, and the question here is not one of comparison with other milk or other ranches, but whether defendant Mills shall be deprived of the use of a name that is valuable to him. The

finding that "D. O. Mills never sold nor conveyed to A. F. Green and F. H. Green nor to either of them, the good will of the business of selling milk in the city of San Francisco," is, I think, supported by the evidence. The evidence shows that at the time of the dissolution of the copartnership four milk routes were operated. Those routes were not defined in the evidence. There was no agreement that Mills should not engage in that business in the city. Whatever might be said of the "routes" then operated, there is nothing in the evidence to indicate that he intended to exclude himself from the business of selling milk in the city, unless during the continuance of his contracts with his former partners. Besides, so far as the use of the trade name is concerned, the good will of the milk routes is an immaterial factor. It was found by the court that Green & Green "were to take from D. O. Mills all the milk which might be necessary to carry on the said business;" and this, it is said, is not justified by the evidence. The agreement, as we have seen, specified a minimum and maximum quantity, and, while they did not contract not to buy or sell other milk, and the evidence shows that they sometimes did so, yet the finding is substantially true. It was a division of the business, and during the continuance of these contracts they advertised no other milk, and there is no evidence tending to show that it was not usually sufficient to supply their customers. The finding that the use of the word "Millbrae" was a representation to the public that the milk sold was produced at Millbrae farm or dairy is incontrovertibly supported by the evidence, as is also the finding that the use of the same word by the plaintiff after it ceased to sell Millbrae milk was a false representation. The assurance given by plaintiff to its customers that it was selling them Marin county milk could not have been necessary if the use of the word Millbrae did not imply that it was selling milk from Millbrae dairy.

It was further alleged in the complaint that defendants Taylor and Mills entered into a scheme which had for its object the going into the business of selling milk in said city, and of obtaining customers by enticing away the customers of the plaintiff: that in pursuance thereof they induced the defendant Cole, who had been in the employment of the plaintiff and its predecessors for 15 years, and had full knowledge of their milk routes, to leave the plaintiff and enter into their service, and were thus able to impose upon the customers of the plaintiff and sell them milk while such customers believed they were purchasing from plaintiff; that defendants' wagons closely resembled plaintiff's, and had painted on them the words "Millbrae Dairy," and were run under the personal charge of defendant Cole, and by

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these means, and particularly by using the name "Millbrae," and having the same painted upon their wagons, and having them in charge of defendant Cole, have been drawing away plaintiff's customers, and allege damages in the sum of \$500. these issues the court found that no scheme was entered into; that none of plaintiff's customers were imposed upon, or bought milk from defendants when they supposed they were buying from plaintiff; that the wagons used by defendants do not resemble plaintiff's wagons; that none of plaintiff's customers have been drawn away, except by fair and open competition; that none of said customers were misled by the defendants' use of the trade name "Millbrae," and that plaintiff has not sustained any damage. Appellant claims that none of these findings are supported by the evidence. That defendants sold milk to a very considerable number of the former customers of plaintiff is not disputed. Whether defendants obtained these customers by improper means is a mixed question of law and fact; the means used being a question of fact, but whether such means were improper is a question of law, depending upon the relation of the parties, and their rights and duties towards each other. There is no doubt that plaintiff has sustained loss by the competition of defendants, but whether such loss is a legal injury, entitling the plaintiff to recover damages, is quite another question. The use of the trade name, so long used by plaintiff and its predecessors, must necessarily aid the defendants in securing custom, but, having the right to use it, plaintiff cannot complain. The circulars used by defendants for advertising their business were headed "Millbrae Dairy, of Millbrae, San Mateo County," and informed the people that they would sell their own milk, and further said, "Do not confound it with the Millbrae Company." We think these findings are fully justified by the evidence, notwithstanding the evidence shows that plaintiff suffered loss in consequence of what defendants did. Some of these findings, taken by themselves, are mixed conclusions of law and fact, and necessarily so. But they must be read in connection with the other findings, showing the relations of the parties and their rights and duties toward each other. Appellant contends that "a person who sells the good will of a business will be enjoined from again setting up business at such a place and in such a manner as to destroy or diminish the business of which he had sold the good will; that the sole issue is between D. O. Mills, the vendor of the good will of a business, and appellant, successor to his vendees." We think that the only good will that was sold by Mills was the good will of the routes then operated for the sale of Millbrae milk; that it was not the intention of Mills to shut himself out from them, nor

from any part of the city, if his vendees should cease to sell his milk. His vendees might have exacted other conditions, but they did not do so. In the language of F. H. Green, it was a "division of the business" theretofore carried on by the so-called vendor and vendees as partners, and that business was the sale of Millbrae milk. Mills did not sell the good will of the business of selling any other milk, as no other milk was sold, and his vendees could not divert the place where that business was conducted to the sale of a competing article. and shield themselves from his competition by claiming that the good will continued, not only as to the place, but as to the place used for selling a different and competing article. This conclusion makes it unnecessary to consider the cases cited by appellant in support of the proposition that the vendor of the good will of a business "must do nothing to impair or injure it" (a proposition which certainly requires material qualifications), or those other cases which undertake to specify with more or less particularity what the vendor who again enters upon a similar business may or may not do in furtherance of it.

I think the evidence justifies the findings, and that the judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 367

MERRILL et al. v. CLARK et al. (No. 18,284.)

(Supreme Court of California. July 16, 1894.) PUBLIC LANDS-TRANSFER BEFORE RECEIVING PATENT-WHEN PERMISSIBLE.

Under Rev. St. U. S. § 2263, providing that before any notice is made under section 2259 proof of the settlement and improvement 2259 proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land districts in which the lands lie, and that all assignments and transfers before the issuing of the patent shall be void, one who has delivered the final proof of his pre-emption claim, the affidavit required by statute, and the money for the land to the register may transfer the land, though he has not received a patent therefor.

Department 1. Appeal from superior court, Lassen county; W. T. Masten, Judge. Ejectment by W. C. Merrill and another against Mary Clark and others. From a judgment for defendants, and an order denying a new trial, plaintiffs appeal. Affirm-

Shinn & Shinn and S. Solon Holl, for appellants. Spencer & Raker, for respondents,

GAROUTTE, J. This is an action of ejectment to recover possession of 120 acres of land in Lassen county, in this state. The

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respondents had judgment in the court below, and from this judgment, and an order overruling appellants' motion for a new trial, this appeal is taken. Both parties are claiming title from one W. H. Clark. The facts material to a disposition of this litigation may be briefly stated as follows: W. H. Clark, the husband of respondent Mary, upon the 5th day of November, 1881, made final proof upon his pre-emption claim to this tract of land before a deputy county clerk of Lassen county. He also at the same time made the affidavit provided by section 2262 of the Revised Statutes, and paid for the land, with all legal costs and charges. final proof, affidavit, and money were delivered to the register of the land office at Susanville, and, by reason of the neglect or dishonesty of the said register, no further action towards the securing of a patent was taken for many months. Shortly subsequent to the date of final proof, W. H. Clark, by bargain and sale deed, transferred the land to the respondent Mary Clark. Subsequent to this event the certificate of purchase was issued, and the patent to Clark followed in due course thereon. Clark thereupon sold the land to appellants, and, basing their rights upon said transfer, they have brought this action in ejectment. The deed from Clark to his wife was recorded in the recorder's office of Lassen county prior to the making of the second deed to the aforesaid

It is not necessary to determine the character or amount of interest in this realty that passed to the wife under the deed from her husband. Whether he had any title at that time that could be transferred is immaterial, for his deed was such as to convey all after-acquired title, and when his right eventually ripened into a perfect title, by the issuance of the patent, such title passed to his grantee, regardless of any intervening deed given by him to other grantees with notice by them of the prior deed. The application of this elementary principle of law to the facts before us disposes of the entire case, unless Clark's deed to his wife was made in violation of section 2263 of the Revised Statutes. That section provides: "Prior to any notice being made under and by virtue of the provisions of section 2259. proof of the settlement and improvement thereby required shall be made to the satisfaction of the register and receiver of the land district in which such lands lie agreeably to such rules as may be prescribed by the secretary of the interior; and all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void." It is upon the last clause of this section that plaintiffs stand, and insist that the deed to Mary Clark was void and carried no title.

Do the facts of this case bring it within

the prohibition above stated? We think clearly not, especially in view of the construction given this provision of the statute by the supreme court of the United States. The case of Myers v. Croft, 13 Wall. 291, in all respects is similar to the case at bar, and this provision of the statute was there construed with a view to carry out the legislative intention, and in disregard of its strict letter. In accordance with this principle, it was held that the interdiction found in the statute was only intended to apply to a transfer of the right of pre-emption. The court there said: "The object of congress was attained when the pre-emptor went with clean hands to the land office, and proved up his right, and paid the government for his land. Restriction upon the power of alienation after this would injure the pre-emptor, and conserve no important purpose of public policy." And again: "Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, if at that time he was in good faith the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject." Measured by this construction of the statute, the present case discloses no violation of its terms; and Clark had the legal right to make the transfer to his wife at the time he made it. At that time he had done all that the law demanded of him, and had done nothing prohibited by the law. He had made the affidavit required by the statute, and had made it truthfully. He had paid the purchase price, and in all respects had made his final proof. The law demanded no further act from him, and the government had but one duty to perform, and that was to issue his certificate of purchase and the patent based thereon. That such is the fact is evident, for subsequently Clark did nothing more; and the patent was issued upon the original proof and affidavit. It is thus apparent that at the date of the deed to Mrs. Clark his original right of pre-emption had ripened into a right much more substantial and valuable. Under the authority of Myers v. Croft, and upon principles of sound reason, we think the assignment and transfer contemplated by this section is an assignment and transfer made before final proof, and before the taking of the affidavit prescribed by section 2262 of the United States statutes. The fact that the court failed to find upon the statute of limitations set up by respondents is a matter entirely immaterial to appellants.

For the foregoing reasons, the judgment and order are affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(22 Nev. 156)

GARDNER v. BROWN et al. (No. 1,404.) (Supreme Court of Nevada. July 24, 1894.) CLAIM AND DELIVERY - EVIDENCE - DAMAGES -

APPEAL-AMENDMENT OF TRANSCRIPT.

1. To maintain an action for the recovery of personal property where it is alleged that de-fendant is in possession thereof, it must be shown that he was in possession at the commencement of the action.

2. In an action of claim and delivery, where a return of the property, or its value, if a return cannot be had, is asked, the measure of damages is the value of the property at the time of

the trial

3. Where the statute gives only the judges of the district court authority to settle statements upon motion for a new trial, the appellate court has no power to alter or amend one so settled.

Appeal from district court, Ormsby county; Richard Rising, Judge.

Action by M. C. Gardner, Sr., against Louis Brown and others to recover possession of cattle. Judgment for plaintiff, and defendants appeal. Reversed.

Torreyson & Summerfield, for appellants. Trenmor Coffin, for respondent.

BELKNAP, J. This is an appeal from an order overruling a motion for a new trial. The action was in the ordinary form of claim and delivery under the statute for the recovery of the possession of a certain number of cattle and horses alleged to be withheld and detained by the defendants. The answer justifies the taking by the defendants, one of whom is the sheriff of Lyon county, under an execution against J. H. Gardner, a son of the plaintiff, as his property, and a subsequent sale in the month of January, 1893, two months before this suit was commenced. The proofs showed without question that the cattle were sold as alleged in the answer. Upon these facts the question arises, has the plaintiff established a cause of action in claim and delivery against the defendants? In order to have established his case, he should have shown a possession of the demanded property in the defendants, as he had alleged in his complaint. The detention is the gist of the action, and recovery of the possession of the property its primary object. The statute has provided all the appliances to this end, and the allegations of the complaint are consistent with this view. The proofs show a fatal variance, and the requirement of the statute that the complaint shall contain a logical statement of the facts constituting the cause of action has been disregarded. In his recent work on Replevin, Mr. Cobbey states the law as follows: "To enable plaintiff to maintain an action for the recovery of specific personal property, the defendant must be in possession thereof at the commencement of the action. When the petitioner alleges that the defendant is in possession, and the proof shows the contrary, there is such a variance between the allegations and the proof as disables plaintiff from recovery." Section 61. The New York

cases have adopted a different view (Nichols v. Michael, 23 N. Y. 264), but the great weight of authority is the other way (Coffin v. Gephart, 18 Iowa, 257; Riciotto v. Clement, 94 Cal. 105, 29 Pac. 414; Haughton v. Newberry, 69 N. C. 456; Hall v. White, 106 Mass. 599; Aber v. Bratton, 60 Mich. 357, 27 N. W. 564; Griffin v. Lancaster, 59 Miss. 340; Moses v. Morris, 20 Kan. 208; Davis v. Randolph, 3 Mo. App. 454; Feder v. Abrahams, 28 Mo. App. 454; Willis v. De Witt (S. D.) 52 N. W. 1000. We should have hesitated before reversing this case upon this point if substantial justice had been done by the verdict. But the measure of damages established at the trial was wrong, and for this reason, if for no other, we are constrained to remand it. The value of cattle-the subject of the litigation-had fluctuated during the pendency of the suit, and the jury were instructed that the plaintiff could recover the highest value between the taking and the trial. In O'Meara v. Mining Co., 2 Nev. 112, this court decided that in this class of cases, when the plaintiff asks for the return of the specific property, or its value, if a return cannot be had, the value of the property at the time of trial is the only complete indemnity. To the same effect were the rulings in the subsequent cases of Bercich v. Marye, 9 Nev. 312, and Buckley v. Buckley, 12 Nev. 423. In Boylan v. Huguet, 8 Nev. 345, we held that the value of the property at the time of the conversion, with interest from that date, together with such special damages as the plaintiff may be entitled to, was the rule in trover. These decisions show that the purpose of the court has been to fully indemnify the injured party without punishing the wrongdoer.

A motion was made in this court before its submission upon the merits for the purpose of correcting the record by striking out one of the instructions given to the jury at the trial upon the ground that it had not in fact been given at the trial. We denied the motion upon the ground that the statutes invest only the judges of the district court with authority to settle statements upon motion for new trial. In this present case the statement was so settled, as appears by the certificate of the judge. This court has no power to alter or amend it. It is the record upon which we are to act. Judgment reversed, and cause remanded.

MURPHY, C. J., and BIGELOW, J., concur.

(22 Nev. 169)

COFFIN v. BELL et el. (No. 1,401.) (Supreme Court of Nevada. July 20, 1894.) WRITS-SERVICE BY PUBLICATION-ATTACK ON JUDGMENT.

1. Where an order for publication of summons was duly made, and subsequently an aliaa summons was issued and served upon the defendant out of the state, held, that the order directed the publication of the original summons, and that the service of the alias summons is

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sued subsequently to the order, upon the defendant out of the state, gave the court no jurisdiction.

2. A purchaser of land which has been levied on and sold on judgment against his grantor has the right, by suit to quiet title, to attack the judgment on the ground of insufficient service of summons.

Appeal from district court, Ormsby county; Richard Rising, Judge.

Suit to quiet title by Trenmor Coffin against L. H. Bell and William Kinney. Judgment for defendants. Plaintiff appeals. Reversed.

On December 14, 1892, the defendant Bell commenced an action in the district court of Ormsby county against Mrs. C. R. Goddard to recover a money judgment upon an account. At the same time he issued an attachment, which was duly levied upon the property in dispute in this action, a piece of real estate in Carson City. In Bell v. Goddard summons was issued, and served on the defendant in the state of California, but no affidavit or order for the publication of summons was made. January 28, 1893, upon this service, judgment by default was entered, as prayed in the complaint, execution was issued, and the property sold thereunder by the defendant Kinney, as sheriff of said county, to defendant Bell. July 19, 1893, without vacating that judgment, or withdrawing the summons from the files, Bell made an affidavit for publication of the summons, in which he stated that the summons had been issued December 14, 1892. On the same day an order was made accordingly. in which it was stated that, "it further appearing that a summons has been duly issued out of said court in this action, * * * it is ordered that the service of the summons in this action be made upon the defendant, Mrs. C. R. Goddard, by publication," etc. July 21, 1803, what is called an "alias summons" was issued, which was a copy of the first, except that the first said nothing about the costs, while the alias stated that the action was also brought to recover costs of suit, and notified her that, if she failed to answer the complaint, the plaintiff would also take judgment against her for his costs of suit. The alias summons was served upon her in the state of California, and on October 21, 1893, judgment was again entered against her by default, and the property again sold to Bell upon execution thereunder. February 14, 1893, the plaintiff in this action purchased the property from Mrs. Goddard, and June 30, 1893, began this action to quiet his title thereto as against the first judgment and sale, and to restrain the sheriff from executing any deed to Bell. In their answer herein the defendants admitted the invalidity of the first judgment, but alleged their attachment lien, and that they were then engaged in obtaining a second service of summons upon Goddard; and by supplemental answer, filed February 1, 1894, they set up the second judgment, and the sale thereun-

der. Judgment was rendered for the defendants for costs, and the plaintiff appeals.

Trenmor Coffin, in pro. per., and H. F. Bartine, for appellant. Torreyson & Summerfield, for respondents.

BIGELOW, J. (after stating the facts). Where constructive service of summons is relied upon to sustain a judgment, a strict compliance with the provisions of the statute is required (Little v. Currie, 5 Nev. 90; Mining Co. v. Marsano, 10 Nev. 370; Victor M. & M. Co. v. Justice Court, 18 Nev. 21, 1 Pac. 831; Galpin v. Page, 18 Wall. 350; Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co., 139 U. S. 137, 11 Sup. Ot. 512); otherwise the court obtains no jurisdiction over the defendant; and the want of such jurisdiction, when permitted to be shown under the rules of law concerning direct and collateral attack, is fatal to the judgment. The question here is upon the sufficiency of the second judgment entered in the action of Bell v. Goddard. It is claimed to be fatally defective, as against the present plaintiff, upon a number of grounds; but it will only be necessary to notice one or two of them. The affidavit and order for the publication of the summons clearly referred to the original summons, which had been issued long prior thereto, and which the order directed to be published. Where publication is ordered, personal service of the summons out of the state is, by section 31 of the practice act, made equivalent to publication and deposit in the post office; and, in accordance with this, service was made upon the defendant therein in the state of California, but not of the summons ordered to be published. When it was found that the first judgment was insufficient, proper practice would doubtless have been to vacate that judgment, withdraw the summons from the file, and serve it again. The first service was a nullity, and, of course, would not prevent a good service from being subsequently made; nor did the fact that the summons had been returned and filed with the clerk prevent this course being taken. Hancock v. Preuss, 40 Cal. 572. This would have been correct, but in saying this we do not mean to decide that some other course might not also be held sufficient. But, instead of this, two days after the order was made, a second summons, differing in some respects from the original, was issued and served upon Mrs. Goddard. We have no statute authorizing an alias summons, and in the only case found bearing upon the right to issue one without such authorization (Dupuy v. Shear, 29 Cal. 238, 240) it is said, though not decided, that an alias summons is not known to our system of practice. It is, however, unnecessary to decide the point here. It was held in the case last cited-a conclusion with which we agree—that, if more than one summons is authorized by the practice act, the second has

no necessary connection with or dependence upon the first. It is based upon the complaint alone. We are of the opinion that, if it has any validity whatever, it stands the same as though it were the original summons in the case; and that brings us to the point that the summons which was served upon Mrs. Goddard, and which is relied upon to sustain the judgment, was not issued until two days after the order for publication was made. In People v. Huber, 20 Cal. 81, it was held that a judgment founded upon the publication of a summons issued four days after the order for its publication was made was void. In answer to the contention that the order could be made in advance, to take effect when the summons was issued, the court said: "The practice act contemplates that the judge must be satisfied by affidavit of the absence of the defendant at the time when he is applied to for his order, and when it is to take effect. If an order might be procured in advance, and held four days before taking out of the summons, it might be held for a much longer time, and so that when the summons actually issues, the defendant may have returned to the state." In Little v. Currie, 5 Nev. 90, the case of People v. Huber was cited and followed; this court there saying: "It [the order for publication] also directs a summons to issue. This is not its office. The order should be that 'service be made by the publication of the summons.' Suit is commenced before the justice by the 'filing a copy of the note,' etc., 'and the issuance of a summons thereon.' The order is a direction of extraordinary manner of service, and presupposes the existence of a summons; otherwise it is premature. * * * Statutory directions for acquiring jurisdiction by any other than personal service must be strictly pursued." their brief, respondents' counsel contend that these are matters that only concern Mrs. Goddard, and that she is the only one that can complain of the insufficiency of the service, or of the issuance of the alias summons; but in this, we think, they are mistaken. As a purchaser from her, the plaintiff seems to occupy, as to this property, the same position that she herself would have occupied, and to have succeeded to all her rights. People v. Mullan, 65 Cal. 396, 4 Pac. 348. As her successor in interest, the action brought by him to quiet his title as against Bell's judgment, upon the ground that the court had no jurisdiction to render the judgment, is a direct, and not a collateral attack. Choate v. Spencer (Mont.) 32 Pac. 651; 17 Law Rep. 424; Penrose v. McKenzie, 116 Ind. 35, 18 N. E. 384; Morrill v. Morrill, 20 Or. 96, 25 Pac. 362; Buchanan v. Bilger, 64 Tex. 589. For the reason that the summons which was served upon Mrs. Goddard was not the summons ordered to be published, but one that issued two days after the order was made, we are of the opinion that the court never acquired jurisdiction over her.

This was not a strict, nor even a substantial, compliance with the law. It follows that the judgment by default rendered against her is void, and the sale thereunder of the property in dispute in this action to defendant Bell gave him no title thereto. Judgment and order refusing a new trial reversed, and cause remanded.

MURPHY, C. J., and BELKNAP, J., con-

(10 Utah, 96)

OOBLENTZ et al. v. DRIVER MERCAN-TILE CO.1

(Supreme Court of Utah. June 28, 1894.)

Assignment for Creditors—Validity—Fraudulent Preferences.

A voluntary deed of assignment, in which the assignee is fraudulently preferred to a large amount, is void, though he did not participate in the fraud.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by Joseph Coblentz and others against the Driver Mercantile Company to set aside a deed of assignment, and for the appointment of a receiver. There was a judgment for defendant, and plaintiffs appeal. Reversed.

Frank B. Stephens, W. T. Gunter, Sutherland & Howat, and Booth, Lee & Gray, for appellants. S. H. Lewis, H. S. McCallum, and W. H. Dickson, for respondent.

SMITH, J. This was an action commenced by the creditors of an insolvent mercantile corporation for the purpose of having a deed of assignment for the benefit of creditors set aside, and for the appointment of a receiver, and the distribution of the insolvent estate. The assignment was attacked on the ground that it was made with the intent to hinder, delay, and defraud creditors. The complaint specifically set out certain fraudulent preferences in the deed of assignment; among others, one to the assignee, W. H. Remington, for \$2,225. Remington was made a defendant, and answered. The court appointed a receiver, but, upon the hearing of the case, rendered judgment for defendants, discharged the receiver, and directed the receiver to deliver the property in his hands to Remington, assignee, to be distributed under the deed of assignment as changed and modified by the court. Among other things, the court found that the preference in the deed of assignment in favor of W. H. Remington for \$2,225 was not a valid claim against the insolvent estate, and that Remington was entitled to nothing under the deed of assignment; that this claim was included in the deed with the fraudulent intent on the part of the assignor to defraud its creditors, but that this intent was not known to Remington. These find-

¹ Rehearing denied.

ings, apparently squarely in conflict, would be inexplicable if the facts were not fully disclosed by the record. The record, however, shows the following history of the transaction relative to the preference of Remington, assignee: "That said indebtedness to W. H. Remington is invalid, because said indebtedness is evidenced by a note which was given by the Driver Mercantile Company for \$2,000 of a \$5,000 note signed by said Remington and Clute to Wells, Fargo & Co., and upon which \$5,000 note said Clute realized \$5,000, and appropriated the whole of the same to his individual use. The said Remington signed said \$5,000 note apparently as a joint maker with said Clute, but, so far as he, Remington, was concerned, he was an accommodation maker only. The said Remington signed said \$5,000 note upon the representations of said Clute that \$3,000 of the \$5,000 so realized was to go to said Clute's individual use, and \$2,000 thereof to the use of the Driver Mercantile Company, and not otherwise. said Remington understood and acted upon the belief that the said \$2,000 so realized was to go to and for the use and benefit of said Driver Mercantile Co., and that the same was being borrowed for its benefit, and for no other purpose; and said Remington did not know, nor was he informed, of said Clute's appropriating all of said \$5,000 to his, said Clute's, individual use; and that said Remington did not at any time knowingly aid or abet said Clute in appropriating said \$5,000 to his (Clute's) individual use, or any part thereof, save \$3,000 thereof." It is clear from this finding that Remington had actually paid nothing out for or on behalf of the insolvent corporation. He had become surety on the personal note of E. R. Clute for \$5,000. There is no finding that he had ever paid any part of this note, or that it was unpaid, or that Clute was insolvent. Under such circumstances, we are at a loss to know how Remington, as assignee, could in good faith accept a deed of assignment in which he was preferred for a large sum of money to the exclusion of other creditors of the corporation, when he had never, so far as the record shows, had any dealings of any kind with the corporation. It would seem from the facts found, that Remington must have participated in the fraudulent acts of the corporation in making this assignment, but we are not called on to decide this question.

Respondents rely on the case of Pettit v. Parsons, 9 Utah, 223, 33 Pac. 1038, and claim the case at bar comes within the decision in that case. An examination of the case of Pettit v. Parsons will show that it has no application to this case; that was an action by the assignee against the United States marshal, who had seized the assigned property at the suit of attaching creditors. The defendant offered on the trial evidence of the ex-

ecution of a chattel mortgage and bill of sale made prior to the assignment, and of which the assignee and beneficiaries under the assignment had no knowledge. The court sustained an objection to this testimony. It was this ruling that was before this court in that case. We affirmed the ruling on two grounds: First. There was no allegation of fraud set up in the answer of the marshal. We held that the party relying upon a charge of fraud must allege and prove it. Second. There was no claim that the creditors or assignee had any knowledge of the fraudulent making of the chattel mortgage or bill of sale, being independent and antecedent transactions. We held that a participation in them by the assignee or beneficiaries was necessary in order to avoid the assignment. The latter proposition was not necessary to a decision of that case, but we now hold that it correctly declared the law. There is no conflict between the case of Pettit v. Parsons and that of Smith v. Sipperley, 9 Utah, 267, 34 Pac. 54. In this last case the fraudulent preference was contained in the deed of assignment itself, and we held the conduct of the beneficiaries was fraudulent, in that they had loaned the capital to the insolvent firm knowing that it had always been insolvent, the creditors being members of the debtors' families; that, these loans being always concealed from the persons dealing with and crediting the firm. the attempt by these family creditors to secure a preference over other creditors of the firm was fraudulent, in fact, and rendered the deed of assignment void. It would render this opinion too long by far if we should attempt to review all of the cases cited on both sides here upon this question. We think, however, without substantial conflict, the following rules will be found to be sustained where the matter is not governed and controlled by a local statute: First. Antecedent and fraudulent acts by the assignor, in which the assignee or beneficiaries have not participated, will not render an assignment for the benefit of creditors void. Second. Mere fraudulent concealment of assets by the assignor at the time of or after the deed of assignment, if done without the concurrence of the assignee or beneficiaries, will not avoid the deed. Third. Fraudulent preferences or conditions in a voluntary deed of assignment itself will avoid it, whether known to the assignee or beneficiaries or not. We are aware of the fact that on this latter proposition there is considerable conflict of authority, but much of it is explained by the fact that state bankrupt laws or insolvent laws directly affect many of the decisions where no such statute exists. We think the weight of authority is that in voluntary assignments for the benefit of creditors, where the fraudulent intent of the assignor is carried into the deed itself, and made operative through it, this renders it void, without regard to the question whether the assignee or

beneficiaries knew anything of it or not. See Wilson v. Forsyth, 24 Barb. 105; Rathbun v. Platner, 18 Barb. 272; Bank v. Atwater, 2 Paige, 54; Savage v. Knight, 92 N. C. 493; Hunt v. Weiner, 39 Ark. 75; Craft v. Bloom, 59 Miss. 69. But there lies a distinction between such voluntary conveyances and absolute conveyances for a valuable consideration. In these latter cases, where there is a valuable consideration paid by the grantee, he gets a good title, notwithstanding the intent of the maker to defraud, if he is not a party to such fraud, and buys without knowledge of the corrupt intent. This distinction appears to us to be a sound one, but the failure to observe it is, in our opinion, the reason for much apparent conflict of opinion among the courts upon the question as to whether the fraudulent intent of the maker, effectuated by means of a deed, avoids the instrument or not. A voluntary deed of assignment is usually the result of the operation of the mind of the grantor alone, while a deed purporting to convey the estate absolutely is a contract requiring the concurrence of the minds of both the grantor and grantee. In the former, as we have said, the fraudulent purpose of the maker affects the entire deed, and makes it void; while in the latter case, to give it the same effect, is to perpetrate an absolute wrong on the innocent grantee. This distinction is well sustained by authority as well. Wilson v. Forsyth, supra; Reiger v. Davis, 67 N. C. 185; Bump, Fraud. Conv. p. 364, and cases in note. There are some cases which hold that, where a voluntary assignment for the benefit of creditors is made to secure several independent debts, some of which are valid and some fictitious, the court will eliminate the fictitious, and allow the deed to stand as to those that are good. In the case of Smith v. Sipperley, 9 Utah, 267, 34 Pac. 54, we distinguished these cases, and held, on the authority of the supreme court in Peters v. Bain, 133 U. S. 690, 10 Sup. Ct. 354, that where the fraud complained of was fraud in law only, and it could be eliminated from that which was good in the deed, then the latter portion would be allowed to stand. The other rule—that a transaction void in part for fraud in fact is entirely void-is fully sustained by the case of Crawford v. Neal, 144 U. S. 598, 12 Sup. Ct. 759. Now, in the case at bar, the assignee, Remington, was not a creditor of the insolvent corporation at all. It owed him nothing, yet it made a deed to him, by which he is created a creditor for the sum of \$2,225; and he is by the same instrument preferred for the whole of this sum as against the bona fide creditors of the concern. It takes no argument to show that this is fraud in fact as distinguished from fraud in law, and it seems to us that, under the facts found, if Remington did not participate in this fraud, he must have purposely avoided learning that which it was not to his interest to know. The judgment is reversed, and the cause remanded, with directions to enter judgment in favor of the plaintiffs upon the facts found; appellants to recover costs.

MERRITT, C. J., and MINER and BARTCH, JJ., concur.

LIMA MACH. WORKS v. PARSONS et al. (Supreme Court of Utah. June 4, 1894.)

CONDITIONAL SALE—CHATTEL MORTGAGE.

Under Comp. Laws, § 2814, which declares that the provisions of the chattel mortgage act shall not apply to conditional sales of railroad equipment and rolling stock, a conditional sale of a locomotive is valid, as against the vendee's creditors, though it is not executed and recorded as chattel mortgages are required to be.

Appeal from district court, Weber county; before Justice James O. Miner.

Action by the Lima Machine Works against E. H. Parsons and others. Plaintiff obtained judgment. Defendants appeal. Affirmed.

Kimball & Gilbert and E. M. Allison, Jr., for appellants. Brown & Henderson, for respondent.

SMITH, J. This is an action of conversion, brought by the plaintiff, a corporation, against the defendants, to recover the value of a certain locomotive engine which was seized by defendant while acting as United States marshal for Utah. Such seizure was made under an attachment duly issued in a suit of the First National Bank of Ogden against the Ogden City Railway Company. There is no dispute but that the Ogden City Railway Company obtained possession of the engine, for the conversion of which this suit is brought, from the plaintiff, under and by virtue of a written contract, which was follows: "Exhibit A. This indenture, made this 28th day of February, A. D. 1890, between the Lima Machine Works, of Lima, Allen Co., Ohio, a corporation duly chartered under the laws of the state of Ohio, party of the first part, and the Ogden City Railway Co., of Ogden City, in the county of Weber and territory of Utah, party of the second part, witnesseth, that the said party of the first part hath let, and by these presents doth let, unto the said Ogden City Railway Co., party of the second part, one Shay patent locomotive engine, weighing about twenty tons, in working order, and built with three cylinders, 8-inch bore and 8-inch stroke, and all complete, with all fixtures belonging thereto, for the term of four months from the date of shipment of locomotive from Lima, and for the sum of four thousand (\$4,000) dollars, to be paid in the following manner, to wit: One thousand (\$1,000) dollars on shipment of locomotive from Lima; one thousand (\$1,000) dollars sixty days after arrival of locomotive at Ogden; and the balance, two thousand (\$2,000) dollars, one hundred and twenty days after

arrival of locomotive at Ogden, Utah. Subject to an extra charge for pilot and drawhead at each end, and extra headlight. And it is further agreed by and between the parties to these presents that if default be made in the payment of the first or any of the above installments or payments, or if the said party of the second part shall undertake to dispose of said Shay patent locomotive, or if the same shall be attached, levied upon, or taken by a third party, then it shall be lawful for, and the party of the first part may, re-enter into full possession of said Shay patent locomotive, take away, repossess, and enjoy the same, as though these presents were not made, but that the re-entry by said party of the first part, and repossession of said Shay patent locomotive, shall not operate as a payment of the indebtedness of the said party of the second part above contracted, nor discharge said party of the second part from liability for the same; but the said party of the first part shall have the right to dispose of the said Shay patent locomotive at public or private sale in good faith, and after payment of costs, and expenses of said sale, and the other expenses growing out of the default of said party of the second part, shall credit the net proceeds thereof upon the indebtedness of the said party of the second part, and if the same shall not be sufficient to pay the full amount of said indebtedness of the said party of the second part it shall be liable for balance thereof; and the party of the second part covenants and agrees that the said Shay patent locomotive shall be taken to Ogden City, territory of Utah, county of Weber, and there placed upon the Ogden City Railway, at Ogden, in the territory of Utah, and there kept and used, and not removed from the possession and control of the said party of the second part without the written consent of the party of the first part thereto first had and obtained, and at the expiration or sooner determination of the said term they will quit and surrender the said Shay patent locomotive in as good condition as reasonable wear and use will permit; and the said party of the first part hereby covenants and agrees that the said party of the second part, on paying the above-specified installments, and performing the covenants aforesaid, shall and may peacefully and quietly have, hold, and enjoy the said Shay patent locomotive for the said term. And the party of the first part hereby covenants, promises, and agrees to and with the said party of the second part that if the said party of the second part shall well and truly keep the covenants within made, shall make no default in the payment of the aforesaid installments as the same shall become due and payable, and if this lease shall not be determined sooner, by consent or otherwise, that the said party of the first part will make, execute, and deliver to the said party of the second part a good and sufficient bill

of sale for said Shay patent locomotive, the consideration whereof shall be the amount of the above-named payments received for said term, making in all the sum of four thousand (\$4,000) dollars, lawful money, payable at office of party of the first part, in Lima, Ohio. Witness our hands and seals the day and year aforesaid. Witness: Ogden City Railway. [Seal.] B. N. Call. By A. H. Swan [Seal.] Superintendent." The cause was tried to a jury, who returned a verdict in favor of the plaintiff. A motion for a new trial was overruled, and defendant appeals from both the judgment and order.

The only error relied upon here, and presented for our consideration, is whether or not the court below erred in holding that the contract above set out was a conditional sale or lease, under which the plaintiff's title to the engine did not pass until it was paid for. The defendants contend that the writing was absolutely void, as to creditors of the railway company, because it was not executed and recorded as required by section 2801, Comp. Laws Utah, relating to chattel mortgages. We think that section does not apply to contracts like the one under consideration. Section 2814 of the Compiled Laws, being the last section of the chapter on chattel mortgages, is as follows: "The act shall not apply to contracts made by any railway company owning or operating a railway in this territory, for the possession, use and conditional purchase of rolling stock and equipment to operate such railway * * * and such contracts shall be valid as to all persons without recording the same." The case at bar is certainly squarely within the exception made by this section. The doctrine that conditional sales of personal property are valid is fully established in this jurisdiction. See Hirsch v. Steele (decided at our last term) 36 Pac. 49, and Russell v. Harkness, 4 Utah, 197, 7 Pac. 865; Id., 118 U. S. 663, 7 Sup. Ct. 51. We are of opinion that the court below committed no error, and the judgment and order appealed from are affirmed.

MERRITT, C. J., and BARTCH, J., concur.

DANIHER v. GRAND LODGE A. O. U. W. et al.

(Supreme Court of Utah. June 4, 1894.)

MUTUAL BENEFIT INSURANCE — BY-LAWS — FORFEITURE OF MEMBERSHIP—WAIVER OF PROOFS.

1. An unincorporated society, having the characteristics of a fraternal organization, required as a condition of membership a physician's certificate of good health. On admission each member received a certificate entitling his beneficiary to \$2,000 on his death. Each member, to keep his certificate in force, must pay an assessment on each death among the members. Held, that the society was, in effect, a mutual life insurance company, and the certificate an insurance contract.

2. Where the constitution and by-laws pro-

vide that nonpayment of dues shall forfeit the membership, and that a member in default may be reinstated on payment of his arrears, an association which has accepted and retained assessments paid by a member with full knowledge of the fact that he is in default, and which has taken no action to effect a legal suspension under the by-laws, waives the forfeiture.

3. Where the constitution and by-laws of an unincorporated society provide for the payment of a fixed sum on the death of each member, and create a board of arbitration, to whom all claims against the society shall be submitted, and whose decision shall be final, such provisions constitute merely a revocable agreement to arbitrate, and do not preclude resort to the courts.

bitrate, and do not preclude resort to the courts.

4. Refusal to pay a death loss on the ground that the certificate of membership has been forfeited is a waiver of proof of death.

Appeal from district court, Weber county; before Justice James A. Miner.

Action by Dennis Daniher against the Grand Lodge Ancient Order of United Workmen, Jurisdiction of Nevada, and all individual members of all lodges within said jurisdiction subordinate to and under the control of said Grand Lodge A. O. U. W. of Nevada, including D. Thorburn and N. M. Ruick. Plaintiff obtained judgment. Defendants appeal. Affirmed.

J. W. Kinsley, N. M. Ruick, and J. H. Mac-Millan, for appellants. Matthew Gerine and W. R. White, for respondent.

BARTCH, J. The plaintiff brought this action to recover \$2,000, the amount of a beneficiary certificate issued by the defendants to Jerry T. Daniher, who designated the plaintiff, his father, as his beneficiary, to whom payment should be made after his death. Jerry T. Daniher died November 18, 1888, and thereafter demand was made and payment refused. Upon the trial of the cause the court entered judgment in favor of the plaintiff, and thereupon the defendants appealed.

The first material question to be determined is whether there existed, between the deceased and the appellants, a contract of insurance, which includes the question whether the Ancient Order of United Workmen is in any sense to be classed as a mutual life insurance company. It is shown by the record that the association is a voluntary, unincorporated, beneficial and benevolent society. Under its constitution and by-laws, it is designed to promote the welfare of its members, and protect those dependent upon them. One, if not its principal, object, is to provide for the payment of a stipulated sum to the beneficiaries of its deceased members. Its governing bodies consist of a supreme lodge, of grand lodges, and of subordinate lodges. It is the province of the supreme lodge to prescribe and determine the rights, privileges, and duties of the members of the society and of the beneficiaries of deceased members. Grand lodges are organized and exist under its authority, and subject to the constitution and general laws of the order, in such countries, states, territo-

ries, and districts as the supreme lodge may determine. A grand lodge has original jurisdiction, within its territory, over all matters pertaining to the welfare of the order, and, for the government of itself and its subordinate lodges, may adopt constitutions, by-laws, rules, and regulations, and may alter and amend the same. It exercises control and supervision over the subordinate lodges within its jurisdiction. The defendant grand lodge, jurisdiction of Nevada, has control over and supervision of all the subordinate lodges in the states of Nevada, Idaho, Wyoming, Montana, and in the territory of Utah. Under the constitution and by-laws of the order, there is established a beneficiary fund for the benefit of all members in good standing, and each member who complies with the rules and regulations of the order is entitled to a benefit certificate in the sum of \$2,000, payable, at the death of the member, to the person designated by him as his beneficiary. These certificates are issued by virtue of the power vested in the grand lodge, in the nature of mutual benefit insurance, of which the members of the order may avail them-The beneficiary fund is maintained by assessments upon the individual members. Under the rules and by-laws of the lodge, all assessments are dated on the 1st day of the month, and the sum of one dollar is levied upon each member for each death which occurred during the preceding month. Notice of assessments must be served personally or by mail, on or before the 8th day of the month in which the assessments were made. Then it is incumbent upon each member to pay the same on or before the 28th day of the month, and, if he fails to do so, he shall stand suspended from all the rights, benefits, and privileges of the order. Any member thus suspended may be reinstated at any time within 30 days from the date of suspension by paying all assessments then remaining unpaid, and, after 30 days, but within 3 months, by paying all assessments in arrear and pending, and furnishing a certificate of good health. Any suspended member, after the expiration of three months from the date of his suspension, can only be reinstated upon examination and recommendation of the medical examiner, as in the original instance, and at the expiration of six months from the date of his suspension his beneficiary certificate shall be annulled.

It further appears from the agreed statement of acts that a member in good standing may sever his connection with the order by making proper application for that purpose in the form prescribed by the supreme lodge, and paying all dues, fines, and assessments for which he may be liable, and by surrendering his beneficiary certificate, in writing, together with all rights and privileges which he may have acquired by reason of his membership in the order. Upon such application being made, a final card issues in the form prescribed by the supreme

lodge, and it seems there is no other way provided for a member to sever his connection with the lodge. Thus, from an examination of the record, it is clear that the order has assumed the characteristics of a fraternal organization, but it is also equally clear that it has embodied within its constitution and by-laws many of the incidents of a mutual life insurance company, and these apparently predominate. The controlling object of the order seems to be the providing a beneficiary fund, out of which a certain stipulated sum is to be paid to the beneficiary of each member in good standing, upon the happening of a contingency. Good health is a requisite to become a member, and every application for membership must be accompanied by a physician's certificate to that effect. That an applicant is insurable is one of the qualifications for admission, and when he is admitted into full membership a certificate in the nature of an insurance policy is issued to him, and he cannot maintain his membership without keeping such certificate in force by the payment of his assessments and dues. The assessments are, in their nature, premiums, the nonpayment of which works a forfeiture of the in-Very ample and exacting provisions are contained in the constitution and by-laws in relation to the beneficiary fund, to enforce payment of assessments upon the death of a member, while the other declared objects of the association seem to be almost without provision for enforcement. It is evident from these provisions and requirements that the main object of the order is protection to the beneficiaries of its deceased members by insurance, and that its fraternal charter is merely incidental. The contract made between this association and each of its members by issuing a beneficiary certificate, as shown by the record in this case, does not essentially differ from an ordinary contract of mutual life insurance. The life of the member is the subject insured, and the risk is death. The sum to be paid is certain, and so also are the assessments to be paid during the continuance of the risk. There is an absolute undertaking to pay the beneficiary designated, upon the happening of the contingency, unless forfeiture has resulted by nonpayment of dues or assessments. The conclusion is inevitable that it is an insurance contract, and that the association is, in effect, a mutual life insurance company. The rights of the parties to this suit must therefore be determined by the law applicable to mutual life insurance corporations. Bac. Ben. Soc. § 52; State v. Miller, 66 Iowa, 26, 23 N. W. 241; Commonwealth v. Wetherbee, 105 Mass. 149; State v. Bankers' & M. Mut. Ben. Ass'n, 23 Kan. 499; Mc-Corkle v. Association (Tex. Sup.) 8 S. W. 516.

The next question for consideration is that of forfeiture. Counsel for appellants insist that the plaintiff ought not recover, because the deceased, in his lifetime, forfeited all his rights to membership, by failing to comply with the rules and regulations of the order. It is shown by the record that in the month of March, 1887, the deceased became a member of Warren Lodge No. 18, which is located at Carlin, Nev., and is a subordinate lodge, subject to and under the control and direction of the defendant grand lodge, jurisdiction of Nevada. In the same month, the beneficiary certificate in question was issued to him by the defendant grand lodge, countersigned by Warren lodge. In October, 1888, there were three assessments levied against the members of Warren lodge, which were due on the 8th and became delinquent on the 28th of the same month. The deceased failed to pay these assessments on or before the 28th, but on the 30th of October, 1888, he paid to the financier of the lodge the sum of \$2.50, which, it appears, was received by him in full payment of all assessments and dues due from the deceased up to October 28, 1888, and the same was sent to, received, and retained by the grand lodge. About the 4th of November, 1888, the deceased handed his beneficiary certificate to the recorder of the lodge, saying that he did 10t care to belong to the lodge any longer, but the lodge took no action to suspend him. Thereafter, about the 5th or 6th of November, 1888, the deceased was again regularly notified of two more assessments which would become delinquent on the 28th of that month, and these remained unpaid at the time of his death. These are substantially the facts as they appear from the evidence, so far as they affect this question. It is apparent that the deceased failed to pay his assessments on the 28th of October, 1888, the day whereon the same were delinquent, and that such failure, under the constitution and by-laws of the order, constituted a technical suspension, which might lead to a forfeiture of his rights and privileges as a member of the order, if insisted upon by the lodge. Conceding this, the question is, was the forfeiture waived by the subsequent acts or omissions of the appellants? Did the appellants do or omit to do any act or acts which would estop them from denying that the deceased was a member in good standing at the time of his death? Two days after the October assessments became delinquent the deceased paid the financier the \$2.50, and this was sent to the grand lodge, and retained by it; and five or six days after such delinquency the officer of the lodge gave the deceased notice of the November assessments. The money was received and the notice was given with full knowledge on the part of the officer of the appellants of the default in payment by the deceased, and, under these circumstances, they must be charged with knowledge of the facts in the case. There was some contention in the oral arguments of counsel on the point whether the sum paid was for assessments or dues, but this can

make no difference, for, in either case, the receipt and retention of the money negatives the idea that the lodge was insisting on the suspension at that time. The notice of the November assessments was given after the deceased had handed his certificate to the financier. All these acts on the part of the appellants show that at that time they did not intend to insist on the suspension and forfeiture. Nor is there anything in the record to indicate that such was the case, until after the death of the deceased. Nor was there any action taken by the appellants regarding the suspension, although, from an examination of such portions of the constitution and by-laws of the order as are contained in the abstract of the record, it seems manifest that an absolute legal suspension could be effected only by action of the lodge. The appellants, having accepted and retained the money, and having given the deceased notice of subsequent assessments, with a full knowledge of the default, and having taken no action to effect a legal suspension, must be held to have waived the forfeiture, if one had occurred. This conclusion is in harmony with the elementary doctrine that forfeitures are not favored in law, and this is true when applied to life insurance, as in the case at bar, or to any other kind of forfeiture. Nor has the defendant grand lodge entirely departed from this rule of law, as will appear from an examination of its constitution and by-laws, shown by the record, for elaborate and careful provisions appear to be made for the reinstatement of members who become suspended. Courts will not be inclined to do violence to the spirit of those provisions, or to the benevolent character and object of the order, by refusing to consider any act or circumstance which may indicate an intention on the part of a defendant to waive a forfeiture. Bac. Ben. Soc. §§ 86, 362; Millard v. Supreme Council, 81 Cal. 340, 22 Pac. 864; Helme v. Insurance Co., 61 Pa. St. 107; Erdmann v. Insurance Co., 44 Wis. 376; Tobin v. Society, 72 Iowa, 261, 33 N. W. 633; McDonald v. Supreme Council, 78 Cal. 49, 20 Pac. 41; Association v. Koontz (Ind. App.) 30 N. E. 145; Perine v. Grand Lodge, 48 Minn. 82, 50 N. W. 1022; Association v. Windover, 137 Ill. 417, 27 N. E. 538; Stylow v. Insurance Co., 69 Wis. 224, 34 N. W. 151; Rice v. Society, 146 Mass. 248, 15 N. E. 624; Insurance Co. v. Lester, 35 Am. Rep. 122; Rowswell v. Aid Union, 13 Fed. 840. There are a few cases which seem to hold otherwise on this question, but the great weight of authority is as above indicated.

It is further contended by the appellants that the plaintiff cannot recover, because he failed and refused to submit his case to the board of arbitration, as provided in the constitution and laws of the order, after demanding a hearing. The constitution, among others, contains a provision relating to the board of arbitration, as follows: "In this

board is vested jurisdiction to hear and determine all controversies as to the liability of this grand lodge for any claim made against it by those claiming to be the beneficiaries of deceased members, and also as to who are entitled as beneficiaries where conflicting claims are set up; and the decision of a majority of said board shall be final and conclusive, unless reversed by the grand lodge or supreme lodge, it being the purpose and intention of this provision that all these rights shall thus be determined without recourse to courts of law." It then provides how appeals may be taken. It is evident that this provision is intended to cover the whole subject of conflicting or disputed claims of beneficiaries, and the intention is that claimants shall not have recourse to courts of law. When individuals unite to form a voluntary association, and adopt a constitution and by-laws, the relation which exists between the members is one of contract, and the constitution and by-laws form the terms of the agreement. Such agreement is valid and binding upon them, so long as it is not in contravention of the law of the land or of public policy. As to their binding effect, there is no distinction between the constitution and the by-laws, except that it generally requires less solemnity and formality to change the latter than the former. If in either the association inserts provisions attempting to create a tribunal having the power to adjudicate upon all the property rights of members or beneficiaries arising by virtue of membership in the order, then such provisions have no more effect than a revocable agreement to submit to an award, because, otherwise, the attempt would be to usurp the functions of the sovereign power, for it alone can create judicial tribunals. In the construction of all such provisions, the courts will apply the most cautious rules in the interests of justice and fair dealing. If the constitution or agreement provides for the determination only of some particular fact or facts, or of a question where no obligation to pay a fixed sum is expressed in the contract, or where no particular thing is to be done, but only such sum is to be paid, or such thing is to be done, as may be determined by the arbitrators, then, in such and like cases, the provision or agreement to submit is binding, in the absence of fraud. The case at bar must be distinguished from these classes of cases, however, for here the sum to be paid is definite; and the constitution, which provides, in general terms, that all claims and rights of members and beneficiaries shall be submitted to the board of arbitration of its own creation, and that its decision shall be final and conclusive, is legally ineffectual to bar this action. The rule of law is well settled that in such a case an agreement to arbitrate does not preclude the parties to it from resorting to their legal remedies. Nor is a submission to arbitration, under such

an agreement, a condition precedent to the bringing of an action. To hold otherwise would be an attempt to clothe such voluntary associations with power to create judicial tribunals, which would be contrary to the law of the land. Bac. Ben. Soc. § 123; Whitney v. Association (Minn.) 54 N. W. 184; Seward v. City of Rochester, 109 N. Y. 164, 16 N. E. 348; Austin v. Searing, 69 Am. Dec. 665; Crossley v. Insurance Co., 27 Fed. 30.

The point is made by the appellants that no proof of death was made before the bringing of this action. It is shown by the record that application for a death report was made to the officers of the lodge, who were aware of the death of the deceased, and that they refused to make out a certificate. It is further shown that the appellants disclaimed all liability to the appellee under the beneficiary certificate, and refused payment. Under such circumstances, proof of death is unnecessary. In cases of life insurance, such proof is intended as a protection to the insurers, and, when they refuse to pay on other and distinct grounds, the occasion for it ceases, and the proof is waived. Bac. Ben. Soc. § 413; Lazensky v. Supreme Lodge, 31 Fed. 592; Williams v. Insurance Co., 54 Cal. 442; Insurance Co. v. Pendleton, 112 U. S. 696, 5 Sup. Ct. 314.

Counsel have raised some other questions in their arguments, and, while they have not escaped our notice, still, after due consideration, we do not deem them of sufficient importance to the decision of this case to call for special discussion. The record reveals no reversible error. The judgment is affirmed.

MERRITT, C. J., concurs.

SELZ, SCHWAB & CO. v. TUCKER et al. (Supreme Court of Utah. June 4, 1894.)

PLEADING-COMPLAINT-ATTACHMENT.

A complaint which shows on its face that the debt sued for is not yet due, and which does not allege any acts of fraud, allowing the plaintiff, under Comp. Laws 1888, \$3308, subd. 5, to sue before his claim falls due, is demurrable, even though it states that attachment proceedings have been begun under said act, since the complaint should show a good cause of action without reference to the attachment affidavit.

Appeal from district court, Utah county; before Justice H. W. Smith.

Action by Selz, Schwab & Co., a corporation, against James Tucker and H. C. Wallace for goods sold and delivered. Plaintiff obtained judgment. Defendants appeal. Reversed.

Frank Pierce and Booth, Lee & Gray, for appellants. Jones & Schroeder, for respondent.

BARTCH, J. This is an action for the case a judgment by default will be reversed price of goods sold and delivered. The de- on appeal. 1 Black, Judgm. § 95; Choynski

fendants interposed a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled, and, the defendants failing to answer, judgment was entered, by default, in favor of plaintiff for \$681 and costs. From this judgment the defendants annealed.

The first question presented for review is the sufficiency of the complaint. The plaintiff brought this suit before the debt was due. and instituted attachment proceedings against the defendants, under subdivision 5, § 3308, Comp. Laws Utah, 1888. In the affidavit for attachment it is alleged that the defendants have assigned and disposed of, and are about to assign and dispose of, their property, with intent to defraud their creditors; but in the complaint no such allegation appears. Nor does the complaint contain any allegation, setting forth the acts constituting the fraud, which would entitle the plaintiff to bring suit before the maturity of the debt. The only allegation which appears in the complaint on this point is as follows: "That plaintiff has commenced an attachment proceeding against the defendants under subdivision 5, § 3308, of the Compiled Laws of Utah, 1888, which provides that certain actions may be commenced for debts not due." Counsel for appellants contend that this allegation is not sufficient to charge fraud, and that the complaint shows, on its face, that the debt was not due when the action was commenced. As shown by the record, this position appears to be correct. Fraud is the foundation of this suit, and therefore the facts upon which the plaintiff relied, as constituting fraud, should have been specifically alleged. Because such facts were set up in the affidavit for attachment is no reason why they should not be set up in the complaint. Under the Code, civil actions are commenced by the filing of a complaint (section 3202, Comp. Laws Utah, 1888), and, unless a cause of action is stated, the defendant need not answer, but, after summons, may demur. At the time of issuing the summons, or at any time thereafter, attachment proceedings may be instituted, provided a statutory cause therefor exists. Such proceedings, however, must be preceded by the filing of a complaint. If, then, the complaint fails to state the facts which entitle the action to be prematurely brought, it cannot be sustained on demurrer. Such facts must be alleged the same as though no attachment had issued, so as to enable the defendant to put them in issue by denial. Cox v. Dawson, 2 Wash. St. 381, 26 Pac. 973; Woods v. Tanquary (Colo. App.) 34 Pac. 737, Heard v. Ritchey, 112 Mo. 516, 20 S. W. 799. We are of the opinion that the allegations in the complaint were not sufficient to state a cause of action, and therefore the defendant was not compelled to answer. In such a case a judgment by default will be reversed

v. Cohen, 39 Cal. 501; Abbe v. Marr, 14 Cal. 210. We do not consider it necessary to notice the other points presented in the record. The judgment is reversed and remanded.

MERRITT, C. J., and MINER, J., concur.

KNUDSEN et al. v. OMANSON. (Supreme Court of Utah. June 4, 1894.) BOUNDARIES—SHORE LINE—PUBLIC LANDS— PLEADING—ESTOPPEL.

1. The patentee of a fractional subdivision bordering on a navigable lake, which has been meandered in the government surveys, takes title to all land beyond the meander line formed by the gradual subsidence of the lake, since the boundary is not the meander line, but the water line.

2. A withdrawal of certain government lands from settlement does not affect the title of one who has received a patent for some of such lands before the withdrawal, since, after issue of the patent, the government has no further title to the land included therein.

3. Where no estoppel is pleaded or relied on, evidence of a settlement of boundary between plaintiff and a third person is not admissible as showing the true location of such boundary as against plaintiff.

Appeal from district court, Utah county; before Justice J. W. Blackburn.

Action by Andrew Knudsen and Herman Knudsen against Neils Omanson to quiet title. Plaintiffs obtained a decree. Defendant appeals. Affirmed.

John N. Judd, for appellant. King & Hontz and Geo. Sutherland, for respondents.

MERRITT, C. J. This action was brought for the purpose of quieting title to about 160 acres of land on the borders of Utah lake, a navigable body of fresh water, in Utah county, Utah territory. The record does not disclose any serious conflict in the evidence. The facts are substantially as follows: That in 1856 the United States government surveyed the land adjoining the lake. Sections 4 and 9, township 7 S., range 2 E., Salt Lake meridian, including lots 3 and 4 of section 4, and lot 1 of section 9, are designated as fractional, owing to the fact that they adjoin and were partially covered by the lake; and all lying below and west of these lots is represented on the government plats and maps as water. In making the survey the water's edge was approached as nearly as possible, and the west line of these lots is shown by the government surveyors to be waters of the lake, and is what is called "a meander line." The lots in controversy, containing 148.50 acres, were entered as a homestead by one Hans Knudsen about the year 1876, and were subsequently patented to him. The plaintiffs succeeded to his title long prior to the commencement of this action. The lots were bounded on the north by Provo river, a stream of water which empties into the lake. After the government survey of these

lots, the waters of the lake gradually receded, and deposits of soil were made by the lake and the river below the meander line. and the lands in controversy were thus formed. In 1888 there was a strip of such laud extending from the meander line of the lots above described, along the south side of Provo river, a distance of about a mile west to the then waters of the lake, varying in width from 20 to 40 rods. Extending south from the west end of this strip of land, almost at right angles, is a narrow sand bar, which divides the waters of the main lake from a smaller body sometimes called "Smith's Lake." Sometimes this sand bar extends a few inches above the water and sometimes it is submerged entirely. Between the meander line of the lots in question and the sand bar is a large body of marsh land, which is of no value except for pasturage. In 1888, the defendant (appellant) entered upon a portion of the lands in controversy under a lease from the plaintiffs (respondents), paying one year's rental for the same. Thereafter appellant repudiated the lease, and set up a claim to a part of the premises, as well as to other lands formed in the same manner. He committed various acts of trespass upon the lands, and this action was brought to determine the title, and to obtain injunctive relief against a repetition of threatened trespasses. The court below found in favor of the plaintiffs (respondents), and adjudged them to be owners of all the lands lying between the meander line of said lots and the waters of Utah lake, and enjoined the defendant (appellant) from entering or trespassing thereon. The defendant (appellant) thereupon appealed to this court.

It is claimed by the appellant that the title which passed from the United States by the Knudsen patent was to the land described in the patent, and nothing more; that the land now in controversy is public domain, and the defendant (appellant) is entitled to it as against every one except the United States. We do not think this claim is well founded in law. In surveying fractional parts of the public lands bordering upon lakes or streams, meander lines are run, not for the purpose of establishing a boundary for the land, but in order to determine the quantity of upland to be paid for by the purchaser. A meander line is not a boundary, but the water whose body is meandered is the true boundary, whether it in fact coincides with the meander line or not. Hardin v. Jordan, 140 U. S. 371, 11 Sup. Ct. 808, 838; Mitchell v. Smale, 140 U. S. 406, 11 Sup. Ct. 819, 840; Lamprey v. Metcalf (Minn.) 53 N. W. 1139; Schurmeler v. Railroad Co., 10 Minn. 82 (Gil. 59); Jefferis v. Land Co., 134 U. S. 178, 10 Sup. Ct. 518; Palmer v. Dodd, 64 Mich. 474, 31 N. W. 209. It is held by all the authorities, so far as our investigation has gone, that the water's edge, and not the meander line

itself, is the real boundary of the land, and that the owner of the lands so bounded has a right to follow the water as it recedes, and that he is entitled to all lands which may be added by recession or accretion. In the case of Hardin v. Jordan, the doctrine is clearly announced by the supreme court of the United States, whose decision is absolutely conclusive on this court, that, whether the body of water is navigable or not, the practical result is the same, the only difference being that in the case of nonnavigable waters the riparian owner takes the fee to the center of the lake or stream, while in the case of navigable waters the ownership in fee extends only to the water's edge, but in either case all the accretions and relictions belong to him as an incident of his riparian ownership. The reason generally given for this rule is that, as the riparian owner is likely to lose soil by encroachments of the water, he should also have the benefit of such as would be gained from the same source, and also because it falls within the maxim "de minimis non curat lex." The supreme court of Minnesota, in the recent case of Lamprey v. Metcalf, supra, adds the following: "But it seems to us that the rule rests upon a much broader principle, and has a much more important purpose in view, namely, to preserve the fundamental riparian right, on which all others depend, and which often constitutes the principal value of the land,-of access to the water. The incalculable mischiefs that would follow if a riparian owner is liable to be cut off from access to the water, and another sandwiched in between him and it, whenever the water line has been changed by accretion or reliction, are selfevident, and have been frequently animadverted upon by courts," These considerations certainly apply to riparian ownership on lakes as well as on streams. Take the case in hand, of our small inland lakes, the waters of many of which are slowly, but gradually, receding. The owners of lands bordering on them have often bought with reference to access to the water, which usually constitutes an important element in the value and desirability of the land. If the rule contended for by the appellant is to prevail, it would open the door for prowling speculators to step in and acquire title from the state to any relictions produced in the course of time by the recession of the water, and thus deprive the owner of the original shore estate of all riparian rights, including that of access to the water. The endless litigation over the location of the original water lines, and the practical injustice to the owner of the original riparian estate, that would follow, would of themselves be sufficient reason for refusing to adopt any such doctrine. But, whatever the foundation, the rule itself is too firmly fixed by both reason and authority to admit of successful controversy, and it is a rule both just and salutary. Hardin v. Jordan, supra; Railroad Co. v. Schurmeir, 7 Wall. 288; Boorman v. Sunnuchs, 42 Wis. 233; Jefferis v. Land Co., 134 U. S. 196, 10 Sup. Ct. 518; Banks v. Ogden, 2 Wall. 67. These are only a few of the many cases which sustain the proposition we have announced, and it would serve no useful purpose to incumber this opinion with further citations. The question was exhaustively reviewed by this court in the case of Poynter v. Chipman, 8 Utah, 442, 32 Pac. 690, and a conclusion was reached contrary to the contention of the appellant here. Further investigation furnishes us no reason to depart from the decision in that case.

Defendant offered to show by the records of the United States land department that in November, 1891, Utah lake was selected by the government as a reservoir site, and all the land bordering the lake was withdrawn from settlement; that among these was the west half of township 7 S., of range 2 E., including section 4 and section 9. The court, on the objections of plaintiffs, rejected this evidence, and the ruling is assigned as error. The patent from the government to Hans Knudsen of the lots heretofore described vested the title absolutely in him. The government no longer had any right of control over the lands so patented. His rights, and the rights of his successors in interest, could not be affected by any order withdrawing any lands from settlement and sale. Such an order could only be effective as to lands the title to which still remained in the government. By this patent Knudsen and his successors in interest became riparian owners upon the lake, and acquired a vested right to all lands which might be added to the lots patented by accretion or reliction. This was a right with which the government could not interfere. Without troubling ourselves to consider what were the rights of the United States in these waters before they conveyed the lands bordering on them, it is well settled that, having disposed of lands bordering on a meandered lake by patent, without reservation or restriction, they have nothing left to convey, and consequently the land department was therefore without jurisdiction. Lamprey v. Metcalf (Minn.) 53 N. W. 1139; Palmer v. Dodd, 64 Mich. 474, 31 N. W. 209. In addition to this, the controversy here was not between the government and the plaintiffs, but between the plaintiffs and the defendant, a private citizen, and in no way connected with the government title. We think the evidence was wholy irrelevant and immate-

Testimony was also offered to show that, prior to the bringing of this suit, some parties were cultivating a portion of the land lying between the meander line of the Knudsen patent and the land claimed by defendant; that a controversy arose between these parties and Knudsen as to where the line

was; that this controversy was referred to one J. D. Jones to arbitrate, and that he settled the meander line of the Knudsen patent as the true line, to which settlement Knudsen assented. The testimony was objected to and excluded. In this we do not think the court erred. The defendant does not in any manner connect himself with the parties to this dispute. His only defense is that the land is public domain of the United States. No estoppel is pleaded or relied upon. Poynter v. Chipman, 8 Utah, 451, 32 Pac. 690. We find no error in the record, and the judgment of the district court is therefore affirmed.

BARTCH and MINER, JJ., concur.

YOUNG v. SCHROEDER et al. (Supreme Court of Utah. June 4, 1894.) EXECUTION SALE—EQUITABLE RELIEF.

Where land worth \$26,000 is sold in separate sales to satisfy a judgment of \$1,700, and the purchasers are the attorneys of the judgment creditor, and it appears that they directed the land to be sold in such parts as to prevent its bringing a fair price, such sales may be set aside, even after the time for redemption has expired, especially where they have assured the judgment debtor that the statutory period for redemption would not be insisted on

Appeal from district court, Salt Lake county; before Justice George W. Bartch.

Action by John M. Young against A. T. Schroeder and others. Plaintiff obtained a decree. Defendants appeal. Affirmed.

Jones & Schroeder, for appellants. W. H. Dickson and Williams & Van Catt, for respondent.

MERRITT, C. J. This action was brought to obtain a decree of the court adjudging certain deeds (mentioned in the complaint, and executed by the United States marshal of Utah territory pursuant to certain execution sales made under a judgment obtained in the third district court by Clark, Eldredge & Co., a corporation, against John M. Young, the plaintiff, and others) to be fraudulent, and that the plaintiff be permitted to redeem from such sales, notwithstanding the statutory time for redemption had expired, and that defendants be required to convey to him the property mentioned and described in said deeds and complaint. This relief was sought on the ground of gross inadequacy of the price obtained at such sales, coupled with a great number of irregularities attending the sales, which led to the sacrifice of plaintiff's property. The alleged irregularities are specifically set forth in the complaint, and also in the findings of the court below. Upon the filing of the complaint the defendants Frank B. Stephens and wife made a satisfactory settlement with the plaintiff, and in pursuance thereof property in controversy, and the suit as to these defendants was thereupon dismissed. After that the defendants Schroeder and wife filed their answer, and a trial was had, which resulted in a judgment and decree in favor of plaintiff substantially as prayed for in the complaint, from which decree, and the order denying a new trial, this appeal is prosecuted

The findings of fact made by the court below are very full. We have carefully examined the record, and are satisfied that they are fully sustained by the evidence. From these findings it appears that on the 9th of February, 1891, Clark, Eldredge & Co., a corporation, commenced an action against John M. Young (the plaintiff herein), Henry Goddard, and George Goddard to recover \$1,640.61, with interest from January 3, 1891. That afterwards a judgment by default was entered against the plaintiff (John M. Young) on March 6, 1891, for \$1,-673.36, and costs amounting to \$30.50, said judgment bearing interest at 1 per cent. per month. That Frank B. Stephens and A. T. Schroeder, partners, were the attorneys for Clark, Eldredge & Co. in said action; that the plaintiff, John M. Young, and his sister, Lydia Y. Merrill, were the owners in fee, as tenants in common, of all of that part of lot 2, block 70, Plat A, Salt Lake City survey, commencing 641/2 feet west from the northeast corner of said lot 2, thence west 611/2 feet, thence south 20 rods, thence east 941/2 feet, thence north 90% feet, thence east 311/2 feet, thence north 411/4 feet, thence west 161/2 feet, thence north 1481/2 feet, thence west 48 feet, thence north 491/2 feet, to the place of beginning; and also lot 12 in block 8, Five-Acre Plat A, Big Field survey, in Salt Lake county, Utah. That the title of the plaintiff and Lydia Y. Merrill in each of said properties was derived from the last will and testament of John Young, deceased, father of said John M. Young and Lydia Y. Merrill, and was subject to a right in Sarah Milton Young and Ann Olive Young to receive each one-fourth of the income arising from said properties during their respective lives. That the plaintiff's interest in said portion of lot 2 at the times of the sales hereinafter mentioned was worth at least the sum of \$25,000, and his interest in said lot 12 was worth at least \$1,000. (There is an alley extending from north to south practically through the center of said portion of said lot 2.) That on the 29th day of April, 1891, an execution was issued in said action of Clark, Eldredge & Co. to the United States marshal, directing him to levy on sufficient personal property to satisfy said judgment, and, if sufficient personal property could not be found, then to levy on the real estate belonging to the defendants in said action; and the marshal, being unable to find any personal property out of which to satisfy said judgment, did, on May 7, 1891, conveyed to him all their interests in the give notice that he attached and levied on

all the right, title, claim, and interest of said plaintiff and his codefendants in said action in and to that certain parcel of land described as beginning 101 feet north and 301/2 feet east of the southwest corner of lot 2, block 70, Plat A, Salt Lake City survey, running thence east 151/2 feet, thence north 28 feet, thence west 151/2 feet, thence south 28 feet, to the place of beginning; and also on that part of the same lot described as beginning 321/2 feet west from the southeast corner of said lot, running thence west 38 feet, thence north 981/8 feet, thence east 38 feet, thence south 981/3 feet, to the place of beginning; and also on a part of lot 12, block 8, Five-Acre Plat A, Big Field survey. That part of said lot 2 secondly described in said notice lies on the east side of said alley, while that portion firstly described in the notice lies on the west side. This lastmentioned portion was carved out of the heart of that portion of said lot 2 owned as aforesaid by plaintiff and his sister, and there was no means of ingress to or egress from this portion so carved out of the larger tract. That the marshal, by his return, dated July 25, 1891, certified that under said writ he had sold the property described in the notice to John Clark, and, deducting his commissions and expenses of sale, paid the balance realized upon said sale, viz. \$962.36, to the attorneys of Clark, Eldredge & Co., and further returned that there was still due and unpaid on said judgment the sum of \$886.90. (The John Clark mentioned in the return was a director and the principal stockholder of Clark, Eldredge & Co.) On July 28, 1891, an alias execution issued from the said court in said action for the full sum of \$1,673.36 and \$30.50 costs, directed to said marshal, and thereafter the marshal made return thereon to said court that he had levied on all the right, title, claim, and interest of said plaintiff and his codefendants in said action in and to that certain parcel of land described as beginning 641/2 feet west of the northeast corner of said lot 2, running thence west 451/2 feet, thence south 20 rods, thence east 781/2 feet, thence north 90% feet, thence east 314 feet, thence north 414 feet, thence west 161/2 feet, thence north 1481/2 feet, thence west 48 feet, thence north 491/2 feet, to the place of beginning; and certified by said return that he had sold all the premises last described to the said Frank B. Stephens and A. T. Schroeder for the sum of \$828.70; and further certified that the judgment obtained by said corporation was still unsatisfied to the extent of \$100. (The marshal's return was erroneous in this: that the true balance was less than \$26.) On the 30th of September, 1891, said marshal made a further return to said last-mentioned writ, in which he certified that on September 30, 1891, he sold all of lot 12, block 8, Five-Acre Plat A, Big Field survey, situate in Salt Lake county, and also all that certain parcel of land described as beginning 39 feet east

and 81 feet north of the southwest corner of said lot 2, running thence north 209 feet, thence east 161/2 feet, thence south 209 feet, thence west 16½ feet, to the place of beginning, to said Frank B. Stephens and A. T. Schroeder, for the sum of \$136; and that, deducting the costs and expenses of said last levy, amounting to \$30, paid the balance, \$106, to the attorneys of said Clark, Eldredge & Co., and returned said writ fully satisfied. All of that part of lot 2 firstly described in this statement, a plat of which appears in the record, constitutes a single parcel of land, and should be regarded and treated as such, and not as being divided nto separate lots or parcels; and each and every parcel of said lot 2, block 70, Plat A, so sold under said several writs of execution, was a part and portion of that part of said lot 2 which the said John M. Young derived title to under the will of John Young, deceased, as aforesaid.

It further appears that said Stephens furnished the marshal, from time to time, with a description of the property to be levied upon and sold under said executions, and that the officer did levy and sell, from time to time, according to the descriptions furnished him by said Stephens. That the property so sold to said Clark was afterwards, and prior to the commencement of this action, conveyed by Clark by quitclaim deed to said Stephens & Schroeder, and that the same was bid in by said Stephens for said Clark. That the other portions of said lot 2, sold under said several executions, and said lot 12, were bid in at said sales by Stephens for himself and Schroeder, and that at none of said sales was there any other bidder than Stephens, nor was either of said sales attended by any person other than Stephens and the officer conducting the sales. At the time the last of these sales was made, to wit, on 30th September, 1891, the balance due Clark, Eldredge & Co. on said judgment amounted to \$25.57, and no more, while the property of the plaintiff was sold for \$136 at such sale, \$106 of which was by the marshal paid to Stephens & Schroeder, no part of which was ever accounted for to plaintiff. It further appears that after said several sales had been made, and before the time for redemption had expired, Stephens informed the plaintiff that the statutory time for redemption would not be insisted upon; that the plaintiff, believing and relying upon such promise and assurance, allowed the period for redemption to elapse without redeeming any of said property from said sales, and that marshal's deeds were given to the purchasers at said sales in pursuance of the statute in such cases made and provided. It further appears that said lot 12 had been sold for taxes for the year 1890, and also for the year 1891, and that in the month of April, 1892, after Schroeder had obtained the marshal's deed for said lot 12, he was informed that the plaintiff was about to redeem said lot 12 from both of said

tax sales, and that he well understood at the time that plaintiff was unaware of the fact that said lot 12 had been sold under execution; nevertheless he permitted the plaintiff to redeem said property from said tax sales, and purposely concealed from him the fact that said property had been so sold under execution, and that he and his partner, Stephens, then held the marshal's deed therefor. It further appears from the record that it was the design and purpose of Stephens & Schroeder at the outset to exhaust, if possible, all of the property of plaintiff, of whatever nature or description, regardless of its value, under said several executions, and that they in fact accomplished that purpose. Prior to the commencement of this action, plaintiff offered to pay to Stephens & Schroeder the full amount of the Clark, Eldredge & Co. judgment, together with the interest thereon at the rate of 1 per cent. per month. to compensate Stephens & Schroeder liberally for all services and trouble that they had rendered or been put to in the premises, to repay all or any advances which they, or either of them, might have made on account of the property, with interest thereon, and, in addition, to give them a bonus of \$1,000 if they would reconvey said properties to plaintiff, which offer they declined and refused to accept. Such, in brief, is the history of the transaction by which the plaintiff was stripped of all his possessions, and his property, worth at the time \$26,000 or more, was taken to satisfy a judgment of about \$1,700. An additional feature of the transaction is that Stephens & Schroeder were members of the bar, attorneys for the judgment creditors, who thus, under the forms of law and the processes of the court, sought to enrich themselves without any consideration for the rights of the judgment debtor, and who proceeded in disregard of the injustice and oppression to which he was thereby subjected.

It is this transaction which appellants ask this court to approve. We find ourselves unable to yield to the appeal. We may say, with the supreme court of the United States in the case of Byers v. Surget, infra: "It seems pertinent here to inquire under what system of civil polity, under what code of law or ethics, a transaction like that disclosed by the record in this case can be excused, or even palliated." It is insisted by appellants that mere inadequacy of price, however gross, will not authorize the courts to set aside a judicial sale. The general rule undoubtedly is that mere inadequacy of price, alone, does not authorize the disturbance of such a sale; but we are not prepared to sanction the unqualified statement of the rule as put by appellants' counsel. If the inadequacy is so gross as at once to shock the conscience of all fair and impartial minds, if the sacrifice is such that every honest man would hesitate to take advantage of it, it may well be doubted whether every such case would be beyond the power of a court of equity to relieve against. In Byers v. Surget, 19 How. 303, it is said on page 311: "To meet the objection made to the sale in this case, founded upon the inadequacy of the price for which the land was sold, it is insisted that the inadequacy of consideration simply cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts, viz. unless such inadequacy be so gross as to shock the conscience; for this qualification implies necessarily the affirmation that, if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud." In the case of Butler v. Haskell, 4 Desaus. Eq. 651, the chancellor says: "I consider the result of the great body of the cases to be that, wherever the court perceives that a sale of property has been made at a grossly inadequate price, such as would shock a correct mind, this inadequacy furnishes a strong, and, in general, a conclusive, presumption, though there be no direct proof of fraud, that an undue advantage has been taken of the ignorance, weakness, or the distress or necessity of the vendor; and this imposes on the purchaser a necessity to remove this violent presumption by the clearest evidence of fairness of his conduct." In Graffam v. Burgess, 117 U. S. 192, 6 Sup. Ct. 686, the supreme court of the United States says: "From the cases here cited we may draw the general conclusion that, if the inadequacy of price is so gross as to shock the conscience, or if, in addition to gross inadequacy, the purchaser has been guilty of any unfairness, or has taken any undue advantage, or if the owner of the property or party interested has been for any other reason misled or surprised, then the sale will be regarded as fraudulent and void, or the party injured will be permitted to redeem the property sold. Great inadequacy requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise the presumption of fraud." All the cases unite in the doctrine that on gross inadequacy of price, coupled with irregularities attending the sale, especially where such irregularities are not merely formal and technical, but such as have a direct tendency to prevent the realizing of a fair price for the property sold, and are attributable to the purchaser at the sale, it is the duty of the courts to set the sale aside. unless the complaining party is estopped by his own laches. Chamblee v. Tarbox, 84 Am. Dec. 614; Howell v. Baker, 4 Johns. Ch. 119; Nesbitt v. Dallam, 28 Am. Dec. 236; Morris v. Robey, 73 Ill. 462; Byers v. Surget, 19 How. 303; Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686.

This is not a case which rests on mere inadequacy of price alone, but one where the sales complained of were attended by such substantial irregularities as must have prevented a sale at a fair sum. For instance, one of the parcels of said lot 2, levied upon and sold under the first execution, is de-

scribed as beginning 101 feet north and 391/2 feet east of the southwest corner of said lot 2, thence east 151/2 feet, north 28 feet, west 151/2 feet, and south 28 feet to the beginning. Reference to the plat in evidence shows that the property thus described is a portion of that part of lot 2 to which plaintiff and his sister derived title through the will of their deceased father, as before stated, and is included within the exterior boundaries of that portion thereof shown by the record to have been at that time leased to one Gebhardt. The purchaser of the part thus levied on and sold by the marshal acquired a piece of land having no means of access to it. It is needless to say that such a transaction must necessarily result in a sacrifice of the property. Again, in the sales made under the several executions of portions of said lot 2 it appears that in each instance the levy was upon and the sale of all the plaintiff's right, title, and interest in a specific part of the portion of said lot 2 so owned by him and his sister, Lydia Y. Merrill. This is also an irregularity that renders the sale voidable, if not void; the necessary tendency of a sale under such a levy being to depreciate the value of the property sold. In Freeman on Cotenancy and Partition (section 216), under the heading of "Conveyance of Part under Execution," it is said: "We have already seen that the decisions determining the effect of a conveyance made by a cotenant, and purporting to convey his interest in some specified parcel, are very inharmonious. The reasons which exist in the case of a voluntary are somewhat different from those accompanying an involuntary conveyance. purchase of the grantor's interest in a specifled parcel is, in effect, a wager that such parcel will be set off to him on partition, or otherwise confirmed to him by the other cotenants. Still, if such circumstances exist that the grantor sees fit to make, and the grantee to accept, a conveyance which may, in the event of an unfavorable partition, convey nothing, we can see no valid reason for denying the utmost effect to the deed which it can be given, consistently with the rights of the other cotenants. But in the case of an involuntary transfer of property the interest of the person whose estate is to be divested by compulsion ought to be carefully considered and jealously guarded. If an officer may lawfully levy on a specific parcel and subject it to forced sale, he may thereby sacrifice the property of the defendant, for few persons would be found willing to bid for that which, when purchased, consisted of a mere contingent interest,-an interest which the other cotenants were not bound to notice, and which might be finally lost upon a partition of the common property. Hence the rule, supported by a decided preponderance of the authorities, is that the levy and sale of the debtor's interest in a specific part of the lands cannot be sustained." See, also, Starr v. Leavitt, 2 Conn. 243; Smith v. Benson, 9 Vt. 138, and the cases cited in note to Smith v. Huntoon [(Ill. Sup.) 24 N. E. 971] 23 Am. St. Rep. 651. The rights of the cotenants of the judgment are not affected by the sale. In proceedings instituted by them for partition of the common property they can ignore the same, and the result of the partition may be to deprive the purchaser at such judicial sale of that which he bid and paid for. Such being the hazard which the purchaser must necessarily take, it is not reasonable to suppose that any one would bid a fair price for the property. The wisdom of the rule announced in the cases just cited are exemplified by the facts of this case. That part of lot 2 in controversy is but 941/2 feet in width east and west. It is cut through the center from north to south by an alleyway, and the record discloses that it could be most equitably divided between the cotenants, the plaintiff and his sister, by allotting to one all of that part lying on the east, and to the other all that lying on the west, of the alley. But it will be remembered that under the first execution issued on the Clark, Eldredge & Co. judgment the marshal levied on and sold two parcels of said lot 2, one of which lies on the east side of the alley and the other near the center of that portion situate on the west side. Now, if Lydia Y. Merrill, the cotenant of the plaintiff, or those claiming under her, should commence suit for partition, it would be found impracticable to make such a division of the property as she or they would be entitled to without ignoring one or the other of these sales. The court called upon to make partition would be constrained to ignore such sales, or at least one of them. Moreover, at the time the last sale was made under the executions mentioned, the balance remaining unpaid on the Clark, Eldredge & Co. judgment amounted to \$25.57, and no more, yet the officer levied upon and sold property of Young to satisfy an alleged balance of \$136, and, after deducting his fees, expenses, and commissions therefrom, paid the balance, \$106, to Stephens & Schroeder, who retained the same ever after. This was not an irregularity merely, such as would render the sale voidable, but, the levy and sale being excessive, the sale was absolutely void. Glidden v. Chase, 56 Am. Dec. 690; Patterson v. Carneal, 13 Am. Dec. 208; Hastings v. Johnson, 1 Nev. 613. It will be observed that the purchasers at all the execution sales complained of except the first were the attorneys for the judgment creditor; that to the extent of furnishing the officer with the descriptions of the property to be levied on and sold by him under the executions, they directed and controlled the processes of the court, and directed and required the officer to levy upon and sell the property in such parcels as rendered it impossible to realize at the sales a fair price therefor. A pur-

chase by an attorney for his own benefit at i a sale over which he has exercised any direction or control should always be closely scrutinized by the court. In Jones v. Martin, 80 Am. Dec. 641, speaking of such purchases, the court says: "Public policy and the analogies of the law require that they should be considered per se as in the twilight between legal fraud and fairness, and should be deemed fraudulent, or in trust for the debtor, upon slight additional facts." Howell v. Baker, 4 Johns. Ch. 117; Byers v. Surget, 19 How. 303. And where, as in this case, the attorneys, who became purchasers, have so directed and controlled the officer charged with the duty of executing the writ as to lead to a sacrifice of the debtor's property, the court will not hesitate to grant relief.

It is contended by the appellants that relief cannot be granted in this case, because the statutory period for redemption had expired before this suit was brought. The cases are by no means rare where a court of equity has interfered to set aside a sale after the time for redemption has expired, such sale having been attended by irregularities, and having resulted in a gross sacrifice of the judgment debtor's property. Morris v. Robey, 73 Ill. 462; Blight's Heirs v. Tobin, 18 Am. Dec. 219; Bullen v. Dawson, (Ill. Sup.) 29 N. E. 1038; Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686. We may add that it appears from the record that the plaintiff was assured by Mr. Stephens, before the period for redemption had expired. that the statutory period would not be insisted upon; and it comes with bad grace from the defendant now to urge that the plaintiff should be estopped by the fact that he relied upon that promise. It is true that this assurance was given, not by defendant Schroeder, but by his partner, Stephens. They, however, were acting in concert, engaged in a joint venture, and all the acts and declarations of Stephens in connection with the sales and purchases in question were, under the circumstances disclosed by this record, binding upon the defendant Schroeder. Blight's Heirs v. Tobin, 18 Am. Dec. 219.

We have made a careful examination of the record in connection with the numerous errors assigned on the part of the appellants, and have been unable to find any error which would call for a reversal of the decree of the court below. The fact that there was a gross sacrifice of the judgment debtor's property at these sales is proved beyond controversy. In the same manner it is established that these sales were attended by many and serious irregularities, for which the parties claiming through these sales were directly responsible. Where such facts are clearly established by the evidence, and a decree is pronounced permitting redemption on an equitable basis, it will not be disturbed because of any technical errors in the trial of

the case. Let the order and decree appealed from be affirmed.

MINER and SMITH, JJ., concur.

BENSON v. ANDERSON et al. (Supreme Court of Utah. June 7, 1894.) JUDGMENT-EQUITABLE RELIEF.

1. Equity will review a decree of the probate court, where the same has been obtained by fraud and mistake that has worked a posi-

tive injustice.

2. Where it appears that the probate court awarded an intestate's entire estate to his brother, when he left n wife surviving him, and that the wife was an old woman, who had very little understanding of the English language, it is sufficiently shown that the court either labored under a mistake, or was fraudulently imposed upon.

Appeal from district court, Weber county; before Justice James A. Miner.

Action by Sophia V. Benson against Nicholas Anderson and others to quiet title. Defendants obtained a decree. Plaintiff appeals. Reversed.

Maloney & Perkins, for appellant. B. H. Jones and Kimball & Allison, for respondents.

SMITH, J. This was an action, brought originally in the district court, to set aside certain proceedings in the probate court of Box Elder county, and praying that plaintiff's title be quieted to certain lands which are in her possession. The record discloses that the case was tried before J. B. Barton, referee, who filed findings of fact and conclusions of law, upon which a decree was entered dismissing plaintiff's bill. The evidence is before us, and shows the following state of facts: About the year 1864 the plaintiff was the wife of one Valentine Valentinsen, and at that time, with her husband, entered upon and took possession of the land in dispute, the same being then public land of the United States. Subsequently Valentinsen died, and later the plaintiff married Bengt A. Benson, and continued to live on and cultivate this land. In 1889 one Alice Rosenbaum,-having obtained the government title to the land in controversy,-by a sufficient deed, conveyed it to the husband of plaintiff, Bengt A. Benson. On August 27, 1889, Bengt A. Benson died, leaving personal property and the land in question as his estate. Defendant Nephi P. Anderson was appointed administrator of the estate of Benson. Such proceedings were then had in the probate court that on April 15, 1890, a decree of distribution was made, distributing the entire estate, including the land in controversy, to the defendant Nicholas Anderson, and disinheriting the plaintiff entirely. Nicholas Anderson, it is conceded, was a brother of Benson, deceased. The plaintiff had notice of all proceedings in the probate court. No appeal was taken from the de-

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cree of distribution, and the time for appeal had expired when this suit was brought. During all of said proceedings, and up to the present time, plaintiff was living on the land in dispute, cultivating it, and claiming to own it. It further appears that the plaintiff is an old Danish woman, who has a very poor knowledge or understanding of the English language; that the probate proceedings were in English; that she depended wholly on others for information as to her rights, and the proceedings in the probate court. It was insisted by plaintiff that she paid Rosenbaum for the land, though, as to this, there was a conflict in the testimony. The referee, as conclusions of law, found that Nicholas Anderson was the owner in fee simple of all the land, and that plaintiff's bill should be dismissed.

It is difficult for us to see just how such a conclusion was reached, on the facts found. There is no question, in our opinion, but that the district court, sitting as a court of chancery, had power to review a decree of the probate court, where the same had been obtained by fraud or mistake that had worked a positive injustice. See Pom. Eq. Jur. \$ 919. and cases cited in note. There is no dispute but that Bengt A. Benson died without issue. It is expressly found that plaintiff is his widow. The defendant Nicholas Anderson, it appears, is a brother of the deceased, although that fact is not expressly found. If it be true that Anderson is the brother of deceased, then plaintiff is entitled to one-half of the estate, and Anderson the other half. Comp. Laws Utah, § 2741, subsec. 2. The failure to follow the plain command of the statute just cited is very persuasive evidence that the probate court, in making its decree of distribution, was laboring under a mistake as to the facts or the law of the case, or was fraudulently imposed upon. It was suggested in argument that the order and decree could be accounted for on the ground that plaintiff was a polygamous wife of Benson, but the findings of the referee negative this idea, for it is found. as a fact that plaintiff married Benson. There is no hint that the marriage was not a valid one. Plaintiff was at the time competent to marry, and there is no pretense but that Benson was. Upon the facts, as found, we must hold that plaintiff was Benson's lawful wife, and is his widow. We have no doubt, however, that the probate court was laboring under some such mistake; and, whatever the mistake was, it was of a vital character, as it effectually deprived plaintiff of the home where she had lived for 30 years, and gave the entire estate, both real and personal, to the brother of the deceased. We do not feel that we can give our sanction to such a proceeding. This the judgment below did. We do not intend to declare that a party to a probate proceeding may sit by when an erroneous decree is entered against him, and negligently permit the time for appeal to expire, and depend on a bill in equity to correct it. But in this case sufficient excuse is shown for the failure to appeal, and no such neglect is shown in this case as ought to deprive the plaintiff of relief.

Some question is made as to the right of appellant to be heard in this court, but all these questions have been passed upon on the motions to dismiss the appeal, and we do not deem it necessary to refer to them again.

We do not deem it necessary to direct a retrial of the case in the court below, but, upon the evidence before us, it is apparent that we can direct the court below to enter a judgment that will be just to both parties. It is therefore ordered that the cause be remanded to the district court, with directions to set aside the decree of distribution made by the probate court of Box Elder county, and that the district court enter a decree awarding one-half of the entire estate of Bengt A. Benson to plaintiff, and onehalf to defendant Nicholas Anderson, and to include the dwelling of plaintiff in the onehalf awarded to her; and the district court is directed to take any proof it may deem necessary to enable it to make a just and equitable division of said estate.

MERRITT, C. J., and BARTCH, J., concur.

RITER et al. v. SUN FOUNDRY & MACH.
CO. et al.

(Supreme Court of Utah. June 7, 1894.)

GUARANTY BY OFFICER OF CORPORATION.

The treasurer of a corporation wrote a letter accepting, for the corporation, plaintiff's offer to sell certain property at a specified price, in which letter he said, "I will guaranty you the money between 30 and 40 days." Held, that this language was only an assurance that the company would pay during that time, and not a personal guaranty of payment.

Appeal from district court, Utah county; before Justice H. W. Smith.

Action by L. E. Riter and W. G. Van Horne against the Sun Foundry & Machine Company and A. A. Noon. Plaintiffs recovered judgment against the company only. Plaintiffs appeal. Affirmed.

Williams, Van Cott & Sutherland, for appellants. Kellogg & Corfman, for respondents.

MERRITT, C. J. In this case suit was brought by the plaintiffs against the defendants, the Sun Foundry & Machine Company and A. A. Noon, to recover the price of certain property sold by plaintiffs to the defendant company. On the trial of the case in the court below, judgment was entered in favor of plaintiffs against the defendant foundry, and in favor of the defendant Noon. The purchase of the property was made by means of a letter, addressed to the plain-

tiff Riter, as follows (Exhibit A): "Sun Foundry Machine Shops, Provo City, Utah, July 16th, 1891. Dear Sir: We will accept your offer for the whole plant now on the ground, old Copperopolis mill, for the sum you name, \$650. I will guaranty you the money between thirty and forty days. Please answer by return mail, and we will send men to take it down, etc., at once. Respectfully, A. A. Noon, Treasurer." To this letter the plaintiff kiter, on July 17, 1891, replied as follows (Exhibit B): "L. E. Riter & Co., Silver City, Utah, July 17, 1891. A. A. Noon, Esq., Treasurer Sun Foundry and Machine Co., Provo-Dear Sir: Your acceptance of my price for the old Copperopolis mill, i. e. \$650, is binding. Your modification of terms of payment, wherein you guaranty payment within or between 30 and 40 days, is satisfactory. Resp'y yours, L. E. Riter."

It is an admitted fact, and so found by the court below, that at the time these letters were written the defendant Noon was the treasurer of the defendant corporation; that by means of said letters defendant corporation contracted the debt sued upon by plaintiffs. The answer and acceptance of its terms, as shown by Exhibit B, was addressed to "A. A. Noon, Esq., Treasurer Sun Foundry & Machine Co., Provo." The language of these letters shows that the Sun Foundry & Machine Company is charged with all liability, and that the defendant Noon cannot be personally held. Falk v. Moebs, 127 U. S. 597, 8 Sup. Ct. 1319. It does not appear that there is any personal contract of guaranty entered into by defendant Noon. So far as these letters show, the defendant corporation bought the property from plaintiffs for \$650, to be paid between 30 and 40 days. We can only determine the time given for payment by the defendant corporation by the language used by Noon. We think that Noon, in using this language, only meant to assure the plaintiffs that the defendant corporation would pay the plaintiffs within the time designated, and did not intend to assume any personal responsibility. None of the authorities cited in appellants' brief hold that an expression of this kind has ever been held to be a guaranty. Judgment affirmed.

MINER and BARTCH, JJ., concur.

PEOPLE v. LARSEN.

(Supreme Court of Utah. June 11, 1894.) CRIMINAL LAW-CROSS-EXAMINATION.

Where a defendant has testified in his

own behalf he may be asked on cross-examina-tion, for the purpose of affecting his credibility, whether he had been previously arrested for a similar offense.

Appeal from district court, Weber county; before Justice James A. Miner.

Charles H. Larsen appeals from a conviction of assault. Affirmed.

Evans & Rogers, for appellant. John W. Judd and W. L. Maginnis, for the People.

BARTCH, J. The defendant was indicted for an assault with intent to rape a female child of the age of 11 years, and was convicted of an assault. A motion for a new trial having been overruled, he appealed to this court. At the trial of the cause the defendant submitted himself as a witness in his own behalf, and on cross-examination the court permitted the prosecuting attorney, over the objection and exception of counsel for the defendant that it was immaterial and irrelevant, to ask the following question: "Have you ever been arrested for a crime similar to this?" It is insisted that the court erred in requiring the witness to answer the question, and this is the only point raised in the record. It is entirely optional with the defendant, in a criminal action, to appear as a witness; and, if he fail to so appear, no presumption can be raised against him because of said failure, but, if he once offer himself as a witness, then the prosecuting attorney may cross-examine him, the same as any other witness. Comp. Laws Utah, 1888, § 5198. A witness is exempt from answering any question which has a tendency to subject him to punishment for felony; nor is he required to answer any question which has a tendency to degrade his character, unless it be to the very fact in issue, or to a fact from which the fact in issue would be presumed. Id. § 3959. This immunity from answering degrading or criminative interrogatories or cross interrogatories is purely a personal privilege of the witness, which he can claim or waive, at his pleasure. His counsel can neither claim nor waive it for him. It is a privilege of crime, and he alone can know whether an answer will subject him to punishment. The witness may waive it, and answer, regardless of any objection of counsel. If he declines to answer, that circumstance cannot be permitted to draw an inference of the truth of the fact to which the question relates. When he chooses to become a witness in the case, he leaves his position as defendant, and while he is upon the stand he is subject to the same rules, and must submit to the same tests, which by law are applicable to other witnesses. Whart. Cr. Ev. §§ 430, 432; 1 Greenl. Ev. § 451; Com. v. Shaw, 4 Cush. 594; State v. Wentworth, 65 Me. 234; Brandon v. People, 42 N. Y. 265; Paxton v. Douglas, 16 Ves. 239. In this case the question was not claimed, by the witness, to be privileged. It was simply objected to by counsel as immaterial, irrelevant, and not cross-examination. Nor did it imply an answer which would prove a link in a chain of testimony, and render it sufficient to convict him of a crime. Nor would it be criminative evidence at all. He was merely asked whether he had been previously arrested for a similar offense. This was a proper ques-

tion on cross-examination, which he, having become a witness of his own volition, was bound to answer. The jury were to determine the weight which ought to be given to his testimony, and they had a right to know and understand the character and conduct of the witness whose statements they were called upon to believe, and this does not conflict with the presumption of innocence. It rests within the sound discretion of the trial court to determine the limits to which a cross-examination, in a criminal case, may be conducted, on matter not relevant to the issue, for the purpose of judging of the character of the witness, and of the credit which ought to be given to his testimony from his own voluntary admissions. 1 Greenl. Ev. § 455; People v. Hite, 8 Utah, 461, 33 Pac. 254; Hanoff v. State, 37 Ohlo St. 178; People v. Mather, 4 Wend. 229; Connors v. People, 50 N. Y. 240; Territory v. O'Hare (N. D.) 44 N. W. 1003. Such a cross-examination may be allowed whenever there is reason to believe that the ends of justice require it. In this case there appears to be no abuse of discretion, and the objection to the interrogatory by counsel cannot avail the defendant. The judgment is affirmed.

MERRITT, C. J., and SMITH, J., concur.

AMERICAN PUB. CO. v. FISHER et al. (Supreme Court of Utah. June 12, 1894.)

ALTERATION OF INSTRUMENT - AMENDMENT OF CONSTITUTIONAL LAW - RIGHT OF Pleading — TRIAL BY JURY.

1. Plaintiff made and signed a written offer to manufacture certain goods for defendant at a specified price, and defendant wrote his name below that of plaintiff. Afterwards, plaintiff interlined above defendant's signature the words, "All terms and conditions included in above approved, read, and agreed." Held, that defendant was not liable as on an accorate offer since the

proved, read, and agreed." Held, that defendant was not liable as on an accepted offer, since the alteration was a material one.

2. Under Comp. Laws, § 3256, authorizing courts in their discretion to allow amendments to pleadings, it is not an abuse of discretion to allow an answer to be amended at the trial.

3. Laws 1892, c. 44, providing that in civil actions a verdict may be rendered by a concurrence therein of nine or more jurors, does not conflict with Const. U. S. Amend. 7. which declares that the right of trial by jury shall be preserved. Hess v. White (Utah) 33 Pac. 243, followed.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by the American Publishing Company against A. Fisher and others. Defendants obtained judgment. Plaintiff appeals. Affirmed.

Dey & Street, for appellant. Brown & Henderson and Rawlins & Critchlow, for respondents.

SMITH, J. This is an action by the plaintiff to recover of defendants \$20,844.75, claimed to be due upon a written contract, which is set out in the complaint, and is in words and figures as follows: "March 28, 1890. A. Fisher Brewing Company, Salt Lake City, Utah-Gentlemen: Will submit sketch for your trade-mark, with sketch for your labels, also submitting finished bottle proofs of plates, and will furnish you with one and one-half (1½ million) million labels in the course of a year after the proofs have been made, in black and bronze, with trade-mark inserted, at fiftyfive cents (55c.) per M. labels; and will duplicate this first year's shipment in each of the following five years at same rate after the expiration of this first year. Will also submit six different kinds of sketches for small advertising cards on style of cards submitted, printed in colors in front and black on back, furnishing you with 50 M. of each kind of cards, after sketches have been submitted, as soon as ready, at \$9.75 per M. We shall also insert your tradecards. mark and compliment card on your edition of the panoramic view of Salt Lake City, and will furnish you with 10 M. copies of said Salt Lake City view, with trade-mark inserted, after sketch of trade-mark has been submitted to you, as soon as ready, at 97c. per copy (ninety-seven cents) per copy of said view. Will attend to the application for registration of your trade-mark for you, and will submit designs for your different stationery headings and for a hanger in course of a year, with your trade-mark embodied on same, furnishing you with 10 M. of each kind of the following stationery as soon as ready, viz. letter heads 81/2x11, letter heads 81/2x51/2, note heads 51/2x81/2, statements 51/4x81/2, bills 81/4x7, business cards and envelopes. Will also send you proof of bock card submitted in spring 1891. Price of hangers and price of bock cards, in colors, is 37½c. apiece (all prices are made on goods at our office at Milwaukee), with your name and trade-mark inserted, and will furnish you 300 bock cards for the season of 1891. Terms, cash on delivery. Very truly yours, American Publishing Co., of Milwaukee, Wig. Per A. E. Cotzhausen, Treas. All terms and conditions included in above approved, read, and agreed. A. Fisher Bry. Co., A. Fisher." (Signed in duplicate.)

The complaint alleges, in substance, that plaintiff substantially performed said contract on its part, except as to certain particulars wherein it was prevented by defendants, and alleges that defendants have paid no part of the sums due for articles furnished under said contract. The defendants answered, denying that they ever made the contract sued on, and allege that it was fraudulently altered, and is a forgery; but allege affirmatively that, owing to certain statements of the representative of plaintiff, they did indorse their firm name on the proposal of plaintiff, but with the express understanding that it was in no sense a contract, and was for an entirely different purpose, and

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that it was at the time so understood by both parties. The answer also sets out at great length an explanation of the reasons why the defendants approved certain designs for work afterwards done by plaintiff. Upon the trial a verdict was rendered in favor of defendants, concurred in by nine jurors. A motion for a new trial was overruled, and plaintiff appeals.

The alteration which it is claimed was made in the contract sued on, and which defendants claim rendered it a forgery, was the interlineation above the name of defendants' firm, as indorsed on the proposal, of the words: "All terms and conditions included in above approved, read, and agreed." The evidence as to whether these words were interlined after the defendants indorsed the contract was certainly squarely in conflict. The question was submitted to the jury, and they found it to be a forgery. We do not feel that we would be authorized to disturb their verdict. We think the alteration alleged to have been made, and set out above, was material, and, if the writing had been a contract before, the alteration would have had the effect to destroy it, and render it a nullity; and, of course, if it was not a contract before, the unauthorized addition of these words could never make it one. Very slight alterations in a written instrument, made after it is signed by the obligor, if made without his knowledge or consent, and made by a party interested in the contract, or at the instance of such party, will destroy the instrument altogether. See Robinson v. Reed, 46 Iowa, 219; 2 Add. Cont. p. 853; Bigelow, Frauds, 255, and cases cited in note. In the brief of appellant we are urged to set aside the verdict because the evidence fails to sustain the plea of fraudulent interlineation, and the same matter was earnestly presented in the oral argument. But there was evidence in the case from which the jury would have been justified in finding that the interlineations, both in the original contract and in the approvals, were made as claimed by defendant, so that we cannot disturb their finding. The appellant also urges that, admitting that the alterations were made as claimed by defendant, and were unauthorized, still it does not detract from or add to the agreement. We have already said that we are of opinion that the alterations were material, and a very casual reading of the contract, as set out in the complaint and copied in this opinion above, will, it seems to us, convince any one that the words added above the firm name of defendant, to wit, "All terms and conditions included in above approved, read, and agreed," are of vital importance in determining the meaning and legal effect of the entire instrument. Without these words, the explanation offered by defendant as to why he signed the paper at all, and his claim that he did so merely to show that the salesman of plaintiff had called on his firm and made the offer contained in the writing, as a basis for future orders for supplies, is a reasonable one. With these words in the writing, it is impossible for any one to believe that explanation. With these words added, the writing appears to be a perfect contract, consisting of an offer and acceptance. It is not our purpose to discuss at length the evidence introduced, or to attempt to say who ought to be believed or who should be disbelieved. We do say, however, that the entire transaction, so far as the plaintiff is concerned, bears all the evidences of the rankest kind of fraud and imposition upon the defendants. If this transaction is to be upheld, the defendants will be compelled to pay for enough advertising matter to run them for an indefinite period of time, variously estimated at from 10 to 100 years, the same being of a character that would ordinarily be changed each season. It may be said that the courts are not guardians for business men who make foolish and improvident contracts, and the appellant here urges this thought upon our consideration, and we concede that it is in a large measure correct. But where, as in this case, the alleged maker of such a contract denies that he made it, then the nature of the bargain, it being one of such a ruinous character as the one under consideration, is quite cogent evidence that no sane business man ever entered into it, except he was imposed upon by some unfair means. The course of dealing carried on by the plaintiff, as shown by the record, is certainly very singular, and bears evidence of a deliberate conspiracy to entrap the defendants. Such being the tendency of the entire evidence, it is not difficult to see how the jury, even upon the statement of defendant Fisher alone, found that the contract, so called, had been fraudulently altered, even though their verdict was equivalent to a verdict of guilty of forgery against the agent of plaintiff.

One other objection urged here is that defendants were permitted to amend their answer on the trial, and after the introduction of testimony was begun. The amendment was allowed without previous notice, but no objection was made on this ground. "The court may, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading," etc. Comp. Laws Utah, § 3256. Terms were imposed as a condition of filing the amendment complained of, there being no objection on the ground that it was without notice. We think there was no abuse of discretion.

The last objection urged is that the verdict was rendered by only nine jurors. This matter we have recently fully passed upon, and in our opinion the law authorizing a verdict by nine or more jurors in a civil case is valid. Hess v. White (Utah) 33 Pac. 243. We are aware that two other territorial suppreme courts, on a like statute, have taken

a contrary view since the opinion in Hess v. White was rendered, (Carroll v. Byers [Ariz.] 36 Pac. 499; Bradford v. Territory [Okl.] 34 Pac. 66), and one territorial supreme court has decided practically in accordance with our view. Still we adhere to the rule we have already declared on this subject. We do not deem it necessary to notice other matters in the brief of appellant. The appellant's brief nowhere contains a concise statement of the points, or any point, on which a reversal is asked. While it is very lengthy, it is difficult to determine from it just what occurred in the district court that is complained of here.

We have discussed all the matters which we think are presented by the record, although we have omitted several about which appellant's brief has much to say. The judgment of the district court is affirmed, with COSTA.

MERRITT, C. J., and MINER and BARTCH, JJ., concur.

(10 Utah, 173)

TUCKER et al. v. SALT LAKE CITY. (Supreme Court of Utah. June 12, 1894.)

ACTION AGAINST CITY-DEFECTIVE SIDEWALK-Instructions.

1. In an action against a city for injuries caused by a defective sidewalk, a charge that the burden of proof is on plaintiff to show the negligence charged by him; that it was the city's duty to use all reasonable care to keep its city's duty to use all reasonable care to keep its sidewalks in a reasonably safe condition; that knowingly failing to do so was negligence; that notice of the dangerous condition of a sidewalk might be inferred from the fact of its existence for any length of time; that it was plaintiff's duty to use ordinary care in passing along a street; that if plaintiff was guilty of contributory negligence he could not recover; and that it was the jury's province to determine from the evidence as to whether the sidewalk was dangerous for persons using ordinary walk was dangerous for persons using ordinary care, whether the city had notice of the dan-ger, and whether plaintiff used ordinary care, correct.

is correct.

2. An instruction to find for defendant if the sidewalk was of sufficient width and in such safe condition that plaintiff, with ordinary care, could have avoided the injury, is erroneous as assuming that the city need not keep the whole width of its sidewalks in good condition.

3. Laws 1892, c. 44, providing that in civil actions a verdict may be rendered by a concurrence therein of nine or more jurors, does not conflict with Const. U. S., amend. 7, which declares that the right of trial by jury shall be preserved. Hess v. White (Utah) 83 Pac. 243, followed. followed.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by Elizabeth B. Tucker and her husband against Salt Lake City. Plaintiffs obtained judgment. Defendant appeals. Affirmed.

E. D. Hoge, for appellant. Frank B. Stephens and Benner X. Smith, for respondents.

MERRITT, C. J. This action was brought by plaintiff and her husband, who has since | complaint, and was thrown down and suf-

died, against the city of Salt Lake. complaint alleges that on or about the 1st day of August, 1890, in front of the livery stable formerly known as McKimmin's stables, on the north side of Third South street, between Main and West Temple streets, the said city made, constructed, and caused to be constructed and put down an iron, glass. and cement sidewalk, a portion of which was negligently, willfully, and knowingly constructed on a sharp incline, making a steep and slippery descent, dangerous, etc.; that plaintiff, when passing along said sidewalk, was unaware of danger, stepped on said incline, without fault or negligence on her part, was thrown upon the sidewalk, and broke her arm, etc., for which damages were claimed in the sum of \$4,500. The answer denied all the allegations of the com-A trial was had before the court and a jury. The jury rendered a verdict in favor of plaintiff for the sum of \$2,000, and judgment was rendered by the court in favor of plaintiff for said sum and costs. Defendant moved for a new trial, which was overruled, whereupon defendant appealed, and assigned as error the failure of the court below to give certain instructions asked by defendant, and also excepted to the charge given by the court to the jury.

From a careful examination of the record, we find no error: the charge of the court below was full, and stated correctly the law of the case. The court charged the jury "that the defendant had put in an answer denying the allegation as to negligence on the part of the city, and the burden of proof is on the plaintiff to show by a preponderance of evidence the negligence charged in the complaint; that it was the duty of the city to use all reasonable care to keep and maintain the sidewalk in a reasonably safe condition to persons passing upon it, and if the city knowingly failed to do so it is chargeable with negligence. Though there may not be any actual notice to the city, or any of its authorized officers whose duty it is to repair the sidewalks and remedy dangerous places, yet if you believe from a preponderance of evidence that the danger had remained there any length of time; that the city officers whose duty it was to examine sidewalks and repair them, in the use of reasonable diligence, should have discovered the danger,—then you have a right to infer notice to the city." The court further instructed the jury that if they believed, from a preponderance of the evidence, that the city permitted this dangerous sidewalk, as alleged in the complaint, to remain in the street, after the city officers whose duty it was to repair the streets knew of it, or should have known of it in the use of reasonable diligence, and if they further believed that the plaintiff, without fault on her part, and with the use of due care, while walking along the street, stepped upon the incline, as described in the fered injury as alleged, in that they should find for the plaintiff. The court further charged the jury that it was the duty of the plaintiff to use ordinary care, in passing along the street, to see and observe any dangerous places in the street, and if they believed, from a preponderance of the evidence, that she was guilty of negligence in stepping on such a dangerous place,—"if you believe from the evidence it was,-which contributed to the injury, then she cannot recover." The court further charged the jury that it was their province to determine, from all the evidence, in the first place, whether the dan-ger existed, and whether the city had notice of it; as to whether it was dangerous to persons walking along with ordinary care; and as to whether the plaintiff used reasonable care. These charges, we think, fully and fairly stated the law of the case, and were quite as favorable to the defendant as the law would justify.

We have examined the proposed instructions asked by defendant and which were not given by the court, and find that their substance was already given by the court in its charge, with the following exception, viz.: The defendant asked the court to charge the jury that, "if you find from the evidence that the sidewalk where the plaintiff Elizabeth Tucker, was injured, was of sufficient width, and in such safe condition, that the said plaintiff, Elizabeth Tucker, by the use of ordinary care, could have avoided the injury complained of, you must find for defendant," -which the court refused to give, and which ruling was excepted to by defendant, and who now assigns the same as error. court properly refused to give said instruction, because it was an assumption on the part of appellant that as a matter of law the whole width of the sidewalk need not be in good condition, and that a city is not compelled to keep the whole width of the sidewalk in good condition. That is not the law. "Where a city opens a sidewalk to public travel, it is bound to keep every portion of it in repair." Roe v. City of Kansas (Mo. Sup.) 13 S. W. 404; Morrill, City Neg. 67; Brusso v. City of Buffalo, 90 N. Y. 679. All persons using streets and sidewalks have the right to assume that they are in good and safe condition, and to regulate their conduct on that assumption. Kenyon v. City of Indianapolis (Ind.) 1 Wils. 139; Gibbons v. Village of Phoenix (Sup.) 15 N. Y. Supp. 410; Hopkins v. Ogden City, 5 Utah, 390, 16 Pac. 596. The city engineer of the defendant corporation testified as follows: "I saw the sidewalk where the plaintiff fell, when being constructed. I considered the slope too great for safety, and know it has remained in the same condition as when constructed." The defendant offered no testimony in the case. We consider that the defendant corporation was guilty of gross negligence. The validity of a verdict by nine jurors has already been sustained by the court, and we adhere to our former ruling. There is absolutely no merit in this appeal. The judgment is affirmed.

MINER, SMITH, and BARTCH, JJ., concur.

FRED W. WOLF CO. v. SALT LAKE CITY BREWING CO.

(Supreme Court of Utah. June 13, 1894.)

VERDICT—CONCURRENCE OF NINE JURORS—CONSTITUTIONAL LAW.

Act March 10, 1802, providing that in all civil cases a verdict may be rendered on the concurrence of nine or more members of the jury, is valid. Hess v. White 33 Pac. 243, followed.

Appeal from district court, Salt Lake county; before Justice G. W. Bartch.

Action by the Fred W. Wolf Company, a corporation, against the Salt Lake City Brewing Company, a corporation. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Dickson and W. C. Hall, for appellant. Frank Pierce, for respondent.

MERRITT, C. J. The appellant's only point for setting aside the verdict and for reversal of the judgment in this case is that the verdict of the jury was concurred in by only nine of the jurors. The record presents only this question: "Can nine concurring jurors render a verdict?" The legislature of Utah, on March 10, 1892, amended the jury law, and provided that "in all civil cases a verdict may be rendered on the concurrence of nine or more members of the jury." This statute has been held valid by this court in the case of Hess v. White, 33 Pac. 243, and also by this court, at its present term, in the cases of Publishing Co. v. Fisher, 37 Pac. 259, and Tucker v. Salt Lake City, 37 Pac. 261. There being no other error assigned, the judgment of the court below is affirmed.

MINER and SMITH, JJ., concur.

EVANS v. JONES.

(Supreme Court of Utah. June 12, 1894.)

Waiver of Demurrer—Presumptions on Appeal—Bill of Exceptions.

1. Where defendant demurs, and afterwards answers, but before trial withdraws the answer, and allows judgment to be entered, it will be presumed that he waived the demurrer, where the record discloses nothing to the contrary

2. Where a cause is submitted on appeal upon the judgment roll alone, rulings of the court, not preserved by a bill of exceptions, cannot be considered.

Appeal from district court, Weber county; before Justice James A. Miner.

Action by John Evans against R. H. Jones.

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From a judgment for plaintiff, defendant appeals. Affirmed.

B. H. Jones, for appellant. Weber & Johnson, for respondent.

BARTCH, J. The abstract in this case is very imperfect, and discloses no merit in the appeal, which rests alone on the judgment roll, and this also appears to be imperfect. It appears therefrom, however, that the action was brought before a justice of the peace on a promissory note. The demand in the complaint was for \$200 and interest, and reasonable attorney's fee, according to the terms of the note. Judgment was rendered in the district court for \$286.66, amount of principal and interest on the note, and for \$30, attorney's fee. The record does not disclose any final proceedings in the justice's court, nor how the action was transferred to the district court; but it does show that the defendant demurred to the complaint, and afterwards filed an answer. The record is silent as to what disposition was made of the demurrer, but shows that, while the cause was pending in the district court, the defendant, having been regularly served with process, and having appeared by answer, afterwards withdrew the answer. after, his default was entered, and evidence introduced by the plaintiff to ascertain the defendant's indebtedness to him, and also to determine what was a reasonable attorney's fee for its collection. The court then ordered judgment to be entered as above indicated.

Counsel for appellant insists that the court erred in entering judgment before disposing of the demurrer, which raised an issue of The rule is that, in a case where both law. an issue of law and of fact are raised by a demurrer and answer, the issue of law must first be disposed of, and if the cause is tried on the issue of fact raised by the answer, and judgment rendered, it will be presumed on appeal that the demurrer was overruled before trial. Where, as in this case, the defendant demurs, and some time thereafter answers, but, before trial, withdraws the answer, and allows judgment to be entered, it will be presumed that he waived the demurrer. Brooks v. Douglass, 32 Cal. 209; Abadie v. Carrillo, Id. 172; Guthrie v. Phelan (Idaho) 6 Pac. 107.

The other points mentioned in the appellant's brief cannot be considered by this court, because no bill of exceptions was taken, the cause being here solely upon the judgment roll. When a party wishes to have an order or ruling reviewed in this court, he must except thereto at the proper time, and preserve his bill of exceptions, and submit it with the record. There appears to be no error in the record before us. The judgment is affirmed.

MERRITT, C. J., and SMITH, J., concur.

(10 Utah, 184)

UNITED STATES v. McMILLAN et al. (Supreme Court of Utah. June 18, 1894.)

CLERK OF COURT—FEDERAL AND TERRITORIAL FEE BILL—FEES FOR NATURALIZATION.

1. The federal fee bill (Rev. St. U. S. § 823 et seq.) provides that no other compensation shall be allowed to clerks of the district courts than that therein prescribed. 2 Comp. Laws 1888, p. 804 et seq., prescribes the fees and compensation of clerks of the district court. Held, that the federal fee bill was not applicable to cases in the territorial courts in which the United States was not a party, and that the clerk need not account for any moneys received by him in other cases.

by him in other cases.

2. Nor need he account for moneys earned or received in the matter of naturalization.

Appeal from district court, Salt Lake county; before Justice George W. Bartch.

Action by the United States against Henry G. McMillan and others. From a judgment sustaining a demurrer and dismissing the complaint, plaintiff appeals. Affirmed.

U. S. Attorney, for the United States. W. H. Dickson, Rawlins & Critchlon, and Jas. W. Kimball, for respondents.

MERRITT, C. J. This is an action brought by the United States against Henry G. Mc-Millan, late clerk of the third district court of Utah Territory, and his bondsmen, to recover an alleged surplus of fees and emoluments alleged to have been earned and received by said McMillan as such clerk, and which it is alleged he failed to account for and pay over as required by sections 833, 844, Rev. St. U. S. The complaint contains two counts. The first alleges that between the 8th day of June and the 31st day of December, 1888, the said McMillan, as such clerk, earned and received, as fees and emoluments of his said office, \$7,458.70, of which sum \$988.90 was earned and received in United States cases; \$3,776 for declarations of intention and naturalization; and \$2,693.80 from private persons in civil litigation, and from the territory on account of territorial business. It is further alleged that the said McMillan was entitled to retain of said moneys, as his personal compensation and reasonable and necessary expenses of his office, the sum of \$3,728.98, and no more, and that it was his duty to account for and pay into the treasury of the United States all moneys received by him in excess of said last-mentioned sum, to wit, \$3,729.72; that he has failed to account for or pay any part thereof, except the sum of \$2,160, leaving a balance due the United States, as alleged, of \$3,708.12. The second count alleges that between the 1st day of January and the 31st day of December, 1890, the said McMillan, as such clerk, earned and received, as fees and emoluments of his said office, the sum of \$10,544.70, of which sum \$1,793.35 was earned and received in United States cases; \$1,-439.50 for declarations of intention and naturalizations; and \$7,311.85 from private persons in civil litigations and from the ter-

zitory on account of territorial business. It is further alleged that the said McMillan was entitled to retain of said moneys, as and for his personal compensation, and as reasonable and necessary expenses of his said office, \$6,256.75, and no more, and that it was his duty to account for and pay into the treasury of the United States all moneys received by him as aforesaid in excess of said sum of \$6,256.75, to wit, the sum of \$4,287.95; and that he has failed to account for or pay any part of said sum, except the sum of \$793.40, and a judgment is prayed against the said clerk and his bondsmen accordingly. To this complaint, and to each count thereof, the defendants demurred, on the ground that the facts stated were insufficient to constitute a cause of action. The demurrer was sustained by the court below, and, the plaintiff declining to amend, judgment was entered in favor of the defendants, dismissing the bill of the complainant, from which judgment this appeal was prosecuted by the government.

Two questions are presented: First. Is the clerk required to account for, as fees and emoluments of his office, moneys earned and received by him in civil cases between private parties and from the territory in territorial business? Second. Is he required to account for, as such fees and emoluments, moneys earned and received by him in the matter of the naturalization of aliens? We think both of these questions are to be answered in the negative. The legislature of the territory of Utah, by an act approved February 20, 1874, prescribed the fees and compensation of clerks of the district courts. This act is still in force, and will be found in 2 Comp. Laws 1888, p. 804 et seq. This act has received the implied sanction of congress. Clinton v. Englebrecht, 13 Wall. 434, 446. And we take judicial notice that the practice of the courts of this territory has been to tax the costs of the clerks, marshals, etc., in accordance with the territorial fee bill in all other than United States business. It in many instances prescribes for the clerk larger compensation than does the federal fee bill for precisely similar services, and also gives an allowance for some services for which no corresponding charge is found in the act of congress. The federal fee bill (Rev. St. U. S. § 823 et seq.) provides that no other compensation shall be taxed and allowed to attorneys, solicitors, and proctors in the courts of the United States, to district attorneys, clerks of the circuit and district courts, etc., than that therein provided for. Now, if this act is applicable to civil cases between private parties, and to territorial civil and criminal business, then all moneys received and collected by the clerk in such cases in conformity with the territorial fee bill, and in excess of what could have been allowed to him if his compensation were taxed under the federal fee bill, were illegally exacted, and the territory, or the indi-

vidual from whom they were so illegally exacted, and not the United States, should be entitled to sue for and recover the same. In the case of Marte v. Railway Co., decided at the last January term, and reported in 35 Pac. 501, we held that the federal fee bill was not applicable to cases in the territorial courts in which the United States was not a party, or of which the federal courts would not have exclusive jurisdiction if the territory were a state; and that officers, jurors, and witnesses, when discharging duties and services under United States laws, should be compensated according to the federal fee bill, and, when discharging duties or services under the territorial laws, they should be compensated according to the territorial fee bill. We adhere to the ruling in that case, and we hold that the clerk was not required to account for any moneys earned or received by him in other than United States cases. We also hold, upon the authority of U. S. v. Hill, 120 U. S. 169, 7 Sup. Ct. 510, that he is not required to account for moneys earned or received in the matter of naturalizations. The questions here presented were not involved in the case of U. 8. v. Averill, 130 U. S. 335, 9 Sup. Ct. 546, relied upon by appellant. An examination of the record in that case discloses that the complaint therein charged simply that the clerk, Averill, had received and earned as fees and emoluments of his office a certain sum in excess of what he was entitled to retain for his personal compensation and the reasonable and necessary expense of his office, and that he had failed to account for the same. For aught that appears, all the moneys earned and received by the clerk in that case were earned and received as his fees and emoluments in United States cases. The judgment of the lower court is affirmed.

MINER and SMITH, JJ., concur.

GALLIGHER et al. v. YOSEMITE MININ. 4 & MILLING CO.1

(Supreme Court of Utah. June 19, 1894.,

Trusts—Foreclosure — Interest of Trustres-

ACCOUNTING—CONFLICTING EVIDENCE.

1. Where property is held in trust to secure the payment of certain debts, the facts that the trustees are interested as partners in certain of the creditor firms does not affect their right to foreclose and sell the trust property.

2. Upon an issue of whether the removal

of certain ore from a mine by trustees caused special injury to the mine, where the evidence is conflicting, several witnesses on each side giving contrary testimony, the finding of the referee will not be disturbed.

3. Though certain expensive operations carried on by the trustees of a minerat the carried on by the trustees of a minerat the carried on by the trustees of a minerat the carried on by the trustees of a minerat the carried on by the trustees of a minerat the carried on the carried o

ried on by the trustees of a mine at the re-quest of the beneficiary yield no profit, such expenses are a legitimate charge against the trust property.

Appeal from district court, Salt Lake county; before Justice Bartch.

¹ Rehearing denied July 27, 1894.



Action by Joseph E. Galligher, William H. Remington, and George M. Scott against the Yosemite Mining & Milling Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Arthur Brown, Frank Hoffman, and M. M. Kaighn, for appellant. W. H. Dickson, for respondents.

SMITH, J. This is an action by plaintiffs to enforce a certain trust agreement made between plaintiffs and defendant. The agreement is as follows (Exhibit No. 1):

"George M. Scott and William H. Remington, and each of them, agree with the Yosemite Mining and Milling Company, a corporation, as follows: They will procure the assignment and transfer to them of accounts and claims against said corporation as follows: George M. Scott & Co., \$4,236.37; Remington, Johnson & Co., \$2,671; Bingham Mercantile Co., \$395.52; Bringham Mercantile Co., \$358.65; James Anderson, \$3,640; Scott & Anderson, \$72.35; W. J. McIntyre, \$300,-\$11,673.89. That they will accept and receive said corporation's note therefor, for \$11,673.89, due October 1, 1888, with interest at 12 per cent. per annum, secured by deed of trust on its properties, the same being listed in the outstanding deed of trust to Mc-Cormick & Co. That they will bid in and purchase all of said properties at the sale under said McCormick deed of trust, in which one Josiah Barnett is trustee, for an amount not exceeding the sum of said incumbrances and claims, and hold same, first, to secure to them the repayment of the money required to cover the amount of said McCormick deed of trust and the claims and accounts hereinbefore mentioned, necessary and proper costs and expenses and interest, and afterwards in trust for the benefit of said corporation. That they will endeavor, by sale or otherwise, to realize the largest possible amount out of or on said properties, and pay the surplus received therefrom, after paying said incumbrances, costs, and interest, over to said corporation, its agent or successor. Witness the hands and seals of said parties, this 13th day of September, 1888, in the city of Salt Lake, Utah. [Signed] George M. Scott. [Seal.] [Signed] W. H. Remington. [Seal.] [Signed] The Yosemite M. & M. Co. [Corporate Seal.], by M. M. Kaighn, Its President. Witness: C. O. Whittemore."

This action is to foreclose the equity of the defendant, and procure a sale of the property described in it. The complaint shows that in addition to the money to be paid to Mc-Cormick & Co., and the other claims described in the agreement, there is due the plaintiffs, for moneys laid out and expended in caring for and working the trust property, a large sum of money. The aggregate claim of plaintiffs at the trial, after allowing all offsets, was about \$60,000. The answer denied that anything was due plaintiffs; set

out at great length certain acts of mismanagement and waste on the part of plaintiffs while in possession as trustees, and that plaintiffs had sold large quantities of valuable ores from said mines, and had not accounted therefor. The answer prayed an accounting, and that plaintiffs be charged with the damage to the property resulting from mismanagement; and that plaintiffs take nothing, and defendant recover its property free of incumbrance, and the costs of the action. The cause was referred to a referee, who tried the same and reported findings of fact in favor of plaintiffs and against defendant: that the amount due plaintiffs from defendant, after allowing all offsets, was \$55,488.98. The court rendered judgment for this amount, and decreed a lien therefor on defendant's mining property, and directed a sale of the same to pay the judgment and costs. A motion for a new trial was made and overruled, and defendant appeals from the judgment and order.

The appellant claims that certain credits were improperly allowed to plaintiffs, and certain others were disallowed to defendant, which, if corrected, would show that plaintiffs are in fact indebted to defendant. The items mentioned in the brief, and for which it is claimed plaintiffs should not have credit. are: Legal expenses, \$83; witness fees, \$156.-50; and refund from Varian & Barnett, \$450. As to these three items, it is sufficient to say they appear by the record to have been disallowed by the referee and court below, and are not included in the judgment at all. The first credit which was allowed plaintiffs which is complained of is the sum of \$11,-673.89, mentioned in the trust agreement, above set out, with the interest on it. This debt, as will be seen by the trust agreement, supra, was evidenced by a note of October 1, 1888; and the consideration for this note was very largely debts due to George M. Scott & Co. and Remington, Johnson & Co. It was admitted on the argument that Scott and Remington, the trustees, were interested in these firms, and, further, it is not claimed that defendant has paid any of these debts. The plaintiffs are trustees holding property to secure their payment. If they have not paid them, we fail to see how the defendant can be harmed by a foreclosure and sale of the trust property, to procure funds for their payment. We think in the accounting, as against defendant and in favor of plaintiffs as trustees, this item was properly allowed.

Defendant claims the following credits, also allowed plaintiffs, are improper, and should have been disallowed, to wit: Unnecessary expense of setting boller, \$76; repairs on burned-out boiler, \$331.78; new pump, \$398.90; unnecessary expense in pumping, \$3,600; unnecessary expense in sinking incline, \$6,000; loss in hauling and concentrating ore, \$8,554.52,—total, \$18,961.10. We have carefully examined the testimony as

to each of these items, and are fully convinced that, as to each of them, the findings of the referee in favor of plaintiffs are fully justified by the evidence. The plaintiffs began working the mine at the written request or demand of the defendant, through its president and manager. The mine had been idle for a considerable length of time before Scott and Remington took possession. The lower workings were filled with water, and the machinery of the concentrating mills does not appear to have been capable, for some reason, of doing efficient work in concentrating low-grade ores. Outside of the testimony of witnesses directly on the point, the previous conduct of the defendant in allowing several thousand tons of ore to lie on the dump without working, when it was so much in need of money, is well-nigh conclusive evidence that there was some practical difficulty in handling the ore with the machinery in the possession of defendant. The plaintiffs took this same ore from the dump, and, notwithstanding it is claimed they paid too much for hauling and concentrating it, they managed to get a very considerable profit out of it. If, as defendant now claims, it could have worked the ore for less expense by working it in its own mills, it is extremely difficult to conceive a reason why it did not do it. This discussion relates to the last of the above items, to wit: "Loss in hauling and concentrating ores, \$8,554.52." As to the other items, they all appear to have been necessarily incurred. and are no greater expense than might ordinarily be expected to be encountered in pumping out and trying to work a mine partly filled with water, and which had long been disused. The plaintiffs had some misfortune in the breaking of machinery and otherwise, but no more than would ordinarily be expected, and no more, apparently, than the defendant had in the work it had done on the mine. In other words, we fail to find in the evidence anything that would warrant us in the conclusion that plaintiffs, either willfully or negligently, incurred expense in working the mine which they could reasonably have avoided.

The defendant claims that it should have been allowed certain additional credits which were not allowed by the referee, as follows: Damage to ore bin, \$750; damage to tramway, \$10,000; damage to mill, \$5,000,-total, \$15,750. As to the first of these items, it is sufficient to say that it was allowed to defendant by the referee. The damage to the tramway is earnestly insisted upon here. The facts, as shown by the record, are that in 1886, or prior thereto, defendant had erected a wire-rope tramway, something over a mile long. After using it a few months defendant ceased to use it, and thereafter, up to the time plaintiffs took possession, in 1888, the tramway was not used. The weight of the testimony shows (although it was not without conflict) that when plaintiffs

took possession, in 1888, the wire cable was down on the ground; that many of the posts or stations had been carried away, and that the buckets or carriers were detached and scattered or lost. The cable and buckets were gathered up by plaintiffs and sold, and the proceeds credited to defendant. We think the referee was right in disallowing defendant's claim for damages on this account. The value of this tramway, if repaired, was wholly problematical. The cost of repairing it must have been great. Plaintiffs had before them the experience of defendant in abandoning the tramway when it was in perfect repair, and returning to wagons as a means for transporting ore. Under such circumstances they would hardly have been warranted in expending money to set up this tramway again. Such being the case, it was clearly their duty to gather up the available material of the tramway and sell it for the best price they could obtain. This is just what they did, and we cannot find that defendant was damaged thereby. The remaining item claimed is \$5,-000, damage to mine. This damage is claimed to have arisen by reason of the fact that plaintiffs took out certain ore that had been left along the sides of the incline by the previous management, and left waste in some of the levels. It is claimed that the ore was left for show, ventilation, and support, and that its removal injured the mine in the sum claimed. It must be admitted, we think, that the removal of any ore from a mine is an injury to the mine, to the extent, at least, to which the removal exhausts the mine. This is conceded by the parties here, but defendant claims that the particular ore removed was of especial value for the purposes above named,-greatly in excess of the market value of the ore. As to whether the extraction of this ore caused any special injury to the mine is a question upon which the testimony is directly conflicting. Palmer, Harkness, Egan, and Treweek, all men of great experience, testify that no damage was done. They had each made an inspection of the ground, to determine if there was any damage, just before the trial. On the other hand. Kaighn, Frances, Harkins, Hall, and Nulhall all state that the extraction of this ore, and certain other acts complained of, caused considerable special injury to the mine. Under such circumstances, we do not think we are warranted in disturbing the finding of the referee, which on this issue was against the defendant.

It was claimed generally at the argument that this court must set aside a judgment which in effect found that in 1888 plaintiffs took possession of an old developed mine, held it, working it most of the time, and then at the date of the judgment, December 17, 1891, secured judgment for \$55.488.98 against defendant, whereas the entire claims of plaintiffs were less than \$30,000 when they took possession. We cannot reverse the

judgment on such a general claim as this. The facts and figures in the record are against the defendant. The plaintiffs appear to have had competent men in charge, and to have done the very best that could be reasonably expected in working the mine. The loss on the mining operations appears to have been caused by reason of pumping out the lower levels, which were flooded, and in sinking the incline, and running the levels in barren ground, all of which work was begun and carried on at the written request of the defendant, and upon defendant's assurance that rich ore bodies would be discovered by such work. The work, being bethe water level, was exceedingly expensive, and, as it turned out, developed nothing of value. Plaintiffs ought not to be charged now with the money lost in these operations. Being incurred in good faith, they would under any circumstances be a legitimate charge against the trust property; but especially is this so when it appears, as in this case, that it was done at the instance of the only beneficiary under the trust that now complains. The judgment and order denying a new trial are affirmed.

MERRITT, C. J., and MINER, J., concur.

OTTENBURG et al. v. BARNES et al. (Supreme Court of Utah. June 19, 1894.)

APPOINTMENT OF RECEIVER — ASSIGNED ESTATE—ADEQUATE REMEDY AT LAW—PLEADING.

In an action against a firm by judgment creditors to set aside as fraudulent an assignment for the benefit of creditors, and for the appointment of a receiver, the complaint alleged that plaintiffs' executions had been returned unsatisfied, that the assignment contained an illegal preference, that unless prevented by the court the assignee would turn over the property to the preferred creditors, and that the assignee was insolvent. Held, that the complaint was not denurrable on the ground that plaintiffs had an adequate remedy at law.

Appeal from district court, Weber county; before Justice James A. Miner.

Action by Simon Ottenburg and others against Charles C. Barnes and others. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

A. R. Heywood, J. H. McMillan, and W. L. Maginnis, for appellants. Kimball & Gilbert and E. M. Allison, Jr., for respondents.

SMITH, J. This was an action in the nature of a bill in equity to set aside a fraudulent assignment for the benefit of creditors, for the appointment of a receiver of the assigned estate, and for general relief. A demurrer was interposed on the ground that the bill did not state sufficient facts to constitute a cause of action. The demurrer was sustained. Plaintiffs declining to amend, judgment was entered for defendants, from which plaintiffs appeal. The complaint states substantially that plaintiffs are judg-

ment creditors of Matson, Barnes & Co.; that they have had executions issued and returned unsatisfied, and that their judgments are unsatisfied; that the firm of Matson, Barnes & Co., up to January, 1893, was a partnership consisting of defendants, E. W. Matson, C. C. Barnes, and George H. Matson; that in January, 1893, the firm was insolvent, and has so continued ever since; that in January, 1893, by a secret arrangement between themselves, E. W. Matson and C. C. Barnes, who were respectively brother and half-brother of George H. Matson, pretended to buy out the interest of George H. Matson for \$6,000, and in July, 1893, the firm made an assignment to defendant T. P. Bryan for the benefit of creditors, and in such assignment preferred George H. Matson for the \$6,000 purchase money above mentioned. It is further alleged that Bryan has \$5,000 worth of property in his hands, and that he threatens to and will pay the same over to George H. Matson as a preferred creditor unless prevented by the court. It is also alleged that Bryan is not a fit person for assignee or trustee; that he is a partner with all of the defendants in certain other enterprises; that he is insolvent; that he has secretly, and to evade process, disposed of a large portion of the assigned property; and that he has no experience that would fit him for handling the assigned property. The suit is brought on behalf of all creditors who will join (and several have joined), and the prayer is for a receiver for the assigned estate (which consists of merchandise), and for a cancellation of the deed of assignment, and for general re-

The demurrer confessed all the facts alleged to be true. And counsel for respondent here admits that the assignment is void as to the creditors, and also admits that Bryan is about to dispose of the trust funds in payment of the fraudulent claim of George H. Matson, pursuant to the provisions of the deed of assignment; but he claims that plaintiffs, by their own showing, have an adequate remedy at law, and therefore the complaint discloses no ground for equitable relief. Let us examine this claim. Cases arising from the fraudulent conduct of a party are usually cases in which courts of law and equity have concurrent jurisdiction. See Pom. Eq. Jur. §§ 139, 140, 174. At section 175 of Pomeroy's Equity Jurisprudence, the author points out in a masterly way the true distinction between law and equity jurisdictions. Without using his language, the difference is this: Whenever the relief sought in the action is the recovery of specific lands or specific chattels or a specific sum of money, or one or more of these, without other relief, then the case is one cognizable only at law; but if the case is one where, in order to reach either of these final results, it is necessary to procure a cancellation of some writing, or the taking of an account, or some other act of adjudication which goes beyond a simple verdict in

favor of one or the other party, then the case is one in which the courts of equity also will assume jurisdiction. An action solely for the cancellation of an instrument is exclusively equitable. See Id. 171. An action at law may involve the same result indirectly. In the latter case the courts of law and of equity have concurrent jurisdiction. For a perfect elucidation of this rule, see Id. 110. In the case at bar, the ultimate relief sought is unquestionably the recovery of a portion of the assigned insolvent estate, and yet, in order to obtain this, they must have the deed of assignment canceled, must have an accounting with the assignee, and a distribution of the money among the parties joining in the suit. As stated by Pomeroy (section 175, supra): "The money is to be regarded as a fund which is to be either awarded to a single claimant or distributed among several claimants in the shares to which they are adjudged to be entitled." In such a case as the one at bar, no doubt the plaintiffs might obtain relief at law if they could persuade an officer to levy their executions on the property in the possession of Bryan, in utter disregard of the claims of Bryan; but it would seem to be a sufficient answer to all this to say that they have exhausted the final legal process, to wit, an execution, and have failed to obtain any relief. Then, again, it is manifest that, by such a levy as that just suggested, the officers and plaintiffs both lay themselves liable to a suit by Bryan for con-Can it be said that the remedy version. which exposes a party to vexatious litigation is an adequate remedy? We think the law has wisely provided a remedy by which the fraudulent claims of Bryan in this case may be set at rest, and the rights of plaintiffs to a distribution of the trust fund be declared, without the risk of further expense or litigation. That is just what plaintiffs have asked in this complaint. If the facts alleged are true, they are entitled to this relief. Among other authorities sustaining this conclusion are: Wait, Fraud. Conv. § 51; Bump, Fraud. Conv. p. 530; Stevenson v. Matteson (Mont.) 32 Pac. 291; Smith v. Sipperly (Utah), 34 Pac. 54. The judgment of the court below is reversed, and the cause is remanded, with directions to the court below to overrule the demurrer and to hear the case; appellants to recover of respondents the costs of this ap-

MERRITT, C. J., and BARTCH, J., concur.

NELSON v. SALT LAKE RAPID TRANSIT CO.

(Supreme Court of Utah. June 19, 1894.)

CARRIERS—EJECTION OF PASSENGERS — CONFLICT-ING EVIDENCE—CONCLUSIONS OF VERDICT.

In an action by a passenger against a railroad company for wrongful ejection, where defendant pleads that plaintiff was smoking, con-

trary to the rules of defendant, and the evidence upon such issue is conflicting, a verdict for plaintiff will not be disturbed on appeal.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by Charles T. Nelson against the Salt Lake Rapid Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Williams, Van Cott & Sutherland, for appellant. O. W. Powers and S. P. Armstrong, for respondent,

MINER, J. The plaintiff brings this action to recover damages alleged to have accrued to him by reason of having been ejected from the cars of the defendant without It appears from the plaintiff's testimony that he was a passenger on the defendant's cars on the night of October 1, 1891, and was returning to the city from one of the outlying districts in Salt Lake City, with a large amount of money on his person and in a satchel he carried. He had paid his fare, and testified that he had a cigar in his mouth, but it was not lighted. He was not smoking on the car. That he afterwards held the cigar in his hand, but it was not lighted. The conductor received his fare, and afterwards told him he must cease smoking, or get off the car. The plaintiff replied that he was not smoking. After a short time the conductor returned, and said to plaintiff, "I told you to quit smoking." Plaintiff replied that he was not smoking, whereupon the conductor ordered him off the car, and then took hold of his shoulder and gave him a jerk, and his satchel slipped off. Plaintiff grabbed the satchel, and again the conductor grabbed plaintiff. The conductor was told that he had money in his satchel, and had sent his horses into town, and he rode on the car for protection. Plaintiff also states that he desired to ride on the outside platform, but was refused this permission. Plaintiff was put off the car about three miles from the central part of the city. and was obliged to walk to the city, with the money upon him, on a dark night. He also states that he was frightened when he was put off the car; was afraid he would lose the money, or be robbed of it; that he had been drinking that day, but was not intoxicated. The place where he was put off was not lighted by the city. Other testimony was offered by the plaintiff, tending to corroborate his testimony. Mr. Carpenter testified that plaintiff had a cigar in his hand, with ashes on it, but no smoke came from the cigar. The defendant offered the testimony of several witnesses, tending to show that plaintiff was smoking in the car, and also that he had been drinking to excess. The case was argued before the jury, and a verdict rendered for the plaintiff for \$100. The defendant assigns as error that the plaintiff was violating a rule of the company by smoking in the cars, and that a clear

preponderance of the evidence shows that plaintiff was smoking in the car, in violation of the rules of the company, and against the request of the conductor not to smoke, and that the damages are excessive. We are satisfied from the whole record that there was a clear conflict in the testimony. plaintiff testifies, and is corroborated by one witness, that he was not smoking while in the car, while several witnesses on the part of the defendant testify he was smoking in the car. This testimony raises a question of fact that could only be passed upon by the jury. Under our statute, the jury are the judges of the facts, the credibility of the witnesses, and of the weight of the evidence. Our statute requires this instruction to be given to the jury. Comp. Laws 1888, 15 3361, 3876, 5033. This court will not disturb a verdict merely because the evidence is conflicting, or because the court, looking at the testimony as written, would come to a different conclusion than that reached by the jury, who had the witnesses before them. This has been the uniform ruling in this court. Farr v. Griffith, 9 Utah, 416, 35 Pac. 506; Pratt v. Clawson, 7 Utah, 254, 26 Pac. 300; Haynes, New Trials & App. \$ 288; Seley v. Southern Pac. Co., 6 Utah, 319, 23 Pac. 751; Mining Co. v. Haws, 7 Utah, 515, 27 Pac. 695; Wells v. Wells, 7 Utah, 68, 24 Pac. 752; Toponce v. Stock Co., 6 Utah, 439, 24 Pac. 534; Trihay v. Mining Co., 4 Utah, 480, 11 Pac. 612; Cunningham v. Railway Co., 4 Utah, 211, 7 Pac. 795; Bowers v. Railroad Co., 4 Utah, 225, 7 Pac. 251; Wilkinson v. Parrott, 32 Cal. 104. The court below saw the witnesses, and heard the testimony, and refused to grant a new trial. We can see no reason for disturbing the judgment, either because there was insufficiency of evidence to support it or because it was The case was properly submitexcessive. ted to the jury, and their findings should not be disturbed. The judgment of the court below is affirmed.

MERRITT, C. J., and BARTCH and SMITH, JJ., concur.

AMERICAN WATERWORKS CO. OF NEW JERSEY v. FARMERS' LOAN & TRUST CO. et al.

(Supreme Court of Colorado. July 2, 1894.) CORPORATIONS-APPOINTMENT OF RECEIVER-SUB-SEQUENT SUIT BY OFFICER IN ANOTHER STATE-

1. A corporation is subject to the laws of the state or sovereignty under and by virtue of which it has been created, and these laws have a paramount influence over its corporate powers, where it undertakes to exercise them.

2. Where a corporation, in pursuance of the laws of the state where it was created, has been adjudged insolvent, and placed in the hands of a receiver with full powers to control and manage its affairs, and where such corporation, its officers, directors, agents, and attorneys, has been absolutely enjoined from in any manner

continuing the business of said corporation, or from attempting to use its name, privileges, or franchises for any purpose whatever, held, that an officer of the corporation could not use its

an omcer of the corporation could not use its name to prosecute a writ of error in another state against the objection of the receiver.

3. Though the laws of a state do not have extraterritorial force as mere laws, nevertheless the general rule is that things done in one state in pursuance of the laws thereof, are valid and hinding in other states. binding in other states.

(Syllabus by the Court.)

Error to district court, Arapahoe county.

Writ of error by the American Waterworks Company of New Jersey from a judgment in favor of the Farmers' Loan & Trust Company and others. On motion of E. Hyde Rust, receiver of said waterworks company, to dismiss the writ of error. Writ dismissed.

Motion to dismiss the writ of error. The motion was based upon a duly-verified petition, which, omitting the formal parts, was as follows: "Your petitioner, E. Hyde Rust, receiver of the American Waterworks Company of New Jersey, respectfully petitions the court and prays that the writ of error in the above-entitled cause be dismissed, and in support of said petition represents unto the court as follows: (1) The American Waterworks Company of New Jersey was incorporated under an act of the legislature of the state of New Jersey, entitled 'An act concerning corporations,' approved April 7, 1875, and the acts supplementary thereto and amendatory thereof, which said act, among other things, expressly provides as follows, to wit: 'Whenever any incorporated company shall have become insolvent, or shall suspend its ordinary business for want of funds to carry on the same, it shall and may be lawful for any creditor or stockholder to apply, by petition or bill of complaint, to the chancellor, setting forth the facts and circumstances of the case, for a writ of injunction and the appointment of a receiver, receivers, or trustees; whereupon, the chancellor, being satisfied of the sufficiency of said application. and also of the truth of the facts and allegations contained in the said petition or bill, by affidavit or otherwise, and upon giving, when so ordered, such reasonable notice, to be served or published, as the chancellor, in an order to be made for that purpose, shall direct, the chancellor may proceed in a summary way to hear the affidavits, proofs and allegations which may be offered by or on behalf of the parties; and if, upon such inquiry into the matters or cause of complaint, it shall be made to appear to the chancellor, that the said company has become insolvent, and shall not be about to resume its business in a short time thereafter, with safety to the public and advantage to the stockholders, it shall and may be lawful for the chancellor to issue an injunction to restrain the said company and its officers and agents from exercising any of the privileges or franchises granted by its certificate, or by the act incorporating the said company, or from collecting or receiving any debt, or from paying out, selling, assigning or transferring any of the estate, moneys, funds, lands, tenements or effects of the said company until the court shall otherwise order.' (2) Your petitioner represents to the court that the said act is a part of the charter of the American Waterworks Company of New Jersey, and that in said act it is further expressly provided as follows: 'It shall and may be lawful for the court of chancery, if the circumstances of the case and the ends of justice require it at the time of ordering the said injunction, or at any other time afterwards during the continuance of the said injunction, to appoint a receiver or receivers, or trustee or trustees, with full power to demand, sue for, collect, receive and take into their possession, all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property of every description belonging to said company at the time of their insolvency or suspension of business as aforesaid: and to sell, convey or assign all the said real or personal estate.' (3) And your petitioner further shows that heretofore, and on, to wit, the 8th day of April, 1892, there was exhibited in the court of chancery of the state of New Jersey a bill of complaint by certain stockholders and certain creditors of the American Waterworks Company of New Jersey, including the Denver City Waterworks Company and others, against the said the American Waterworks Company of New Jersey, by and in which it was made to appear to the said court of chancery of the state of New Jersey, as the fact then was and still is, that the said the American Waterworks Company of New Jersey was insolvent, and was not carrying on its ordinary business for want of funds, and that its liabilities were in excess of its assets, and that the said company was without any legally constituted governing body, and was unable to elect or convene one; and said bill prayed that said company, its officers, agents, directors, and attorneys, and each and every of them, might be enjoined and forbidden from receiving any debts due the said company, from paying and transferring any of its moneys or effects, and from in any manner exercising any of the franchises or privileges of its charter, and from holding any meetings or alleged or pretended meetings at which action might be taken concerning the business of said company, or attempt to use the defendant's name and its privileges and franchises for any purpose whatever, and that said defendant company might be decreed to be insolvent, and that a receiver thereof might be appointed according to the form of the statute in such cases made and provided,-that is to say, the statute of the state of New Jersey,-and that the said complainants in said action might have such further or other relief in the premises as the nature of the case might require and as might be agreeable to equity and good conscience; whereupon, after issue join-

ed and appearance made by the said defendant the American Waterworks Company of New Jersey in its own name, as well also as of certain of its stockholders defending and opposing said application, including among such stockholders Clarence H. Venner, who was then, and still is, one of the vice presidents of said the American Waterworks Company of New Jersey, the said court of chancery of the state of New Jersey did, on the 20th day of July, 1892, make and enter the following decree, to wit: 'Upon opening the matter this day to the court by Lindley M. Garrison, of counsel for the complainants. in the presence of Flavel McGee, of counsel for Clarence H. Venner and others of the directors who were permitted to interpose for the defendant by order of the chancellor, and due proof being made of the service of the order to show cause heretofore granted herein, and it appearing to the court that the said defendant corporation is insolvent, it is on this 20th day of July, A. D. 1892, ordered that the said order to show cause be made absolute, and that an injunction do issue against the said defendant according to the prayer of the said bill. And it is further ordered that E. Hyde Rust, Esq., of Jersey City, be, and he is hereby, appointed receiver, with full power to demand, sue for, collect, and receive and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes, and property of every description belonging to the said the American Waterworks Company, and to perform all the duties imposed upon him and required by law, and especially by an act entitled 'An act concerning corporations,' approved April 7, 1875, and the acts supplementary thereto and amendatory thereof. And it is further ordered that the said E. Hyde Rust, Esq., before entering upon his duties, take the oath prescribed by law, and give bond to the chancellor for the sum of twenty thousand dollars, conditioned for the faithful performance of his duties, to be approved, as to form and security therefor, by John W. Heck, Esq., one of the masters of this court. [Signed] Alex. T. Mc-Gill, Chancellor.' (4) Your petitioner further shows unto the court that he, the said E. Hyde Rust, did, on the 22d day of July, 1892, duly file his bond as receiver as aforesaid, in the sum of twenty thousand dollars; that the said bond was duly approved, as in said order provided, and your petitioner qualifled as such receiver, and entered upon his duties as such, and since then has been, and is now, receiver of said the American Waterworks Company of New Jersey. (5) Your petitioner further shows that an injunction was duly issued in said cause as prayed for in the complaint therein filed, and in accordance with the order of said chancellor, wherein it was provided as follows: 'The said defendant company (meaning the American Waterworks Company of New Jersey), its

Teller & Orahood, for plaintiff in error. Wolcott & Vaile, for E. Hyde Rust, receiver.

PER CURIAM. By the petition to dismiss the writ of error, the answer thereto, and the agreed statements of facts filed in connection therewith, all matters essential to the determination of this motion are admitted. 1. A corporation is a creature of the law. It is always subject to the law of its charter, or, if it has no special charter, then to the incorporation laws of the state or sovereignty under and by virtue of which it has been created; and though it may transact business in other jurisdictions, yet its charter or the laws to which it owes its existence have a paramount influence over its corporate powers wherever it undertakes to exercise them. Hence, to determine the capacity or disability of a corporation in a given case. regard must primarily be had to the laws of the state or sovereignty from which it has derived its franchises. See Railway Co. v. Gebhard, 109 U. S. 527, 3 Sup. Ct. 363. Also, Bank v. Earle, 13 Pet. 585 et seq., and cases there cited.

2. It appears that plaintiff in error is a corporation duly organized under and by virtue of the laws of the state of New Jersey. From the agreed statement of facts it appears that plaintiff in error, prior to the suing out of the writ of error in this cause, had become an insolvent corporation, and had been so adjudged by a court of competent jurisdiction in the state of New Jersey; that by the judgment of said court under the laws of said state the petitioner, E. Hyde Rust, had become the duly appointed and qualified receiver of said corporation, with full powers to control and manage its affairs; and, further, that plaintiff in error as a corporation, its officers, directors, agents, and attorneys, and each and every of them, had been absolutely enjoined from in any manner continuing the business of said corporation, or from attempting to use its name, privileges, or franchises for any purpose whatever. There is nothing in the petition, answer, or agreed statement of facts to show that plaintiff in error, or Mr. Venner as one of its vice presidents, has ever been relieved from the disabilities of said injunction, or that they, or either of them, have any power or authority to prosecute the writ of error herein. It seems clear that Mr. Rust, as receiver of the plaintiff in error, is justified in pleading the laws of New Jersey relating to insolvent corporations, and the decrees of a court of competent jurisdiction of that state based thereon, in support of his motion to dismiss the writ of error herein. Such laws and decrees are admitted to be correctly set forth in the petition.

3. Against the granting of this motion to dismiss it is urged that the laws of a state have no extraterritorial force. It is also urged that the receiver of a corporation cannot exercise his powers as such beyond the jurisdiction of the court appointing him. Conceding that the laws of a state do not have any extraterritorial force as mere laws, nevertheless the general rule is that things done in one state in pursuance of the laws of

that state are to be regarded as valid and binding in other states. Moreover, Mr. Rust by his petition to dismiss this writ of error, is not seeking to transact business or do any affirmative act by virtue of his authority as receiver of the corporation. On the contrary, he seeks to prevent the corporation of which he has been invested with exclusive control from doing an affirmative act contrary to the laws of the state from which such corporation has derived its powers, and contrary to the judgment of a court having full jurisdiction in the premises; in other words, he seeks to prevent Mr. Venner from making an unauthorized use of the name of such corporation. In taking this course Mr. Rust is undoubtedly acting within the scope of his authority as the duly appointed and qualified receiver of plaintiff in error. Relfe v. Runcle, 103 U. S. 225; Bockover v. Association, 77 Va. 85. An extended discussion of the legal questions involved in this motion seems unnecessary. Whatever may be the grievances of Mr. Venner, it is clear that he is not entitled to use the name of plaintiff in error in the further prosecution of this writ. The motion to dismiss must be sustained. Writ dismissed.

STATE v. SCHIELER.

(Supreme Court of Idaho. April 20, 1894.) HOMICIDE-JUSTIFICATION - PRELIMINARY EXAM-INATION-MOTIVE-REVIEW ON APPEAL

1. The record shows that the deputy sheriff had served process in the case on trial, and was also a witness in the case. Held, it was within the discretion and proper for the court to excuse him from serving as a grand juror while such case was being considered by them.

2. Under our statute, a preliminary examination, as a basis upon which to find an indictionary is not precessary.

dictment, is not necessary.

3. Where depositions are read before the 3. Where depositions are read before the grand jury, and the same parties who made them personally appear and testify in the case, and the record does not show that the indictment was found or predicated upon such deposition. sitions, held not to be reversible error.

4. It is entirely within the discretion of the

trial court to permit the wife of deceased to re-main in the court room during the trial, al-

though objected to by defendant.

5. It is not incumbent upon the prosecution to show, in the first instance, any motive for the homicide, further than the same was developed by a proof of the circumstances of the killing. The correct practice is for the defense to show the absence of motive, to be rebutted by proof on the part of the prosecution.

6. Where the law of the case has been cor-

rectly given by the court to the jury, and in addition thereto it gives an erroneous instruction, which is not excepted to until after the verdict is returned, held, that the exception comes too late, and such error is not sufficient

to warrant a reversal.

7. W. was unarmed, peaceably and quietly passing along a road or trail which ran through the premises of another, and upon which he had been forbidden to travel by S., who was the servant of the owner. S. while completely concealed, fires at and kills W., who was 30 feet away, and who was making no hostile demonstration, or even approaching the house in which S. was concealed. Held, that a plea of self-S. was concealed. Held, that a plea of selfdefense could not be predicated upon such a state of facts, and the court could have properly declined to instruct upon the law of self-

(Syllabus by the Court.)

Appeal from district court, Idaho county; W. G. Piper, Judge.

Harry H. Schieler was convicted of manslaughter, and appeals. Affirmed.

James W. Ried and James W. Poe, for appellant. George N. Parsons, Atty. Gen., for the State.

HUSTON, C. J. The defendant was indicted for the crime of murder, in the killing of one John S. Wilson, and, upon trial at the June term of the district court for Idaho county, was convicted of the crime of manslaughter, from which conviction, and judgment thereon, this appeal is taken. The record presents 54 assignments of error.

The first assignment of error is the excusing of one F. C. Smith from the grand jury. It seems from the record that said Smith was not only a deputy sheriff of the county, and had been engaged in serving process in the case on trial, but he was a witness in the The excusing him from the grand jury was in the discretion of the court, and

was entirely proper.

The second assignment of error is the refusal of the court to set aside the indictment upon motion of the defendant, based upon the grounds (1) that no preliminary examination had been had of defendant upon the charge upon which the indictment was (2) that the indictment was not found; found by a competent grand jury; (3) that the indictment was found upon incompetent and illegal evidence. As to the first ground, it is sufficient to say that under our statutes no preliminary examination is necessary to the finding of an indictment. The second ground is a repetition of the first assignment of error, and has already been passed upon. As to the third ground of the motion to set aside the indictment, it appears that certain depositions were introduced before the grand jury; but it does not appear, nor is it presumable, in the face of the fact that some seven witnesses were personally examined by the grand jury, that the indictment was found or predicated in whole or in part upon such depositions. And the parties who made the depositions-with, we believe, a single exception-were personally before the grand jury as witnesses. We find no error in the refusal of the motion to set aside the indictment.

The third assignment of error is to the overruling of the demurrer to the indictment. The demurrer was general, and was properly overruled.

The fourth assignment of error is to the action of the district court in refusing the request of defendant's counsel to be allowed the closing argument upon the trial. As this assignment was not urged on the argument, we presume the counsel, upon reflection, had wisely concluded to abandon it.

The fifth assignment of error is the allowing of the witness Frankle Wilson (wife of deceased) to remain in the court room during the trial, against the objection of defendant. This, we think, was a matter entirely within the discretion of the trial court, and inasmuch as the uncle of defendant was, at request of defendant's counsel, permitted to remain in the court room during the trial, there is no good reason apparent why the wife of deceased should not be allowed the same privilege, if it seemed proper to the trial court.

The sixth assignment is covered by what has been said in regard to the second assignment.

The seventh to the sixteenth assignments of error, inclusive, go to the admission of testimony. We have carefully and laboriously examined the testimony in the record, and we are convinced that more latitude was given the defense, in the introduction of testimony, than a strict enforcement of the rules would have permitted. The error, if any, in this regard, was in permitting a mass of testimony on the part of the defense which by no recognized legal rules could have any bearing upon or pertinency to the issues on trial.

In a plenitude of caution, counsel have included in their assignment of errors many exceptions which we do not deem it essential to consider or pass upon separately, as they are mostly raised on objections to the admission of testimony by the defendant tending to disprove what defendant assumed was claimed by the prosecution to be the motive actuating defendant in the commission of the homicide. In the presentation of the case on the part of the prosecution, certain witnesses testified to facts tending to prove that the defendant had been a suitor of the wife of deceased prior to her marriage with deceased, with the apparent object of predicating upon the rejection of his suit in that behalf a motive for his hostility towards the deceased, which culminated in the homicide. It was sought by defendant to negative the effect of this evidence by showing the bad character of the wife of the deceased prior to her marriage, to wit, that she was of notoriously bad character, was the inmate of a brothel, etc. It was not incumbent upon the prosecution to show, in the first instance, any motive for the homicide, further than the same was developed by a proof of the circumstances of the killing. The absence of motive might be shown in defense, to be met by proof in rebuttal on the part of the prosecution. The prosecution, however, having offered proof tending to show the relations of defendant and the wife of deceased in the first instance, as supplying a motive for the homicide, it was entirely proper for the defense to introduce testimony tending to disprove any such relations; and this, we think, the court permitted, to the fullest extent necessary to that end. It is not possible that any jury possessed of ordinary intelligence could, after hearing the testimony introduced, as the same appears in the record, have any doubt as to the character of the wife of deceased prior to her marriage. But the defendant, in seeking to avoid Scylla, has run upon Charybdis. In showing the character of the woman (the wife of deceased), he has shown the relations that existed between her and the defendant at that time, which, it is evident from the record, were not of a purely platonic nature. It would seem to be the logic of the defense that, having done away with the presumability of marital aspirations on the part of the defendant towards the wife of deceased, he had thereby shown an absence of motive or ground of hostility on the part of the defendant towards deceased. This assumption is entirely unwarranted. All history, from King David down to Breckenridge, shows that lust is a far greater incentive to crime than a love which seeks only a pure and lawful consummation.

Several exceptions are taken to the instructions given by the court, as well as to the refusal of the court to give certain instructions asked by the defense. We have examined with critical care the instructions given by the court, and we find that, with one single exception, the law of the case was properly given. Nearly if not quite all of the instructions asked by the defense were given, in substance, by the court. Counsel, in criminal cases, are very prone to attempt to secure the benefit of a closing argument to the jury by interpolating an argument into the instructions asked. The law of the case having already been correctly given by the court to the jury, to repeat it, with the embellishments of counsel, would tend, not only to distract the jury, but to impede the cause of justice.

The court, having given the following instruction: "(4) The jury are instructed that if they believe from all the evidence that at the time the defendant fired the fatal shot the circumstances surrounding the defendant were such as to induce in his mind an honest belief that he was in danger of receiving from deceased some greatly bodily harm, and that deceased was about to make a felonious assault upon him, or that deceased was wrongfully and feloniously entering the dwelling house or habitation to do him some great bodily harm, and that the defendant, in doing what he did, was acting from the instincts of self-preservation, then he was justified in doing what he did; otherwise, not,"-added the following: "(6) You are instructed that you can find one of four verdicts, and if you should find from the evidence, beyond a reasonable doubt, that the prisoner at the bar killed the deceased, John S. Wilson, with premeditated malice, purposely and maliciously, then you should find him guilty of murder in the first degree.

Second. If you should find from the evimony, beyond a reasonable doubt, that the prisoner killed the deceased purposely and maliciously, but without deliberation and premeditation, then you should find the prisoner guilty of murder in the second degree. Third. If you are satisfied from the testimony, beyond a reasonable doubt, that the prisoner killed the deceased voluntarily, and under circumstances that did not justify or excuse the killing, then you should find the prisoner guilty of manslaughter. Fourth. If you are satisfied from the evidence, beyond a reasonable doubt, that the defendant, the prisoner at the bar, killed the deceased, John S. Wilson, in necessary self-defense, or that he believed that he was violently and forcibly trespassing upon the premises he was in charge of, with the intent to commit a felony, as explained in these instructions, and that he was justified in the act of killing, then you should return a verdict of not guilty." So much of the latter part of the sixth instruction as requires the jury to be satisfled "beyond a reasonable doubt" is clearly erroneous. But in view of the fact that the court had already, in its instructions, correctly laid down the law, are we warranted in presuming that the jury were misled, or the rights of the defendant impaired, by this mistake of the court,-attributable, as it evidently was, to the haste in which the exigency of the trial had compelled the court to prepare its instructions?

It is claimed in the argument by counsel for appellant that the evidence warranted but one of two verdicts,-either acquittal on the ground of self-defense, or conviction for murder in the first degree. We agree with counsel in this contention, in part. We think the evidence in the case, as shown by the record, fully warranted a verdict of murder in the first degree; but the most careful and scrutinizing examination of the evidence has failed to develop a single element of excuse or justification. Where the evidence shows a case of murder in the first degree, and the jury, under proper instructions, returns a verdict of manslaughter, the verdict will not be disturbed. Jones v. Com. (Ky.) 25 S. W. 877. Hostility existed between the defendant and deceased. To what it was attributable, is a matter of little consequence. Its existence is established beyond question or cavil, and that it was mutual. Threats had passed, made by both. On the morning of the homicide, they had met and quarreled, and again threats were interchanged. Defendant had told deceased that he must not pass through the premises of Reibold on his way to the Delaware mine. This trail had been and was being used by parties passing to and from the Delaware mine, and objection to such use seems to have been based more upon personal than general grounds. But, even conceding that deceased was a trespasser, it will scarcely be contended that his trespass, as shown by the record, would

be any justification for the taking of his life. Deceased was passing along the trail peaceably and quietly in the company of his wife, unarmed, except as to the "billy," as it was called, which was found in his pocket after his death. The defendant was in a log building, armed with a Marlin gun, entirely and completely protected from any assault from the deceased, had such assault been meditated or intended; and, when the deceased was 30 feet or more from the building in which the defendant was housed, defendant, without a word of warning,-without any order or command to deceased to leave the premises,-deliberately fires at him through an aperture in the cloth or curtain hanging in front of the window of the house in which defendant was. The evidence fails entirely to show anything like a hostile demonstration on the part of the deceased, either towards the defendant or towards the building where he was. Deceased had not even left the trail upon which he was traveling, or made or given any sign or evidence of an intention to approach the house where defendant was, or to leave the trail. Without note of warning, he was deliberately shot down. How is it possible that a plea of self-defense can be predicated upon such a state of facts? There was no element of selfdefense in the case, and, in giving the instructions it did, based upon the theory of self-defense, we think the court went to the very verge of the rule of "favorem vitae;" and, viewing the verdict in the light of the evidence, it is impossible to conclude that the jury were misled, to the prejudice of defendant, by the unfortunate lapsus of the court in the sixth instruction. It is urged that no exception was taken to said sixth instruction until after the verdict was returned. This, in itself, is, in our view, sufficient to take it from the consideration of this court. It cannot be doubted that, had the attention of the court been called thereto before the jury retired, the correction would have been made, and it was due to the court that this should have been done. Failing to do it, we think the exception comes too late. Finding no error in the record warranting a reversal, the judgment of the district court is affirmed.

MORGAN and SULLIVAN, JJ., concur.

ERWIN v. HUBBARD, Assessor.

(Supreme Court of Idaho. June 22, 1894.)

AXATION — REFUSAL TO FURNISH LIST OF PROF

Taxation — Refusal to Furnish List of Property—Penalty—Double Taxation.

1. It is the duty of the taxpayer to furnish the assessor, on demand, the statement on oath required by section 1429, Rev. St. 1887; and, if he neglects or fails to do so, it is the duty of the assessor to assess such taxpayer's property within his jurisdiction, and in that case the taxpayer cannot recover taxes paid under protest on property so assessed.

2. Although property was assessed in the

county of A. in 1889, the assessment of the same property in the county of W. in the same year was not double taxation, but a penalty imposed by law for refusal to furnish the statement required by said section 1429.

(Syllabus by the Court.)

Appeal from district court, Washington county; E. Nugent, Judge.

Action by Henry Erwin against Frank M. Hubbard, assessor of Washington county, to recover taxes paid under protest. Judgment for defendant. Plaintiff appeals.

George H. Stewart and R. Z. Johnson, for appellant. T. Calvin Hyde, George Ainslie, and S. L. Tipton, for respondent.

SULLIVAN, J. This is an action to recover a certain sum of money paid by the appellant to the defendant, as assessor and tax collector of Washington county, as taxes assessed upon certain cattle belonging to the appellant in the year 1889. The facts found by the trial court, necessary to be stated, are substantially as follows: That plaintiff, who is appellant here, resided in Ada county during the year 1889, and was engaged in the business of stock raising; that his ranch and headquarters for his said business were in said Ada county; that at least a part of his stock grazed for a portion of the year in Washington county; that at the hour of 12 o'clock m. of the second Monday of April, 1889, the said stock of appellant were in said Ada county, except 250 head of cattle, which 250 head were at said hour and date in Washington county, where they had been driven by appellant, and were then ranging and grazing; that on the 24th day of June, 1889, the assessor and ex officio tax collector of Ada county listed and assessed to plaintiff 60 head of horses and 1,500 head of stock cattle; that at the time of said assessment all of plaintiff's cattle were in said Washington county, 50 head of which had been there continuously since the spring of 1888, and that said 50 head were not included in said assessment, and that said assessment did not include any of plaintiff's cattle under the age of one year, of which there were about 100 head; that on the 21st day of January, 1890, the plaintiff paid the said taxes assessed against him by the assessor of Ada county on the 60 head of horses and 1,500 head of cattle; that prior to said assessment, but subsequent to the second Monday of April, 1889, all of said plaintiff's cattle, including those less than one year old, were driven by him into said Washington county, except the 250 head above referred to, for the purpose of having them range and graze there so long as the condition of the natural feed and the weather would permit during said year; that on the 30th day of July, 1889, the defendant, as assessor of said Washington county, assessed 1,000 head of said cattle to the plaintiff, and on the 19th day of December, 1889. seized 100 head of said cattle, and proceeded

to give notice that he would on the 28th day of December, 1889, sell the same, or sufficient thereof to pay the said tax and costs of seizure and sale; that on the 21st day of December the plaintiff paid said defendant the sum of \$331,—the amount of said tax and interest and costs; that said payment was made for the purpose of regaining possession of said cattle, and to prevent the sale The court found that said payment thereof. was made under what it denominates an "alleged protest," which protest was in writing, and is set forth in full in the record. The court further finds that the said assessor of Washington county did demand and request, prior to assessing the 1,000 head of cattle above referred to, from the plaintiff, a statement in writing setting forth specifically all of the real and personal property owned by plaintiff, in conformity with the provisions of section 1429 of the Revised Statutes of 1887, and that the plaintiff failed and refused to make such statement; that thereafter, on the 30th day of July, 1889, the said assessor did list and assess 1,000 head of cattle to plaintiff at \$11 per head, and that the taxes thereon amounted to \$275; that plaintiff failed and neglected to pay said sum, and that by reason thereof the said assessor seized and took possession of 100 head of said cattle, and was proceeding to sell the same under the provisions of the statute in such case made and provided, when the appellant paid the taxes and costs under protest. From the foregoing facts the court concluded that 250 head of plaintiff's cattle were in Washington county at 12 o'clock m. on the second Monday of April, 1889, and were subject to taxation in said county for that reason, and that because of appellant's failure to make the statement required by section 1429, Rev. St., he could not complain because the assessor, legally through mistake, assessed him with 750 head of cattle more than were subject to assessment in said county.

The record shows that over 1,000 head of appellant's cattle were in Washington county on the day respondent made said assessment. The statute makes plain the duties of the assessor. It also makes equally plain the duty of the taxpayer, in furnishing the assessor a statement of his property, on oath. on demand. It is the duty of the assessor to list and value all property within his jurisdiction, not exempt from taxation. The assessor and his sureties are liable on his official bond for all taxes on property within his county, which, through his willful failure or neglect, is not assessed. Rev. St. 1887, § 1457. As one means of assisting the assessor in ascertaining the taxable property in a county, section 1429, Rev. St., makes it his duty to exact from each person a statement on oath, setting forth specifically all the real and personal property owned by such person, or in his possession or under his control, at 12 o'clock m. on the second Monday of April, in this state, and as to property not in this state at that day and hour, all other property owned by him, or under his control, on the day of assessment. Said section sets forth specifically what the sworn statement must contain, and one of the several requirements is that it must contain the county in which the property is situated, or in which it is liable to taxation. The assessor, upon receiving a statement of taxable property situated in another county, is required by section 1436, Rev. St., to make a copy of such statement, and transmit the same to the assessor of the proper county. It is the duty of the taxpayer to furnish the assessor, on demand, the statement on oath above referred to; and, if he neglects or refuses to do so, it then becomes the duty of the assessor to note the refusal on the assessment book, opposite the name of such delinquent, and thereafter he must proceed to make an estimate of the value of the property of such person; and section 1433, Rev. St., declares, inter alia, that the value so fixed must not be reduced by the board of commissioners.

Under the facts in this case, and the provisions of the statute, the question is, can the appellant recover? His home ranch was in Ada county, near the Washington county line. His stock ranged during a part of each year in Washington county. Some of his cattle remained in Washington county during the entire year. The assessor of Washington county demanded a statement on oath of appellant, in conformity with section 1429, on the 17th day of June, 1889, and the appellant neglected to furnish such statement. On or about the 30th day of July, 1889, the assessor noted the neglect of appellant to furnish such statement opposite his name on the assessment book, and estimated the value of appellant's cattle at \$11 per head, and the number of said cattle in Washington county at 1,000 head. There is no dispute as to the fact that appellant had at least 1,000 head of cattle in Washington county on the date of said assessment, and there is no dispute as to their value. The claim of appellant is that at least 750 of said cattle had been assessed in Ada county, and to permit or allow their assessment in Washington county would be double taxation, which is forbidden by the provision of section 1400, Rev. St. 1887. We cannot assent to that proposition. If a taxpayer's property is assessed in two counties because of his refusal to furnish the statement required by section 1429, Rev. St., we do not think that "double taxation," within the meaning of the term as used in said section 1400. The sections of the revenue law must be construed together, and so construed, if possible, as to give effect to each section; and, if a taxpayer has stock ranging in several counties, it is his duty to furnish the assessor of each county, on demand, a statement or list of his property. If he fails so to do, it is the duty of the assessor of each county to assess such taxpayer's property that is within his county, and, if the same property is assessed in two different counties, it is not double taxation; for, if a person fails to furnish the required statement on oath to the assessor, he tacitly submits himself to the valuation of the assessor, and by his refusal he waives those exceptions which he might have urged, had he furnished the statement. It was not intended that the taxpayer might refuse to furnish a list of his property, and take his chances on the assessor assessing him with less property than he owned, and afterwards, if the assessor assessed him with more than he owned, have all the benefits which he would have if he had given a true list of his property. The provision contained in section 1433, which states that the value so fixed by the assessor shall not be reduced by the board of commissioners, clearly indicates that the owner shall lose the right to have his property valuation reduced if he neglects or refuses to furnish to the assessor the list required. This is clearly intended, then, as a penalty for such refusal; but if he can neglect to furnish the list, and then procure the reduction by an appeal to the court, then this provision in section 1433 is rendered nugatory, and he may refuse to furnish such list with impunity. It is quite difficult, sometimes, for the assessor to ascertain what property the taxpayer has, unless the list is furnished; and, if the farnishing of such list is not compulsory, much property would unavoldably escape taxation, as, if the valuation or enumeration is too low, no complaint is made, and, if too high, an appeal would be taken to the court. This cannot be the intention. We must believe the intention of the legislature was to provide that if the list was refused no redress could be had in case of overvaluation. In this case, if the appellant had given the statement demanded, this suit would not have been brought; or, at least, if the assessor had assessed appellant with 750 head of cattle which had been assessed in Ada county, the board of commissioners of Washington county, on a proper showing, would have corrected such assessment.

It is further claimed that the appellant, in response to the demand of the assessor for a list, wrote a letter to the assessor, stating therein that all his property had that year been assessed for taxation in Ada county. But the statute requires a statement on oath to be furnished, and a simple statement in a letter is not sufficient.

As to the 250 head of cattle which the trial court found were in Washington county at 12 o'clock m. of the second Monday of April, 1889, and for that reason were properly assessed in said county, the question is raised as to the situs of personal property for taxation purposes; but, in our view of the case, it is not necessary for us to determine that question. The trial court found that said

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250 head of writtle were in Washington county on said last-mentioned day and hour, and were in said county on the day they were assessed by respondent. The appellant refused to furnish the statement or list of his property demanded by the assessor. Thereafter, the assessor assessed him with no greater number of cattle than he owned in Washington county on the date of the assessment. Under the circumstances of this case, appellant cannot recover. The judgment must be affirmed, with costs in favor of respondent, and it is so ordered.

MORGAN, J., concurs. HUSTON, C. J., did not sit at the hearing, and took no part in the decision of this case.

BANNOCK COUNTY v. C. BUNTING & CO. (Supreme Court of Idaho. June 1, 1894.) COUNTIES-ISSUE OF BONDS-SUBMISSION TO VOTE
-VALIDITY OF WARRANTS.

1. Counties may issue bonds to take up both warrant and bonded indebtedness, under section vote of two-thirds of the electors of the county voting at an election to be held for that pur-

voting at an election to be near for that parpose.

2. The submission of the question to a vote of the people of the county is an indispensable prerequisite to the incurring of any indebtedness or liability for any purpose, exceeding in that year the income and revenue provided for it for such year, except for the ordinary and necessary expenses of the county.

3. A warrant issued for purchase of courthouse site at an expense of \$4,000 incurred an indebtedness above the revenue of the current year, was not an ordinary and necessary ex-

year, was not an ordinary and necessary expense, and was issued in violation of the constitutional provision section 3, art. 8.

(Syllabus by the Court.)

Appeal from district court, Bannock county; D. W. Standrod, Judge.

Suit by Bannock county against C. Bunting & Co. to compel specific performance of a contract to purchase bonds. Judgment for defendant, and plaintiff appeals. Affirmed

George M. Parsons, Atty. Gen., S. C. Winters, and Richard Z. Johnson, for appellant. Stewart & Dietrich, for respondent.

PER CURIAM. Plaintiff is an organized county in the state of Idaho. Defendant is a banking company, organized and incorporated under the laws of the territory of Utah, doing business at the town of Blackfoot, in the said state of Idaho. The county commissioners of Bannock county, for the purpose of funding the indebtedness of said county, determined to issue, and did issue, bonds of said county to the amount of \$120,-000, bearing date January 1, 1894. A copy of one of said bonds, all being of the same tenor and date, is as follows, to wit: "No. \$500.00. United States of America. State of Idaho, County of Bannock. Gold Funding Bond. Know all men by these presents, that the county of Bannock, in the state of Idaho,

acknowledges itself to owe, and for value received hereby promises to pay, C. Bunting & Co., or bearer, on the first day of January, A. D. 1904, the sum of five hundred dollars, with interest thereon at the rate of seven per cent. per annum, payable semiannually, on the first day of January and July, as provided by law, and on the presentation and surrender of the annexed coupons as they severally become due. Both principal and interest are payable in gold coin of the United States of America, of the present standard of weight and fineness, at the office of the county treasurer of said county, in the town of Pocatello, Idaho, or at the Chase National Bank, New York City, state of New York, at the option of the holder hereof. This bond is one of a series of two hundred and sixty-four bonds of like tenor and date, numbered from 1 to 264, aggregating the sum of one hundred and twenty thousand dollars, issued for the purpose of funding the principal and interest of certain valid outstanding indebtedness of said county legally contracted subsequent to July 30, 1886, in pursuance of and in conformity with the provisions of an act of the legislative assembly of the territory of Idaho, entitled 'An act to amend title 13 of the Revised Statutes by adding thereto chapter 6, concerning the redemption of county indebtedness,' approved Jan. 25, 1887, as amended by the act of the legislature of the said state of Idaho approved March 13, 1891. It is hereby certified that all acts and things required to be done precedent to the issue of this bond have been done and performed as by law required: and that all of the said indebtedness so funded was contracted within the legal limitations and restrictions thereon, and only for the ordinary and necessary expenses authorized by the general laws of the said state; and also that the said bonds are issued in strict compliance with and in conformity to the laws and constitution of the said state of Idaho, and, for the payment hereof, the full faith, credit, and resources of said county are hereby irrevocably pledged. In witness whereof, the board of county commissioners of said Bannock county has caused this bond to be signed by its chairman, and attested by its clerk, under the corporate seal of the said board, and to be countersigned by the treasurer of said county, and the coupons hereto attached to be signed by the said treasurer, this first day of January, A. D. 1894. John S. Baker, Chairman. Attest: O. J. Bell, Clerk. [Seal.] Countersigned by J. W. Keeney, County Treasurer." A notice of the intention to issue and negotiate said bonds was published in the Pocatello Tribune, a newspaper printed and published in said Bannock county. In response to said notice, the respondent, O. Bunting & Co., made and filed with the clerk of the board of county commissioners the following proposal to purchase said bonds: "Pocatello, Idaho, November 24, '93. To the Honorable Board of

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County Commissioners, Bannock County, Idaho-Gentlemen: For the one hundred and twenty thousand dollars, Bannock county, Idaho, funding bonds, advertised for sale today, a copy of which notice we inclose herewith, we will pay you par and accrued interest for the entire issue, on the following terms, to wit: Said one hundred and twenty thousand dollars bonds to be dated December the 1st, 1893, or January 1st, 1894, and to be issued in denominations of five hundred dollars each, principal and interest to be made payable in gold coin of the United States of America, of the present standard of weight and fineness, and to bear interest at the rate of seven per cent. per annum; said interest to be paid semiannually on the first day of January and the first day of July in each year, and both principal and interest to be made payable at the office of the county treasurer of the county of Bannock, or at Chase National Bank in the city of New York, state of New York, at the option of the holder of the bonds; said bonds to be subject to our approval as to validity and legality. We herewith inclose our certified check on the First National Bank of Pocatello for five thousand dollars, to meet the requirement of your notice. Respectfully, C. Bunting & Co." On the 24th day of November, 1893, the above bid was accepted by the commissioners, who thereupon ordered that the bonds be executed, sold, and delivered to the defendant. Said bonds were so engraved and executed and tendered and offered to the said defendant, and a demand made for the payment therefor. Defendant refused to accept said bonds, and refused to pay the stipulated price therefor, or any part thereof. The plaintiff brings this suit to compel specific performance.

The defendant contends: First. "The board of county commissioners were and are without jurisdiction to issue such bonds,' quotes section 15, art. 7, of the constitution in support thereof. This section provides that the legislature shall provide by law such a system of county finance as shall cause the business of the several counties to be conducted upon a cash basis. The framers of the constitution must of course have taken into consideration the condition of the several counties of the state financially at the time the constitutional convention was in session. Many of said counties were largely indebted both in bonds and outstanding warrants. One of the methods clearly authorized by this section of the constitution for bringing the business of the counties to a cash basis was and is by issuing bonds for the purpose of taking up outstanding warrants and refunding bonds. This will more clearly appear hereafter in considering other sections of the constitution. This section also recognized another method of bringing the county to a cash basis, which is contained in the latter part of the section, to wit: "It shall also provide that whenever

any county shall have any warrants outstanding and unpaid, the county commissioners shall levy a special tax not to exceed ten mills on the dollar. * * * for the creation of a special fund for the redemption of such warrants." This method might be found entirely adequate, convenient, and inexpensive in certain cases where the indebtedness was not so large, but it could be discharged within a comparatively short term of years. There is another method, which, though not mentioned in the constitution, and perhaps for that reason not ordinarily considered by the commissioners, is to rigidly and perseveringly reduce by all proper means the expenses of the county below the income. The methods of bonding and levying a special tax were both provided for by law, and therefore both recognized by the constitution, and not therein forbidden, to wit, the former by section 3602, and the latter by section 1415, Rev. St., although the last-named section is practically useless, by reason of what is presumed to be a mistake in authorizing the levy of from 6 to 15 mills on the \$100, instead of on the \$1, of taxable property.

Secondly. The respondent contends that the funding law does not contemplate warrant indebtedness. Section 3602 of the Revised Statutes of Idaho, as amended in First Session Laws of State (page 200), reads as follows: "The board of county commissioners of any county may issue negotiable coupon bonds of their county for the purpose of paying, redeeming, funding or refunding the principal and interest of any of the following indebtedness of their county, when the same can be done to the profit and benefit of the county: First, any indebtedness contracted prior to July 30th, 1886. Second, any indebtedness contracted subsequent to July 30, 1886. And all bonds issued under the provisions of this act must show on their face for which of the foregoing classes of indebtedness they are issued. The board of county commissioners of the county may refund the said indebtedness at a rate of interest not to exceed seven per cent. per annum." It is clear from the reading of this section that it includes not only bond indebtedness, but warrants also. As there is no restriction in the wording of the statute to bond indebtedness only, the words "any indebtedness" are sufficiently broad to include debts of both kinds. It is true that the title to the act would seem to restrict the issue of bonds to the refunding of the bonded indebtedness of the counties. The title of the act is as follows: "An act to amend section 3602 of chapter 6 of title 13 of the Revised Statutes. relating to the refunding of the bonded indebtedness of counties." But the title of chapter 6 does not refer to the refunding of the bonded indebtedness of counties at all. but is simply "Redemption of County Indebtedness," and the body of section 3602, as it appears in the Revised Statutes, is the same as the amended section, excepting that

the words "at a lower rate of interest" are inserted in the original section, and are left out in the amended section.

It is again objected by the respondent that there was and could be no adequate provision by the board of commissioners for paying the interest on the bonds as they became due, and for constituting a sinking fund for their redemption at maturity, as required in section 3, art. 8, of the constitution; but we think this requirement of the constitution is sufficiently met by section 3602 of the Revised Statutes, which is as follows: "The board must cause to be levied annually upon all of the taxable property of the county, in addition to other authorized taxes, a sufficient sum to pay the interest on all bonds disposed of in pursuance of the provisions of this chapter, and must at least one year before such bonds become due, and in time to provide the means for their payment, cause to be levied a sufficient additional sum to pay said bonds as they become due."

The next objection of the respondent is as follows: "The board of county commissioners were and are without jurisdiction to issue such bonds, because no question relating to the issue or sale of the bonds was ever submitted to a vote of the electors of the county." The constitution (article 8, § 3) provides that "no county shall incur any indebtedness or liability in any manner or for any purpose exceeding in that year, the income and revenue provided for it for said year without the assent of two-thirds of the qualified electors thereof voting at an election to be held for that purpose." This provision of the constitution is comprehensive and emphatic. Mr. Justice Gray, in the case of District Tp. v. Cummins, 12 Sup. Ct. 221, in considering a similar provision of the constitution of the state of Iowa, which is as "No county or other political or follows: municipal corporation shall be allowed to become indebted in any manner or for any purpose to an amount in the aggregate exceeding five per centum of the value of the taxable property within such county or corporation," etc.,-uses the following language: "The prohibition extending to debts contracted in any manner or for any purpose, it matters not whether they are in every sense new debts, or are debts contracted for the purpose of paying old ones, so long as the aggregate of all debts, old and new, outstanding at one time, and on which the corporation is liable to be sued, exceeds the constitutional limit. The power of the legislature in this respect being restricted and controlled by the constitution, any statute which purports to authorize a municipal corporation to contract debts in any manner or for any purpose whatever in excess of the constitutional limit is to that extent unconstitutional and void." The court goes on to "The treasurer is authorized to sell the new bonds, and to apply the proceeds of the sale to the payment of the outstanding ones. It is evident that, if new bonds are issued without a cancellation or surrender of the old ones, the aggregate debt outstanding, and on which the corporation is liable to be sued, is at once and necessarily increased, and if new bonds, equal in amount to the old ones, are so issued at one time, is doubled; and that it will remain at the increased amount until the proceeds of the new bonds are applied to the payment of the old ones, or until some of the obligations are otherwise discharged. It is true that if the proceeds of the sale are used by the municipal officers, as directed by the statute, in paying off the old debt, the aggregate indebtedness will ultimately be reduced to the former limit; but it is none the less true that it has been increased in the interval, and that, unless the officers do their duty, the increase will be permanent. It would be inconsistent alike with the words and with the object of the constitutional provision, framed to protect municipal corporations from being loaded with debt beyond a certain limit, to make their liability to be charged with debts contracted beyond that limit depend solely upon the discretion or honesty of their officers." The provision of our constitution is, in effect, that no county shall incur any indebtedness or liability, in any manner or for any purpose, exceeding in that year the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose. This provision of the constitution is positive and unequivocal, and the logic of the court in District Tp. v. Cummins, supra, is unanswerable. The provision forbids positively the incurring of any indebtedness, in any manner or for any purpose, exceeding in that year the income and revenue provided for it, without the assent of two-thirds of the electors.

The commissioners ordered issued, and advertised for sale, \$120,000, in bonds bearing 7 per cent. interest. There was then in the treasury of said Bannock county, according to the stipulation in the case, the sum of \$30,-422.55, on the second Monday of January, 1894. No part of the revenue of 1893, amounting to \$30,422.55, had been expended in the payment of the county indebtedness. The indebtedness at that time of the said county. outstanding and remaining unpaid, evidenced by warrants, was, as stated by the court, about the sum of \$135,000. It is clear that if bonds to the amount of \$120,000 were issued and sold, as provided by resolution and order of the board of commissioners, the indebtedness of the county upon the sale of the bonds would be more than doubled, without submitting the question as to the issue of the bonds to a vote of the people of the county, in direct violation of the constitution. It is true the board of commissioners, in their order, recite for what purpose the bonds are to be issued. The order is as follows, to wit:

"The board believing it to be to the best interest and to the profit and benefit of Bannock county that the outstanding indebtedness of said county should be funded by the issue and sale of negotiable coupon bonds of said county, for the purpose of paying, redeeming, and funding the principal and interest of all indebtedness of said county contracted subsequent to the 30th day of June, 1886, ordered that notice of the intention to issue and negotiate such bonds and to invite bidders therefor be given, as required by law." The purpose is stated to be to pay, redeem, and fund the principal and interest of all indebtedness of said county. Suppose, however, that the commissioners, or their successors in office, when the money came into the treasury, should conclude to use it, or a portion of it, for some other purpose. Of course the presumption of this court is that the commissioners would scrupulously carry out the apparent intention of the board when the bonds were sold, as expressed in the above order; but the court cannot deal in presumptions in favor of proceedings taken without compliance with the constitution. Again, until the money was actually so applied, the debt would be more than doubled. It is apparent, also, that when the revenue for the year 1893, then in the treasury, amounting to the sum of \$30,422.55, is deducted from the whole amount of indebtedness of Bannock county on January 1, 1894, which was \$135,000, there would remain as the then indebtedness of Bannock county the sum of \$104,577.45, or, in round numbers, \$105,000. Bonds being issued and sold to the amount of \$120,000 would leave \$15,000 of indebtedness, incurred not for the payment of any prior indebtedness whatever, and of which no disposition is made, or proposed to be made, in the order of the board. This amount is over and above the revenues of the county for the fiscal year of 1893, and is also incurred without submitting the matter to a vote of the people of the county, as the constitution requires. submission of the question to a vote of the people of the county is an indispensable prerequisite to the incurring of any indebtedness or liability, for any purpose, exceeding in that year the income and revenue provided for it for such year; and any indebtedness or liability incurred contrary to this provision is declared by the constitution to be void, unless it be for the payment of the ordinary and necessary expenses, authorized by the general laws of the state. Doubtless, the commissioners might issue bonds to an amount equal to the legal indebtedness of the county at the time of said issue, after deducting the cash on hand; said bonds to be conformable to the constitution and laws now in force, and to be exchanged for county warrants in sums of \$500 or \$1,000 and upward, if the same can be done to the profit and benefit of the county, and cancel the warrants as soon as received therefor, as it would seem that this would not increase the indebtedness. The tax levy made in April, 1893, for current expenses, is for the fiscal year ending the second Monday of January, 1894, and the fund arising therefrom should be applied in payment of warrants issued for such expenses according to date of registry.

Respondent further claims that warrants numbered 224 to 413, inclusive, aggregating the sum of \$94,929.65, issued to Bingham county in payment of indebtedness inherited from Bingham county, and apportioned under special act creating Bannock county; and warrants issued from Nos. 161 to 172, inclusive, and 452, 453, and 137, in 1894, aggregating \$5,599.94, issued to recorder of Bingham county, as provided by said special act. in payment for transcribing records, are issued without authority, and in violation of subdivision 9, § 19, art. 3, of the constitution. But the law creating Bannock county is specially authorized by sections 3 and 4, art. 18, of the constitution; and, in the creation of such county, the legislature is authorized to make any provision necessary to the complete organization of the county, not specifically prohibited by the constitution, and, in doing so, could provide for the apportionment of the indebtedness then resting upon the whole of Bingham, including that part now called "Bannock," and could also provide for the payment for transcribing the records, as this is one of the necessary expenses to the complete organization of the county.

The item \$435.09, warrant No.58, was issued to pay for a temporary jaff. It is the duty of the commissioners to provide a place for the safe-keeping of prisoners. A jail cannot ordinarily be hired, as buildings suitable for jail purposes are not erected by private parties. The above amount might very properly be expended, when necessary, for repairing a jail already built; and as it was paid for a temporary jail, and is certainly a small expense for such a purpose, we think it should be held to be an ordinary and necessary expense, and authorized by the constitution.

Objection is also made to warrant No. 138. for \$4,000, issued for the purchase of a block of land in the town of Pocatello, as a site for courthouse. This is clearly not among the ordinary and necessary expenses of the county. Section 1762, Rev. St. Idaho, clearly indicates that the legislature did not consider this an ordinary expense of the county, as this section makes special provision for erecting courthouse, jail, and other public buildings as follows: "When a petition signed by at least one-third of the taxpayers, who are qualified voters of any county, is presented to the board at any regular meeting, asking that a courthouse, jail or other public buildings or improvements be built for the use and benefit of the county, the cost of which will exceed one thousand dollars, * * the clerk of the board must give notice," etc.,-thus indicating beyond question that the construction of courthouses, jails,

and other public buildings was an extraordinary expenditure. The ordinary expenses of the county may be and are paid without any such preliminary proceeding, and debts are and may be contracted for the ordinary expenses of the county without complying with this statute, although the constitution enjoins upon the people the necessity of placing the counties upon a cash basis. The constitution has adopted a more stringent provision than the one contained in section 1762, as above set forth. Section 3, art. 8, of the constitution requires a two-thirds vote of the people of the county voting at an election to be held for that purpose before such extraordinary indebtedness could be incurred. It is clear that, if the commissioners could incur a debt for a courthouse site at a cost of \$4,000, they might purchase one at a cost of \$10,000, and proceed to erect a courthouse at a cost of \$20,000, all of which would be in direct violation of the constitution. It is, of course, the duty of commissioners to provide a suitable place for holding of the courts and public offices, jails, etc.; but such rooms must be temporarily provided, at as little expense as is consistent with providing suitable quarters, until the question can be submitted to the people. The issue of warrant 138, for the purchase of courthouse site, at a cost of \$4,000, incurred an indebtedness above the revenues of the current year, and was in violation of the constitutional provision. The indebtedness incurred during the fiscal year 1893 is stated at \$39,917.82, and the revenue provided for that year amounts to \$30,422.55 only. The question of incurring such indebtedness was not submitted to the people.

A question is suggested by the record in this case which, while it has not been mooted or discussed in the briefs of counsel, we deem of sufficient importance to be considered by the court. The bonds required by the proposal of the defendant, and issued, or proposed to be issued, by the county of Bannock, are denominated a "Gold Funding Bond," and are by their terms made payable, both principal and interest, "in gold coin of the United States of America, of the present standard of weight and fineness, at the office of the county treasurer of said county, in the town of Pocatello, Idaho, or at the Chase National Bank, New York City, state of New York, at the option of the holder hereof." At the second session of the state legislature of Idaho an act was passed by which it was provided "that from and after this act shall take effect, all obligations of debt, judgments or executions stated in terms of dollars and to be paid in money, if not dischargeable in United States legal tender notes, shall be payable in either the standard silver or gold coin authorized by the congress of the United States, all stipulations in the contract to the contrary notwithstanding." 2d Sess. Laws Idaho, p. 78. The bonds under consideration would seem to be in conflict with the provisions of this statute. While it may be urged that this apparent conflict between the conditions of the bond and the provisions of the statute would not impair the validity of the bonds, as an obligation of the county to pay the same in the same manner as provided by the statute. to wit, "in the standard silver or gold coin authorized by the congress of the United States," it must, we think, be conceded that it would flly comport with the dignity or probity of the state to permit the issuance of evidences of indebtedness which, by their terms, impose obligations not recognized by the laws of the state. The provisions of the federal constitution impose upon the states an inhibition against the making of anything but gold and silver coin a tender in payment of debts. The legitimate and conclusive implication of this provision of the constitution is that the states may make the gold and silver coin of the republic, or such gold and silver coin as is recognized by the republic, a tender in payment of debts. These bonds are not personal contracts or obligations; they are the obligations of municipal corporations, the issuance of which is provided for by express statutes of the state, enacted for this purpose, and should be issued in conformity with the existing law. The statute referred to was enacted in the interest of the taxpayers and debtors of the state, and it is the province and duty of the courts to see, not only that those interests are protected, but that no deception shall be permitted upon those who become the creditors of the state or of any county. To hold otherwise would, in our view, be not only a violation of express law, but would be compromising both the credit and the probity of the state. The proposition of the defendant requires a condition that cannot be complied with by the county, and an obligation on the part of the county to comply with it could not be enforced, but the bonds, when due, would be payable in either the standard silver or gold coin authorized by the congress of the United States. The judgment of the court below is affirmed. Costs awarded to the defendant.

DAVIS et ux. v. FIELDS.

(Supreme Court of Washington. June 1, 1894.)
ACTION TO SET ASIDE JUDGMENT.

An action will not lie to set aside a judgment on the ground that the court erred in setting aside the verdict rendered in the former action, and entering judgment for the plaintiff therein.

Appeal from superior court, Lewis county; W. W. Langhorn, Judge.

Action by E. J. Davis and wife against Cyrus Fields. From a judgment for defendant, plaintiffs appeal. Affirmed.

Frank C. Landrum and Edward F. Hunter, for appellants. Sevascy & Murdoch, for respondent.

SCOTT, J. This action was instituted by appellants in November, 1893, to set aside a judgment and decree in a former suit, rendered March 15, 1893, in favor of the plaintiff therein (respondent here), foreclosing a chattel mortgage executed to him by appellants. The cause of action alleged is that the court, in the former action, erroneously set aside a verdict returned by the jury in their favor, and rendered judgment for the plaintiff. No appeal was prosecuted in said former action, and it is conceded that this is an independent suit or proceeding. The respondent demurred to the complaint. The court sustained the demurrer and dismissed the action. No section of the Code is cited by appellants, sustaining the bringing of such an action. They contend that Railroad Co. v. Black, 3 Wash. 327, 28 Pac. 538, is an authority therefor; but such, clearly, is not the case, as the matter then before the court was a proceeding in the original action, and was brought upon an entirely different The respondent contends that the action will not lie, and such contention must be sustained. The judgment is therefore affirmed.

DUNBAR, C. J., and HOYT and ANDERS, JJ., concur. STILES, J., not sitting.

WEBB v. SPOKANE COUNTY.

(Supreme Court of Washington. June 5, 1894.)
COUNTY COMMISSIONERS—CONTRACTS—TENURE OF
MEMBERS OF BOARD.

A board of county commissioners, having power to contract for the services of a county physician, has power to make such contract for a year, though the members of the board are about to go out of office in a few days. Scott and Hoyt, JJ., dissenting.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

Action by W. Q. Webb against the county of Spokane on a contract for medical services. Judgment for defendant. Plaintiff appeals. Reversed.

W. D. Scott and Prather & Danson, for appellant. Fenton & Henley and L. H. Plattor, for respondent.

ANDERS, J. On January 4, 1892, by an order of the board of county commissioners of Spokane county, at a regular session, the appellant was employed as county physician of said county for the term of one year, beginning February 14, 1892, and ending February 14, 1893, at a salary of \$100 per month. On February 11, 1892, the board concluded to reconsider and annul the contract with the appellant, and to receive bids for county physician up till 10 o'clock a. m., Saturday, February 13, 1892; and on February 25, 1892, the board appointed Dr. Johnson county physician for the year ending February 25, 1893, at a salary of \$85 per month. Un-

til February 25, 1892, the appellant performed the duties of county physician, but he was then requested to turn over to Dr. Johnson all medicines and other property in his hands belonging to the county, and the sheriff was likewise requested to proceed and take possession of and deliver the same to said Dr. Johnson. Some time after February 14, 1893, appellant instituted this action to recover the amount which he claimed to be due under his said contract with the said board of commissioners. The complaint sets forth the contract alleged to have been entered into between the plaintiff and the defendant, and alleges that in pursuance of said employment the plaintiff entered upon his duties as such county physician, and performed all services according to the terms of said agreement until the 25th day of February, 1892, when said board of county commissioners, without cause, discharged the plaintiff, and refused to allow him to perform said services as such county physician; and that during all of said time the plaintiff was ready, able, and willing to perform said services according to the terms of said agreement of employment, and so notified said board of county commissioners. It is further alleged that the claim sued upon was presented to the board of commissioners, and payment thereof demanded and refused. The defendant answered by a general denial, and the cause proceeded to trial upon the issues thus raised. After the plaintiff had introduced his testimony, the court ordered a nonsuit on motion of defendant, and entered judgment for costs against plaintiff, to reverse which order and judgment this appeal is prosecuted.

This case, as presented and argued by counsel, involves but one question for the determination of this court, and that is, was there a valid contract entered into by and between the appellant and the board of county commissioners? It is provided by statute that "the board of county commissioners of the several counties of this state are vested with entire and exclusive superintendence of the poor of their respective counties" (1 Hill's Code, § 3087), and it seems to be conceded by the respondent, and it could not well be denied, that the board of county commissioners, under this provision, had a right to provide for the services of a county physician by contract. But it is contended that, inasmuch as the term of office of each of the commissioners with whom the agreement was made expired on January 9, 1893, they had no authority to enter into a contract extending beyond that date, and that such a contract is contrary to public policy and void. This identical question arose in the well-considered case of Board v. Shields (Ind. Sup.) 29 N. E. 386. and was decided adversely to the respondent's contention. In that case the board of commissioners of Pulaski county, Ind., by written contract, employed the appellee,

Shields, to superintend the county asylum and poor farm of that county for the term of five years from April 1, 1884. The principal controversy in that case, as in this, was as to the validity of the contract, the county insisting that it was void: and in discussing this question the court said: "It is insisted, however, that this contract is void upon other grounds,-that it is in contravention of public policy, for the reason that to uphold it would put it in the power of one board of commissioners to bind the hands of its successors; and that it operates as an unwarranted abridgment of the 'administrative, executive, and legislative' powers of the board. The first of the reasons assigned rests upon an erroneous conception of the constitution of the board of county commissioners,-that that body consists of a series or succession of boards, one following the other. As we have heretofore said, the board of commissioners is a corporation representing the county. From a legal standpoint, it is the county, as is said in State v. Clark [4 Ind. 315] supra. It is a continuous While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason." That the law is correctly stated in the foregoing quotation seems, to our minds, to admit of no doubt. And it is conceded by the learned counsel for the respondent that the board of county commissioners has the right in some cases to enter into contracts the performance of which would extend beyond their term of office,-such as a contract for the erection of county buildings,-but it is suggested that such contracts are founded in necessity, and not in principle. But it seems to us that such contracts are in fact founded in principle, and are within the legitimate powers of such boards. When the board of commissioners in this case proposed to employ the appellant for the period of a year, and he accepted such proposal, a contract was created which was binding upon both parties, and could not be rescinded at the more will of either. McDaniel v. Yuba Co., 14 Cal. 441. For aught that appears, the agreement was entered into in good faith, and, if so, it ought not to be set aside for the reasons assigned. The judgment is reversed, and the cause remanded for further proceedings.

DUNBAR, C. J., concurs.

STILES, J. I concur in the reversal, because the contract made with appellant was reasonable under the circumstances; but I

do not wish to be understood as subscribing in full to the doctrine enunciated in the case cited from Indiana.

SCOTT and HOYT, JJ., dissent.

STATE v. HOLMES.

(Supreme Court of Washington. June 7, 1894.)

LARCENY-INFORMATION-SUPPICIENCY.

An information alleging that defendant committed grand larceny, in stealing a railroad ticket worth \$30, and money of the value of \$22, of the moneys and property of one I., is insufficient to charge the crime of grand larceny, since it fails to state that the ticket was stamped, dated, and signed, and since it would otherwise be worthless, and not the subject of larceny. McCarty v. State, 25 Pac. 299, 1 Wash. St. 377, followed.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

J. W. Holmes was convicted of grand larceny, and appeals. Reversed.

The following is the information:

"In the Superior Court of the State of Washington, in and for the County of Pierce. State of Washington, Plaintiff, vs. J. W. Holmes (given name unknown) and Chester Rollinson, Defendants. Information. J. W. Holmes, whose given name is to the prosecuting attorney unknown, and Chester Rollinson, are accused by the prosecuting attorney of the county of Pierce, state of Washington, by this information, of the crime of grand larceny, committed as follows: The said J. W. Holmes and Chester Rollinson, on or about the 25th day of November, 1893, at the county of Pierce, state of Washington, and within one year prior to the filing of this information, unlawfully and feloniously did steal, take, and carry away one railroad ticket, of the value of \$30, and also lawful money of the United States, of the value of \$22, of the total value of \$52, of the moneys and property of one Isaac Logan, contrary to the form of statute in such case made and provided, and against the peace and dignity of the state of Washington. W. H. Snell, Prosecuting Attorney.

"State of Washington, County of Pierce, ss.: W. H. Snell, prosecuting attorney, being duly sworn, upon oath says he has read the foregoing information, and knows the contents thereof, and believes the same to be true. W. H. Snell, Prosecuting Attorney.

"Subscribed and sworn to before me this 9th day of December, 1893. J. L. McMurray, Notary Public. Residence, Tacoma, Washington."

O'Brien & Robertson, for appellant. W. H. Snell, Pros. Atty., for the State.

DUNBAR, C. J. This case falls squarely within the rule of law announced by this court in McCarty v. State, 1 Wash. 377, 25 Pac. 299. The judgment will therefore be

reversed, and the case remanded, with instructions to sustain appellant's demurrer to the information.

ANDERS and STILES, JJ., concur.

STATE v. MAYBERRY.

(Supreme Court of Washington. June 19, 1894.)

EMBEZZLEMENT-INDICTMENT.

An indictment, in a prosecution for embezzlement brought in K. county, which alleges that defendant on a certain day received, as agent of another, certain moneys, in K. county, and that thereafter, on a certain day, he converted the same to his own use, is insufficient, as it should also allege that the conversion took place in K. county.

Appeal from superior court, King county; T. J. Humes, Judge.

Elmer Mayberry was indicted for embezzlement, and from a judgment quashing the indictment the state appeals. Affirmed.

John F. Miller, Pros. Atty., and A. G. Mc-Bride, for the State. Arthur, Lindsay & King, for respondent.

HOYT, J. Upon this appeal the only question which we can properly consider is as to the sufficiency of the information upon which the defendant was put upon trial; for while it is claimed on the part of the state that, even if the indictment was insufficient, the action of the court was irregular, it does not follow that if such claim is warranted by the facts the state has any relief by appeal. In our opinion, such action of the court, if erroneous, was not of such a nature that it will be reversed in this court upon an appeal by the state. The indictment charged that the defendant, in King county, state of Washington, on a day named, was the agent of one Charles Reichardt, and was, as such agent, then and there intrusted with a certain sum of money, the property of said Reichardt, and that thereafter, on a day named, he did unlawfully convert the same to his own use. The trial court held this indictment insufficient, for the reason that it was not stated that the conversion was in King county, where the indictment was filed, and we think, in so doing, correctly interpreted the law, as applied to the language of the information. There is nothing said therein that in any manner discloses where the unlawful act was committed, and we are unable to agree with the contention of appellant that it would follow from the fact that he received the money in King county that he there converted it to his own use. This is not a case of the effect of proof under a pleading which properly charges the crime. There it will often be sufficient, to establish the fact that the crime was committed in a certain county, to show that the money was there received, and should have been there accounted for; but this is a question

of pleading, and we see no reason for holding the indictment good, in the absence of an allegation of the fact which must be shown in evidence to give the court jurisdiction of the subject-matter of the offense. If the indictment had charged that the conversion was in King county, then proof of circumstances which would authorize the jury to find that to be the fact would be sufficient, without any direct proof in regard thereto; but, since it was necessary for the jury to find that the crime was committed in King county, we think it should have been so alleged in the information, and the judgment must be affirmed.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

BROOKES V. SKOOKUM MANUF'G CO. (FIRST NAT. BANK OF MT. VER-NON, Intervener).

(Supreme Court of Washington. June 1, 1894.)
INSOLVENT CORPORATION—PREFERENCES.

A mortgage given in good faith to a creditor by a firm doing a paying business is not void, as to other creditors, because its debts were greater than its assets, apart from its good will, when the mortgage was given. Thompson v. Lumber Co., 30 Pac. 741, 31 Pac. 25, and 4 Wash. 600, distinguished.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by A. M. Brookes, trustee in a mortgage, against the Skookum Manufacturing Company and the First National Bank of Mt. Vernon, intervener, to foreclose a mortgage. Judgment for intervener, and plaintiff appeals. Reversed.

Strudwick & Peters, for appellant. Million & Houser and Relfe & McCutcheon, for respondent.

SCOTT, J. In January, 1891, S. D. Silver and James Howe were partners, engaged, in Seattle, in the business of manufacturing boxes, furniture, and other products of lumber. In that month, they, together with James Kiefer, organized as a corporation under the name of the Skookum Manufacturing Company, putting into the corporation the business and plant of the former copartnership at \$50,000, and having a nominal paidup capital stock of that amount. This, however, was considerably in excess of the actual value of the property. On the 25th day of February, 1891, said corporation, to secure a loan of \$5,000, executed to the plaintiff a chattel mortgage on the stock, fixtures, and buildings erected by them upon a lot leased by said corporation for the purpose of carrying on its business. Thenceforth, till the 22d of September, 1893, the corporation paid the interest accruing on said mortgage debt, and \$600 on account of the principal. Prior to this time one John H. Hall had bought into the company, and was elected its president. On said 22d day of September, said Hall, as president, applied to the plaintiff for a three-months extension of time, said mortgage debt being due,—and stated that if plaintiff would extend the time of payment thereof for three months he could procure extensions from all the other creditors whose debts were due, and by so doing he could provide for all the indebtedness of the corporation, except the sum of \$2,000, which was not due, and which he would pay from his resources aud from the resources of the corporation's property as said debts matured. Said Hall on that day submitted to plaintiff a written statement purporting to show the condition of said corporation, whereby it appeared that the assets were over \$23,000, and the liabilities were less than \$13,000. Several such statements had theretofore been submitted at different times, by each one of which it appeared that the corporation was possessed of property amounting to considerable more than the total amount of its indebtedness. Plaintiff agreed to give the extension desired, and to accept in lieu of the former mortgage the mortgage in controversy in this action. Whereupon, said corporation executed to the plaintiff, as trustee, the mortgage in controversy, on all of its stock, plant, and buildings (being in great part the property included in the former mortgage), to secure-First, the debt of \$4,400, being the remainder due upon plaintiff's note and mortgage aforesaid; and, second, the claims of other creditors, amounting to about \$4,000, whose claims are set out in detail in the mortgage. Whereupon, the plaintiff canceled the former mortgage of record. The corporation had carried on its business continually from the time of its organization up to and after the giving of this last mortgage. In November, 1893, in consequence of the publication of certain matters relating to the previous doings of the said John H. Hall elsewhere, he suddenly left, without notice, for parts unknown. Whereupon, plaintiff, as mortgagee, took possession of the property, and continued the business; and in January, 1894, while continuing to operate the mill and plant of said corporation, the plaintiff brought this action to foreclose the mortgage last executed to Default was subsequently entered him. therein against said corporation. Prior thereto, the First National Bank of Mt. Vernon filed its complaint of intervention in said action, by which it sought to avoid the chattel mortgage executed to the plaintiff upon the ground that at the time it was given the corporation was insolvent, and the giving thereof to the plaintiff constituted a fraudulent preference of creditors. Testimony was introduced by the plaintiff and said intervener upon the trial of the matters so brought in issue, whereupon the court found against the plaintiff, and held the mortgage void, and this appeal is prosecuted therefrom.

It is contended by the respondent that this action falls within the rule hild down in it then owed more than the value of its prop-

Thompson v. Lumber Co., 4 Wash. 600, 80 Pac. 741, and 31 Pac. 25, and that the trial court was of this opinion. But it seems to us that a substantially different case is presented. It is true the value of the property owned by the corporation at the time said mortgage was executed, leaving its good will out of consideration, was below the amount of its liabilities, as Hall had placed too high a value on the machinery, etc.; but the testimony is uncontradicted that said corporation had conducted its business regularly and continually from the time of its incorporation up to the time Hall left as aforesaid. Respondent contends that the same had been a losing business, but there is nothing in the proof to sustain this. The property owned by the company had not materially changed in value, although doubtless some of it was rather the worse for wear, in consequence of continued use. It is not shown that any material additions were made thereto, nor that any were needed, and there is no proof to show the amount of money made by the corporation during this time; but there is proof that it had conducted a profitable and paying business, and there was testimony. practically uncontradicted, to show that the business had held its own during the time it had been operated by the plaintiff, and that that was the dullest season of the year, and it was expected it would materially increase within a very short time, in consequence of reaching a more favorable part of the year. and of receiving increased orders then in prospect, or pending, for its products; that the good will, though not as valuable as formerly, in consequence of greater competition, was yet a valuable asset, and it was to preserve this that the plaintiff had assumed and continued the operation of the plant. No question is made but that the first mortgage executed to the plaintiff was a valid one, and the second covered largely the same property, although some additional property was included. An attempt was made by the respondent to show that at the time the second mortgage was executed the company was threatened with suits, and had practically ceased to do business, but the proof fails to sustain this contention. It appears that Hall intimated to the plaintiff, at the time he applied for the extension, that he was being pressed somewhat by other creditors, but that he could get an extension of all the company's indebtedness then due, etc., providing the plaintiff would extend the time of payment of his mortgage. This was done as stated, and the company thereafter carried on its business, apparently in a satisfactory manner to all persons interested, until the time its president left as aforesaid, which naturally precipitated action on the part of the creditors. The proofs do not disclose that, at the time this second mortgage was executed, there was anything substantially wrong with the affairs of the company. That erty, aside from its good will, would not necessarily prevent its continuing business, and the business may have previously been a very paying one, notwithstanding this. Dividends may have been declared. And it was for the respondent to show such a state of affairs as would avoid the mortgage, even if it be conceded that if its business had been a losing one this would have been sufficient to avoid the mortgage. That fact, standing alone, however, clearly would not be suffi-cient for this purpose. It seems that Hall, during the time he conducted the affairs of the company, had established a good local reputation as a competent and trustworthy business man. His sudden abandonment of the management of the business could not have been foreseen. And we think the plaintiff was justified in assuming, from the apparent condition of the affairs of the corporation, that it was able and intended to continue its business; and we are strongly inclined to believe, from the proofs, that all the parties acted in good faith at the time the mortgage was given, and, if it was valid then, no subsequent developments or happenings would invalidate it. Its validity could in no wise depend upon what would happen in the future, relating to the company's business or management. There was no attempt, in the case of Thompson v. Lumber Co., to lay down a rule that a corporation conducting a profitable business should be adjudged insolvent simply because, at some particular time, its assets did not equal the amount of its liabilities. What was said in that case was confined to corporations having practically stopped business, or reached a point where the corporate business could no longer be successfully prosecuted. The facts presented here are so essentially different from the facts before the court in that case that the rule there laid down does not apply. The judgment in this case is reversed and the cause remanded, with instructions to enter a decree in favor of the plaintiff.

DUNBAR, C. J., and HOYT, ANDERS, and STILES, JJ., concur.

CHAPPELL v. WOODS et al.

(Supreme Court of Washington. June 11, 1894.)

Assumpsit—Demand—When Necessary.

No demand is necessary for money due on a contract for boarding men, where defendants not only had notice of plaintiff's claim, but ignored it, by utterly refusing to make settlement, though frequently requested to do so.

Appeal from superior court, Douglas county; Wallace Mount, Judge.

Action by W. H. Chappell against Frank Woods and George Woods, partners, to recover a balance alleged to be due for boarding men for defendants. From a judgment for plaintiff, defendants appeal. Affirmed.

Kinnaird & Happy and Pendergast & Malloy, for appellants. W. J. Canton, for respondent.

ANDERS, J. Some time in October, 1892. the appellants, who were operating a sawmill in Okanogan county, employed the respondent to board their employes during the succeeding winter, and agreed to pay him therefor the sum of five dollars per week per man. It was also agreed between the parties that the appellants would erect a boarding house for the use of the respondent, and furnish the groceries and meat used in boarding the mill hands, and that the price of the provisions so furnished should be deducted from the amount due for board, and that they should furnish the respondent with a list of the men they wished to have boarded at the beginning of each month, or at least monthly. Pursuant to this agreement the respondent commenced boarding appellants' employés in November, 1892, and continued to board them until some time in April, 1893. Appellants furnished the supplies according to their agreement, and charged the value thereof to the respondent, and also, as it appears from the testimony, paid the respondent some \$200 in money. After the respondent ceased to board appellants' laborers, a disagreement arose between him and the appellants as to the state of the account between them. The appellants claimed that they had paid the respondent in full for all board furnished by him. The latter denied that he had been so paid, and brought this action to recover the balance alleged to be due. A trial was had by a jury, and at the close of plaintiff's testimony the defendants moved for a nonsuit, which motion the court denied, and the defendants except-A verdict was returned for the plaintiff, upon which, after a motion for a new trial had been made and denied, judgment was duly entered.

The only alleged error relied on by the appellants for a reversal of the judgment relates to the ruling of the court upon the motion for a nonsuit. The appellants contend that a demand for payment was necessary before bringing the action, and that no such demand was proved. If we were to concede that this is a case in which a demand was necessary, we think the necessity for it was obviated by the appellants' unequivocal denial of the claim of the respondent. But we are of the opinion that no formal demand was necessary in order to fix the liability of "The only legitimate obthe defendants. ject of a demand is to enable the party to perform his contract or discharge his liability, agreeably to the nature of it, without a suit at law." Heard v. Lodge, 20 Pick. 53. And, tested by this familiar rule, the contention of appellants cannot prevail. They not only had notice of the respondent's claim, but they utterly ignored it, by refusing to make any settlement with him whatever, ai-

though frequently requested so to do. If the appellants owed the respondent anything, the amount was due before suit was commenced, and, the action being for money due, no demand was necessary. Olvey v. Jackson, 106 Ind. 286, 4 N. E. 149. See, also, Railroad Co. v. Mason, 16 N. Y. 451. The authorities cited by appellants are not applicable here, and therefore do not support their position. Colburn v. Baptist Soc. (Mich.) 26 N. W. 878; Heard v. Lodge, supra; Byron v. Low (N. Y. App.) 16 N. E. 45; Palmer v. Breen (Minn.) 24 N. W. 322. The judgment is affirmed.

DUNBAR, C. J., and SCOTT and STILES, JJ., concur.

LA FRANCE FIRE-ENGINE CO. v. TOWN OF MT. VERNON.

(Supreme Court of Washington. June 11, 1894.)
FOREIGN CORPORATIONS — RIGHT TO DO BUSINESS
—CONTRACTS.

1. Where Gen. St. \$\\$ 1524-1531, require foreign corporations to comply with certain requisites before doing business in the state, and provide that an agent of such a corporation, doing business therein before the requisites are complied with, shall be guilty of a misdemeanor, a person contracting with such a corporation before it has complied with the statutory requisites is estopped to deny the authority of the corporation to make the contract, and capacity to sue thereon.

tract, and capacity to sue thereon.

2. A complaint in an action against a city on a note given for the price of a fire engine, which shows that the contract was entered into by the accredited agents of the city; that the note was issued by the authority of the council; that plaintiff is the owner of the note; that certain payments have been made thereon by warrants on the treasury of the city; and that there is now due on the note a certain sum, which has been duly presented to defendant's council for payment, and the same refused,—states a cause of action.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by La France Fire-Engine Company against the town of Mt. Vernon. There was a judgment for defendant, and plaintiff appeals. Reversed.

Million & Houser, for appellant. J. Henry Smith, for respondent.

DUNBAR, C. J. This action was brought by appellant, a corporation of New York, against respondent, a municipal corporation of the fourth class, to recover of and from respondent a balance due on the purchase price of a fire engine sold and delivered to respondent in the year 1890, the suit being based on a note in words as follows: "\$1,-250.00. Feb. 20, 1891. Two years after date we promise to pay to the order of La France Fire-Engine Co. twelve hundred and fifty dollars, with interest thereon at 8 per cent. per annum from date until paid, at First National Bank, Mt. Vernon, Wash. The Town of Mt. Vernon, per H. Clothier, Mayor of Mt. Vernon, Wash. Attest: Fred. G. Pickering. Clerk. [Seal]." The defendant demurred to the complaint for the reasons—First, that the complaint did not state facts sufficient to constitute a cause of action; and, second, that the plaintiff had no legal capacity to sue. The demurrer was sustained by the court upon the second ground, viz. that the plaintiff had no legal capacity to sue, in that the complaint did not show that the appellant had complied with the laws of the state requiring foreign corporations to file certain papers with the secretary of state, as provided for in sections 1524–1531 of the General Statutes.

It is conceded that appellant has not complied with the laws of this state requiring foreign corporations to file copies of their charters, etc., but appellant contends that respondent cannot question its right to sue in our courts on contracts made with it in its corporate name, after having received the benefit of such contracts. It is a general proposition, sustained by the weight of authority, that, where a statute imposes a penalty for failure to comply with statutory requirements, the penalty so provided is exclusive of any other; at least, no other penalty will be implied. See Mor. Priv. Corp. § 665, and cases cited. Our statute does not provide that the contracts made by foreign corporations which do not comply with the provisions of the statute shall be void, but fixes a special penalty for such a violation; and in the absence of a special declaration that such contracts shall be void, especially where a penalty is attached for the violation, the party contracting with such corporation will be estopped from pleading the want of compliance with the statute by the foreign corporation. This rule was announced by this court, after a pretty thorough investigation of the subject, in Foundry Co. v. Augustine, 5 Wash. 67, 31 Pac. 327; and, as we are satisfied with the rule announced in that case, we will follow it in this.

It is claimed by the respondent that it was held by this court in Huttig Bros. Manuf'g Co. v. Denny Hotel Co., 6 Wash. 122, 32 Pac. 1073, that a foreign corporation had no right to begin suit without first filing copies of its articles of incorporation, appointing an agent, etc. An investigation of that case shows that this court simply held that the filing of articles of incorporation by a foreign corporation, and the appointment of an agent after the filing of a lien notice, and before suit to foreclose the same, was a sufficient compliance with the law relating to foreign corporations doing business within the state. This possibly might be construed as an implication in favor of respondent's theory, but certainly it did not go further than that, and was not a necessary implication, as the circumstances of that case show.

It is also urged by respondent that no authority existed in respondent, or any of its officers in its behalf, to make such a note. The complaint shows that this was a simple contract between the city of Mt. Vernon, by

its accredited agents, and the appellant, and that the note was given as part purchase price of the engine purchased; that it was issued under and by authority of the council of said city of Mt. Vernon; that the appellant is now the owner and holder of said note; that certain payments have been made, by the issuance of warrants upon the treasury of said city, and that there is now due and owing the sum of \$1,460, which said claim has been duly presented to the defendant's council; and that the defendant, by and through its council, have repudiated said note and obligation, and refused to pay the same. It seems to us that a plain contract is stated by this complaint; that if it had not been reduced to writing, or had not been in the shape of a note which it is claimed the respondent had no authority to make, a good and enforceable contract is, notwithstanding, pleaded; that the claim was presented and refused; and that appellant's only remedy would be to sue the respondent, and obtain a judgment. This judgment, of course, is only payable through the medium of a warrant drawn upon the treasury of the city, but, if the council refused to allow the claim when it was presented, we know of no other way by which the city could be compelled to issue the warrant, than by obtaining a judgment in favor of appellant for the amount which was found to be due to it under the contract. For the reason, then, that the court erred in sustaining the demurrer on the ground that the appellant had no legal capacity to sue, and for the further reason that the complaint stated facts sufficient to constitute a cause of action, the judgment will be reversed and the cause remanded, with instructions to overrule the demurrer to the complaint.

HOYT and SCOTT, JJ., concur.

QUINN v. PARKE & LACY MACHINERY CO.

(Supreme Court of Washington. June 11, 1894.)

CONTRACT—RESCISSION—EVIDENCE — SUFFICIENCY

—REPLEVIN—INSTRUCTIONS.

1. Where a written contract is immediately followed by acts of the parties entirely consistent with its terms, and it is permitted to remain intact in the hands of the party to whom it is delivered at the time of its execution, it requires clear and convincing proof to show that in fact such contract was laid aside, and on the same day a new, oral contract, as to the same matter, was entered into and executed.

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2. Where, in an action by an assignee to recover certain machinery taken by defendant, the question is whether a written conditional sale contract between defendant and plaintiff's assignors was rescanded on the day it was made, and an oral contract of absolute sale substituted therefor, and whether such machinery was delivered under the latter agreement, as claimed by plaintiff, and the only evidence of rescission of the written contract is the bare assertion of one of the assignors that the machinery was not delivered under it, a judgment for plaintiff cannot be sustained.

3. In such case it is error to refuse to charge that, before plaintiff can show that the assignors entered into an agreement subsequent to the lease offered in evidence, the jury must find from the evidence, to their satisfaction, that the parties to the lease rescinded it.

Dunbar, C. J., dissenting.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by Barney Quinn, assignee for benefit of creditors of Humphrey & Hamilton, against the Parke & Lacy Machinery Company, a corporation, to recover possession of certain machinery, and damages for its wrongful detention. From a judgment entered on a verdict of a jury in favor of plaintiff, defendant appeals. Reversed.

Fenton & Henley, for appellant. W. M. Ridpath and Feighan, Wells & Herman, for respondent

STILES, J. The complaint alleged that plaintiff was the owner of certain machinery, which the defendant had wrongfully taken from his possession, and prayed the return of the property, or its value, and damages for its detention. The answer opened with the general denial, and continued by stating, as an affirmative defense, that the machinery had been delivered to a firm (Humphrey & Hamilton) June 30, 1890, under a conditional sale agreement in the form of a lease, under the terms of which, upon the happening of certain contingencies, the seller was authorized to retake it, forfeiting all payments. The contract will be found in the report of this case upon the former appeal. Quinn v. Machinery Co., 5 Wash. 276, 31 Pac. 866. It was further alleged that the contingencies mentioned had happened, and that the defendant had thereupon, and in accordance with its right under the contract, retaken the possession. The agreement was set out in full in the pleading. The plaintiff replied by a general denial of each and every allegation contained in the answer, but forthwith also set up a rescission and abrogation of the contract set out in the answer by a subsequent agreement made on the same day. Other allegations of the reply showed a new agreement, also upon June 30th, for a present, absolute sale, with payment to be made in a specified way, which payment was made as agreed. The execution of the conditional sale contract being admitted by the reply, the issues in the case were very simple. The preliminary question as to the right of plaintiff to the possession of the property, as assignee of Hamilton, being disposed of, the vital question was whether or not the conditional sale contract had been rescinded and abrogated, as plaintiff claimed, and whether the machinery was delivered under a subsequent independent arrangement, amounting to an ordinary sale of chattels without conditions.

When a formal written contract is entered into between two parties, covering the points

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of their agreement about a transaction, and it is immediately followed by acts entirely consistent with the terms of the writing, and the writing is permitted to remain intact in the hands of the party to whom it was delivered at the time of its execution, it ought to require very clear and convincing proof to show that in fact the written contract was laid aside, and upon the same day a new, oral contract, about the same subject-matter, was entered into and executed. And the rules of law are exactly in accordance with this proposition, for while it is not denied by the authorities that the most solemn executory written agreement may be rescinded by a subsequent unwritten one, it is as well settled that nothing short of clear, positive, and convincing proof will suffice to establish the fact of such rescission, against a party who denies it, and seeks to sustain the integrity of the writing. Wat. Spec. Perf. § 386; Falls v. Carpenter, 28 Am. Dec. 595; Lauer v. Lee, 42 Pa. St. 165; Chouteau v. Iron Works, 83 Mo. 73; Dick v. Ireland, 130 Pa. St. 299, 18 Atl. 735. Now, in this case, not one word was said by Hamilton (the only witness for plaintiff on the point that the machinery was sold outright) to the effect that any rescission was ever agreed upon, or even suggested. He testified that after negotiating with Hendrie, appellant's agent, "he drew up a document, and it was in the form of a lease, and he told us if this man Fabyan, who was agent of the St. Paul & Tacoma Lumber Company, would sign with us, we could have the machinery." They brought Fabyan in, and procured him to accept an order drawn by Humphrey & Hamilton on the St. Paul & Tacoma Lumber Company, in these words: "Please pay to Parke & Lacy Machinery Company onehalf of the amount of our lumber bill against you, as it is delivered, and as the payments are made or to be made by you to us as per agreement; said payments by you not to amount to over the sum of fifteen hundred dollars, and the time of said payments to be within the term of sixty days." The witness had no definite idea of the transaction, for he insisted that the contract of sale was in writing, and that the foregoing order was the written contract. He further stated that the delivery of the machinery was under this contract only. The price of the machinery was \$1,447, of which \$747 was due July 30, and \$700, with interest, December 1, 1890. This was the substance of all that the witness testified. The theory of the plaintiff was that because the order was for \$1.500. due within 60 days, this transaction was inconsistent with the terms of the conditional sale contract, which called for only \$1,447 at 80 days and 5 months. But it was clearly developed that the basis of the order was a contract for lumber which Humphrey & Hamilton had with the St. Paul & Tacoma Lumber Company, under which the former might furnish more or less lumber, and might earn more or less than the sum ordered paid. The order was not accepted as payment, and it turned out that no more than \$1,000 was realized from it, because no more than that was earned, and by the time this amount was realized the firm had incurred a debt on open account to the appellant in the sum of \$838.90, which Humphrey directed to be paid out of the \$1,000, leaving but \$606.10 to be applied on the machinery,-less than the first payment, and not received until several months after it was due. Of course, the appellant was at liberty to take such an order without thereby giving up the conditional feature of its contract, for there was no inconsistency in that, and the court so charged. But, with this matter of the order out of the case, there was nothing whatever to sustain the allegations of the reply concerning a rescission and new contract but the assertion of Hamilton that the machinery was not delivered under the written agreement, and that was not evidence of anything. The contract had been executed and delivered, and delivery of the machinery was an act contemplated by it, and not inconsistent with it. No agreement to rescind was shown, and no other contract of sale was proven to have been agreed upon. Therefore, the presumption remained that the delivery occurred as provided for in the writing.

A point is made that Hamilton's testimony was to the effect that there was a refusal on the part of appellant's agent to deliver the machinery, notwithstanding the contract, unless Fabyan would sign it with Humphrey & Hamilton. But the words quoted above (and they contain all that was testified) do not bear such an interpretation, for they do not show a refusal, but a willingness; and the phrase, "sign with us," must have referred only to some kind of security which Fabyan furnished by accepting the order.

The proof as to payment fell short of the price by several hundred dollars, even conceding that the full amount received upon the order ought to have been credited upon the contract. If the assignee paid anything to appellant which was intended to apply upon the purchase price of the machinery, it could only have been upon the theory that appellant had some sort of a lien upon it; for if the indebtedness of Hamilton to appellant, shown by his inventory, was general merely, his assignee would have no authority to pay out money to a creditor, except by way of dividend under order of the court.

The court refused the following charge: "Before the plaintiff can show that the firm of Humphrey & Hamilton entered into an agreement subsequent to the lease offered in evidence, you must find from the evidence, to your satisfaction, that the parties to this lease rescinded or abrogated it." This was a proper charge, and it might have been made much stronger. Chouteau v. Iron Works, 83 Mo. 78.

We have had occasion several times to review cases where parties had entered into the most formal contracts, as here; but, when it

came to performance, one party sought, by his sole testimony, to show some new and material agreement, apparently relying upon the chances he might have with a jury, which is often compelled to balance purely contradictory statements of witnesses, and decide according to a mere preponderance. But, in the face of an acknowledged contract, it would not be fair or safe that the mere unsupported statement of a party should prevail, and establish a rescisssion. If it were otherwise, there could be no reliance in writings at all. Every one who has made a contract in writing has it in his own hands, if there is a mutual abandonment of it, to cause its destruction, as far as he is concerned; and if he omits such a common-sense precaution he must bear the burden of making out a clear and convincing case of actual rescission, by reasonable corroborative proof, when he seeeks to avoid what his own hand has written. Judgment reversed, and cause remanded for another trial.

SCOTT, ANDERS, and HOYT, JJ., concur.

DUNBAR, C. J. (dissenting). I think there was sufficient testimony to warrant the jury in finding that the machinery was delivered under the new contract, and I therefore dissent.

MERCHANTS' NAT. BANK OF TACOMA
v. PEET et al.

(Supreme Court of Washington. June 26, 1894.)
TRIAL BY COURT—RECEPTION OF IMMATERIAL EVIDENCE.

Where, in an action against a firm on a note signed by one partner, the court tried the case without a jury, and found that such partner had no authority to sign the note, but also found that the other partner afterwards ratified the signature, error in admitting evidence as to the former's authority to sign the note is immaterial.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by the Merchants' National Bank of Tacoma against Fred T. Peet and Morton Ramsdell, executor of Howard R. Goodwin. From a judgment for plaintiff, defendant Ramsdell appeals. Affirmed.

Ben Sheeks, for appellant. Doolittle & Fogg, for respondent.

SCOTT, J. This action was brought by respondent against Peet & Goodwin to recover on a promissory note. Judgment was taken by default against Peet. Pending the action, Goodwin died, and the action was revived against Ramsdell (Goodwin's executor), who appeals. Peet & Goodwin were partners, as attorneys at law, and were also engaged in the loan business. The note was executed by Peet. Over the objections of appellant, Peet was permitted to give evidence tending to show that he had Goodwin's per-

mission to sign the firm name to the note, and that the money obtained on the note went to pay a note given by himself for land bought of Goodwin. Other objections were raised as to the testimony of one Opie, relating to a deposit slip which was in the handwriting of a third person,—there being nothing to show that Goodwin had anything to do with it,—and also the testimony of the witness Thompson, as to the custom of the bank, was objected to; and these matters are alleged as errors upon this appeal.

The respondent first contends that, conceding such testimony was erroneously admitted, it in no wise tended to prejudice appellant's case, and we think the point is well taken. The case was tried by the court without a jury, and findings of fact were made. Peet's testimony was immaterial, because the court found that he had no authority to execute the note in question. But the court also found from other testimony, which was not objected to, that Goodwin had ratified the giving of said note on several different occasions; and the testimony of Opic and Thompson, complained of, was in no wise material to the issue. Affirmed.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

STATE v. SMITH.

(Supreme Court of Washington. June 26, 1894.)

LARCENY—PROCURING PROPERTY BY FRAUDULENT PERSONATION.

A sewing machine is a subject for larceny, within 2 Hill's Code, p. 665, providing that every person who shall fraudulently personate another, and, in such assumed character, receive any money, "or other property whatever," intended to be delivered to the party so personated, with the intent to convert the same to his own use, shall be guilty of larceny.

Appeal from superior court, King county; T. J. Humes, Judge.

An information was filed against E. P. Smith, charging him with aiding in the concealment of stolen property, knowing the same to have been stolen; and from an order sustaining a motion to quash the information the state appeals. Reversed.

John F. Miller, Pros. Atty., and Daniel W. Bass, Deputy Pros. Atty., for the State.

ANDERS, J. The prosecuting attorney of King county filed an information in the superior court of said county, charging the respondent with the crime of aiding in the concealment of stolen property, knowing the same to have been stolen. A motion was filed to quash the information on the grounds—"First, that said information does not state the particular circumstances necessary to constitute the crime of larceny; second, that the said defendant has never had a preliminary examination before a committing magistrate.

in so far as the crime alleged against him is concerned." Said motion was sustained. and the defendant was, by order of the court, discharged from custody, whereupon the counsel for the state appealed. The respondent has neither filed a brief nor entered an appearance in this cause in this court. The record does not disclose the precise ground upon which the court set aside the information, but it is asserted in the brief of counsel for the state that the motion was sustained on the ground that a sewing machine could not be a subject of larceny, under section 53 of the Penal Code; and as it plainly appears that the information was verified, and does not appear that the defendant was not charged with a crime, and examined before a committing magistrate, we must presume that the ground alleged was that upon which the action of the court was based. Section 53, Pen. Code (2 Hill's Code, p. 665), provides that every person who shall falsely represent or personate another, and in such assumed character shall receive any money, or other property whatever, intended to be delivered to the party so personated, with the intent to convert the same to his own use, shall be deemed guilty of larceny. That the words, "or other property whatever," used in this statute, include within their meaning a sewing machine, seems too plain for argument. In construing penal statutes, as well as others, the primary rule is that the intent of the legislature is to be ascertained by giving the words of the statute their plain and ordinary meaning. It was manifestly the object and intention of the lawmakers to make it a crime for any person, by assuming to be another, to get possession of any article or thing of value whatever, with intent to convert the same to his own use, and the language used is susceptible of no other interpretation. The judgment is reversed.

DUNBAR, C. J., and STILES, HOYT, and SCOTT, JJ., concur.

(9 Wash. 107)

STATE ex rel. THOMPSON v. PRINCE, Sheriff.

(Supreme Court of Washington. June 5, 1894.)
SHERIFF'S FEES—COMMISSION ON SALES.

When the judgment creditor bids in the property for the amount of his judgment with interest and costs, the sheriff is not entitled to a percentage as on "moneys actually made and paid" to him on execution (Sess. Laws 1893, p. 423), as 2 Code, § 507, requiring the successful bidder to forthwith pay the money bid to the officer, would not authorize the officer to demand the money in such a case, and the percentage is intended as pay for the actual handling of the money. Dunbar, C. J., and Anders, J., dissenting.

Appeal from superior court, Thurston county; M. J. Gordon, Judge.

Mandamus, on the relation of Susan L. Thompson, to G. S. Prince, as sheriff of

Thurston county, to make return to an order of sale. Writ made peremptory, and defendant appeals. Affirmed.

Milo A. Root, for appellant. Burke, Shepard & Woods, for respondent.

SCOTT, J. This is a proceeding in mandamus brought by the relator against the sheriff of Thurston county to compel him to make return to an order of sale under foreclosure of mortgage, without payment to him of commission upon the amount of the bid, the property having been bought in by the plaintiff. The original action is the ordinary one upon a promissory note for \$50,-000, with interest, and for the foreclosure of a real-estate mortgage given to secure it. Susan L. Thompson, the relator in this proceeding, is the plaintiff, and the Cherry Hill Coal Company the defendant. A judgment and decree of foreclosure were rendered in the plaintiff's favor by the superior court of Thurston county on January 29, 1894, for \$59,485, on which an order of sale was issued to the sheriff, who advertised the property for sale in the usual manner. The sale took place April 7th, and the property was bid in by the plaintiff for the amount of her judgment with interest and costs. amount of the bid was not paid to the sheriff, but his statutory fees for advertising, posting notices, conducting the sale, etc., amounting to \$34 and over, were paid. The sheriff demanded, in addition to these, that the plaintiff pay him \$632.10, as the statutory percentage upon the amount of the plaintiff's bid, and refused to make return of the order of sale, or to give the plaintiff a certificate of sale, until this percentage was paid. The plaintiff demanded that her judgment be applied in payment of her bid, according to a direction contained in the decree and the order of sale, and tendered to the sheriff a receipt for the amount of her judgment, to be filed with the sheriff's return. She also demanded that the sheriff issue her a certificate of sale, which he refused to do until his commission of \$632.10 was paid. An alternative writ of mandate was then sued out by the plaintiff, requiring the sheriff to make his return to the order of sale, and issue a certificate of sale to the plaintiff, or show cause why he did not. A motion was made to quash this writ, and at the hearing the judge below denied the motion, and ordered that the writ be made peremptory and absolute. The appeal is from the order denying the motion to quash, and making the writ peremptory.

The provisions of the statute (Sess. Laws 1893, p. 423) relating thereto are as follows: "Percentage on all moneys actually made and paid to the sheriff on execution or order of sale, under one thousand dollars, two per centum. Percentage on all sums over one thousand dollars, one per centum." Appellant contends, however, that, if the commission could not be charged under this sec-

tion, it could be by virtue of section 3027, vol. 1, of the Code, which is as follows: "Each and every officer who shall be called on or required to perform service for which no fees or compensation are provided for in this chapter shall be allowed fees similar and equal to those allowed him for services of the same kind for which allowance is made herein." The above provisions of Sess. Laws 1893 are identical with those contained in another section (3017) of the chapter of which section 3027 is a part, and also with those found in section 2086, Code 1881, when the fee system prevailed. Appellant contends that a service was rendered here by the county's officer, for which no fee is provided unless the commission in question can be charged, and, as the county pays such officer his salary, it is entitled to be reimbursed, and that it is the purpose of the law to reimburse it by fees earned. It is evident, however, that the case stands upon exactly the same footing as if the fees went to the sheriff, as they did formerly, and that the county is entitled to no greater or different consideration than the sheriff would be. The question presented is simply one of statutory construction. It is apparent the commission could not be charged under section 3017, for no money was "actually made and paid to the sheriff." Counsel for appellant contends that the sheriff has a right to compel the actual payment of the money, but we cannot agree with him. There is no reason why the money should be paid over under such circumstances. Such a requirement would serve no good purpose, and might be productive of serious harm. It might not have been an easy matter for the plaintiff to have raised nearly \$60,000 to pay over to the sheriff, even though she was entitled to receive it back immediately; and the failure to raise it might have resulted in a sale for a much less sum, to the injury of either the plaintiff or the execution defend ant, and perhaps, in a measure, to both of them. She had this money invested in this property, in effect, and it was to satisfy the same that the sale was decreed. Why should she be compelled to duplicate the amount in money for a mere formality? Section 507 (volume 2) of the Code, which provides that "the officer shall strike off the land to the highest bidder who shall forthwith pay the money bid to the officer," does not cover such a case as this, for it is neither within the reason nor spirit of the rule. Law is founded on reason, and statutes should be construed to avoid absurd consequences. What could be more absurd than to require the plaintiff in this case to raise this sum of money, and pay it over one moment, to receive it back the next? It would seem like a most unreasonable requirement. This statute cannot receive a literal construction to include this case, in the light of the other sections mentioned which would conflict

tained in section 3017, viz. "on all moneys" actually made and paid to the sheriff on execution or order of sale," the legislature seems to have recognized that a sheriff might serve executions and execute orders of sale so that the same might be satisfied and performed without actually receiving any money, as in this instance, and meant to exclude all such cases, and to prohibit him from charging any commission therefor. This seems clear, under a very ordinary rule of construction. Words more direct and certain could not well have been used; and to import something else therein than that which is so plainly specified is to say, practically, that a statute cannot be framed to cover a specific thing named, and exclude others not mentioned. Nor is the meaning at all doubtful as to what service the fee was provided for. It is for handling the money. The use of the word "percentage" implies this also. It is contended that it was intended to pay for "crying the sale;" but, if such were the purpose, it is likely the legislature would have provided a specific sum, for that service is the same whether the property sells for \$1 or \$60,000. On the other hand, if it is to pay for the responsibility incurred in receiving and returning the money, it is an apt provision requiring payment in proportion to the risk imposed. If it was so intended, section 3027 would not be applicable; for, the money not having been actually made and paid, no service was rendered to which it could apply. In any event this section was only intended to operate where there is no provision relating to the subject, and fees are expressly provided for serving executions. Being of the opinion that a sheriff has no right to demand the money generally in such cases, we have attached no importance to the provision contained in the decree directing him to receive the plaintiff's bid without the payment thereof. There may be some cases whch conflict somewhat with the foregoing conclusions, but we have found none directly in point, and the weight of authority, we think, clearly sustains them. Coleman v. Ross, 14 Or. 349, 12 Pac. 648; Fiedeldey v. Diserens, 26 Ohio St. 312; Dawson v. Grafflin, 84 N. C. 100; Gordon v. Maupin, 10 Mo. 352; Fowler v. Pearce, 44 Am. Dec. 526; Jacobs v. Turpin, 83 Ill. 424.

Appellant claims that it was customary to collect commissions in such cases, under a like statute, when the fees went to the sheriff. The respondent disputes this, and we are not prepared to say that a uniform practice prevailed throughout the territory in relation thereto, even if it should be conceded as of governing force, if it was the universal custom of sheriffs to collect commissions in such cases under the former fee system. Judgment affirmed.

sections mentioned which would conflict HOYT and STILES, JJ., concur. DUNtherewith. By the clause aforesaid, con-



STICKLER V. GILES.

(Supreme Court of Washington. June 12, 1894.) INTEREST-STATED ACCOUNT-EXTENSION OF TIME OF PAYMENT-CONSIDERATION.

1. Where the debtor tells the person in whose hands an account has been placed for collection, without objecting thereto, that he will pay the same, it is a stating of account between the parties, and the account bears interest from that date.

2. A debtor told his creditor that he was the bear of the contract of the contrac

unable to pay him, but that he had a contract for certain work, and would get his first esti-mate from the 12th to the 15th of the month, and that he would then pay the debt. The creditor agreed to wait. Held, that it did not constitute a valid contract of extension, because

the time was not certain, as it depended on the contingency of the work being performed. 3. A promise to pay at a future time a debt already due, and which draws interest, is not a consideration for the extension of the time of payment when the rate of interest thereon is

not changed.

4. Where a statute establishes the legal rate 4. Where a statute establishes the legal rate of interest, and also provides that any other rate can be collected when the agreement therefor is in writing, only the legal rate can be verbally contracted for.

5. Questions not argued in appellant's principal brief cannot be considered on appeal, though they are argued in respondent's brief and in appellant's reply brief.

and in appellant's reply brief.

Appeal from superior court, Thurston county; M. J. Gordon, Judge.

Action by O. E. Stickler against Milton Giles. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Milo A. Root, for appellant. Fitch & Campbell and Robinson & Linn, for respondent.

HOYT. J. Plaintiff brought this action to recover damages arising from the fact that the defendant had reported him as being delinquent in the payment of a certain bill to an association of which the defendant was a member. A number of questions were presented in the court below, but the case finally there turned upon the decision of the question as to whether or not at the time the association took the action which resulted in the damage complained of the claim of the defendant against the plaintiff was The trial court held that it was, and that for that reason the action of the defendant was warranted. This ruling of the court was excepted to by the plaintiff, and the decision thereon is the sole ground of error upon which he founds his right to a reversal. There are some other questions argued in the brief of the respondent and in the reply brief of the appellant, but in appellant's principal brief no other questions are raised, and, if the action of the court in reference to that question was correct, the judgment must be affirmed, whatever may be the opinion of this court as to the other questions passed This result must follow from the general rule that an appellant must assign the errors upon which he relies. The facts in relation to the account which the defendant

had against the plaintiff were that it had been due and unpaid for some time; that it was placed in the hands of the association of which the defendant was a member for collection; that this association notified the plaintiff that they had the claim for collection, and of the amount thereof; that thereafter plaintiff went to the defendant, and stated to him that, owing to the hard times, he could not make present payment, but that he would pay him as soon as he could, and would pay him interest; that soon after he again went to the defendant, and said to him that he had obtained a contract for doing certain work for the county; that he would get his first estimate upon said work from the 12th to the 15th of August, and that he would then pay him the bill, with interest at the usual rate of 10 per cent; that defendant replied to this proposition that it was all right; he would wait. It was after this last conversation that the action in reference to the account was taken by the association, of which the plaintiff complains, and he contends that the conversation between him and the defendant was sufficient to show a contract by which the time for the payment of the bill was extended. It is claimed on the part of the respondent that there was no contract of extension for two reasons: First, that the time named as the limit of such extension was not sufficiently definite; and, second, that there was no consideration therefor. If we could interpret the conversation as does the appellant, we should agree with him that the time was sufficiently definite; but we cannot do so. As we understand the conversation, it amounted to no more than a statement on the part of the appellant that he had the contract for this work, and that in the usual and ordinary course he would receive his first estimate the middle of August, and that when he did so receive it, and get his money thereon, he would pay the bill; and, thus construed, it did not name any time for the payment with such definiteness as to warrant us in holding that the contract was extended to any definite time. We agree with the contention of the appellant that it is not necessary that such extension should be to a day absolutely definite and certain if it is to some time which the future is sure to make certain. If there had been an absolute certainty that the work under the contract would be performed, and the appellant get his estimate and his pay thereon about the middle of August, and the agreement had been that it should be extended until he did so get his pay, it would probably have been sufficiently definite. But from the very nature of the conversation it is evident that the happening of these events was uncertain, and dependent upon conditions which might or might not result. If for any reason the work was not done to the satisfaction of the county, it might refuse the estimate; or the work might be entirely abandoned, and any right to payment therefor forfeited by the appellant. Counsel for appellant has evidently seen the force of these suggestions, and has attempted to construe the conversation as establishing the fact that appellant agreed to pay the bill on the 15th of August, regardless of the question as to whether or not the events spoken of should come to pass. But we are unable to agree with his contention in that regard. As to the question of consideration for the contract of extension, it is claimed that the agreement to pay interest constituted such considera-That an agreement to pay interest on tion. an account which would not otherwise draw interest would constitute such consideration is beyond question. It is equally clear that such an agreement would constitute no consideration if, without it, the account would draw the same rate of interest. account of such a nature, at the time this conversation was had, that it would draw interest without any express promise on the part of the appellant to pay it? We think it was. Some time before this last conversation was had, the appellant, after having received notice from the association that they held this account for collection, and that it was for a certain definite amount, without making any objection thereto, or in any wise questioning its correctness, agreed generally that he would pay it. This, in our opinion, was equivalent to a stating of the account as between the parties, and from that time it would draw interest at the legal rate. Such being the status of the account at the time the conversation which is relied upon occurred, the promise to pay interest thereon did not in any sense add to the burden of appellant nor to the benefits to accrue to the respondent, and constituted no consideration for a promise.

Appellant, however, makes a further contention,—that, since the legal rate of interest was reduced after this conversation was had, and before the expiration of the time to which it was claimed the account had been extended, to a less rate than 10 per cent., the promise to pay at the rate of 10 per cent., made by the appellant, did add to his burdens and to the respondent's benefit, and that that fact was sufficient to make such agreement to pay a consideration for the promise. In our opinion, the statement by the appellant in the conversation referred to amounted to no more than an agreement to pay legal interest. It is true, he says that he agreed to pay interest at the rate of 10 per cent., but he also stated that he said "at the usual rate of ten per cent.," and, construing all that was said together, it amounted only to a statement on his part that he would thereafter pay interest at the legal But, even if we should construe his statement to amount to an agreement to pay interest at the rate of 10 per cent., it could only have force so long as the legal rate was 10 per cent. The statute in force at the time provided the rate of interest money should draw, and further provided that any other rate could be collected when an agreement therefor was specified in writing, and under it we think it must be held that only the legal rate could be contracted for without an instrument in writing. The judgment must be affirmed.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

HANNA et ux. v. SAVAGE et al. (Supreme Court of Washington. June 13, 1894.) APPEAL BOND—LIABILITY OF SURETIES.

An appeal bond, which does not comply with the statute by obligating each signer for the full amount of the judgment, does not bind the sureties, as it is insufficient to secure a stay, and is therefore without consideration. Per Stiles and Anders, JJ., dissenting.

For majority opinion, see 36 Pac. 269.

STILES, J. (dissenting). The bond construed in this case was, by statute, required to obligate each signer for the full amount of the judgment. It was given to stay proceedings. It did not comply with the statute, and it was, therefore, not a good bond, and did not secure a stay. It could have been moved against at any time, and we should have held it not a compliance with the law. Under these circumstances I am unable to join in ordering judgment against the sureties when the paper they signed has procured no stay, and was, therefore, without any consideration.

ANDERS, J. I concur in the above.

STATE ex rel. STEARNS v. SMITH et al. (Supreme Court of Washington. June 19, 1894.)

AGRICULTURAL COLLEGE — TREASURER OF BOARD
OF REGENTS—FORFEITURE OF OFFICE.

Where the treasurer of the board of regents of the agricultural college is required to be a regent (Gen. St. § 966), and the governor appoints a new board, who qualify and enter upon their duties, including the election of one of their number as treasurer, and the former regents, including the one elected treasurer by them, cease to perform any of the duties of regents, except that such treasurer retains the funds held by him when the new board was appointed, his rights to the office of treasurer are forfeited, and is only treasurer de facto, because the appointment of such new board was not confirmed by the senate as required by law.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by the state of Washington on relation of John W. Stearns against Andrew II. Smith and others on the official bond of defendant Smith as treasurer of the board of regents of the agricultural college. From a judgment for plaintiff, defendants appeal. Affirmed.

John A. Shackleford, for appellants. Jas. A. Haight, Asst. Atty. Gen., for respondent.

SCOTT, J. This is an action on the official bond of the defendant Andrew H. Smith, given as treasurer of the board of regents of the agricultural college. The bond runs to the state, as required by Gen. St. § 966. The breach assigned is the failure of Smith to turn over the funds of the college in his hands at the expiration of his term. John W. Stearns is alleged to be his successor in office. The cause was submitted on an agreed statement of facts, and judgment was rendered against Smith and his sureties, from which they have appealed.

The act providing for the agricultural college was passed late in the legislative session of 1891, and approved by the governor too late to enable him to submit to the state senate for confirmation or rejection the names of the trustees he intended to nominate, as the constitution requires. The five trustees of the college were named by him a few days later, and a commission was issued to each trustee, designating the term he was appointed to hold. Said appointees qualified and entered upon the performance of the duties pertaining to the office. The college was organized, a corps of instructors was obtained, and its work as an educational institution was entered upon. Extensive building operations were carried on, and others were projected, and large sums of money from both the state and national government were received and disbursed. At the beginning of the next legislative session, in 1893, these appointments, with many others, were submitted to the state senate for confirmation or rejection. No final action was had until the 7th of March,-two days before the adjournment of the legislature,-when the somewhat unusual action was taken of rejecting all of such appointees, with perhaps one or two exceptions, in a body, although, so far as known, there was no personal objection to them, with perhaps a very few exceptions. It seems that the interval before adjournment was too short to admit of the selection and submission of so many new names to the senate. Article 13, § 1, of the constitution provides as follows: "Educational, reformatory and penal institutions; those for the benefit of blind, deaf, dumb or otherwise defective youth, for the insane or idiotic, and such other institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be provided by law. The regents, trustees, or commissioners of all such institutions existing at the time of the adoption of this constitution, and of such as shall thereafter be established by law, shall be appointed by the governor, by and with the advice and consent of the senate; and upon all nominations made by the governor, the question shall be taken by the ayes and noes, and entered upon the journal." And section 966 of the General Statutes requires the board of regents to elect one of their own number as treasurer; consequently only members of the board are eligible to the office, or qualified to hold it. At the time of the rejection of Smith he had \$17,036.82 of the moneys of the state dedicated to the use of the agricultural college. This money he has retained, and never paid over to the state, or to any officer or any person on account or for the benefit of the state or college. March 31, 1893, the succeeding governor appointed a new board of regents of the agricultural college, who duly qualified according to law, and have ever since performed the duties of the board of regents. The appointments and commissions of the new board were in every substantial respect like those of the old board. On the 4th day of May, 1893, Stearns, the relator in this case, was duly elected treasurer by the new board, and thereupon duly qualified according to law, and entered upon the performance of his duties as such, and has ever since said time actively performed the duties of treasurer of said board of regents. On the 26th day of May, 1893, and before the commencement of this suit, said Stearns, as such treasurer, demanded of defendant Smith said sum of money. Upon his refusal to comply therewith, application was made to this court for a writ of mandamus to compel him to turn over said funds, which was denied, upon the ground that such treasurer was not a state officer, within the meaning of the constitutional provision giving to this court jurisdiction to issue such writ. State v. Smith, 6 Wash. 496, 33 Pac. 974.

We find it unnecessary to determine some of the questions which have been raised upon this appeal. For instance, it is contended by respondent that Smith ceased to be treasurer immediately upon his rejection by the senate, and that it then became his duty to turn over the funds in his hands to the state treasurer, he being authorized to receive and retain the same under subdivision 1, § 105, Gen. St., which provides that it shall be the duty of the state treasurer "to receive and keep all moneys of the state not expressly required by law to be received and kept by some other person." It is claimed that he was the only officer authorized to receive or retain the same pending the election of a successor to Smith, and the failure to pay the same over to him is alleged as one of the breaches of the bond. If, however, the appointment of Smith as regent was to fill a vacancy (the office never having been previously filled), and he was a state officer, he could continue to hold until the election of his successor, under the following provision of the constitution, viz.: "When, during a recess of the legislature, a vacancy shall happen in any office, the appointment to which is vested in the legislature, or when at any time a vacancy shall have occurred in any other state office, for the filling of which vacancy no provision is made elsewhere in this

constitution, the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." Otherwise his term of office would have been terminated under section 964, Gen. St., relating to the board of regents, which makes no provision for a holding over as to the first appointees, but does as to all subsequent ones. If the terms ended, the governor had the unquestioned right to fill the vacancies. It is contended, however, by appellant that said regents are state officers, within the meaning of article 13 aforesaid, and would hold over until their successors were regularly nominated by the governor and confirmed by the senate, and consequently that the action of the governor in naming a new board, and the subsequent election of Stearns as treasurer by them, was without effect. A question of considerable importance would be presented here, relating to the powers and duties of the legislature and of the executive, and it might indirectly involve a great many officers now engaged in transacting the business of the state in its various departments. This, and a due respect for the co-ordinate branches of the state government, would lead us to approach it with caution, and not to render a decision thereon,-at least one which would be contrary to the construction adopted by the executive,-unless the same is necessary to a determination of the case. A like condition with respect to such appointments will very likely not again arise in the history of the state, and the present situation was no doubt largely occasioned by the more or less unsettled condition of affairs attending the recent change from a territorial to a state form of government, and the manner of making such appointments arose from the necessities of the case, or the necessity therefor was deemed to have arisen. The argument and authorities presented by appenants in support of their contention strike us with a great deal of force. But, after a careful consideration of the case, we do not think the course of the appellant Smith has been such as would enable him to preserve his rights under his appointment as regent and election as treasurer. were we to determine such contention in his His claim that he was lawfully so appointed and elected, and that he rightfully entered upon and assumed the duties of regent and treasurer, must be conceded. But it is also conceded that the new board of regents, immediately upon being appointed and commissioned, duly organized, assumed, and entered upon the discharge of their duties as regents of said college, and the former board, of which appellant Smith was a member, ceased to perform any duties in relation thereto; and the acts of the new board have been in no wise questioned by the former regents, nor by the state, and Stearns, upon his election by said board as treasurer, and qualification as such, immediately entered upon the duties of said office, and has con-

tinued and is now continuing therein without question or hindrance by appellant or any one. It does not appear that appellant Smith ever assumed to act as regent after his rejection by the senate, and his only action as treasurer thereafter has been to retain, and insist upon retaining, the funds then remaining in his hands. He, together with his associates on said former board, stood by, and allowed the succeeding board and treasurer to assume and discharge the duties of such offices without question otherwise. By so doing they all in effect abandoned their offices as regents, and appellant Smith his position as treasurer as well. No term is fixed or prescribed for the office of treasurer, and he had no right to hold it under the statute unless he was a regent. He could not abandon the former and retain the latter. There cannot be an officer de jure and an officer de facto in possession of the same office at the same time, and if the officer de facto is in possession the officer de jure cannot be in also. Mechem, Pub. Off. § 322. The present board of regents became, and now are, the de facto regents of said college, in full and exclusive possession of such offices, and it is the duty of the courts to ald them in obtaining possession of the public funds devoted to the agricultural college, etc. Commissioners Washington Co. v. School Com'rs Washington Co. (Md.) 26 Atl. 115. Being such board, they had a right, and it was their duty, under the law, to elect a treasurer from their own number; and it is well settled that the acts of officers de facto pertaining to the office of which they have possession are valid and binding where it is for the interest of the public to sustain them. Throop, Pub. Off. § 649. And important public interests are involved in instances like this. Consequently their act in electing Stearns was a valid act, and he became and is the treasurer de jure of such board. Id. § 657. The judgment of the lower court is affirmed.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

REICHEL et ux. v. JEFFREY et ux.

(Supreme Court of Washington. June 26, 1804.)

ACCORD AND SATISFACTION-PLEADING.

1. In an action for breach of warranty in 1. In an action for breach of warranty in a deed, defendant answered, alleging that subsequently to the delivery of the deed the parties entered into an agreement to the effect that defendant place in the hands of a certain person a certain sum, to be paid to plaintiff in satisfaction of any damages from a breach of the covenant, and that said sum was placed in the hands of such person, who was advised of the disposition to be made thereof. Held, that it was a good plea of accord and satisfaction. faction.

2. In such a case the fact that plaintiff, on the solicitation of defendant, consented that the money should be turned over to defendant, which was done, is immaterial.

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Appeal from superior court, Thurston county: M. J. Gordon, Judge.

Action by C. H. Reichel and wife against Alexander Jeffrey, Jr., and wife. From a judgment for defendants, plaintiffs appeal. Affirmed.

Chas. H. Ayer and Chas. M. Dial, for appellants. Allen & Moore, for respondents.

DUNBAR, C. J. This was an action by appellants against respondents, in covenant, upon the warranty in a deed. The breach alleged is the existence of an unexpired lease. The defendants answered, alleging that, "subsequent to the sale, acceptance, and execution of the deed, there was an oral or verbal agreement made and entered into by plaintiff C. H. Reichel and defendant Alex. Jeffrey, Jr., as follows: That said defendant place in the hands of T. N. Allen the sum of one hundred dollars, to be forfeited by said defendant, and paid to plaintiff, in full satisfaction of any damage they might sustain from Covert's [the tenant's] possession in the event that said Covert failed or refused to deliver up said premises upon demand of plaintiffs herein," and that said sum of \$100 was, in conformity to said agreement, placed in the hands of said Allen, who was fully advised as to the object and intent of the same, and the disposition to be made thereof. There were many other allegations and denials in this complaint, but this is the principal one which we find it necessary to consider. Paragraph 2 of plaintiffs' reply is as follows: "They admit that said defendant [plaintiff] C. H. Reichel consented, on or about the time of said purchase, that \$100 of the purchase money should remain in the hands of one J. F. Murphy, to be forfeited in case said defendants should fail to place plaintiffs in possession within ten days after the. date of said sale. They further state that, at the solicitation of the defendants, he consented that said money be turned over to said defendants, and said money was turned over to said defendants, or their attorney T. N. Allen, and no part thereof inured in any way to these plaintiffs, or to their benefit.' Upon the filing of the reply, defendants moved for judgment on the pleadings, which motion was sustained by the court, and judgment was entered in accordance with said motion, which action of the court is alleged as error by the appellants here.

It seems to us that the plea of accord and satisfaction set out in defendants' answer has not been denied by the reply. It is urged by the appellants that defendants' answer did not contain a plea of accord and satisfaction, but simply a plea of accord. We have examined the definitions of the terms "accord and satisfaction" in the authorities cited by appellants, and it seems to us that the contract pleaded in the answer was an executed contract. The allegation is not only that the parties to the action agreed to place is

in the hands of T. N. Allen the sum of \$100. to be forfeited by the defendants, and paid to plaintiffs, in full satisfaction of any damages they might sustain by reason of the breach of the covenant, but there is a further allegation that the agreement was carried out or executed by the payment to said T. N. Allen of the said sum. This is altogether different from an allegation that there was an agreement that the sum of \$100 should be paid at some future time to the plaintiffs, in case of a breach. The fact that they agreed upon the person to whom it was to be paid, and that the person agreed upon was instructed to pay the same to the plaintiffs in case of a breach, amounts substantially to an allegation of payment to and acceptance by the plaintiffs. No subsequent action by either party remained to be done to perfect the agreement, and the manner and circumstances under which the parties to the agreement placed this money would preclude either of them from denying the execution of the agreement: and as the reply of the plaintiffs in no way denies this affirmative allegation in the answer, but substantially admits it, the accord and satisfaction stand confessed by the pleadings. agreement would also be good under the doctrine announced in Hart v. Gould (Mich.) 28 N. W. 831, where the doctrine was announced that the law favors settlements of disputed matters by the parties without recourse to litigation, and, presuming that in such settlements the parties consulted their own interests, will not interfere, except in the case of fraud or mistake; and, where such settlement has been made by way of compromise, it cannot be avoided by either party excepting on the grounds of fraud or mistake.

There are other questions involved in this case, viz. the insufficiency of the complaint, which it is not necessary for us now to decide. The lower court having sustained the motion for judgment on the pleadings on the ground above mentioned, and this court finding that said motion was properly sustained, the judgment will be affirmed.

SCOTT, HOYT, STILES, and ANDERS, JJ., concur.

RIGNEY v. TACOMA LIGHT & WATER CO.

(Supreme Court of Washington. June 26, 1894.)

Appeal—Review — Discretion of Trial Court.

Where the evidence is indefinite and wanting in several particulars to sustain the verdict, the action of the trial court in granting a new trial unless plaintiff would remit a portion of the verdict will not be disturbed.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Robert P. Rigney against the Tacoma Light & Water Company for damages. There was a verdict awarding plain-

tiff \$3,000, and from an order granting a new trial unless plaintiff remitted \$1,600 from the verdict he appeals. Affirmed.

Baker & Campbell, for appellant. Chas. W. Seymour, for respondent.

SCOTT, J. Plaintiff sued for damages for the unlawful diversion by the respondent of the waters of a natural water course called "Clover Oreek" and its tributaries, which flow through and upon the lands of the plaintiff. He sought to recover therein for damages resulting from such diversion during the three years immediately preceding the commencement of the action. Issue was joined, and trial had, and the jury returned a verdict in favor of the plaintiff for \$3,000. The defendant moved for a new trial upon several of the statutory grounds, one of which was insufficiency of the evidence to justify the verdict; and another was excessive damages, appearing to have been given under the influence of passion or prejudice. The court granted a new trial unless plaintiff would consent to remit \$1,-600 from the verdict, and the plaintiff appealed therefrom. Said claim for damages was based upon three grounds. One was in consequence of being deprived of water for horses, cattle, and other stock; another for deprivation of the seepage water to the pasture lands; and the third for the deprivation of the overflow waters of the low lands. The lower court filed a written opinion on the motion for a new trial, whereby it appears the court found that the evidence was sufficient to sustain a recovery upon the first ground alleged, which, however, only amounted to a portion of the damages recovered; and that, in the opinion of the court, the evidence was insufficient to justify the remainder of the verdict upon the other grounds. It is contended by appellant that the order of the court granting a new trial ought not to be allowed to stand, for the reason that it appears that the findings of the court were erroneous. It seems by the opinion filed that the court did not find that the jury were at all influenced by passion or prejudice, but found the contrary; and appellant claims it was only upon this ground that the action of the court could be sustained in requiring him to remit a portion of the verdict to avoid having it set aside entirely. The amount claimed for damages upon the first ground was only \$1,-000, and the amount proved by the plaintiff was still less than this; so that it appears that a part of the \$1,400 which the court ruled might stand would necessarily have been based upon one or both of the other grounds of damages sued for. Appellant further contends that the action of the court cannot be sustained upon the ground of insufficiency of the evidence, for, if the evidence was insufficient as to the two other grounds alleged, the court should have set |

aside the entire amount recovered or based upon said grounds; and that, by allowing a part of it to stand, it was found that there was some evidence to support it, and the evidence to support a part would support all of it. Appellant further contends that there was evidence in the case sufficient to support the verdict as brought in, and, consequently, that it was beyond the power of the trial court to set the same aside, or make the order in question, on the ground last specified. It may be that, by taking an extreme view of the testimony and the inferences to be drawn therefrom, and giving it its most favorable construction for the plaintiff, there would be some evidence upon which the verdict of the jury might be based; but it was certainly weak and unsatisfactory in some particulars, if not entirely wanting. In Pederson v. Railway Co., 6 Wash. 202, 33 Pac. 351, and 34 Pac. 665, this court said: "Insufficiency of the evidence to justify the verdict is made a ground for a new trial by our statute; and that would seem to imply that in proper cases a new trial may be awarded although the verdict be supported by some evidence." And in Kohler v. Railway Co., 8 Wash. 452, 36 Pac. 253, 681, we held, in effect, that the granting of a new trial in such an instance as this is a matter intrusted to the discretion of the lower court, and would not be interfered with unless it was made to appear affirmatively that such discretion had been improperly exercised. After considering the testimony introduced upon the trial of this case, we do not think there was any abuse of discretion in the premises. In fact, the evidence appears to us to have been indefinite, insufficient, and wanting in several particulars to sustain the verdict as brought in, and that the jury did not have sufficient evidence before it to base a verdict upon the second and third grounds specified. The appellant cannot complain because the court, instead of setting the same aside entirely, allowed him the privilege of retaining a portion of it. Affirmed.

HOYT, STILES, and ANDERS, JJ., concur. DUNBAR, C. J., dissents.

(9 Wash, 162)

RATHBONE, SARD & CO. v. FROST. (Supreme Court of Washington. June 13, 1894.)
FRAUD—PLEADING—ENLARGEMENT OF GUARANTY.

1. In an action on a continuing guaranty of \$500, the answer alleged that plaintiff's agent told defendant that he had sold the principal \$500 worth of goods, and asked defendant to guaranty payment; that defendant executed a guaranty; that thereafter defendant received from plaintiff a letter inclosing another paper, and desiring him to sign it, as being plaintiff's usual form of guaranty, and in accordance with the original agreement; that, relying on the representations, plaintiff signed it; that this was the instrument sued on; that it was understood that the original agreement was not to be

changed; that the bill guarantied had been fully paid. *Held*, that fraud was sufficiently alleged to admit proof of the character of the first guaranty, and the substitution of the second.

2. One who contracts with a foreign correction is extended to done its right to do busing

poration is estopped to deny its right to do busi-

ness in the state.

Appeal from superior court, Thurston county; Emmett N. Parker, Judge.

Action by Rathbone, Sard & Co., a corporation, against Robert Frost, on a contract of guaranty. Judgment for plaintiff. Defendant appeals. Reversed.

W. I. Agnew, for appellant. Richards, Murray & Pratt and Robinson & Linn, for respondent.

DUNBAR, C. J. The complaint in this case alleges that on the 30th day of August, 1888, at the city of Olympia, territory of Washington, the defendant, in consideration of the sum of one dollar, to him in hand paid by the plaintiff, did, in writing, guaranty the payment at maturity to plaintiff of any and all bills of merchandise which the plaintiff might from time to time thereafter sell to George L. Jones upon such credits as might be agreed upon between the plaintiff and the said Jones, and without requiring any demand or notice of default; that the defendant's liability was by said writing limited to \$500; that plaintiff afterwards, and prior to October 12, 1891, and on the faith of said guaranty, sold and delivered to said George L. Jones merchandise, consisting of hardware, to the full amount of \$500, the purchase price of which, according to the terms of sale, was payable on delivery of the goods; further alleges demand of payment of Jones, and refusal by him to pay the same, and demands judgment against the defendant on his guaranty for \$500, and costs of the action. The answer, among other things, alleges that some time shortly prior to the 30th day of August, 1888, the agent of plaintiff called upon the appellant, representing that he had sold to said Jones a bill of merchandise of the value of \$500, and desired the appellant to guaranty payment of the same; that thereupon said agent drew up a guaranty to that effect, and appellant signed and delivered the same; that appellant's liability was limited in said instrument to the sum of \$500 for goods already purchased by Jones of said respondent; that thereafter, on or about August 30th, appellant received by mail from the respondent another paper, accompanied by a letter of transmittal, wherein respondent represented to appellant that it desired his guaranty to be upon the form which it usually used, and desired him to sign the form inclosed and return the same to it, and represented that such new guaranty was simply for the purpose of carrying out the original agreement and contract signed by the appellant; that, trusting and relying upon said representations, without paying any attention to the form inclosed, appellant signed the new agreement, and forwarded it | fraud on the part of the respondent; at least

to respondent, which said second instrumentis the same set forth in plaintiff's complaint; and alleges further that it was well understood and agreed by and between respondent and appellant that the original contract or guaranty was to be in no way modified, extended, or enlarged, and that the bill of goods ordered by Jones to the amount of \$500, and for which the appellant became liable, had been wholly paid, and that thereupon the liability of defendant ceased.

Upon the trial of the cause, the appellant offered evidence tending to show the character of the first guaranty and the circumstances under which the second guaranty was executed. The testimony offered was as follows: "That the guaranty sued upon in this action was substituted for the original guaranty given by him, in which his liability was limited to five hundred dollars. That the guaranty upon which suit is brought was given by Mr. Frost under the following representation, by inclosing the same by letter: 'Aug. 25, 1888. Robert Frost, Olympia, Wash. Ter.-Dear Sir: We are in receipt of an order from our Mr. Traphagen for stoves, to be shipped to Geo. L. Jones, of your place, and we are also in receipt of your guaranty for the account of Mr. Jones up to \$500. We would much prefer that you make out this guaranty on one of our blanks, which we inclose herein for your signature. We will hold the guaranty which we received through Mr. Traphagen until we receive this from you, when we will return it to you. There is but little difference in the blanks, but we prefer to have our own regular forms for our account, in order to make everything more satisfactory. Yours, truly, Rathbone, Sard & —.' Further, that the original Co. per guaranty for which the one sued on was given limited the liability of the defendant to the amount of five hundred dollars. Also, that the original guaranty was never returned to defendant, but was lost or retained by the plaintiff." This testimony was objected to by the plaintiff, the objection was sustained, and, upon motion of the respondent, the jury was instructed to find a verdict for the respondent.

In refusing to admit such testimony, we think the court erred. The respondent objected to the introduction of the testimony on the ground that the affirmative allegations of the answer did not charge fraud on the part of respondent. While it is true the answer does not allege in terms that the respondent was guilty of fraud in obtaining the execution of the second guaranty, yet, if the acts which constitute the fraud are set forth, it is not necessary that the appellant should plead the conclusion of law, which would be about all that an allegation stating in terms that the respondent was guilty of fraud would amount to. We think the allegations of the answer and the proof offered in this instance, if true, are sufficient to establish

it is sufficient proof tending to establish fraud to be allowed to go to the consideration of the jury. The testimony is that the second guaranty is a continuing guaranty, and that the first guaranty was limited to the goods which were already bought by Jones at the time the guaranty was executed. Certainly. then, there is an essential difference, so far as the responsibility of Frost is concerned, in these two instruments, and yet the letter accompanying the new instrument, which the respondent desired appellant to sign, positively states to appellant that "there is but little difference in the blanks," and gives as a reason for preferring their request to have the second guaranty signed that they would like to have it on their regular forms. When the respondent said, "We would much prefer that you make out this guaranty on one of our blanks, which we inclose for your signature," and, further, that "there is but little difference in the blanks, but we prefer to have our own regular form for our account, in order to make everything more satisfactory," the evident intention was to convey the idea to the appellant that the change required was simply a matter of form, and not of substance; and Frost, evidently with a desire to accommodate where he could do so without any expense to himself, complied with the seemingly innocent request. But the result shows that there was a very material difference, for in one instance Frost would have been entirely exonerated from the payment of this claim, and in the other he is held responsible to the amount of \$500. It is true it may have been a little careless on the part of Frost not to have examined the second instrument with reference to the conditions of the first, but it is upon careless people ordinarily that frauds are perpetrated. If it was not the intention of the respondent to obtain by the change a benefit which was not contained in the first agreement, then it has secured a contract which was not intended either by it or Frost, and, if it was its intention to obtain this additional benefit, it evidently obtained it by sharp practice, and, when sharp practice is analyzed, fraud will usually be found to be its principal constituent element. We do not think the law should uphold men in their attempts to overreach others who are unsuspecting, and who rely upon the honor and integrity of those with whom they are dealing. Certain it is in this case, if the testimony of the appellant be true, that the liability of appellant was increased after the contract was entered into, and there would seem to be no reason why Frost should have entered into the second and more extended contract. And the fact that the accredited agent of the company was not supplied with the usual forms used by the company in such cases, and that a form of more limited liability was first used, and then one of more extended Hability obtained under the pretense of desiring simply their usual printed forms, is, to

say the least, a suspicious circumstance in this case. We think the testimony should have gone to the jury for their consideration. This being true, the instruction asked by appellant, viz. that "if you find from the evidence that the contract between the plaintiff and the defendant, when originally entered into, was the contract by which the defendant's liability as guarantor was limited to the amount of five hundred dollars; and if you further find from the evidence that the plaintiff obtained the guaranty upon which he sued from the defendant through fraud, and that the defendant was misled by the statements and representations of the plaintiff,-then the plaintiff is not entitled to recover,"-should have been given by the court. The answer also alleged that, during the times mentioned and set forth in plaintiff's complaint, the plaintiff was a foreign corporation, attempting to do business in the state of Washington without complying with the laws of this state with respect to foreign corporations doing business therein, and that, therefore, it had no legal capacity to sue; and a portion of appellant's brief is devoted to the discussion of this proposition. This question was settled by this court adversely to the contention of appellant,-to the effect that where a party had contracted with a foreign corporation he was estopped to question the right of the corporation to do business in the state,—in Dearborn Foundry Co. v. Augustine, 5 Wash, 67, 31 Pac, 327, and in La France Fire Engine Co. v. Town of Mt. Vernon, 9 Wash. —, 37 Pac. 287; but, for the errors alleged above, the judgment will be reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

SCOTT, ANDERS, and STILES, JJ., concur.

ROGERS v. CITY OF SPOKANE.

(Supreme Court of Washington. June 18, 1894.)
Accord and Satisfaction—Failure to Perform
Agreement.

The fact that a person injured through the negligence of a city agreed to accept a certain sum in satisfaction of his claim does not bar his right of action against the city, when the city council afterwards merely authorized the comptroller to pay him such sum, and he did not accept it, and no tender was made to him.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by A. W. Rogers against the city of Spokane. There was a judgment for plaintiff, and defendant appeals. Affirmed.

James Dawson, Corp. Counsel, for appellant. Turner, Graves & McKinstry, for respendent.

DUNBAR, C. J. This is an action by the respondent against the city of Spokane for dam-



ages received by respondent while acting as a duly-authorized scavenger for said city, in removing the contents of a cesspool, and disposing of the same in the Spokane river, from the city dump structure, by reason of respondent and his team being precipitated from said dump structure into the Spokane river on account of the alleged unsafe structure maintained by the city. The complaint contained the usual allegations of negligence on the part of the city, and damages suffered by respondent. The answer was a denial of the negligence of the city in maintaining said structure, an allegation of contributory negligence on the part of the respondent, and an affirmative defense, which was as follows: "Defendant, for a further affirmative defense and answer to said complaint, alleges that before the commencement of this action, to wit, on the ---- day of October, A. D. 1893, the said plaintiff agreed to accept the sum of three hundred and forty. three and 90/100 dollars in full discharge and satisfaction of said claim, on a compromise thereof, and to execute to the defendant a release and discharge therefrom, and that the said defendant then and there agreed to pay said plaintiff said sum in full satisfaction and discharge of said claim, as a compromise thereof: that on, to wit, the 27th day of October, A. D. 1893, the said defendant, at a regular meeting of its council, by its said council, empowered and directed its comptroller to issue to said plaintiff warrants for said sum, payable from its treasury, and the same are now ready to be delivered to said plain-On the trial of the cause the following testimony was offered: "Question. Now, Mr, Patterson, will you state whether there was any agreement made between the finance committee and the city council to compromise the claim of Mr. Rogers? If so, state what, (Objected to by counsel for plaintiff as immaterial, irrelevant, and incompetent.) Mr. Dawson: I propose to prove by this, your honor, that they actually went into negotiations to settle this, and the amount was agreed on, and that Rogers agreed to accept that amount, and upon that agreement of Rogers it was presented to the city council, and the city council passed upon it, and directed the comptroller to draw warrants for that amount, and Mr. Rogers agreed to come pack and get the amount agreed upon. He never did come back, but brought this suit. The amount agreed upon was itemized, and he agreed to accept that as a compromise of this case."

The objection to the introduction of this testimony was sustained by the court, so that it will be seen that this case squarely raises the law of accord and satisfaction. This is one of the most difficult branches of the law to determine, as the authorities seem to be somewhat conflicting, and the circumstances under which the questions arise are so diversified and numerous. An "accord and satisfaction" is defined to be "an agree-

ment between two persons, one of whom has a right of action against the other, that the latter should do or give and the former accept something, in satisfaction of the right of action, different from, and usually less than, what might be legally enforced. When the agreement is executed, and satisfaction has been made, it is called 'accord and satisfaction." Black, Law Dict. p. 16. Another definition is, "A satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar to all actions upon this account;" and another, "A settlement of a dispute on the satisfaction of a claim by an executed agreement between the party injuring and the party injured." The definition given by Rap. & L. Law Dict. is as follows: "An accord is an agreement between two or more persons, one of whom has a right of action against the other, that the latter shall render and the former accept something in satisfaction of the right of action, etc. If the accord is carried out by the payment, delivery, or performance and acceptance, the arrangement is called an 'accord and satisfaction,' or, as sometimes called in the old books, an 'accord and execution,' and operates as a bar to the right of action." In fact, the definition of all the writers, and the well-understood meaning of the term, is substantially as expressed above; so that it will be seen from the allegations of this complaint that there could have been no accord and satisfaction, for the agreement was never executed and the payments never made.

There is another and more modern, and probably better, application of this principle, which has been sustained by the courts, vizi that an accord and satisfaction is the substitution of another agreement between the parties in satisfaction of the former one; or probably a better definition would be where a promise to do a thing is set up in satisfaction of the prior right or claim. And this principle, or application of the principle, is invoked by the appellant here to sustain his appeal. It asserts that it does not plead, or attempt to plead, accord and satisfaction, nor does it contend that the proof was sufficient to support accord and satisfaction: but its contention is that the matter pleaded, if true, is good as a release of the original cause of action, and a good defense to this action, based as it is upon the original case after once agreeing to settle the same; that where there is a disputed liability, and an unliquidated claim based thereon, existing between parties, and the parties get together, and, as a compromise of the matter in dispute, agree upon an amount to be paid by the one party to the other, when the amount is fixed and determined, and there is an agreement in the two minds that the amount fixed to be paid is the amount due, and the party by the compromise liable to pay agrees to pay the same, and the other agrees to accept the same, the payment of the amount so fixed becomes immediately the only matter open between them, and all claims and demands in dispute become immediately merged in the fixed sum, and both parties to the settlement and compromise are mutually bound by the settlement. We think this is a proper statement of the law, with this qualification: that it must appear that it was the new agreement to perform which the party who was entitled to recover relied upon, instead of the performance of the agreement by the payee. This class of cases is thus commented upon in note f, p. 819, 2 Pars. Cont. (7th Ed.). After commenting upon cases of this character, including Babcock v. Hawkins, 23 Vt. 562, which is one of the strongest cases upholding this doctrine, the author says: "But the rule established by these cases has made no material change in the form of the plea. It is still true that an accord without satisfaction is not good. Therefore, if a defendant intends to set up a new promise, without performance, in bar of an action, he must take care to aver distinctly that it was agreed that the new promise should be received in satisfaction. If he sets forth the agreement in such a manner that it appears upon the face of the plea that performance, and not the promise to perform, was to be received in satisfaction. and does not aver performance, the plea will, of course, be bad. This will explain several recent English cases which might seem at first sight to be at variance with what is stated in the text." Tested by this rule the answer in this action most certainly does not state a ground of defense, so far as the plea of settlement is concerned; for it will be observed that the allegation of the affirmative answer is not that the plaintiff agreed to accept the agreement of the city council to pay him the sum of \$343.90 in discharge and satisfaction of his claim, but that he agreed to receive the payment of the said sum agreed upon in satisfaction of his claim; and the three cases cited by appellant in its reply brief, in our judgment, support the position taken by Mr. Parsons. Goodrich v. Stanley, 24 Conn. 613, which is the main case cited by appellant in his reply brief, holds that: "Where it is claimed that an agreement, with promises on the one side to pay, and on the other to accept payment of, an obligation in a mode other than according to its tenor, is a satisfaction or extinguishment of such obligation, it should explicitly appear that such was the intention of the parties. That where the payee of a negotiable promissory note, both before and after its transfer, promised the maker that if the latter would continue to labor for him he would apply the amount of such labor in payment of the note; that in consideration thereof the maker promised to continue so to labor until the note should be fully paid, and the payee agreed to accept the labor in satisfaction of the note,—it was held that this was only an agreement on the part of the payee to ac-

cept the labor of the maker, and not an agreement to accept merely his promise to render it, in satisfaction of such note." It was further held: "Where the payee, for a valuable consideration, assigned such note when overdue, but the labor agreed to be performed in satisfaction of it had not been rendered at the time of the assignment, that said agreement to labor not only constituted no satisfaction of the note, but was merely an unexecuted accord, and therefore imposed no legal duty upon the maker, prior to the assignment, or consequently upon the assignee, afterwards, to accept such labor, even if it had been tendered." The court, in the discussion of the case, says: "The defendants claim that it is found that after the note became due, and before its transfer to the plaintiff, there was a mutual agreement between Booth and Goodrich, in which the latter promised that he would continue to labor for the former until the amount due on the note should be fully paid by such labor, and the former promised that he would accept said labor, and apply it in satisfaction of the note; that it was then further agreed between them that the promise of Goodrich should be accepted by Booth in satisfaction of the note, and that it was so accepted. And the defendants insist that this substitution of the promise of Goodrich for the note was an extinguishment, by way of accord and satisfaction, of such note, and therefore constituted a valid defense to it against Booth, and consequently against the plaintiff, his assignee. If." says the court, "Booth accepted, in satisfaction of the note, the promise of Goodrich to pay the amount due upon it, in his labor, and did not merely agree to accept such labor when it should be performed, in satisfaction of it, and that was a valid promise, on which, upon its nonperformance, an action would lie in favor of Booth, the authorities appear to be decisive to show that such acceptance would be an executed accord, which would be a satisfaction and extinguishment of the note." the court, after commenting upon cases of this character, proceeds as follows: "In order that such an accord should be a defense to the original debt, it is necessary, in the language of Parke, B., in the case last cited (namely, Evans v. Powis, 1 Welsb. H. & G. 601), that the plaintiff should have 'agreed to accept the agreement itself, and not the performance of it, as a satisfaction for his debt. so that if it was not performed his only remedy would be by an action for the breach of it, and not a right to recur to the original debt.' There must be a valid agreement substituting a new cause of action in place of the old. It is not sufficient that there is a mere accord between the same parties, with mutual promises, but there must be a new agreement, with a new consideration." And the court holds that where it is the promise to perform, instead of the performance, that is accepted, it must explicitly appear that such was the intention of the parties; finding in this case that Booth did not agree to rely upon the mere promise of Goodrich to perform the labor, but upon the performance of the promise. And the other cases cited by appellant in its reply brief are to the same effect.

So that the rule on this question is brought down, by the modern authorities, to a question of intention. This intention must be gathered from the contract, and in this case the contract must be ascertained from the allegations of the answer. From the allegations of the answer, it certainly does not appear that it was the intention of the respondent to accept the promise of the city of Spokane to pay him \$343.90, but that it was the payment of the said sum that he relied upon to extinguish his claim. Under the pleadings in this case, it plainly appears that the claim was to remain in force until the satisfaction under the new agreement, namely, the payment and acceptance of the warrant was completed; and it may be, as was said in Kromer v. Helm, 75 N. Y. 578, that it was indefensible in morals for the respondent to refuse to abide by the agreement that he made, but he was under no legal obligation. and had the right to enforce his claim at any time before his acceptance of the amount agreed upon. In fact, so far as the allegations of the answer in this case are concerned, it does not even appear definitely that there was a meeting of the minds of the city council and the respondent at any time. Certainly, there was no tender by the council of the amount at the time that the alleged agreement was made. And whether or not there is any distinction to be made on the question of tender between a municipal corporation and an individual is a question which it is not necessary for us now to decide, as it does not appear from the answer that the date on which the plaintiff agreed to accept the amount specified was the date on which the city council empowered its comptroller to issue the said warrant to the respondent. We think that the objection that the answer did not state facts sufficient to constitute a defense in this particular should have been raised by demurrer; that such is much the better and fairer practice, because, if the court should sustain the objection, the pleader can have an opportunity to amend his pleadings to correspond with the facts. But inasmuch as this question has not been raised by the appellant, and inasmuch as it further appears from the testimony offered that the proof was not even as strong in support of the plea in bar as the allegations of the answer, the agreement of respondent appearing to be with the finance committee, by which it was afterwards submitted to the city council for ratification, after respondent's acceptance of the same, and that no amendment could have been made in accordance with the facts, we will not disturb the judgment of the court on that ground. This disposes of the objection to the instruction of the court that the assertion that the plaintiff agreed to receive \$343.90 in consideration of his claim against the city, and that the city agreed to pay it, and ordered it paid, constituted no defense, and that it was therefore withdrawn from their consideration.

It is stated by the appellant in its brief that but two questions are presented in this case, viz.: First, error of the court in excluding the evidence showing a compromise between the parties; second, excessive damages awarded respondent. There is, however, some little attempt to show that if the dump was in a dangerous condition it could have been seen by any person, and that the respondent was therefore guilty of contributory negligence, in not taking notice of its dangerous condition. The testimony, however, shows that the respondent had not been acquainted with the structure when it was first made, and had not had an opportunity to observe its gradual decay, or rather displacement from its original position; he never having been to the place before the 8th of August, the accident occurring on the 24th of the same month.

So far as the question of excessive damages is concerned, from the testimony of the respondent and of the physician attending him, it would take, it seems to us, a large stretch of the imagination to conclude that such testimony showed that the verdict was founded upon the passion and prejudice of the jury. It may have been that, if this court had been sitting as a trial jury, it would not have given the respondent the same amount of damages that was given by the jury. That question having been submitted to a tribunal authorized by law to make a finding upon that subject, we are not inclined to disturb it. The judgment will therefore be affirmed,

SCOTT, ANDERS, and STILES, JJ., concur.

SEWARD et al. v. SPURGEON et al.

(Supreme Court of Washington. June 1, 1894.)
REFORMATION OF DEED—COSTS—REVERSAL

1. In an action for the reformation of a deed it appeared that defendant and S., the grantor of plaintiff, agreed to purchase certain land. The deed was made by mistake to S. alone, who afterwards executed to defendant a deed for his half interest, and the division line between their halves was staked out, and a fence built on the line. Defendant's tract, as marked off, contained a few more acres than the other. The evidence was conflicting as to whether the tract was divided as to acreage or value. S. had the choice of the tracts after the division. The description in the deed called for more land than defendant claimed. Defendant had sold several parcels of his tract which bordered on the division line to innocent purchasers. Held, that a decree that the line staked out be the division line was proper.

¹ Rehearing pending.



2. Where, in an action for the reformation of a deed executed in the division of land, it appeared that defendant only claimed to a certain division line, which the court decreed to be the proper division line, and that plaintiff had never requested him to correct the deed so as to conform thereto, the fact that the court failed to reform the deed so as to conform to such line is not ground for reversal so as to entitle plaintiff to costs.

Appeal from superior court, Clarke county; E. A. Wiswald, Judge.

Action by Orson M. Seward, guardian, and others, against Mathias Spurgeon and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Mitchell, Tanner & Mitchell, for appellants. Miller & Stapleton and Green & Sparks, for respondents.

DUNBAR, C. J. In November, 1873, Orson M. Seward, one of the appellants in this action, and Mathias Spurgeon, one of the respondents, purchased a portion of a donation land claim of Joseph Petrain, in Clarke county, Wash. They each advanced onehalf of the purchase price, with the agreement that the deed should be made to them as tenants in common, each to own an undivided one-half thereof. The deed, however, instead of being made to Seward and Spurgeon jointly, was made out by Petrain in the name of and to Orson M. Seward, by reason of which he took the legal title to the whole of said land. Afterwards they divided the land between them. Appellants contend that the agreement was to divide the land equally, so far as acreage was concerned, but that by reason of a mistake made by the surveyor who surveyed the land at the time the deed was made Seward actually deeded to Spurgeon more than one-half of the number of acres of said tract of land; that his deed called for about 135 acres of land, when in fact 1251/2 acres was one-half of the whole tract. At the time the deed was made a division line between the land of Spurgeon and that of Seward was agreed upon by the parties. Stones and stakes were set to establish it, a fence on said division line was built a portion of the way at least across the line, and said line has ever since been respected by both parties as the true line. Subsequent to this conveyance and the establishment of said line, Spurgeon sold and conveyed to the defendants C. E. Wheelock and William Smiley each a portion of said land so conveyed to him, and which reached up to the division line above referred to. In 1881, Nancy E. Seward, wife of said Orson M. Seward, and the mother of the other appellants named herein, died intestate, leaving said children her lawful heirs. Her estate was duly administered upon, and the land distributed to said children, appellants herein. Afterwards Orson M. Seward deeded to the other appellants all his right, title, and interest in and to the excess of land so claimed to be conveyed to said Spurgeon, Orson M. Seward appearing in this action as guardian for some of the minor heirs. A division of the land between the heirs led to the discovery of the alleged mistake in September, 1891, and this action is brought to reform the deed from Seward to Spurgeon, and to establish the boundary line between the original Spurgeon tract and the original Seward tract of land. The court found upon the trial of the cause: (1) That Seward and Spurgeon agreed to purchase and hold as tenants in common that certain tract of land described in the complaint. (2) That on or about the 1st day of November, 1873, purchase was made of said tract; that the deed therefor was made to Orson M. Seward, who took legal title to same, and became trustee of said Spurgeon for an undivided one-half thereof. (3) That subsequently Seward and Spurgeon agreed to divide said tract equally between them, and for that purpose the county surveyor established a line within the supervision of Seward and Spurgeon, dividing the tract into two equal parts; that said line then and there established was by Seward and Spurgeon accepted; that Seward had his choice of the two parcels as divided, and selected the south half, and Spurgeon took the north half; that ever since the 6th day of January, 1874, Seward and Spurgeon have continued to occupy, cultivate, and improve their respective tracts; that the dividing line between Seward and Spurgeon made an equal and equitable division of said tract; that defendants C. E. Wheelock and William Smiley were innocent purchasers of the tracts which they respectively hold from Mathias Spurgeon, who at the time of their purchase from him held the legal title to said tracts; that the line established and accepted by Seward and Spurgeon at the time of the partition of said tract and observed as such since that time be and continue the boundary line between them, their successors and assigns, said line so established being described in the judgment.

From a perusal of the record we are satisfied that the findings of the court were clearly warranted by the testimony. At the trial appellants introduced County Surveyor Robb, who testified that a certain line indicated by him would be an equal division of the land so far as area or acreage was concerned. While it seems to be true that the deed from Seward to Spurgeon actually calls for a greater number of acres than would be comprehended in one-half of the tract, yet the testimony is conflicting as to whether the agreement was for an equal division of acres or an equal division so far as value is concerned. It appears from the testimony that the line was actually established, and that Seward had his choice of the tracts that were divided by said line; but, conceding that the agreement was that the division should be made with reference to the number of acres, then there is no testimony whatever in this case tending to show that the parties to the contract agreed to divide the land with reference to the particular line established and reported by Surveyor Robb. And, if we understand what a reformation of a deed means, it must be shown clearly that the parties to the contract intended to deed a particular piece of land; that the deed actually given did not express the agreement of the parties; and a court of equity will then decree that the instrument shall be reformed to express the actual intention of the parties. But, as we say above, there is no testimony showing that the particular line of division indicated by the surveyor was ever agreed upon by the parties to this contract. While it may be true, and doubtless is, that what is termed the "Robb Line" would be an equal division of the tract of land, yet there might be 40 lines run across the tract, which would equally divide the land, and the court, under the testimony, has no authority to reform the deed upon that basis. Besides, according to the report of the surveyor, the deed from Seward to Spurgeon absolutely conveyed nothing, the line not being closed, so that an intelligent description, or any description at all, was expressed in the deed; and the location of the dividing line at the time, and its observance since by both the parties, is really all there is to indicate the intention of the parties at the time. The case, in any event, would have to fail so far as defendants Wheelock and Smiley are concerned, for the testimony is undisputed that they were innocent purchasers for value without notice, both of them having purchased and paid for the tracts of land in dispute without notice of the alleged mistake.

It is stoutly maintained by the appellants that, inasmuch as the deed from Seward to Spurgeon calls for land north of the established line between the two respective tracts,—or, in other words, land which is embraced within what is conceded to be Seward's rightful boundary,—in order to protect appellants' title the deed should have been reformed. But, conceding that this concession has been made, and that the deed from Seward to Spurgeon had actually conveyed such land, the judgment of the court is substantially a reformation of the deed, so far as the protection of appellants' title is concerned.

So far as the question of costs is concerned, the record shows that no demand was ever made upon respondent Spurgeon for the correction of this deed. He has at all times, at the trial and before, disclaimed any title whatever to any land north of the established line agreed upon between them so long ago. The court found, as we think rightfully, from the testimony, that said established line was the true line, which was all that was contended for by the respondents; and, their contention having been fully sustained by the court, we see no reason

why they should be put to costs to litigate the wrongful contention of the appellants. The judgment will therefore be affirmed.

SCOTT, HOYT, ANDERS, and STILES, JJ., concur.

CLOUD v. TOWN OF SUMAS.

(Supreme Court of Washington. July 13, 1894.)
MANDAMUS—PAYMENT OF TOWN WARRANTS.

Where one loans money to a town, and receives warrants therefor, his proper remedy on the refusal to pay the warrants is by mandamus to compel payment thereof, and not by action on the warrants. Dunbar, C. J., dissenting.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by J. A. Cloud against the town of Sumas to recover money loaned defendant. From a judgment for plaintiff, defendant appeals. Reversed.

Chambers & Lambert and Black & Leaming, for appellant. Ronald & Piles, for respondent.

SCOTT, J. In June, 1801, the town of Sumas became a municipal corporation of the fourth class. The town authorities, desiring to make certain public improvements, such as the grading of streets, etc., and the town not having the money on hand to pay therefor, entered into negotiations with the plaintiff, who at that time was engaged in the hanking business at said town, the result of which was an agreement between the town authorities and the plaintiff that the plaintiff would supply said town with moneys to the extent of not to exceed \$5,000. Several warrants were issued by the town authorities to plaintiff, and the amount called for, less a certain discount, was deposited in plaintiff's bank to the credit of the town, and these sums were thereafter paid out upon warrants issued to various parties by the town treasurer. This action was brought by the plaintiff to recover the moneys advanced to the credit of the town. He obtained judgment, and the town appeals.

A number of technical objections regarding the regularity of the proceedings of the council authorizing the obtaining of these moneys from the plaintiff are raised upon this appeal. It is also contended that municipal corporations of the fourth class have no authority to borrow money. And it is further contended that the present action will not lie in any event, as the remedy of the plaintiff, if he has any, is by mandamus, to compel the payment of the warrants issued to him for the moneys aforesaid. Owing to the conclusion we have arrived at as to this last proposition, whatever may be our views upon the other questions raised. as to whether any of them are entitled to any merit, or whether the transaction was one of loaning money, or, rather, the pay-

ment of debts contracted by the town to other parties, they are eliminated from the case, and are not now entitled to consideration. We are of the opinion that the plaintiff mistook his remedy. All he could obtain upon a judgment in his favor would be a warrant, issued by the town authorities, for the payment of his claim in accordance with the provisions of section 674, vol. 2, of the Code, and he already has a warrant therefor. No execution would lie against the town. If this action can be maintained upon the warrants which have been issued, then a like suit might be maintained upon the warrants issued in satisfaction of this judgment, and so on without limit. Clearly the law contemplates no such proceedings. The plaintiff already has the town's evidences of indebtedness, issued to him in regular form. and, if the treasurer should refuse to pay them in their regular order, he can resort to a mandamus to compel such payment. roll v. Board, 28 Miss. 38. See, also, Trust Co. v. Gelbach (Wash.) 36 Pac. 467. And the questions, if they are further insisted upon, affecting the legality of such warrants, can be tried in that proceeding. Jefferson Co. v. Arrighi, 54 Miss, 668.

Reversed.

STILES, ANDERS, and HOYT, JJ., concur.

DUNBAR, C. J. I dissent. It seems clear to me that the object of this suit, as gathered from the complaint, was to test the validity of the warrant heretofore issued, or, rather, to test the validity of the respondent's claim against the city. The record shows that the validity or legality of this claim is denied by the treasurer, and is the only real matter in issue. If that be true, then the issues may as well be determined in this case as in a mandamus proceeding; and the ends of justice will not be subserved by sending the respondent out of court, and imposing upon him the expenses of another suit.

ABERNETHY V. TOWN OF MEDICAL LAKE.

(Supreme Court of Washington. June 5, 1894.)
Towns—Invalid Organization—Reincorporation—Effect on Contracts—Mandamus.

1. Where a town is organized under a void law (Laws 1800, p. 206) which authorizes it to make contracts for street improvements, such contracts are made binding on the town by the enactment of a law (Laws 1893, c. 80) providing for the reincorporation of such towns, and declaring legal all contracts made under the void law.

2. Where the statute provides for the payment of the town's debts by issuing warrants on the treasurer, and a warrant is so issued, which the treasurer refuses to pay, mandamus to compel the payment of the warrant is the proper remedy.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by Robert Abernethy against the town of Medical Lake on a town warrant. Judgment for defendant, and plaintiff appeals. Affirmed.

Prather & Danson, for appellant. Jones, Belt & Quinn, for respondent.

STILES, J. It was decided in City of Pullman v. Hungate (Wash.) 36 Pac. 483, that those municipal incorporations which were declared to be void in Territory v. Stewart, 1 Wash. St. 98, 23 Pac. 405, and whose attempted resuscitation was held unsuccessful in Town of Denver v. City of Spokane Falls, 7 Wash. 226, 34 Pac. 926, had been legally established as corporations by the act of March 9, 1893 (Laws, p. 183), and that a complaint which showed an attempt at a street assessment under the act of 1890 could be maintained under the act of 1893. City of Pullman v. Hungate has been followed in several other cases, and it applies in this case, where there was a contract made by the town to pay money, instead of a tax or assessment levied by it. The town, in territorial days, took steps towards the grading of a street at the expense of property owners. The contractor failed to complete the work, and, after the reorganization of the corporation in 1890, the council proposed to persons who had been bondsmen of the contractor that if they would finish the work the town would accept it, and "ratify the indebtedness incurred on said street." The proposition was accepted, the work completed, and reported satisfactory, and an ordinance was passed declaring a certain sum to be indebtedness of the town in favor of plaintiff's assignor. Without further order, the mayor and clerk issued warrants, the payment of which was limited to the "Lefevre Street Grade Fund." but there was no such fund, and payment has been refused by the treasurer for want of fund.

The authority of City of Pullman v. Hungate must decide this case on the main point of the plaintiff's right to have a recovery. The act of 1893 expressly provides that all contracts made by the cities and towns therein legislated for are declared legal, and of full force and effect. The undertaking of the respondent town was a contract which. the legislature could have authorized the town to make, and it could, therefore, render it valid afterwards, the other party consenting. That, under the act of 1888, streets could be improved only at the expense of abutting owners (if such, in fact, be the case), can have no effect to restrict the payment of this debt to a "grade fund." The contract was general, and was made after the supposed valid organization under the act of 1890, which authorized the council to expend from the general fund any sum they deemed necessary for the improvement of streets. Laws, § 161, p. 206, proviso. A contract of this nature must be supposed to

be within the contemplation of the act of 1893. But has the appellant pursued the proper remedy? Finding against the respondent on the main proposition, we see no necessity for advantage to grow out of this action. The complaint shows a settled and allowed claim against the town, and the issuance of slightly irregular warrants, which can, upon demand, be replaced by proper general fund warrants of the same dates. These can be had upon application to the mayor and clerk, and, if they refuse, mandamus will lie to compel the performance of their duty. These warrants the treasurer must pay, in the order of their issuance, out of any funds coming into his hands belonging to the general fund, and, if he refuses, a like suit will lie against him. The statutes prescribe how municipal corporations shall pay ordinary contract debts, viz. by the issuance of a warrant payable in its order, with interest from date of presentation. But it is not contemplated that the owner of an allowed claim shall sue the corporation generally, upon the original contract, when the clerk or other officer refuses to issue a warrant; nor that the holder of a warrant which the treasurer declines to pay shall get a judgment upon the warrant. Such a judgment, like a judgment upon a claim disallowed, would again be settled by a warrant, and take its turn in the order of payment. contracting powers of the town have done all they can by the making of the contract and the allowance of the claim. It is the ministerial officers who are now in fault, and the plaintiff must move sem to action before he is entitled to any other remedy. Dillon, Mun. Corp. §§ 849, 850, and notes. Judgment of dismissal affirmed.

DUNBAR, C. J., and ANDERS and SCOTT, JJ., concur.

WILKESON COAL & COKE CO. v. DRIVER et ux.

(Supreme Court of Washington. June 13, 1894.) INJUNCTION-DISMISSAL OF ACTION-PRACTICE.

1. Where all the parties to a suit have voluntarily submitted themselves to the equity side of a court, the question of whether plaintiff has an adequate remedy at law cannot be raised at the trial by motion to dismiss.

2. Objection that a complaint does not state

facts to constitute a cause of action, made a ground of demurrer by statute, cannot be raised by motion to dismiss.

3. The fact that the allegations of a com-

3. The fact that the allegations of a complaint are general is not ground for dismissing the action, but for motion to make more definite.

4. Where a temporary injunction against trespasses is granted till plaintiff bring action to fix boundaries and determine title, and till such action be determined, and defendant immediately brings action for that purpose, and plaintiff, in good faith, tenders an issue to determine title, defendant should not be allowed to dismiss his action on the ground that his complaint is insufficient, and so obtain a dismissal of plaintiff's action for an injunction, or, if definition, the state of plaintiff's action for an injunction, or, if defendant be allowed to dismiss, plaintiff should be allowed time to commence an action to deter-mine title, and dismissal of his action for in-junction should be conditioned on his failure to do so.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by the Wilkeson Coal & Coke Company against Arthur Driver and wife. Action was dismissed, and plaintiff appeals. Reversed.

Ashton & Chapman and Remington & Reynolds, for appellant. John P. Judson, for respondents.

SCOTT, J. This was a suit in equity. Plaintiff alleged that it was the owner of a certain piece of land described in the complaint, and that the defendants had repeatedly trespassed thereon, and had induced other persons to commit trespasses thereon, and were continuing so to do, thereby depriving the plaintiff of all use thereof, and that the defendants and such other persons so continually trespassing upon said premises were each of them insolvent, and a judgment against them would be uncollectible; that it would be a great hardship for the plaintiff to be compelled to bring numerous separate actions against said trespassers; and that plaintiff has no adequate remedy at law. Plaintiff further alleged that it owned and operated extensive coal mines adjacent to the land aforesaid, and had erected, at great expense, its offices, stores, supply houses and a great number of dwelling houses for its employes, in the immediate vicinity thereof, and that in order to secure the best results in its business, and to receive the reasonable value of the services of its employes, sobriety and abstinence from the use of intoxicating liquors among said employés was a primary requisite, and it was necessary therefor to put and keep its said employés beyond the reach of temptation to use intoxicating liquors, and that there were none such then in the vicinity, but that the defendants were then erecting a building upon the and described in the complaint, wherein the defendant Arthur Driver intended to start and maintain a saloon; that conducting a saloon thereon would occasion great and irreparable injury to the plaintiff, and greatly essen the value of its property and injure its business, etc.; and that the defendants threaten to hold possession of said land by force, and to maintain a saloon thereon, during the pendency of any suits that might be brought against them to eject them from said premises. The complaint contained a prayer for an injunction against the defendants, preventing them from committing any trespass upon the premises aforesaid, and from completing said building, and also for a restraining order Juring the pendency of the suit, and contained a prayer for weneral relief. Notice was served upon the defendants to show cause why a restraining order

should not be issued, and a hearing was had thereon before the court on the 2d day of February, 1892. Whereupon, the court, first reciting the appearance of the parties, and the hearing of evidence in relation to the issuance of a restraining order, and that as it appeared "that the plaintiff was engaged in the institution of proceedings against the defendants for the purpose of trying the title to, and ascertaining the boundaries of, the land upon which the acts and doings sought to be restrained were being committed," ordered that until the final trial and disposition of such action, and until the final hearing of the case pending, the said defendants, and each of them, and all and every person claiming by, through, or under them, should be enjoined and restrained from committing any act of trespass upon the premises described in the complaint, and particularly from completing the building aforesaid in process of erection. To this complaint, defendants interposed an answer and cross complaint denying the plaintiff's title to the land described in the complaint, and alleging title in themselves. At the time this action was commenced, and order granted, it is conceded that no suit had been instituted by the plaintiff to determine the title to the land in controversy, and that the reference to such proceedings in the order aforesaid was to a suit which the plaintiff was then contemplating and preparing to bring. Before the same was instituted, and on the 17th day of March following the granting of the order, the defendants herein instituted an action in equity against the plaintiff in this action, alleging that they and the defendant company were adjoining proprietors of certain real estate, and that the land in controversy in the former action was a strip adjoining the boundary or dividing line of said lands, and that each of said parties claimed to own the same in consequence of a controversy as to where the dividing lane was or should be located. And the plaintiffs prayed that the court should order the boundaries between said lands to be established and properly marked, and also for general relief. The defendant company answered, denying that the boundary line was located as claimed by the plaintiffs, and alleged that it was so located as to make the lands in controversy a part of the lands and premises owned and claimed by them. In the foregoing we have only sought to give a general description of the matters alleged in the pleadings in said actions, in order that the nature thereof might be indicated. the 2d day of November, 1892, said actions were called up for trial, and the parties announced themselves ready for trial. Whereupon, the defendants herein moved the court to dismiss this action on the ground that the complaint "does not state facts sufficient to entitle said plaintiff to any relief in this court," to which the plaintiff objected, and objected to further proceedings with said action]

until the other action had been tried to determine the title to the property in controversy. Whereupon, the defendants herein (the plaintiffs in said other action) moved to dismiss the same at their cost, to which the defendant company objected, and offered to make any amendments to their answer in said action which might be deemed necessary in order to make such action suitable to establish the boundaries, and try and determine the title to the premises in dispute, and announced themselves as ready to proceed and try the title to said premises. It was conceded that the company had not brought any action to try the title to said lands, but it offered to show that it had relied in good faith upon the action brought by Driver and wife therefor. The court overruled said objections, and allowed Driver and wife to discontinue the suit brought by them, which they d.d. Whereupon, the court also granted the motion aforesaid of defendants, Driver and wife, to dismiss this action, and the plaintiff appealed.

In granting said motion the court made the following order:

"This cause coming on to be heard upon the motion of the defendant to dismiss this cause upon the ground that the pleadings do not show or state facts sufficient to constitute a cause of action, or to authorize the court to grant any relief to plaintiff;

"And it appearing to the court that, in the order granting the preliminary injunction, it was ordered that the temporary injunction remain in force till the plaintiff should bring an action to fix the boundaries and determine the title to the premises on which the alleged trespasses were committed, and until said action should be determined; and the court now finds that no such action has been brought by said plaintiff, and no proceeding has been commenced to determine said boundaries to try said title, except an action (No. 6,956) in this court, and commenced by defendant, in which the plaintiff made answer and a so-called counterclaim, which said action has been dismissed on the motion of plaintiff, the defendant herein, and which action this court finds was not suitable to determine said boundaries or to try said title;

"And the court, now being fully advised in the premises, sustains said motion:

"Wherefore, by reason of the law and the premises, it is considered and adjudged by the court that plaintiff's cause be and the same is dismissed without prejudice, and the defendants have and recover of and from the plaintiff their that and disbursements herein, taxed at —— dollars, and that execution issue therefor.

"To which ruling of the court, plaintiff excepts, exceptions are allowed, and thereupon plaintiff gives notice of appeal to the supreme court of the state of Washington.

"And plaintiff specially excepts to the second paragraph of this decree, which sets forth that the court finds that no action has

been begun to determine the boundaries of the premises on which the trespasses were committed, on the ground that no such evidence was offered or admitted in this cause. Exception allowed."

It appears thereby that the court dismissed the action upon a different ground than the one set up in the motion, but as the respondents contend that the motion should have been granted also because the complaint did not state a cause of action, and because the plaintiff had an adequate remedy at law, it will be necessary to consider these matters We are of the opinion that the complaint was open to objections properly The trespasses complained of, with the exception of the erection of the building in controversy, were not specifically set forth, the same only being pleaded in very general allegations; and a motion to correct the pleading in this particular, and to make the same more definite and certain, would doubtless have been granted. The cause of action set up with reference to the purpose of the defendants to start and maintain the saloon business in question was not sufficient to entitle them to an injunction, in our opinion, under the authority of Railroad Co. v. Whalen, 13 Sup. Ct. 822; but we are of the opinion that the complaint did state a cause of action, though the same was defective in form; and it is not essential to inquire at this time whether it was of equitable cognizance, for all parties had voluntarily submitted the matters in controversy to the consideration of the equity side of the court, and the question whether the plaintiff had an adequate remedy at law could not be raised at that time by the motion.

It is contended by appellant that the objection that the complaint does not state facts sufficient to constitute a cause of action cannot be taken by a motion to dismiss; that such point can only be raised by a demurrer to the complaint, or by an objection to the admission of evidence; and we are of the opinion that this point is well taken. It is specially provided as a ground of demurrer by the statute, and the fact that the complaint was defective in form was no ground for dismissing the action. If it did not state facts sufficient to constitute a cause of action, and was demurred to upon that ground, the plaintiff would have had a right to amend: and if the matters set up were not well pleaded, and a motion to make the complaint more definite and certain had been made and sustained, the same result would have followed.

Nor do we think the action of the court in dismissing the suit can be sustained upon the ground specified in the order. It is contended by the respondents that the action brought by them was brought under section 668, vol. 2, of the Code, and that the facts set up were insufficient to enable them to maintain the action thereunder, and that they were justified in dismissing the same. But this positive of the suit of the same is the same of the court in the same is the same. But this positive dismissing the same. But this positive same is the same is the same of the same of the same is the same of the

tion is not tenable, in our opinion. The defendant company had raised no such question, but had in good faith tendered an issue to determine the ownership of the land in controversy, in the action which Driver and wife had themselves instituted for that purpose shortly after the granting of the restraining order in the former suit; and, conceding their right to dismiss said action, the plaintiff herein should have been given an opportunity to commence an action for such purpose, and the dismissal of this cause should at least have been conditioned upon its failure to do so.

Under the circumstances, we think the appellant was excused from bringing the action it contemplated bringing when the restraining order was obtained, and had a right to rely upon the action brought by the respondents for a like purpose, and consequently were not chargeable with any neglect or failure of duty in the premises. This being so, the order dismissing the action is not sustainable, and the judgment of the court must be reversed.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

HAMAR v. PETERSON.

(Supreme Court of Washington. June 13, 1894.) EQUITY—APPEAL—REVIEW OF FINDINGS.

A finding of partnership in an equitable action will not be disturbed where plaintiff testified positively to the fact of partnership and defendant to the contrary, and the confirming circumstances were about equally divided. Stiles and Anders, JJ., dissenting, on the ground that the findings did not amount to one of partnership.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Lars E. Hamar against Oliff Peterson. Judgment for plaintiff. Defendant appeals. Affirmed.

Wickersham & Reid, for appellant. Hans Spilde, for respondent.

HOYT, J. Some questions are raised as to the nature of the proceeding instituted in the lower court, and as to the form of the relief granted by the judgment therein. It is also claimed on the part of the appellant that the finding of the court that a partnership had ever existed between the respondent and the appellant was unwarranted by the evidence. It seems to us that this latter question is the only material one, for the reason that, if the finding of the court upon the question of partnership was correct, the other rulings do not adversely affect any substantial right of the appellant. If the partnership existed, it was in a court of equity that an accounting of its transactions should be had. Hence the court, and not the jury, would necessarily have to pass upon the questions in relation thereto; so that appellant

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could not claim the right to have them determined by a jury, and the other rights which he claims are not substantial ones, and the form of the decree, though perhaps unusual, is not of such a nature that it deprived appellant of any substantial right. The only question, therefore, which we are called upon to decide is as to the claim that the evidence did not warrant the finding of the lower court that a partnership existed between the parties, as alleged in respondent's complaint. The evidence upon this subject is unsatisfactory and conflicting. The respondent testifies in the most positive terms to the fact of the partnership, and the appellant in equally positive terms testifies to the contrary. Some circumstances in the case tend to confirm the testimony of the respondent, and others of about equal weight that of the appellant; so that the proofs stand substantially balanced, as far as they can be gathered from the record. This being so, it would follow that, if we were to determine the facts entirely uninfluenced by the findings of the lower court, the plaintiff must fail, for the reason that the burden of proof was upon him. It therefore becomes necessary that we should determine the force to be given in this court to the findings of fact by the lower court in an equitable proceeding. Under the old method of trial of cases in courts of chancery there was little reason why the appellate court should give any weight to the findings of the lower court, because the proofs were all reduced to writing, and the lower court decided the case upon such written proofs, without the aid furnished by the appearance of the witnesses before it, in the same manner as did the appellate court. But even under that system of practice it was held by most courts that they would not set aside a finding of the trial court, unless they were satisfied it was wrong. Even in suits in admiralty, where the appellate court not only tried the case anew upon the proofs offered in the lower court, but might, if it saw fit, allow additional proofs to be introduced upon the hearing, it was held that the findings of the lower court would not be disturbed without it appeared satisfactorily to the appellate court that they were wrong. If this was the rule under the former practice, how much more should it be under the one now existing? In the trial of cases under our statutes there is practically no difference in their conduct in the trial court, whether they are of legal or equitable cognizance, excepting that in one a right of trial by jury obtains while in the other it does not. The findings of the trial court in an action at law have the force here of the verdict of a jury; and it is hard to find an adequate reason for holding that such is the effect of such findings, and at the same time hold that the findings of the same court upon the testimony of witnesses introduced before it in the same manner should have no force, when

the fact to be determined is the basis of equitable, instead of legal, relief. Especially would it seem to be absurd to so hold under the provisions of the present statute governing the manner of the removal of causes to this court. Thereunder it is made the duty of the lower court, in equitable as well as in legal proceedings, to find the facts upon which it founds its judgment; and such findings may be excepted to alike in both classes of cases. From which it must follow that, if there ever was any reason why the findings of the court in one class of cases should have almost conclusive weight, and in the other no weight at all, such reason no longer exists. In our opinion, the finding of the trial court in an equitable action should be adopted by this court in determining the rights of the parties, unless the preponderance of evidence against such finding is so great that we are satisfied it was wrong. Apply this rule to the question under consideration, and the result will be that we cannot disturb the findings of the court as to the question of partnership, from which it will follow that the judgment must be affirmed.

DUNBAR, C. J., and SCOTT, J., concur.

STILES, J. I dissent from the conclusions arrived at by the majority, in the first place, because the court made no finding of the material facts involved in the controversy. No separate findings whatever were filed, but the decree recites the following facts as found to be true: "That plaintiff and defendant entered into an agreement to run the saloon business in the basement of defendant's building [description], by the terms of which agreement the plaintiff was to contribute his time and services to the said business and the defendant the basement room of his said building; and that, if the business paid sufficient profit therefor, the defendant was to be paid \$50 per month as rent for the said basement, and the plaintiff a reasonable compensation for his services as manager of the business. That the advancement of money made by defendant in the procurement of license and stock with which to start the business, was advanced to the business, and, by the terms of the agreement, for the same the plaintiff was to credit the defendant with the same on the notes held by plaintiff against defendant and wife for such amount thereof as the business failed to realize." These were the only findings of fact, and, it seems to me. plainly fall far short of a finding that the parties entered into a partnership agreement. If the business realized profit enough, defendant was to have \$50 a month rent for his basement, and the plaintiff a reasonable compensation for his services as manager. Nothing whatever was said about any further profits or any losses. There was no conclusion of law that the parties were partners, or that there were either profits or losses of the business, or any partnership property in existence on which the court could be called to administer. Such being the state of the record, there is nothing by which this court should consider itself bound. either one way or the other. The only evidence of the partnership was the statement of the respondent, not definitely that an agreement of partnership was made, but of certain facts, most of which were drawn out of him by the baldest kind of leading questions, and which it was maintained went to show the existence of such a relation. Certain witnesses testified that the appellant had some talk with them regarding the fitness of an applicant for the position of barkeeper in the saloon. In my judgment, the appellant's testimony completely outweighed everything that was offered to sustain the allegation of a partnership.

ANDERS, J., concurs in above.

(9 Wash. 85)

SMITH et al. v. COCHRANE. (Supreme Court of Washington. June 2, 1894.)

(Supreme Court of Washington. June 2, 1894.)

Eminent Domain—Lating Out Highway — Jury

Trial—Constitutional Law.

TRIAL—CONSTITUTIONAL LAW.

1. Act March, 1893 (Laws, p. 237), relating to laying out highways, provides that notice of the proceeding shall be given by posting, and, after the survey has been made and the plat and award has been filed by the viewers, the clerk shall publish a notice that the court will consider the report on a certain day, when, if any one objects to the award, the court will call a jury. Held, that the act is in violation of Const. art. 1, \$ 16, which provides that compensation for a taking of property for a public use shall be ascertained by a jury unless a jury is waived.

is waived.

2. The act is also unconstitutional in that it does not provide for sufficient notice to the

persons whose lands are taken.

Appeal from superior court, King county; J. W. Langley, Judge.

In the matter of the petition of A. A. Smith and others for a county road, and William Cochrane files objections. From a judgment for petitioners, Cochrane appeals. Reversed.

Stratton, Lewis & Gilman and D. G. Inverarity, for appellant. John F. Miller, Pros. Atty., and A. G. McBride, for respondents.

STILES, J. To a petition addressed to the superior court of King county for the establishment of a county road, appellant filed objections, some of which appear to have been proper and necessary to be passed upon before any step could be taken by the court. For example: (1) The objection that 10 free-holders had not petitioned; (2) that the proposed road was impracticable, and intended only to subserve certain private interests; (3) that no due or proper notice of the proceeding had been given. Whether these points, all of which were jurisdictional, were passed upon or not, the record does not dis-

close. But there were other objections, which were in the nature of a demurrer, or grounds attacking the constitutionality of the act of March 9, 1893 (Laws, p. 237), and, these having been overruled, the case is brought here by appeal upon them alone.

Appellant qualifies himself to make objection to the validity of the law by showing that he is a resident owner of certain lands. part of which will have to be taken for the road as proposed, and his first point is that the act does not provide for personal service of notice of the proceedings upon owners of his class. Two kinds of constructive service are provided for: First, there is a notice by posting, which was probably intended rather to affect the public generally than owners of lands. The county is required to pay for land taken, and maintain these roads, although it appears to have no voice in the matter through any of its officers, and it may be supposed that the posted notice will serve to inform citizens generally that a new expense will be incurred at the ipse dixit of 10 freeholders, unless some one shall remonstrate. But, after the route of the road has been surveyed, and the plat and award of damages have been filed by the viewers, the clerk is required to publish a notice that the court will hear the petition and consider the report of the viewers on a day fixed; and this notice is probably intended to be for the particular benefit of owners of lands taken, since, in their report, the viewers are particularly directed to describe the land appropriated, and give the names of owners if known, or, if they are unknown, to state the fact. It seems from the seventh section that the final question as to whether the road is practicable and will be of general use and public benefit is to be left open until the hearing under the published notice, and that, if any one objects to the award, the court may call a jury, and "hear testimony on the subject;" but, they failing to appear and contest, the evident intention is that owners shall be concluded by the award made by the viewers, and the order of the court thereon. That such an award could not stand under our constitution is plain. The mandate of the instrument is that the compensation to be paid for a taking of property for a public purpose shall be ascertained by a jury, unless a jury be waived, as in other civil cases, in the manner prescribed by law. Const. art. 1, § 16. Now a waiver may take place by the failure of a party to appear at the trial, but in no case analogous to this does a judgment follow as matter of course for the sum prayed for in the complaint. The court may still call a jury, but, if it consents to the waiver, it must hear the evidence, and render judgment accordingly. A suit for damages is nearest like a condemnation case; and yet. under this act, there is no complaint, no allegation of damage, and no evidence. The report of the viewers of course contains their

¹ For dissenting opinion, see 37 Pac. 494.

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finding, and it might be taken as a complaint containing an allegation of damage in a negative sort of way; but it is an unsworn paper, the viewers are not present in court, and it states no facts which would enable the court to pass a judgment upon the actual damage. An acceptance of the award by an owner would doubtless estop him from any further criticism of the proceeding, but it is not such cases that the law was intended to meet

Returning to the question of notice, there is no doubt that the prevailing number of cases, and perhaps the weight of authority, the country over, is that in condemnation cases the legislature has the power to prescribe the kind of notice, whether personal or constructive, which shall be given to property owners, resident or nonresident. Lewis, Em. Dom. § 367; Brown, Jur. § 172; Elliott, Roads & S. pp. 152, 153. In the case of nonresidents no other method is practicable, and it fulfills the requirement of due process of law under both state and federal constitutions. Huling v. Improvement Co., 130 U. S. 559, 9 Sup. Ct. 603. But the decisions as to residents are not entirely unanimous, the supreme courts of Michigan, Wisconsin, and California holding that personal notice is necessary when the owner resides within the jurisdiction. Kundinger v. City of Saginaw, 59 Mich. 355, 26 N. W. 634; State v. City of Fond du Lac, 42 Wis. 287; Mulligan v. Smith, 59 Cal. 206. Mr. Lewis, in the section cited, gives it as his personal view that these courts have the best of the reasoning. So far as this state is concerned, the principal reason given by the supreme court of Michigan, viz. that of a long course of legislative practice amounting to a construction that actual notice was required by the constitution prevails, for such notice has been and is the general rule in the territory and state. All cities and towns, quasi-public corporations, and even the state itself, have to pursue that method of acquiring jurisdiction, and it would probably cause a revolution were it proposed that railroad companies should have such damages assessed upon notices posted in three or four places of their own selection. It has been frequently said by courts that the taking of land by eminent domain is a proceeding in rem, and the service of a constructive notice has been justified by the practice which prevails in that class of cases. But it is well known that proceedings in rem presuppose that the complaining party has a superior right to the subject of the suit, or a right to have it subjected to his claim, and that the first requisite is a seizure of thing itself, after which follows notice. "The theory of the law is that all property is in the possession of its owner in person or by agent, and that its seizure will therefore operate to impart notice to him" (Windsor v. McVeigh, 93 U. S. 274); but the same case holds most emphatically that, in addition to the seizure,

there must be notice. In attachment cases property must be taken into the custody of the court before any step can be taken based on a constructive service; and, if the subject of the seizure is land, there must be a levy, and some act of posting, or service upon the occupant, or record in the registry of deeds, to take the place of possession. In divorce cases the jurisdiction of the court to make a disposition of property requires that the property be described in the complaint. Philbrick v. Andrews (Wash.) 35 Pac. 358. And in probate cases without an inventory of property in the hands of the administrator there can be no order affecting the real estate of the decedent.

In those states where the legislature is the sole judge of what is a public use of property under their eminent domain laws, it may be possible that the declaration of intention and the award of damages made in regard to land particularly described might be construed as the taking, as was done in Mc-Micken v. Cincinnati, 4 Ohio St. 395; but in this state no such result can occur, because our constitution expressly takes away from the legislature the power to determine what is a proper purpose for the condemnation of property, and vests it in the judiciary, so that each owner has the right to contest the proposed taking as against him on that ground. There is no authority, therefore, for a preliminary seizure, and the prime requisite of a proceeding in rem fails at the outset. Again, it has been held, though at an early period only, that no part of the proceeding to take lands, including the assessment of damages, is judicial; but that view, as a general proposition, has been long since set aside, and it is now universally agreed that the assessment is judicial. Monongahela Nav. Co. v. U. S., 13 Sup. Ct. 623. And our constitution also settles that point. Under the simple constitutional provision of Nebraska that "no property shall be taken or damaged for public use without just compensatior therefor," the supreme court of that state held, in Pawnee County v. Storm, 52 N. W. 696, that while constructive service would serve to authorize the location of a road, the owner of land over which it was located, who did not have actual notice of the proceeding, could not be deprived of his right to damages by his failure to make demand therefor. if he presented his claim within a reasonable time; but in the presence of a requirement that the damages be ascertained and paid before the taking there is no room in this state for an adjustment of equities such as was there made. We think the provisions of our constitution imply that in condemnation proceedings the same general character of notice will be given to persons whose rights are to be affected as was customary in the territory in actions legal or equitable affecting property real or personal, and that this law does not meet that requirement. In Monongahela Nav. Co. v. U. S., which was a

condemnation proceeding undertaken by the government under a special act of congress, Justice Brewer, speaking of the necessity that the courts are under to guard private rights guarantied by constitutional provisions, quotes with approval the language of Justice Bradley in Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, as follows: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon their motto should be 'obsta principils.' " We must regard it as a mere lapse that the legislature should in this instance have failed to provide for the same sort of service that it required in the act of 1891, where the state was authorized to condemn lands, and in all the other acts, both public and quasi-public, on the same subject. Were the point yielded in this instance, we should probably soon have further encroachments when laws for the taking of lands for ditches, flumes, drains, and private roads came to be passed; for the instinct of interest would be present to induce the legislature to provide ways of giving notice in which there would be a large chance that the proceeding might be entirely ex parte, and without the knowledge of the person to be affected. Therefore we feel impelled to pronounce this act, as to the appeliant, unconstitutional, although it is with much regret, as it is stated that without this law there is no way of opening a road through the lands of an unwilling resident.

Another point is made against the payment of awards by warrant on the county treasurer. The just compensation required means a money compensation beyond question; but in the case of a public corporation, which is required to make its disbursements in a certain prescribed method, we think compensation would be made within the meaning of the constitution by the issuance of a warrant in the ordinary way, if there were funds in the treasury out of which it would be paid upon presentation. That would be a payment in money. If, after the decree had been made, it should turn out that there were no funds for present payment of a warrant, it might be questionable whether the landowner would be under any obligation to surrender possession of his property until the fund was created. And if it should appear in the condemnation proceeding that by reason of the county's financial condition no such fund could be created within a reasonable time, the proceeding ought to abate. In Keene v. Bristol Borough, 26 Pa. St. 49, an injunction was issued restraining a borough from taking possession of lands condemned, because there was no present ability on its part to accumulate the money necessary for compensation. But on this ground we do not hold the act invalid. It may be that the warrant of the auditor of King county would be paid at once on presentation to the trensurer. Judgment reversed, and petition dismissed as to appellant.

DUNBAR, C. J., and ANDERS, J., concur.

(9 Wash. 96)

STATE v. WRIGHT.

(Supreme Court of Washington. June 4, 1894.)
FORGET — INDICTMENT — SUFFICIENCY — FORGED
INSTRUMENT—WHEN NEED NOT BE SET OUT.

1. Where the forms of criminal pleading are those prescribed in the Code (Code Proc. §§ 1202, 1234), and the requirements are that an information shall contain a statement of the offense in ordinary and concise language, an information charging forgery need not set out a copy of the instrument alleged to have been forced.

one see in ordinary and concise language, an information charging forgery need not set out a copy of the instrument alleged to have been forged.

2. An information alleged that W., on a certain date, did forge the indorsement of B. & Co. to a check signed with the name of S. as drawer, and which had thereon the name of M. as payee, and drawn on a certain bank named, and was so drawn for the sum of \$37.50, and had indorsed on the back thereof the name M.; said forgery and counterfeiting of the indorsement of said B. & Co. by said W. being then and there falsely done, for the purpose and with the intent of said W. to then and there cheat and defraud one K. Held sufficient.

Appeal from superior court, Thurston county; M. J. Gordon, Judge.

Harry Wright was acquitted of the crime of forgery, and the state appeals. Reversed.

Milo A. Root, for the State. John R. Mitchell, for respondent.

DUNBAR, C. J. This was an action by the state against the defendant for forgery. The information was as follows: "Comes now Milo A. Root, county attorney and prosecuting attorney for Thurston county, state of Washington, and, the court being in session and the grand jury not being in session, gives the court to understand and be informed that one Harry Wright is guilty of the crime of forgery, committed as follows, to wit: He, the said Harry Wright, at the city of Olympia, in Thurston county, state of Washington, on the 17th day of October, 1893, did falsely and fraudulently forge and counterfeit the indorsement of O. L. Branson & Co. (a firm and partnership of business men in said city of Olympia) to and upon a certain order for money (said order being of the class commonly called 'checks'), which said order was signed with the name of S. S. Brooke as drawer, and had thereon the name James Morgan as payee, and drawn on and directed to the Bank of British Columbia, of Tacoma, state of Washington, and was so drawn for the sum of thirty-

seven and fifty one-hundredths dollars, and had indorsed on the back thereof the name 'James Morgan'; said forgery and counterfeiting of the indorsement of said O. L. Branson & Co. by said Harry Wright being then and there falsely and fraudulently done, for the purpose and with the intent of said Harry Wright to then and there cheat and defraud one G. Kaufman, then and there being." The defendant entered a plea of "not guilty." A jury was impaneled, and the cause tried. After the evidence was in, the judge, upon his own motion, held that the information was fatally defective, for the reason that it did not contain a copy of the instrument alleged to have been forged. The judge then directed the jury to render a verdict of acquittal, which was done, and the prisoner, by order of the judge, discharged.

It will be seen that there is but one question involved in this case, namely, whether it is essential to an indictment for forgery that a copy of the instrument alleged to have been forged be set forth in the indictment. The citation of authorities from courts which consider themselves bound to follow the common-law rule of practice in criminal cases furnishes no guide to this court, in consideration of the fact that our statute is a wide departure from the rules of the common law governing courts in criminal proceedings. Section 1202 of the Code of Procedure provides especially that all the forms of pleading in criminal actions heretofore existing are abolished, and that hereafter the forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed herein. So that the one question to determine is, is the requirement claimed by the respondent prescribed by our statute? The requirements are specified in section 1234, and they are: (1) That it must contain the title of the action, specifying the name of the court to which the indictment or information is presented, and the names of the parties; (2) a statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended. Thus it will be seen that it is the statement of the acts constituting the offense which is required, and, if the statement of the acts constituting forgery can be made without setting forth a copy of the instrument forged, the requirements of the statute are met without such recitation; and we see no reason why the acts which constitute forgery cannot be as specifically designated and set forth in the indictment as the acts constituting any other crime.

The test of the validity of this indictment is, does it enable a person of common understanding to know what is intended? We think there can be no question but that it does. The acts constituting the crime are set forth with clearness and precision. The

date when the crime was committed is specified. If he is a man of common understanding, he knows what it means to "counterfeit the indorsement of O. L. Branson & Co. upon a certain order commonly called a 'check,' which was signed with the name of S. S. Brooke as drawer, and had thereon the name of James Morgan as payee, and drawn on and directed to the Bank of British Columbia, and for the sum of \$37.50, and had indorsed on the back thereof the name James Morgan,' and that he committed said act falsely and fraudulently to cheat and defraud one G. Kaufman;" and it can scarcely be contended, we think, in view of the plain language used, that the respondent was not made aware by this indictment of exactly the crime with which he was charged. This indictment, we think, is in conformity with the form prescribed in section 1235. Code Proc., which provides that the act charged as a crime be set forth. The acts charged as a crime have been set forth in this information. Again, to accentuate the intention of the legislature to emancipate criminal prosecutions in this state from the enthralling technicalities of the common law, section 1244 provides that the indictment or information is sufficient if it can be understood therefrom (so far as the act is concerned) that the act or omission charged as a crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended, and that the act or omission charged as a crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the rights of the case. And to make assurance doubly sure the legislature has again provided, in section 1245, that no indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of any of the following matters which were formerly deemed defects or imperfections (mentioning them), or for any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits. We are entirely unable to see how the substantial rights of the defendant could have been in any way affected by the recitation or setting forth at length of the instrument alleged to have been forged. Had he been notified by letter that he was charged with committing this crime as plainly and distinctly as he has been notified by this information, no sane person would conclude that he had not been clearly made aware of the crime attributed to him. Our statute provides that words used in an indictment shall be construed with reference to their common and ordinarily accepted meaning, and, if the language is sufficient to notify him unofficially, the formal notification through the medium of the information need employ no more specific language. Digitized by Google

The tender solicitude on the part of the government for the rights of citizens charged with crime is commendable; but the refinements and technicalities of the common law, which, under the circumstances and conditions of society 200 years ago were necessary for the protection of the citizen charged with crime, under the changing conditions of society are no longer necessary, and, instead of insuring the proper results, more often tend to defeat the ends of justice, and prevent the merited punishment of crime; and the blind adherence by the courts to these old and now useless rules of construction has largely, and not without reason, impressed the minds of the common people with the idea that the administration of criminal law is a farce. The legislature, recognizing this fact, has been anxious, especially in this state, in the interests of good government and the protection of law-abiding citizens, to remedy this evil; and every effort has been made to simplify the criminal procedure, so that a result might be reached dependent upon the merits of the defense, rather than upon some technical omission in the pleadings which could under no possibility reach the merits; and in pursuance of that desire they have provided that it shall be sufficient to notify a person charged with a crime by a simple statement of facts. And the courts, whose duty it is to enforce the will of the legislature, no matter what their own views might be of the policy of the law, ought to aid the legislature in carrying out its plainly expressed desire on this point, rather than to render its action nugatory by insisting upon rules of construction which the legislature has plainly said should not be the rules of construction governing the acts which it has passed; and if a common-sense construction, such as is provided for in the Code, be applied to the language of the indictment in this case, the conclusion is inevitable that the respondent was informed in plain and concise language of the crime with which he was charged. This has been the uniform holding of this court ever since its organization, and we cannot forbear to approvingly quote the language of the supreme court of California in People v. Cronin, 34 Cal. 191, as expressing strongly and tersely the sentiment of this court on the subject of the common-law construction of statutes of the character of those in force in this state, being substantially the same statute in force in California. "From the start," says the court in that case, "this court has uniformly held, in respect to indictments generally, that they are sufficient in matter of averment if they allege all the acts or facts which have been used by the legislature in defining the particular offense charged. It is so held, because such has been considered to be the rule adopted by the letter and spirit of the statute by which proceedings in criminal cases are regulated. Section 235 of that statute expressly provides that 'all the forms of

pleading in criminal actions, and the rules by which the sufficiency of pleadings is determined, shall be those prescribed by this act.' If it is possible for the law-making department of the government, in the face of the conservatism of the legal profession, which is too often blind, we fear, to abolish old forms and rules and establish new, it would seem to have been done by the legislature of this state. To this conclusion the profession must come, and it must search in the provisions of the statute for the form of an indictment, and for the rules by which its sufficiency is to be determined, rather than in the common law, for such is the will of the legislature. The legislation of this state is undoubtedly an innovation upon the common law, but it is not for that reason to be condemned without a trial. An obstinate adherence to custom is more pernicious than cautious experiment. But if this change be unwise in the estimation of counsel, it must nevertheless be enforced by the courts. In our estimation, it introduced a salutary and much-needed reform. idea that the forms and rules of a hundred years ago cannot be improved,-which seems to be entertained by some,-must be addressed, if at all, to the legislature. That body has the power to restore the forms and rules of two centuries ago. This court neither has the power nor the desire. In the administration of justice, as in all else, a wise progress is better than blind conservatism. Not yet has it attained its highest perfection, it is to be hoped; much less had it done so a hundred years ago. If it had, then are those who go before wiser than those who come after; the human understanding is not progressive, and mankind learn nothing from the teachings of experience, the mother of all wisdom." It is true that this language was used in reference to the construction of an indictment for murder, but the reasoning is just as applicable to the construction of an indictment for forgery under the statute. When the statute by express terms provides, as does our statute, that hereafter the forms of pleading and the rules by which the sufficiency of pleadings is to be determined are those prescribed in the statute, it is not only fallacious, but absolutely in the face of the mandatory provisions of the law, to seek for rules of construction elsewhere.

We do not think that there is any force to the objection that a recitation is necessary to protect the defendant in his right to a plea in bar in case he were tried the second time for the same offense. If the facts constituting the crime are charged, the identification is as easily made as though they were stated by a recitation of the instrument. Under our system of jurisprudence, and especially under the provisions of the Code which make a plain statement of facts, or of the acts constituting the crime, the groundwork of the information, the danger of a second trial is exceedingly remote, and as a practical fact

the plea of danger of a second trial is more often used to defeat the prosecution in progress, than as a protection against a future prosecution. The judgment will be reversed.

SCOTT and HOYT, JJ., concur.

STANS et al. v. BAITEY et al.

(Supreme Court of Washington. June 7, 1894.)

APPEAL BONDS-COMMON-LAW MARRIAGE.

1. Under a statutory direction to courts to look at the substance rather than the form in

look at the substance rather than the form in interpreting appeal bonds, the fact that such an instrument is in the form of an undertaking, instead of a bond, does not invalidate it.

2. Section 5, p. 121, Sess. Laws 1893, allowed those who did not join in the original appeal to join therein by filing a statement to that effect with the clerk of the court, and provided that all who so joined should be liable for costs and damages as though they had originally joined in the notice. Held, that a party so joining was not entitled to an appeal without executing an appeal bond.

3. A common-law marriage is not established by proof of cohabitation alone, where the parties do not hold each other out as husband and wife.

band and wife.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by James S. Stans and others against James E. Baitey and others for a reconveyance of property held in trust. Judgment for plaintiffs, and defendants appeal. Reversed.

Geo. H. Walker, for appellants. W. W. Likens and Ira A. Town, for respondents.

SCOTT, J. Ellen M. Maltby served notice of an appeal in this action, and gave security therefor, which was in form an undertaking, instead of a bond. Thereafter, appellants Owens and Loomis undertook to join in said appeal by filing with the clerk of the superior court a statement that they joined therein, in pursuance of section 5, p. 121, Sess. Laws 1893, but executed no bond. The respondents move to dismiss,—as to Maltby on the ground that an undertaking for costs is not a sufficient compliance with the statute relating to the giving of a bond, and as to Owens and Loomis on the ground that they failed to give any security whatever. The motion is denied as to Maltby, on authority of Wilson v. Morrell, 5 Wash. 654, 32 Pac. 733, where the question was decided adversely to respondents' contention.

As to Owens and Loomis, we think respondents' motion is well taken. The first security given was only executed in behalf of appellant Maltby. If these appellants had joined in the original notice of appeal, they would have had to give security. Said section 5 provides that all parties who so join in an appeal shall be liable for the expenses thereof, and for costs and damages, to the same extent and upon the same conditions as if they had originally joined in the notice.

The joining in an appeal may occasion largely increased costs. New points may be raised, requiring a more voluminous statement and a more voluminous brief on the part of the respondents, for which the respondents are entitled to security. Aside from the statute, we could not say that this additional burden was imposed upon the sureties for the original appellant, for it is clearly outside of the terms of their contract, and it can only be imposed upon them on the ground that, at the time they became sureties, they did so in the light of the statute which provided that other parties might join in the appeal. But this statute provides that such parties so joining shall be liable for the costs and damages upon the same conditions as if they had originally joined in the notice. One of these conditions was that they should execute a bond to secure the payment thereof. As to Owens and Loomis, the appeal will be dismissed.

Appellant Maltby, during the times herein mentioned, was a resident of the state of New York; and on the 13th of May, 1890, she purchased of Cavender & Fowler, loan brokers of Tacoma, a mortgage for \$1,500, on lots 7 and 8, in block 3219, in the city of Tacoma, paying therefor the sum of \$1,500 and accrued interest. This mortgage was executed to Cavender & Fowler on the 24th day of March, 1890, by one James E. Baitey. in whose name the legal title to the premises stood. Thereafter, this suit was brought by the plaintiffs, claiming to be successors in interest of one Henrietta Baitey, who was alleged to have been the real owner of the property; it being claimed that the same was held in trust for her by said James E. Baitey, and that appellant had notice thereof The case was tried upon this theory, and, after the testimony was in, the court indicated to the plaintiffs that the proofs failed to establish a trust, and the only issue in the case was as to whether said property was the community property of the said James E. Baitey and Henrietta Baitey, and suggested to the plaintiffs that the complaint be amended for the purpose of trying that issue: whereupon 20 days were allowed the plaintiffs within which to amend their complaint, which they did by inserting an allegation as follows: "And these plaintiffs further allege that, on or about the year 1881, the said Henrietta Baitey, deceased, intermarried with the defendant James E. Baitey, in the state of California; and at all times after and until the death of said Henrietta Baitey, on the 2d day of March, 1890, the said Henrietta Baitey and the said James E. Baitey lived and cohabited together as husband and wife, and the property described in this complaint was acquired after the marriage of the said Henrietta E. Baitey and the said James E. Baitey, and while they were living together as husband and wife, in the state of Washington." The evidence already taken was allowed to stand. A marriage license and

certificate of marriage were introduced by appellants to show that said Henrietta Baitey had been married at San Francisco, in 1880, to one Nicholas Olevas, who was then living. Technical objections were raised to their admissibility, which we do not deem it necessary to decide, as will appear later. There was testimony aside from this, however, to show that she had been married to said Olevas, who was her third husband, and that they had never been divorced. James E. Baitey first became acquainted with said Henrietta Baitey at San Francisco, in 1880 or 1881, while she was keeping a lodging house there. He was a sailor, and the testimony showed that, while in port, he lived and cohabited with her until 1883, at which time he came to Seattle, to which place she subsequently followed him. There was no evidence of any marriage ceremony having been performed between the said James E. Baitey and Henrietta Baitey in California or elsewhere. It is contended by respondents that there is no sufficient proof that said Henrietta Baitey ever intermarried with Nicholas Olevas; and, furthermore, as it appeared by the proof that she was a mulatto and Olevas a white man, that under the laws of California, proof of which was made, marriages between white persons and mulattoes were illegal. It is contended that said James E. Baitey and Henrietta Baitey were husband and wife, by virtue of a commonlaw marriage, which was good in the state of California; and that, having assumed such relationship there, and continuing it thereafter in this territory and state up to the time of her death, they were husband and wife, and, if so, the proof is satisfactory that the property acquired was the community property of said parties. A good deal of proof was introduced in the case to show that said parties had always held themselves out as husband and wife in this territory, and we think this fact was clearly established; but we regard it largely immaterial, as marriages under the common law do not and did not obtain here, and it was only relevant as some evidence of a prior marriage. There is no proof of any agreement having been entered into between said parties to take each other as husband and wife in the state of California, and absolutely no proof that they ever held each other out to the community there as husband and wife. Also, it seems to us immaterial whether or not the previous marriage between Henrietta Baitey and Olevas was a valid marriage, for it appears that James E. Baitey understood that she was the wife of said Olevas while he was associated with her in California. This was sufficient to rebut the presumption of any agreement to take each other as husband and wife in that state, if one could obtain from the proof offered, regardless of the fact as to whether she and Olevas were lawfully married. The proof shows nothing more than a mere illicit intercourse and connection between said James E. Baitey and Henrietta Baitey in the state of California. The bare fact that they co-habited there appears, but this was insufficient, standing alone, to establish a commonlaw marriage. Their subsequent conduct in this territory and state where they openly assumed the relations of husband and wife, was of no avail, and we are constrained to find from the testimony that Henrietta Baitey was never the wife of James E. Baitey.

But the respondents contend that, although said parties were not husband and wife, we should find for the plaintiffs, on the ground that the real estate in question was purchased with the funds of Henrietta Baitey, and that James E. Baitey held the legal title thereof in trust for her. The appellants insist that that question is not in the case under its present aspect. However this may be, we are satisfied from an examination of the testimony, with the finding of the lower court, that there was not sufficient evidence to establish a trust relation. Consequently, the judgment of the court finding that the real estate in question was the community property of said James E. Baitey and Henrietta Baitey must be reversed.

DUNBAR, C. J., and ANDERS, J., concur. STILES, J., not sitting.

BLACKWELL et al. v. McLEAN et al. (Supreme Court of Washington. June 27, 1894.)

PARTITION—CLAIM FOR RENTS AND PROFITS—OFF-SET — EXPENSES OF REPAIRS AND DEFENDING TITLE—WHEN ALLOWED — ORDER FOR PRIVATE SALE—VALIDITY.

1. In an action for partition, and for rents and profits, and damages caused by waste, defendants may plead as a set-off expenses incurred in making necessary repairs of buildings and fences, and sums expended at plaintiff's request in defending the title to the premises.

2. Where the statute requires partition sales

2. Where the statute requires partition sales to be made by public auction, to the highest bidder, in the manner required for the sale of real estate on execution (2 Hill's Code, § 603), it is error to decree that the sale may be public or private.

3. It is not a valid objection to a decree of sale in partition that the person appointed to make the sale is designated as "trustee," instead of "referee," as provided by 2 Hill's Code, \$ 584.

Appeal from superior court, Lewis county; W. W. Langhorne, Judge.

Action by Phoebe L. Blackwell and others against Annie M. McLean and others for partition, for rents and profits, and for damages for waste. From the decree entered, defendants appeal. Reversed.

Edward F. Hunter, for appellants. M. Yoder, for respondents.

ANDERS, J. The plaintiffs and the defendant Annie M. McLean are the children and heirs at law of one James L. Holbrook,

deceased, and as such are the owners of certain real estate situated in Lewis county, in this state. Three of the plaintiffs are minors, and are represented by their guardian. The defendant D. A. McLean is the husband of Annie. This action was instituted for partition of certain real estate described in the complaint, and for an accounting for rents, issues, and profits, and for damages for waste alleged to have been committed by defendants. The defendants, in their answer, by way of counterclaim, alleged that during the three years they were in possession of the premises in controversy they paid out and expended in repairing buildings and constructing and repairing fences on said lands the sum of \$600, all of which was proper and necessary for the preservation and security of the buildings and fences thereon; and they further allege that they, at the instance and request of plaintiffs, paid out in cash in defending the title to said lands in two designated actions the sum of \$475, no part of which had been repaid, and prayed judgment for the amount which might be found due them. The plaintiffs replied to the affirmative matter set up in the answer, and upon the issues formed the case was tried by the court. No statement of facts appears in the record, and we have nothing before us except the pleadings and findings of the court and the decree, and we are therefore unable to determine any of the questions of fact which were passed upon by the trial court. The defendants excepted generally to the findings of fact and the decree, but such exception can be of no avail here. The court found, among other things, as a conclusion of law, "that the matter pleaded as a set-off by the defendants is not proper matter of set-off in this action, and is disallowed by the court," which finding was duly excepted to, and is here alleged as error. In our judgment, this ruling was wrong. If, as stated in the answer, the defendants, at the request of plaintiffs, paid out money in defending the title to the premises in controversy, it would seem but just that plaintiffs should be required to repay their proper proportion thereof; and, if necessary improvements were made upon the land by the defendants, such improvements may equitably be considered in connection with the claim for use and occupation, the one offsetting the other. See Carver v. Coffman (Ind. Sup.) 10 N. E. 567, and Cooter v. Dearborn (Ill.) 4 N. E. 388, in which cases these questions are fully discussed. When permitted in cases of partition, the claim for improvements is confined to their value as part of the land, without regard to their cost or the amount expended therefor; and, if the value of the land is not enhanced thereby, nothing will be allowed on account thereof. Cooter v. Dearborn, supra. The trial court found that the lands in question could not be partitioned without great preju-· dice to the parties to the action, and therefore

adjudged that they be sold, and the proceeds distributed to the parties in proportion to their respective interests, and for that purpose appointed one Newland as "trustee" for all the parties to take charge, care, and custody of said lands and the rents, issues, and profits thereof, and to make sale thereof at public or private sale, etc. The statute (2 Hill's Code, § 584) provides that the court may, in cases like this, appoint one or more referees to sell the land; but we apprehend that the fact that the referee, in this instance, was designated as "trustee." constitues no valid objection to the decree. The decree, however, is irregular in this: that it authorizes the sale at public or private sale, whereas the statute provides that such sales shall be made by public auction, to the highest bidder, in the manner required for the sale of real estate on execution. 2 Hill's Code, § 603. For the reasons above indicated, the judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

SCOTT, STILES, and HOYT, JJ., concur.

RAYMOND et ux. v. MORRISON et al. (Supreme Court of Washington. June 13, 1894.) EJECTMENT—PARTIES—LIMITATION—PLEADING.

1. Code Proc. § 529, requiring an action for possession of realty to be brought against the tenant in possession, makes an exception to the rule of Id. § 143, requiring all persons interested in an action to be joined as parties; and, where possession only is sought, such an action may be brought against a tenant in common in sole possession without joinder of his cotenants, devisees under a will, and the executors.

2. Before the Code of 1881, the action of ejectment was limited to 20 years; by the Code

2. Before the Code of 1881, the action of ejectment was limited to 20 years; by the Code to 10. Code, § 760, declares that no right accrued before the Code took effect is affected thereby. *Held*, that a right of action in ejectment, accrued before the Code took effect, did not survive more than 10 years after it took effect.

effect.

3. The statute requires plaintiff in ejectment to show that he or his predecessor was seised of the premises within 10 years. Defendant must plead any title he may wish to prove in himself or another with the certainty required in a complaint. The complaint alleged plaintiff's seisin within 10 years. The answer pleaded affirmatively (1) ownership in fee and lawful possession; (2) adverse possession by defendants and their grantor, with denial that plaintiff or his predecessor had been seised within 10 years. The reply denied (1) every allegation of the first paragraph; and (2) that defendants had been in possession, as alleged in paragraph 2. Heid that, since paragraph 1 was by itself a good plea of title by adverse possession or otherwise, the denial of its averments joined the material issue, and the reply was not bad for failure to deny the possession of "defendants and their grantors."

Appeal from superior court, Thurston county; M. J. Gordon, Judge.

Ejectment by George L. Raymond and wife against Levi Morrison and others. Judgment for defendants. Plaintiffs appeal. Affirmed.

M. L. Baer, for appellants. Allen & Moore, for respondents.

STILES, J. To a complaint in ejectment | the defendants set up in their answer that they were tenants in common, in sole possession of the land in controversy, with the devisees of Joseph Y. Pomeroy, and prayed that the plaintiffs be required to make the executor and devisees of Pomeroy parties defendant, and that the action be stayed until this should be done. The court held that Pomeroy's devisees were necessary and proper parties to the action, and required the plaintiffs to bring them in, which was done over the objection of the plaintiffs. While this matter will probably only affect the question of costs, we think the plaintiffs have a right to a correct ruling upon the point. Code Proc. § 529, provides that an action for the possession of real property may be brought against the tenant in possession, and section 530 provides how a landlord may be brought This last section is the only one we have which changes the common-law rule which required only the tenant in possession to be made a party defendant. The object of this action being to obtain the possession alone, there was no necessity for making the other tenants in common parties hereto. Section 529 is a statutory exception to the rule prescribed in section 143.

The second point made is upon the statute of limitations. This action was brought in 1892, and one of the defenses is adverse possession for a period of 16 years prior to the The appellants maintain that the statute of limitations prescribing 10 years within which an action for the possession of real estate must be brought, found in the Code of 1881, has no application to this action, because of the language of section 760 of that Code. Prior to the enactment of the Code of 1881, the period of limitation of actions for the possession of real estate was 20 years, but by section 26 of that Code the time was reduced to 10 years. Section 760, however, provided as follows: "No action or proceeding commenced before this Code takes effect and no right accrued is affected by its provisions; but the proceedings therein must conform to the requirements of this Code as far as applicable." It was held in Baer v. Choir, 7 Wash. 631, 32 Pac. 776, and 36 Pac. 286, that an action commenced within 10 years after that date was in time, although the full period since the right of action accrued to the time of the commencement of the action was more than 10 years. The present contention is that, notwithstanding the reduced period, the effect of section 760 was to preserve the right to commence an action within 20 years from the time the right of action accrued. It is clear, both upon general principles of right and by the uniform adjudications of courts, that the effect of section 760 would be to preserve everything that could be termed a right accrued. The right to bring an action at all was undoubtedly saved. Changes in the statute of limitation are universaily held not to have the effect to de-

stroy the right of action unless the legislative language in the most positive terms has that effect. Therefore courts have held that in all such cases a reasonable time, at least, will be allowed for the commencement of an action, notwithstanding the apparent provisions of the new statute. But, inasmuch as it is also a universal rule that the time within which an action may be brought is a part of the remedy merely, it is our opinion that the "right accrued" which section 760 provided should not be affected meant the right to maintain an action, and not the right to maintain it within any specified period. We hold, therefore, that while the plaintiff could have brought his action at any time within a period of 10 years from the adoption of the Code of 1881, if it shall turn out to be a fact in this case that the respondents have been in possession of the land in dispute for the period of 16 years before the commencement of the action, that possession will be a bar to the plaintiffs' proceeding.

The next question is one of practice purely, and will necessitate the reversal of the judgment, although the decision upon the question of the statute of limitations may ultimately decide the merits of the case against the appellants. The answer of the defendants contained the following, among other affirmative defenses: "(1) That they [defendants] are the owners in fee, and are lawfully seised and possessed of the tract of land described in the complaint. (2) For further defense, defendants say that they and their grantors hold and have held and possessed said land actually, openly, notoriously, continuously, and adversely, under color and claim of right and ownership in fee, for sixteen years last past, and for more than ten years prior to the filing of this action; and that neither the plaintiffs nor either of them. nor the ancestors or predecessors of either. have been seised or possessed of the premises in question, or any part or parcel thereof, within ten years next preceding the said filing." The reply specifically denies each and every allegation of the first defense, and continues as follows: "(2) That they [plaintiffs] deny that defendants have been in possession of said land in dispute under color of title. claim of right or ownership in fee, as set forth in paragraph 2 of said affirmative defense." Upon this reply the court sustained a motion for judgment on the pleadings, upon the ground that the second denial, while it placed in issue an allegation that the defendants had been in possession, etc., as set forth in paragraph 2 of the affirmative defense, did not deny that defendants and their grantors had so held. Appellants make the point that it was error to render judgment on the pleadings in such a case. The cause being an action in ejectment at common law, it would not have been necessary for the defendants to plead anything beyond the general denial to have entitled them to put in evidence any title which either they or any

third person might have which would serve to defeat the plaintiffs' right to recover the possession. But under our statute (Code Proc. § 532) it is made necessary to a defendant's making proof of title in himself or another that he plead the same in his answer. Therefore, but for the statute, no reply to the allegations of the answer set forth would have been necessary, since other portions of the answer specifically deny all the allegations of the complaint. The section mentioned provides that, if the defense of title in himself or another be set up by the defendant, the nature and duration of such estate or license or right to the possession should be set forth with the certainty and particularity required in a complaint. Now, in this case, the first paragraph of the affirmative defense sets forth that the defendants are the owners in fee, and are lawfully seised and possessed of the tract of land described in the complaint. The statement contained in this paragraph was a full compliance with the requirements of section 532, for, supposing the defendants had been the plaintiffs in an action affecting this land, it would only have been necessary for them to allege that they were the owners in fee, and lawfully seised and possessed of it, in order to state a good title in themselves. They could then have proved upon the trial that their title was based upon an adverse possession maintained for the requisite period, since such possession is now generally held to conferupon the possessor the absolute legal title in fee of the estate. 3 Washb. Real Prop. *p. 501; School-Dist. ▼. Benson, 31 Me. 384; Nelson v. Brodback, 44 Mo. 596; Bliss, Code Pl. § 356; Sharon v. Tucker, 144 U. S. 533, 12 Sup. Ct. 720. It will be noticed that the reply denied each and every allegation of the first paragraph of the defense, and therefore the material issue was joined. The first part of the second paragraph was a mere statement of the evidence upon which the claim of ownership was based. Fitch v. Connell, 1 Sawy. 156, Fed. Cas. No. 4,834; Wythe v. Myers, 3 Sawy. 595, Fed. Cas. No. 18,118.

But it is also urged that there was no denial at all of the last portion of the second paragraph, relating to the seizure and possession of the plaintiff within 10 years next preceding the commencement of the action; but that portion of the defense amounted to noming more than a denial of the allegation of the second paragraph of the complaint that the plaintiffs were seised in fee and possessed and entitled to the possession of the land. Our statute of limitations expressly provides that no action shall be maintained for the recovery of real property, or the possession thereof, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the premises in question within 10 years before the commencement of the action. The second paragraph of the complaint alleged that the plaintiffs were so seised on the 4th day of No-

vember, 1890, which responded to the requirement of the statute, and the burden was upon the plaintiffs to show that they were either seised or possessed of the land within 10 years. Therefore, when the defendants set forth, in the language used in the second paragraph, that the plaintiffs were not so seised, they merely denied an allegation of the complaint. The judgment will be reversed, and the cause remanded.

DUNBAR, C. J., and SCOTT and AN-DERS, JJ., concur.

POTVIN v. DENNY HOTEL CO. OF SE-ATTLE et al.

CORNELL UNIVERSITY V. SAME. (Supreme Court of Washington. June 30, 1894.)

MECHANIC'S LIEN-ASSIGNMENT - EFFECT - RES JUDICATA-CONTRACT FOR PRIORITY.

JUDICATA—CONTRACT FOR PRIORITT.

1. The fact that a person entitled to a mechanic's lien assigns his claim against the owner of the land as collateral security does not defeat his right to claim the lien.

2. Where, in an action between persons claiming mechanics' liens, the priorities of their liens were adjudged, one of such persons, who had stipulated with a mortgagee of the land that his lien should have priority over the mortgage, failed to avail himself of the stipulation, and the mortgage was adjudged prior to the week. and the mortgage was adjudged prior to the mechanics' liens, he cannot, in an action by the builder to establish his lien, to which the parties in the prior action are made parties, avail himself of such stipulation so as to change the order of the priorities adjudged in the former action

3. Such stipulation will be given effect to the extent of awarding to all the mechanics' liens priority over the mortgage to the amount stipulated for by the mortgagee, which amount should be apportioned among the claimants in proportion to their claims.

Appeal from superior court, King county; J. W. Langley, Judge.

Actions by Fabien S. Potvin and by the Cornell University against the Denny Hotel Company and others. Cases consolidated. From the judgment, plaintiff Potvin and defendants Huttig Bros. Manufacturing Company and Dexter Horton & Co. appeal. Reversed.

J. J. Easly and Stratton, Lewis & Gilman, for appellant Potvin. Wiley & Bostwick and Wilshire & De Steiguer, for appellant Huttig Bros. Manufacturing Company. Blaine & De Vries, for appellant Dexter Horton & Co. Wiestling & Wiestling, for respondent Seattle Hardware Company. Cole, Reed & Dawes, for respondent Cornell University. Burke. Shepard & Woods, for respondent Denny Hotel Company.

SCOTT, J. On July 2, 1889, the Denny Hotel Company, a corporation organized and existing under the laws of this state, entered into a contract with Fabien S. Potvin for the construction of an hotel building on certain real estate owned by said company in the

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city of Seattle. Said contract provided that | for the erection of said building the contractor should receive the sum of \$196,000, to be paid in installments of 60 per cent. upon the amount of the estimate made by the architects at certain stated periods in the progress of the erection of the building. The contract also provided for further compensation for extra labor and materials which might be rendered necessary by changes in the original plans and specifications. During the pendency of the work, a controversy arose between the hotel company and Potvin, and it is claimed that the hotel company refused to make any further payments upon the work, or allow Potvin to proceed therewith; whereby he was compelled to abandon it before the building was fully completed. Within the same time, Potvin gave to Dexter Horton & Co., a corporation engaged in the banking business at Seattle, the following order: "Seattle, February 19, 1890. To the Denny Hotel Company of Seattle: Please pay to Dexter Horton & Co., bankers, whatever sums of money or payments that may hereafter be due to me, from time to time, upon my contract with the Denny Hotel Company of Seattle for the construction of what is known as the Denny Hotel, upon blocks 46 and 50, A. A. Denny's addition to the town (now city) of Seattle, and charge such payments to my account. And you are hereby authorized and requested to make such payments to Dexter Horton & Co., and charge the same to my account upon the contract aforesaid. F. S. Potvin."

The Denny Hotel Company accepted this order in writing, as follows: "The Denny Hotel Company of Seattle hereby accepts the foregoing order, subject to all the conditions and limitations of the contract of the Denny Hotel Company of Seattle with said F. S. Potvin, and upon the further express condition that, in thus accepting this order, they in no manner relinquish or release the said Potvin from the obligations of said contract, and in no manner vary or affect said contract. The Denny Hotel Company of Seattle, by Thomas Burke, Vice President, by J. D. Lowman, Secretary."

On April 2, 1891, and within the statutory time after Potvin had ceased work upon the building, he filed for record, in the office of the auditor of King county, a notice of lien, claiming there was due him on said contract the sum of \$166,000. This included a claim for \$52,000 for extras. He brought an action to foreclose said lien, making the Cornell University and the other defendants parties to the action. The Cornell University, a corporation organized and existing under the laws of the state of New York, had in December, 1889, made a loan to the hotel company of the sum of \$100,000, taking its promissory notes therefor, secured by a mortgage on the real estate upon which the hotel was being erected; and thereafter brought an action to foreclose the mortgage, making Potvin a party defendant thereto. The other defendants in said action, except Dexter Horton & Co., were subcontractors, material men, laborers, etc., who had filed lien notices against the property. These actions were thereafter consolidated. Dexter Horton & Co., on motion of Potvin, were made parties The Cornell University and the defendant. Denny Hotel Company answered Potvin's complaint, setting out the foregoing order and acceptance, and claimed thereby that Potvin had waived and released his right to a lien. Dexter Horton & Co. answered, setting up that this order was given as collateral security for the payment by Potvin to them of such sums as had been and were to be advanced by them to Potvin during the progress of the building; and that such sums as were paid on said order were put to the credit of Potvin in their bank, and he was allowed to check against the same, the order being held as collateral security therefor. Potvin, however, by way of reply, set up that this order was not intended as an assignment to Dexter Horton & Co. of the amount due him from the Denny Hotel Company; that he was indebted to Dexter Horton & Co. in a considerable sum, and they, desiring to have a check upon his expenditures, required him to give said order, so that all moneys received by him on his contract should pass through the bank, and that thus they might be informed as to his receipts and expenditures. The cases as consolidated came on for trial, and the hotel company and the Cornell University moved to dismiss Potvin's complaint in the suit brought by him. and his cross complaint in the suit brought by the Cornell University, on the ground that the facts stated in the answer of Dexter Horton & Co., and in the reply of Potvin, showed that Potvin had waived and released his claim of lien against the premises in ques-This motion was granted, and Potvin and Dexter Horton & Co. appealed therefrom.

In a former action commenced in said court, the lien claim of Huttig Bros. Manufacturing Company was established. this action the Scattle Hardware Company was made a party, as well as various other claimants. The court determined the priority of all parties to the action, and decreed that the claims of Huttig Bros. Manufacturing Company and the Seattle Hardware Company were co-ordinate; that they were both subject and subsequent to the mortgage lien of the Cornell University. On an appeal to this court, said decree was affirmed. 6 Wash. 122, 32 Pac. 1073; 6 Wash. 624, 34 Pac. 774. These liens were set up in the present action. Upon the trial of the case, the Scattle Hardware Company introduced in evidence a stipulation between it and the Cornell University, by which it was agreed that said hardware company was entitled to, and might be awarded, priority over the Cornell University. Huttig Bros. Manufacturing Company objected to the introduction

of said stipulation. Subsequently the Seattle Hardware Company was permitted, against the objection of Huttig Bros. Manufacturing Company to introduce proof that the materials upon which its claim had been decreed were furnished prior to the time that the mortgage was executed to the Cornell University. Upon this stipulation and testimony, the court awarded priority to the Seattle Hardware Company over the claim of the Cornell University and the lien claim of Huttig Bros. Manufacturing Company, from which said last company appealed. In the original suit of the Seattle Hardware Company, in which its lien was established, the Cornell University was not made a party.

It is contended by the respondents that the order aforesaid, given by Potvin to Dexter Horton & Co., was an assignment of his claim, and operated to defeat the right to a lien, regardless of whether it was given as security or otherwise; and in support thereof the case of Dexter Horton & Co. v. Sparkman, 2 Wash. St. 165, 25 Pac. 1070, is cited, but we are unable to see wherein it is applicable. In that action there was an absolute assignment of the demand, and the assignee undertook to claim and maintain a laborer's lien thereon, no notice or claim therefor having been filed by the assignor, who performed the labor. Here an entirely different question is presented. We are satisfled that the order in question was in effect an equitable assignment of the claim. 3 Pom. Eq. Jur. § 1283. And it is immaterial, for the purposes of this case, whether the same was given for the purpose alleged by Dexter Horton & Co., or as claimed by Potvin, for under either theory it was merely given as security. We know of no reason why the right to a lien in such case should be held to be defeated. At the time the order was given, the claim had not been perfected so that a lien could then be claimed, and to hold that the same could not be assigned for the purposes of security, without losing the right to a lien, would be to deprive the contractor of the benefit of the demand to that extent. Its value as a security would be depreciated if the right to a lien became lost thereby; and it would force the alternative upon the contractor of withholding it, and not using it for any such purpose, or of losing his right to a lien in case he did so use it. Although this order operated as an assignment, Potvin was still interested in enforcing the claim, for his original liability to Dexter Horton & Co. was not extinguished by the giving of the order. If the amount called for was paid, then his indebtedness to them was discharged to that extent; but, if not paid, he was liable for the full amount. Clearly, he should be allowed to protect, preserve, and enforce the security, even though Dexter Horton & Co. are entitled to receive the money and apply it upon his indebtedness.

As to the further question raised by the appeal of Huttig Bros. Manufacturing Company, we think the decree was erroneous. The priorities of these claims were directly involved in the former suit, and the fact that the Seattle Hardware Company did not in said action undertake to avail itself of its right to a priority, and introduce its proof which it introduced in this action, does not alter the situation, for it ought to have done so then if it intended to assert and insist upon any such right. The Cornell University claims that if this view is adopted the stipulation should be set aside. But we do not so view it. It is immaterial to it whether the amount it has stipulated should be adjudged prior to its claim is paid to the Seattle Hardware Company, or is apportioned to said company and the other claimants. The result is the same to the Cornell University. Consequently, we are of the opinion that the stipulation should be given force to the extent of awarding priority to the lien claimants aforesaid to the extent of the sum stipulated, but that the same should be apportioned between the Seattle Hardware Company and the other lien claimants in proportion to their respective claims, as established in said former actions. Reversed.

DUNBAR, C. J., and ANDERS and STILES, JJ., concur.

DONAHUE v. JOHNSON et al. (Supreme Court of Washington. June 19, 1894.)

APPEAL—FINAL JUDGMENT—DISSOLUTION OF IN-JUNCTION-DAMAGES-MINING CLAIM.

1. In an action on an injunction bond, it appeared that the case in which the injunction was issued was referred to a commissioner, who reported findings of fact in favor of defendant therein, which report was affirmed, and a judgment rendered dismissing defendant, with costs, and dissolving the injunction. Held, that the judgment was a final judgment on the merits. and not a mere disposition of the temporary injunction.

2. In an action on an injunction bond, where no motion is made to dissolve the injunction, which stands until a decision on the merits by which it is dissolved, counsel fees for services in connection with a dissolution of the injunc-

3. Complainant alleged that, when the injunction was served, plaintiff had contracted to sell his mining claim for \$15,000, and that, because of the injunction, the purchaser refused to buy, and that he afterwards sold the claim for \$2,000 less. Held, that he could not recover the \$2,000, there being no proof that the claim was less valueble after the injunction than because was less valuable after the injunction than be-

4. A general allegation of ownership of a mine is substantiated by proof of location and possession.

Hoyt, J., dissenting.

Appeal from superior court, Kittitas county; Carroll B. Graves, Judge.

Action by William Donahue against Thomas Johnson and others on an injunction bond. Judgment for defendants, and plaintiff appeals. Reversed.

Fairfield & Cross and Ralph Kauffman, for appellant. Arthur, Lindsay & King, for respondents.

STILES, J. This is an action for damages upon an injunction bond. The principal point in the case, and the one upon which the nonsuit was granted, grew out of the fact that appellant, in attempting to show the termination of the injunction, offered in evidence a judgment which the court held not to be a final judgment in the cause, and therefore not the proper basis for a suit upon the injunction bond. The complaint in this case alleged that, at a certain time, the plaintiff was the owner and in possession of a certain mining claim, and was prosecuting mining work thereon; whereupon the principal defendant in this action commenced a suit against him to recover possession of the mining claim, and procured a temporary injunction in said action restraining and enjoining the plaintiff from working the mining claim, or in any manner interfering with it. The record in the former case was introduced, by which it appeared that the complaint alleged that the defendant had attempted to relocate and appropriate the mining claim while it was still a lawful mining claim, under a location and appropriation made by the plaintiff or his grantor, and while the defendant was an employé of, or person holding a flduciary relation connected with, the mine, under the plaintiff. It was not clear from the complaint whether the pleader expected to recover possession of the claim under that suit or not, although it was prayed that defendant be declared the trustee of the plaintiff, and that plaintiff be declared to be the owner of the claim; and it would seem that the complaint was framed with a view of possibly obtaining all the beneficial effects of a judgment in his favor for everything short of a writ of restitution, including a conveyance of the mining claim, if it should be found that the defendant had really made a location.

So far as concerns the objection which the respondents here make to the introduction of papers in the former case, on the ground that a suit for possession is pleaded, whereas an action in equity is proved, it is not well taken, as it is immaterial what kind of an action had been commenced if in fact an injunction was procured in connection with it. An order was made by the court referring the former case to a commissioner to take the testimony, and report findings of fact and conclusions of law. After the commissioner had performed his work, and made his report, in which he found all the issues in favor of the defendant, and recommended that he have a decree establishing in him the right of possession of the mining claim, that he go hence with his costs, and that the restraining order issued against him should be dissolved, came the judgment which is in dispute, which recites that the cause came on to be heard upon the exceptions of the plaintiff to the report of the referee, and that, after argument on both sides, the court, being fully advised, "ordered, adjudged, and decreed that the said report be affirmed, excepting as to the last conclusion of law therein, which shall be changed so as to read 'that defendant is entitled to a dissolution of the restraining order heretofore issued against him herein, and that he go hence with costs;' wherefore, by reason of the law and the premises, it is ordered, adjudged, and decreed that the restraining order heretofore issued in this cause against defendant be, and the same is hereby, dissolved, and that defendant have and recover of plaintiff his costs herein, amounting to the sum of . dollars." Thus, the only change which the court assumed to make in the report of the referee was in that part of it wherein the referee recommended that defendant have atfirmative relief, which he had not prayed for in his answer against the plaintiff. Respondents contend that this was not a final judgment in the action, but merely a disposition of the temporary injunction which had been issued in aid of the principal suit. We have no doubt that this judgment was intended to be and was treated by the parties as the final judgment in the case, and the full disposition of the action upon its merits. The judgment shows that one of the matters which the court affirmed was that the defendant go hence with his costs, which means that he be dismissed with his costs. Had the purpose of the judgment been merely to vacate an injunction, neither the parties nor the court would have thought of putting such an order in the shape of a judgment. Moreover, the record fails to show that any motion to vacate was ever made. The only proceeding was a reference of the case to the commissioner. He heard the cause upon its merits, and made his report thereon. The court passed upon the merits of the action, and intended to terminate it. The dismissal of the defendant with his costs, or an order that he go hence, was itself a final judgment, and would have operated to dissolve the injunction, even though it had not been mentioned. It was error, therefore, not to have received the judgment in evidence.

One of the points upon which it is urged the court erred against appellant was in connection with his attempt to prove payment of attorney's fees. The commonly accepted rule is that reasonable compensation paid as counsel fees, paid in procuring the dissolution of an injunction, may be recovered in an action on a bond. 2 High, Inj. (3d Ed.) But counsel fees thus allowable must be those connected with the motion, or other similar proceeding for the dissolution of the injunction, and do not cover the general expenses of defending the merits of the action. Newton v. Russell, 87 N. Y. 527; Trapnell v. McAfee, 77 Am. Dec. 158; Bustamente v. Stewart, 55 Cal. 115; Porter v.

Hopkins, 63 Cal. 53. Inasmuch as no motion for the dissolution of the injunction appears to have been made in this case, but it was allowed to stand until the action was tried upon its merits, and simply failed because of the decision upon the merits, under the foregoing authorities, no attorney's fees could be recovered.

The complaint alleged that, at the time the injunction was served, plaintiff had contracted to sell his mining claim for \$15,000, and that, by reason of the injunction, the intending purchaser refused to complete the contract; and subsequently the claim was sold for \$13,000, and damages on this ground were alleged at \$2,000. Such damages could not be recovered. There is no allegation and no proof that the mining claim was less valuable after the injunction or because of it than it was before. If, after the injunction was dissolved, he saw fit to sell it for less than the former contract price, that was a matter entirely within his own control.

Respondents insist that a demurrer which they claimed to have filed should be considered in determining the disposition of this case. No demuirer is found in the record, but we shall consider the principal point which is urged against the complaint notwithstanding. It is urged that the court ought not to have permitted the plaintiff to substantiate his allegations of ownership of the mining claim by proof of location and possession, but should have required proof of ownership in fee by patent from the United States. The allegations of ownership were in reference to the subject-matter, which was a mining claim. A mining claim is a license extended by the United States to individuals to take minerals from certain areas of public lands, the possession of which is secured to the licensee by complying with the laws and mining rules. One who locates and takes possession of and works a claim of this kind is the owner of it, although the legal title to the land may remain in the United States. The position of the respondents is that, even if a title less than a fee from the government can be shown, still the facts constituting the basis of the claimant's right must be set forth; instancing Thomas v. Chisholm, 13 Colo. 105, 21 Pac. 1019; Lee Doon v. Tesh, 68 Cal. 51, 6 Pac. 97, and 8 Pac. 621; and Anthony v. Jillson (Cal.) 23 Pac. 419,-in support of their proposition. But those cases were all cases of adverse claims obtained under the Revised Statutes of the United States, and the proceedings therein were of such a character that it was eminently necessary that each fact showing the qualification of the claimant, and the due location and maintenance of his claim, be made clear, inasmuch as the court was called upon to decide, as between two or more claimants, which one was entitled to have a patent from the government. But in a case of this kind no such reasons exist for setting forth the facts constituting the claimant's right. He asserts that he is owner, and is entitled thereunder to prove any state of facts which gave him the rights which he claims to have been interfered with by the injunction. Lozo v. Sutherland, 38 Mich. 168; Railroad Co. v. Boyer, 13 Pa. St. 497.

There remain in the case some allegations of damage connected with the interference with plaintiff's mining work, and his losses by reason of having to support a number of men in idleness during the period covered by the injunction; but it would be improper for us at this time to pass upon questions raised in that connection. Under the condition of this case, we are unable to say whether the specific damages alleged to have been suffered would be provable or not, since the evidence was all rejected, and stands merely upon offers, the case having been disposed of finally upon the proposition of the insufficiency of the judgment. Judgment reversed, and cause remanded for a new trial.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

HOYT, J. (dissenting). As I read the complaint of the plaintiff, there was no allegation contained therein that there had been any final judgment rendered in the case in which the injunction bond was given. Construing the allegation in regard to the breach of the condition of the bond as favorably to the pleader as the language will warrant, it amounts to no more than that the injunction had been dissolved, and in no wise sets forth any facts from which it could be gathered that a final judgment in the case had been rendered. For this reason, the proof offered in relation to the final judgment was unsupported by the pleadings, and should have been excluded. I am also of the opinion that a general allegation of ownership is not sustained by proof of a right to occupy under the mining laws of the United States. For these reasons, I am compelled to dissent from the conclusion arrived at by the majority of the court.

WAIT et al. ▼. STROUD.

(Supreme Court of Washington. July 7, 1894.)
BILL OF EXCEPTIONS—SUFFICIENCY.

A bill of exceptions reciting plaintiff's exception to the denial of his motion for a new trial on the ground of the court's commenting on the evidence in the manner set out is insufficient, as not stating that such language was used on the trial, but merely that a motion on that ground was denied. Dunbar, C. J., dissenting.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by Charles A. Wait and another against F. W. Stroud. Judgment for defendant. Plaintiffs appeal. Affirmed.

Waller & Rawson, for appellants. L. Hulsether, for respondent.

STILES, J. The appeal in this case is based entirely upon certain alleged misconduct of the judge who presided at the trial in making comments of the class prohibited by section 16, art. 4, of the constitution. To present their grievance to this court, appellants have had certified up the pleadings, verdict, notice of motion for a new trial, order denying the motion, and their bill of exceptions. The only ground of the motion for a new trial which has any relevancy here was: "Irregularity in the proceedings of the court, and abuse of discretion, by which plaintiffs were prevented from having a fair trial." The notice stated that the motion as to this ground would be made upon atfidavits thereafter to be filed and served upon defendant's counsel, but there are no such affidavits in the record. The motion was denied, and thereupon the plaintiffs procured the judge to sign what purports to be a bill of exceptions to the denial of the motion. The bill, after the title of the cause, reads thus: "Now come the plaintiffs in the aboveentitled case, by their attorneys, and present the following bill of exceptions: (1) The plaintiffs except to the ruling of the court in denying the plaintiffs' motion for a new trial on the ground of irregularity on the part of the court in commenting on the evidence introduced in the case, in the presence of the jury, as follows." Here follow three separate paragraphs, inclosed in quotation marks, containing what counsel here affirm was actual language of the judge occurring at the trial, upon inspection of which we should reverse the case. But, although the judge signed the bill, it is plain to the reader of it that it affirms nothing but that there was an exception to the refusal on the ground specified; not that the ground existed by reason of the judge's having used any such language. The order denying the motion was followed by the words, "To which due exception is taken, and an exception allowed," which was all that was necessary by way of exception to the action of the court in that particular. The trouble about the matter is that the bill does not purport to make a record of what happened at the trial, which might be a sufficient ground for a new trial, but of what occurred on the hearing of the motion; and there is, therefore, nothing before us showing any such irregularities as those claimed. It would appear, also, that in signing the bill the judge was protesting that he had not used the language imputed to him, for he added to his signature the following: "There being no admission by reason hereby that the court used any such language as attributed in first exception." Counsel strenuously urge that this reservation should not be regarded; but whether it be or not does not change the result, since the bill does not, either precisely or in substance, pretend to aver that the objectionable words were made use of. The bill should have been framed so that it would affirmatively state that such and such things did occur at certain stages of the trial, and in that form should have been presented to the judge for his allowance. If he signed it, it would go into the record as part of the history of the trial; but, if he refused to sign it, because he did not admit its truth, this court alone had power to settle the matter. Code Proc. \$ 395. What he did certify referred only to the history of the motion for a new trial. He said he did refuse to grant a new trial on the grounds specified, and then went further than was necessary, and declared that he did not admit that any such grounds existed. It would not have been error if he had refused to sign the bill at all, since the only exception necessary was noted in the order, which he had already signed. Judgment affirmed.

HOYT and ANDERS, JJ., concur. SCOTT, J., concurs in the result.

DUNBAR, C. J. (dissenting). I think the bill of exceptions was all that was required by the law, and as, in my judgment, the judge plainly violated the provision of the constitution prohibiting judges from commenting on facts, the judgment should be reversed.

PETERS v. GAY et al.

(Supreme Court of Washington. July 10, 1894.)

NOTE—BONA FIDE PURCHASER—FEAUD OF PAYER.

1. A person to whom a note is indorsed as security for an undertaking entered into at the time of the pledge is a bona fide purchaser.

2. The fact that the payee of a note which

2. The fact that the payee of a note which was delivered to him by the maker for the purpose of procuring a loan for the maker diverts it to his own use does not invalidate the note in the hands of a bona fide purchaser.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by W. G. Peters against Mont W. Gay and others. From a judgment for plaintiff, defendants the Guarantee Loan & Trust Company and Joseph A Richardson appeal. Affirmed.

Strudwick & Peters, for appellants. Easterday & Easterday (Benton Embree, of counsel), for respondent.

DUNBAR, C. J. This is a suit by respondent to foreclose a mortgage upon land in Glallam county, given to secure the note of defendant Mont W. Gay to defendant B. F. Schwartz, and claimed to have been indorsed and delivered to respondent; and appellants were made parties defendant, for the reason that they claimed some interest in the land sought to be foreclosed. Appellants, claiming under a mortgage upon the same land, of later date than respondent's, deny the delivery of the note and mortgage to Schwartz, the record of the mortgage, and the assign

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ment of either note or mortgage to respondent, and allege affirmatively that the note and mortgage pleaded by respondent were without consideration, and were stolen by Schwartz from the maker, Gay. Respondent introduced his note and mortgage, and rested. Appellants proved the note to have been diverted by Schwartz from the purpose originally intended, which was that Schwartz was to obtain a loan of \$1,200 for Gay, the maker of the note, and give the note and mortgage to the lender. Instead of this, he failed to negotiate any loan for Gay, but delivered the note and mortgage as collateral to secure the account of the bank in Port Angeles, of which he was manager, with the Columbia National Bank of Tacoma, of which respondent was vice president. This diversion of the note was before its maturity; and its delivery, indorsed in blank, was at the time the Tacoma Bank opened an account with the Port Angeles Bank, it being given with other collateral to secure the Columbia National Bank of Tacoma. The only notice that appellants had of respondent's mortgage was by the record. It is claimed by the appellants that the certificate on this mortgage was not competent; that the statute requires a copy of the instrument as recorded certified by the county auditor over his official seal. This question was decided adversely to the appellants' contention in Garneau v. Mill Co., 36 Pac. 463, decided by this court on April 24, 1894; the certificate of the auditor in this case being equally as full as the certificate passed upon by the court in the case of Garneau v. Mill Co., supra. The court found the execution of the negotiable promissory note as alleged in the complaint; the delivery of the same; that the respondent was the owner and holder of the note; that the same was unpaid; that the note was duly assigned for a valuable consideration; that the respondent (plaintiff below) was entitled to judgment; and that his lien was prior to and superior to that of the appellants; and we are of the opinion that all of these findings were justified by the testimony.

This was a case of hardship worked upon the defendant by the conduct of Schwartz: but the indorsement upon the back of the mortgage, relied upon by appellants as giving notice of its fraudulent character, was not made until after the purchase of the note by respondent, and he is in no way responsible for the misfortune of appellants in purchasing worthless security. The note was duly indorsed by the payee before maturity; was delivered to the respondent as collateral to an obligation entered into at the time of the pledge. Respondent became the bona fide holder of the note and of the legal title thereto. The uncontradicted testimony shows that the respondent's claim against the pledgor was \$5,000, contracted in good faith; that the security was taken in good faith, and received before there was any notice of

fraud; and that, of the claim of \$5,000, only \$700 has been paid; and that, including the note in suit, the collateral security held by respondent is only about \$2,000. We see no reason why respondent should be called upon to yield up this security for the benefit of Gay, who allowed his paper to go upon the market, and find its way into the hands of innocent purchasers, or for the benefit of subsequent purchasers, however innocent or unfortunate they may have been. We think none of the contentions urged by appellants can be sustained, and the judgment is therefore affirmed.

SCOTT, ANDERS, and STILES, JJ., concur. HOYT, J., concurs in the result.

VALENTINE v. SLOSS et al. (No. 15,432.) (Supreme Court of California. June 26, 1894.) PUBLIC LANDS - CONFIRMATION OF MEXICAN GRANT-ORDER FOR SURVEY-LIMITATIONS.

1. Where the decree of the circuit court confirming a claim to lands in California under confirming a claim to lands in California under a Mexican grant describes the land as bounded by the "shore of the bay," and the description by courses and distances includes the land to ordinary high tide, the ordinary high-tide line will be the boundary, though "shore," under the Mexican law, extended only to the extraordinary high-tide line, and the Mexican grant described the land as bounded by the shore, as words used in a common-law court decree must be given the common-law interpretation.

2. A patent issued by the United States land office to land claimed under a Mexican grant cannot be collaterally attacked on the ground that it includes land not included in the

ground that it includes land not included in the decree of the district court confirming the grant.

3. When the survey of land claimed under

3. When the survey of land claimed under a Mexican grant was approved by the surveyor general before the passage of Act June 14, 1860, which gives the United States district courts jurisdiction to order such surveys into court on application of any interested party, and no proceedings were pending for the purpose of contesting or reforming the same, the court had no jurisdiction to order such survey into court on exceptions being made thereto into court on exceptions being made thereto after the passage of the act. United States v. Sepulveda, 1 Wall. 104. followed.

4. Limitation does not begin to run against

an action for the recovery of land claimed un-der a Mexican grant until the issuance of a patent to the claimant.

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Thomas B. Valentine against Louis Sloss and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Mullany & Grant and R. Percy Wright, for appellants. Lindley & Eickhoff, for respond-

PER CURIAM. This is an action brought to recover possession of land, under section 738. Code Civ. Proc. Plaintiff claims title derived from the heirs of Juan Read, who received a grant from the Mexican government. His claim was presented to the board of land commissioners, and by them confirm

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ed. Patent issued to the confirmers February 25, 1885, and this action was commenced February 21, 1890. This appeal is from an order denying defendants' motion for a new trial, made upon a statement of the case. The statement contains the following: "It appeared from other documentary evidence introduced that all of the right, title, and interest of John Read, Hilaria Read, and Ynez Read in the land described in the complaint herein had vested in the plaintiff before the commencement of this action. It was admitted by all of the parties to the action that all of the land described in the complaint in this action lies and is included within the boundaries by courses and distances as given in said patent, and as surveyed and delineated on the plat attached thereto. It was admitted on behalf of the plaintiff that all of the land described in the complaint lies between the line of extraordinary high tide and the line of the ordinary high tide of the waters of the Bay of San Francisco, as the same existed on the 2d day of October, 1834, and on the 7th day of July, 1846." It appears from the recitals contained in the patent that the claim was confirmed by the board of land commissioners June 13, 1854. In the decree of the commission the land of which confirmation was made was described as follows: "Commencing from the solar which faces west, at a point at the slope and foot of the hills which lie in that direction and on the edge of the forests of redwoods called 'Corte de Madera del Presidio,' and running from thence, in a northwardly direction, four thousand five hundred varas, to an arroyo called 'Holon,' where is another forest of redwoods, called 'Corte de Madera de San Pablo;' thence, by the waters of said arroyo and the Bay of San Francisco, ten thousand varas, to the Point Tiburon, said point serving as a mark and limit; thence running along the borders of said bay, and continuing in a westerly direction along the shore of the bay formed by Point Caballos and Point Tiburon, four thousand seven hundred varas, to the mouth of the Canada and the point of the Sausal, which is near the Estero, lying east of the house on said premises, which was occupied by said Juan Read in November, 1835; and thence continuing the measurement from east to west, along the east line, eight hundred varas, to the place of beginning,-containing one square league of land, be the same more or less." This decree was approved by the circuit court on appeal, January 14, 1856. The survey upon which the patent was based was approved by W. H. Brown, United States surveyor general for the district of California, March 24, 1883. The field notes of the survey are set out at length in the patent, and the grant therein contained recites that the United States has granted, and does give and grant, to Juan Read and others, "the tract of land embraced and described in the foregoing survey."

1. Appellants' first point is that the pat-

ent, rightly construed, does not include any portion of the salt marsh described in the complaint. It is admitted that the land described in the complaint is included within the boundaries by courses and distances, as given in the patent, and as surveyed and delineated on the map attached thereto. As the patent conveyed by express reference the land described in the survey, the admission leaves no room for this argument.

The second point seems to be the same differently stated. It is said that natural boundaries control courses and distances. The decree describes the land as bounded by the shore of the Bay of San Francisco; that by the civil law, which controlled in Mexico, that line was the line of extraordinary high tide. It is stipulated that the land described is between the line of extraordinary high tide and ordinary high tide. The patent contains a copy of the decree, and the survey purports to describe the same land. The survey, it is admitted, includes all the tide lands, but it is said that it shows where the lines cross the line which divides the uplands from the tidelands, "so that the patent itself affords an accurate description of the land confirmed to the grantee by the district court by simply rejecting the courses and distances after the salt marsh commences, and until the line of extraordinary high tide is reached, and following the Mexican shore of the Bay of San Francisco between the two points." It is contended that the rule laid down in More v. Massini, 37 Cal. 432, determines, in favor of defendants, that the line of the survey does not extend beyond what counsel are pleased to call the "Mexican shore." The cases, however, are not alike: (1) There were indications in the case of More v. Massini that the survey was intended to be bounded by the beach. Here there is no mistaking the fact that the survey was intended to pass the line of the Mexican shore. (2) The decree was rendered in a commonlaw court, and the language used must be given the meaning attached to it by the com-And (3) the Mexican shore is mon law. not shown to be a visible and obvious natural boundary or monument.

3. The third point is that the officers of the United States land office had no authority to issue a patent for the tidelands, because these lands are plainly not included in the decree of confirmation. This question has been so often determined, and the decisions are so uniform, that it can no longer be deemed open for discussion. The following are some of the cases: Moore v. Wilkinson, 13 Cal. 478; Chipley v. Farris, 45 Cal. 527; People v. San Francisco, 75 Cal. 388, 17 Pac. 522; De Guyer v. Banning, 91 Cal. 400, 27 Pac. 761; San Francisco City and County v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364; Knight v. Land Ass'n, 142 U.S. 161, 12 Sup. Ct. 258.

4. It is contended that the court erred

in sustaining plaintiff's objection to the introduction in evidence of the delivery of juridical possession. The correctness of this ruling is shown by U. S. v. Halleck, 1 Wall. 439, and Younger v. Pagles, 60 Cal. 525.

5. The last point made is that the court erred in not permitting the defendants to introduce in evidence the decree of the United States district court approving the Mathewson survey. This survey was made by R. C. Mathewson, deputy United States surveyor general for California, in 1858, and was approved by J. W. Mandeville, United States surveyor general for the district of California, September 19, 1859. It included only 4,460.24 acres, which was about the quantity called for in the grant, to wit, one square league, Spanish measure. It did not include any portion of the demanded prem-The patent includes 7,845.12 acres, which is nearer two leagues, Spanish measure, than one. The Mathewson survey was ordered into the United States district court. September 18, 1860, upon exceptions to it made at that date by the heirs of Juan Read. The exceptions were disposed of September 28, 1865, at which time the court approved the Mathewson survey. June 14, 1860, an act was passed by congress giving the district court jurisdiction upon the application of any party interested to order any such survey and plat into court, and, after due notice and proceedings, to approve or disapprove of the survey, and to direct a modification; and it was provided that "the plat and survey so finally determined by publication, order, or decree, as the case may be, shall have the same effect and validity in law as if a patent for the land had been issued by the United States." If the district court had jurisdiction to affirm the Mathewson survey, it would seem to follow that the decree of confirmation was thereby satisfied, or would be by the issuance of a patent in conformity with it, and that the land office of the United States had no authority to issue letters patent for any other land. Unfortunately, however, for appellants, the Mathewson survey was approved by the surveyor general before the passage of the act of June 14, 1860; and at that time there were no proceedings pending for the purpose of contesting or reforming the same. Section 6 of the act limited its operation, so far as surveys theretofore approved were concerned, to those which had been returned to the court, or those in which proceedings were then pending for the purpose of contesting or reforming the same. This section was construed in U. S. v. Sepulveda, 1 Wall. 104, in such way as to show that the district court had no jurisdiction, and therefore the decree was void. The ruling was therefore correct.

The statute of limitations was pleaded, and, in a separate brief on the part of certain defendants, it is contended that plaintiff's claim is barred, notwithstanding the fact

that the suit was commenced within five years after the issuance of the patent, because, it is said, plaintiff and his grantors could at all times have maintained ejectment upon this title. This position finds some support in the first decision in San Jose v. Trimble, 41 Cal. 536. The views first announced in that case were modified on rehearing, and were practically repudiated in Gardiner v. Miller, 47 Cal. 570, since which decision it has been uniformly held that the statute does not begin to run until the issuance of the patent. It is not necessary to say what would have been the effect upon the bar of the statute had there been a valid decree approving the survey under the act of congress of June 14, 1860. The judgment and order are affirmed.

VALENTINE v. SLOSS et al. (No. 15,233.) (Supreme Court of California. June 26, 1894.)

Commissioners' decision. Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Angellotti, Judge.
Action by T. B. Valentine against Louis Sloss and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Edgar M. Wilson (Warren Olney, of counsel), R. Percy Wright, T. J. Bowers, Mich. Mullany, and Wm. Grant, for appellants. Lindley & Eickhoff, for respondent.

TEMPLE, C. This is an action to recover the possession of land, brought under section 738 of the Code of Civil Procedure. The title of plaintiff is derived from Juan Reed, who claimed the land under a grant from the Mexican government. The claim was duly presented to the board of land commissioners, and was confirmed. Patent was issued to the confirmees February 25, 1885. This action was commenced February 21, 1890. That the land is wholly within the exterior boundaries of the grant, as described in the patent, is not disputed, nor is it denied that plaintiff has succeeded to whatever rights the confirmees had to the land. The land lies wholly above the line of ordinary high-water mark of the Bay of San Francisco, as the same existed at the date of the grant and at all times since. Some of the defendants claim title under patents issued by the state of California under the Arkansas act. Some claim under conveyances from the board of tide land commissioners of the state of California, acting under an act entitled "An act to survey and dispose of certain salt marsh and tide lands belonging to the state of California," approved April 1, 1870. Others claim under patents of the United States. Some of the defendants have since 1872 been in the actual possession of the tracts described in their respective answers, and their possession has been such as would set in motion the statute of limitations, and plaintiff's right of action as to them is barred if the statute commenced to run in their favor before the issuance of the patent to plaintiff's grantors. The land's held under patents from the statute as swamp lands are salt marsh and tide lands, and are all between extreme highwater line and the line of ordinary high water. The grant was bounded by the Bay of San Francisco, and, it is contended, under the Mexican law such grants extended only to the line of extraordinary high tide; that the decree of confirmation followed the language of the

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grant, bounding the land upon the Bay of San Francisco. The decree also contained the folgrant, bounding the land upon the Bay of San Francisco. The decree also contained the following proviso: "Provided, that the quantity of one square league now confirmed be contained within the boundaries called for in the grant and the map to which the grant refers, and, if there be less than that quantity, then we confirm to the claimants that less quantity."

One league Spanish measure was about 4.440. One league, Spanish measure, was about 4,440 acres. The patent includes 7,845 acres, and, as already stated, extends beyond the line of the highest tides, to include the tide lands claimed by the defendants. It is claimed that, by thus including in the survey and patent land plainly not within the boundaries described in the decree of confirmation, the executive officers exceeded their authority, and that the patent is as to such land void. This question has been as to such land void. This question has been so often determined adversely to the contention of appellants that it can no longer be considered an open question. It is a federal question, and has been determined by those courts. The following are some of the cases: Moore v. Wilkinson, 13 Cal. 488; Chipley v. Farris, 45 Cal. 539; People v. San Francisco. 75 Cal. 397, 17 Pac. 522; De Guyer v. Banning, 91 Cal. 402, 27 Pac. 761; San Francisco City and County v. Le Roy, 138 U. S. 656, 11 Sup. Ct. 364; Knight v. Association, 142 U. S. 142, 12 Sup. Ct. 258. The position taken by the defendants as to the running of the statute of limitations finds some support in the case of San itations finds some support in the case of San Jose v. Trimble, 41 Cal. 536. The views first announced in that case were somewhat modified on rehearing, and were practically repudiated in Gardiner v. Miller, 47 Cal. 570, since which decision it has been uniformly held that which decision it has been uniformly held that the statute does not begin to run until the patent has been issued. It does not appear that the survey of the rancho had been judicially approved under the act of congress to regulate the jurisdiction of district courts of the United States in California, dated June 14, 1860. It advises that the judgment and order he efficient advise that the judgment and order be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

VALENTINE v. SLOSS et al. (No. 12,228.) (Supreme Court of California. June 26, 1894.)

Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.
Action by T. B. Valentine against Louis Sloss and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Mullany & Grant and R. Percy Wright, for appellants. Lindley & Eickhoff, for respondent.

PER CURIAM. This case being in all material respects the same as Valentine v. Sloss (No. 17432, this day decided) 37 Pac. 326, it is ordered that the judgment appealed from be affirmed.

CAMPBELL v. BOARD OF COM'RS OF LO-GAN COUNTY.

(Supreme Court of Idaho. July 25, 1894.) COMPENSATION OF SHERIFF-PAYMENT BY COUNTY COMMISSIONERS.

1. Sheriffs are not entitled to compensation for attending upon the district or any other

courts of this state.

2. In case the fees and commissions received in any one year by the officers named in section 7, art. 18, of the constitution shall not amount to the minimum compensation therein provided, they are entitled to receive from the

county a sum sufficient to make their annual compensation equal to such minimum; and it is the duty of the board of commissioners to order a warrant drawn for such amount in favor of the officers so entitled.

3. Officers applying to the board of commissioners for an allowance to make up the minimum compensation provided by the constitution should accompany such application with a detailed statement, under oath, of all the fees and commissions earned by them during the year.

(Syllabus by the Court.)

Error to district court, Logan county; C. O. Stockslager, Judge.

J. P. Campbell presented his claim for fees as sheriff to the board of county commissioners of Logan county, which disallowed his claim; and the sheriff appealed to the district court, which reversed the action of the commissioners. From this judgment the commissioners bring error. Remanded with instructions.

H. S. Hampton, for plaintiffs in error. Selden B. Kingsbury, for defendant in error.

HUSTON, C. J. The defendant in error. as sheriff of Logan county, presented to the board of commissioners of said county his claim for the sum of \$390.88, claimed to be due to him from said county under the provisions of the constitution and the statutes of Idaho. The constitution of the state of Idaho provides (article 18, § 7) that the sheriff shall receive, as compensation for his services, "not more than four thousand dollars, and not less than one thousand dollars; together with such mileage as may be prescribed by law;" and by section 8 of said article it is provided that "in case the fees received in any one year by any such officer [including sheriff] shall not amount to the minimum compensation per annum, therein provided, he shall be paid by the county a sum sufficient to make his aggregate annual compensation equal to such minimum compensation." The sheriffs may, under the provisions of section 6, art. 18, "appoint such deputies and clerical assistants as the business of their officers may require; said deputies and clerical assistants to receive such compensation as may be fixed by the county commissioners." "The compensation of the sheriff and the other officers provided for in section 7, of said article 18, shall be paid by fees or commissions or both as provided by law." By the provisions of the act of the first session of the state legislature (Acts Leg. 1890-91) the fees of the sheriff are fixed for the various services to be by him performed. That act provides no compensation for attendance upon the district or any other courts, and no charge for such services are allowable against the county. See the decision of this court in Eakin v. Nez Perces Co. (decided at this term) 36 Pac. 702.

The defendant in error duly presented his bill for services as sheriff of Logan county for the year 1893 to the board of county commissioners, which is as follows:

"Logan County, Idaho, to J. P. Campbell, Sheriff of Logan County, Dr.: To difference between \$1,000, the amount provided that the sheriff must be paid, and the earnings for the said office for the year 1892:

Leaving a balance due me..... \$ 390 88

-Which account was duly verified."

The board of commissioners disallowed the above bill. The sheriff (defendant in error in this court) appealed from the order of the commissioners, disallowing said bill, to the district court, which court reversed the action of the commissioners, and directed them to allow the bill. For alleged error in the action of the district court, in ordering the allowance of said bill, this case is brought to this court for review by writ of error.

The first error assigned is that the annual report of the sheriff is not such a report as is required by law, as it only states the aggregate amount of the earnings of said sheriff's office, and from which the board could not determine what amount, if anything, was due to make up his minimum compensation. We are constrained to say the report is not such a one as should be submitted to the board by an officer claiming a balance due to make up his minimum compensation, nor is it verified in as exact and apt terms as might be desired. It states, however, that it is "just and true." The purpose of such report was evidently intended as evidence upon which the board were to determine how much was justly due the officer, to make up his minimum compensation allowed him by the constitution; and therefore it should be a detailed statement of all the fees and commissions the officer earned during the year, and the verification should be so worded as to verify that fact, but the law does not require such statement or report, in terms. See subsec. 10, § 2161, Rev. St., as amended in 1 Sess. Laws, p. 180. Taking the verified bill of the sheriff, as disclosed in the record, with his report submitted to the board, we think there was sufficient to enable the board to determine what the officer claimed; and if they were not satisfied they should have notified the officer to furnish further evidence to substantiate his claim. which no doubt would have been cheerfully complied with, and the burden of this litigation avoided.

The second assignment of error, that the court erred in giving judgment in favor of appellant for \$390.88, for the reason that the said appellant had already received \$113 of said \$390.88, as shown by his report, is not true, and is not borne out by the record presented to this court.

Taking the most favorable view of the case made by the attorney for the board of commissioners, we are at a loss to account for their arbitrary action in disallowing the whole claim of said sheriff, with the law so

plainly before them pertaining to their duties in such cases. See section 1775, Rev. St. Idaho. It is true that the charge of the sheriff for attendance on the district, probate, or justices' court is illegal, and so held by this court at this term in the case of Eakin v. Nez Perces County; and if the sheriff did in fact receive \$113 or any part thereof, from the county, so much as he did receive should be deducted from his claim of \$390.88. Whether he did so receive it was a fact wholly within the knowledge of the commissioners, as he only could receive it by their order, upon their allowing his claim for such charge, and directing a warrant to issue therefor, which would be a matter of record in their own court. In view of the foregoing the district court is directed to ascertain whether or not the said sheriff has been allowed by the board of commissioners of Logan county, and a county warrant issued to him therefor, for attendance upon the district, probate, or justices' court, and if so to deduct such amount from his said claim of \$390.88, and order the board of county commissioners of Logan county to allow the balance, and direct a warrant to issue in favor of said sheriff for said amount. The cause is remanded to the district court for further proceedings in accordance with this opinion. Costs awarded to defendant in error.

MORGAN and SULLIVAN, JJ., concur.

PEOPLE v. HART.

(Supreme Court of Utah. June 19, 1894.)

HOUSEBREAKING—EVIDENCE—RECENT POSSESSION
OF STOLEN PROPERTY—GENERAL EXCEPTIONS.

1. A general exception to the instructions is insufficient to warrant their review. People v. Berlin, 35 Pac. 498, 9 Utah, 383, distinguished.

- 2. On a trial for housebreaking, where it is shown that a pistol taken from the house broken into was found in defendant's possession six hours later, the fact that defendant makes no statement explaining his possession of the pistol raises no presumption against him; Comp. Laws 1888, § 5198, providing that defendant's refusal to testify can in no manner prejudice him.
- 3. On a trial for housebreaking, the fact that a pistol taken from the house broken into is found in defendant's possession six hours later is, in itself, insufficient to warrant a conviction.

Appeal from district court, Salt Lake county; before Justice S. A. Merritt.

Thomas Hart was convicted of housebreaking, and appeals. Reversed.

S. P. Armstrong, for appellant. U. S. Atty., for the People.

MINER, J. The indictment in this case charges the defendant with the crime of housebreaking, by unlawfully entering the dwelling room of Casper Bessler, in the Telluride block, Salt Lake City, with intent to steal. The testimony shows that Bessler occupied the room in question, in a building where there were many other occupants of

separate rooms in the building. The landlady of the house kept a key to Bessler's room. During Bessler's absence the room was entered, and a pistol was taken therefrom. About six hours after such entry the defendant was arrested on suspicion of having committed some other offense, and was charged with carrying concealed weapons. At the time of his arrest there was found upon his person a pistol, afterwards identified as the pistol previously taken from Bessler's room, and he was thereupon charged with the offense of housebreaking, embraced in the indictment. The defendant pleaded not guilty. Upon the trial he did not go upon the witness stand to explain his possession, and at no time did he make, or refuse to make, any explanation of his possession of said pistol; and no evidence was in any manner introduced upon the trial, showing or tending to show the guilt of the defendant, or of his connection with said crime charged, except the naked fact that the pistol was found in his possession, as stated. The defendant was convicted, and alleges error in the instructions of the court given on its own motion, its refusal to give the defendant's requests, and also the insufficiency of the evidence to justify the verdict of guilty; that the verdict is against the law, in that the naked possession of the revolver was the only circumstance tending to show guilt.

To the instructions given on the court's own motion, there is only a general exception taken to the entire charge; and no specific part of such charge of the court upon its own motion is excepted to, or pointed out, as erroneous. We think this general exception to the entire charge of the court wholly insufficient to warrant the court in reviewing This rule is established in nearly every state in the Union, and the rule applies to civil as well as criminal cases; and our statute (section 5091, Comp. Laws 1888), like that of California, does not change the rule. People v. Hart, 44 Cal. 598; People v. Flahave, 58 Cal. 249, 253; Nelson v. Brixen, 7 Utah, 454, 27 Pac. 578; Marks v. Tompkins, 7 Utah, 421, 27 Pac. 6; Railway Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566; Geary v. People, 22 Mich. 220; Robinson v. Railroad Co., 48 Cal. 409; State v. Brabham (N. C.) 13 S. E. 217; U. S. v. Gough, 8 Utah, 428, 32 Pac. 695; Banbury v. Sherin (S. D.) 55 N. W. 723: Decker v. Matthews, 12 N. Y. 313; Pinson v. State (Fla.) 9 South. 706; Curry v. Porter, 125 Mass. 94; Brooks v. Dutcher, 24 Neb. 300, 38 N. W. 780; Edwards v. Smith, 16 Colo. 529, 27 Pac. 809; Maling v. Crummey, 5 Wash. 222, 31 Pac. 600; Thompson v. State (Tex. Cr. App.) 22 S. W. 979; Rowell v. Fuller, 59 Vt. 688, 10 Atl. 853; Dick v. State, 87 Ala. 61, 6 South. 395; Beaver v. Taylor, 93 U. S. 46; Block v. Darling, 140 U. S. 234, 11 Sup. Ct. 832; Hicks v. U. S., 14 Sup. Ct. 144; Carver v. Jackson, 4 Pet. 1; Ex parte Crane, 5 Pet. 190; People v. Berlin (Utah) 36 Pac. 199; Society v.

Faulkner, 91 U.S. 415. Section 5091, Comp. Laws 1888, is the same as section 1176 of the California Penal Code, which is a re-enactment of the old Penal Code of that state. Construing this section, the supreme court of California, in People v. Hart, 44 Cal. 508, holds that this provision of the statute refers to the written requests or instructions which either party may present, and request to be given to the jury by the court, and does not refer to the charge which the court may give on its own motion. See, also, People v. Flahave, 58 Cal. 253. In the case of People v. Berlin, 9 Utah, 383, 35 Pac. 498, wherein the facts are set out, it appears that a general exception was taken to the entire charge of the court, but the particular part of the charge excepted to was in no way pointed out. The court affirmed the judgment of conviction. Upon a rehearing of the same case the judgment was set aside by a majority of the court, without noticing this omission, or referring to it, in the opinion. 36 Pac. 199. Judge Bartch dissented from this last opinion, and gave his reasons at length; one of his reasons being that, as no specific exception was taken to the charge of the court, it could not be considered. This important fact seemed to have been overlooked by the court in that opinion, and we call attention to it now so that no misunderstanding or confusion may arise from what otherwise might be considered a conflicting opinion. This court is of the opinion that in the dissenting opinion of Judge Bartch the law upon this point in that case was correctly stated. Hamer v. Bank, 9 Utah, 215, 33 Pac. 941.

The assignment of error alleging the insufficiency of the evidence to justify a verdict of guilty presents a serious question for consideration. There is no evidence in the case in any manner connecting the defendant with the larceny or housebreaking, except the possession of the pistol some time after the alleged larceny. The prosecution admit this, but claim that inasmuch as the defendant chose to remain silent, and pleaded "Not guilty," and made no explanation of his possession, these facts make a presumption against him which justifies the verdict. There are some cases which seem to carry this conclusion, but in many of those cases it appears from the facts that there was other testimony tending, in some reasonable degree, either to connect the party with the larceny, or tending to show a false account given by the prisoner as to the manner of his possession. Under our statute the prisoner was not required to take the stand as a witness, nor is he compelled to be a witness against himself. "His refusal to be a witness, cannot in any manner prejudice him, nor be used against him on the trial or proceeding." Section 5198, Comp. Laws 1888. If the defendant chose to make a voluntary statement concerning his possession of the property, it was his privilege to do so; but in remaining silent he brought upon himself

no presumption of guilt, any more than if he had declined to be sworn as a witness in his own behalf. The defendant had a perfect right to remain mute, and no adverse presumption could arise against him because he did not take the stand and testify as a witness. In the case of People v. Swasey, 6 Utah, 93, 21 Pac. 400, this court held that: "If stolen property had been found in the defendant's possession immediately after the loss, such possession might have been a circumstance to be taken into consideration by the jury, with other circumstances, in arriving at a conclusion as to the guilt or innocence of the defendant, but of itself it was not sufficient. It seems to be an established doctrine, especially in this western country, that in larceny the recent possession of stolen property is not of itself sufficient to warrant a conviction." In the case of People v. Chadwick, 7 Utah, 144, 25 Pac. 737, this court held that, in a charge of larceny, "if the fact of such possession stands alone, and wholly unconnected with any other fact or circumstance, the presumption of guilt will be slight. Therefore, it is not considered safe to convict on the fact of possession alone, without other attending circumstances indicative of guilt." Whart. Cr. Ev. (9th Ed.) § 763; 3 Greenl. Ev. § 31.

We do not think there was sufficient evidence before the jury to justify a conviction of larceny, had that offense been charged in the indictment; and we are also of the opinion that the naked possession of stolen property from 6 to 24 hours after the larceny or housebreaking, when unaccompanied with any other criminating fact or circumstance tending in some degree to connect the accused with the commission of the offense charged, is not sufficient evidence, of itself, upon which to convict of housebreaking. The offense of housebreaking is ordinarily removed one degree further from the act of larceny, and the mere possession of stolen goods does not have the same tendency to connect the accused with the burglary or housebreaking as it would with larceny. State v. Shaffer, 59 Iowa, 290, 13 N. W. 306; Stuart v. People, 42 Mich. 261, 3 N. W. 863; People v. Frazier, 2 Wheeler, Cr. Cas. 55; Davis v. People, 1 Parker, Cr. R. 447: Jones v. People, 6 Parker, Cr. R. 126; State v. Rivers, 68 Iowa, 611, 27 N. W. 781; 3 Greenl. Ev. § 31; Methard v. Ohio, 19 Ohio St. 363; State v. Jones, 19 Nev. 366, 11 Pac. 317; 2 Am. & Eng. Enc. Law, 693; People v. Ah Ki, 20 Cal. 178; Ingalls v. State, 48 Wis. 647, 655, 4 N. W. 785; 2 Bish. Cr. Proc. § 747, note 3; People v. Mitchell, 55 Cal. 236; People v. Levison, 16 Cal. 99; People v. Chambers, 18 Cal. 382. The fact of recent possession of the stolen property was a pertinent and proper fact to go to the jury, as a circumstance in the case, and if accompanied with such evidence as his denial of possession; his giving false, incredible, or

contradictory accounts of the manner of acquiring it; his attempting to conceal it, or to destroy marks upon it; his fleeing on being accused; or being so near to the place where the property was stolen, or the building entered, as to create criminating circumstances against him,—such and other like circumstances, when shown in connection with the possession, the larceny, or housebreaking, may raise a strong presumption of guilt in the exclusive possessor. In this case there is a total absence of any other corroborating or criminating circumstance, and we think there was not sufficient evidence before the jury to justify the verdict in this case. The judgment of the court below is set aside, and a new trial granted.

BARTCH, J., concurs.

SMITH, J. I concur in the judgment on the ground that the evidence was insufficient to warrant a verdict of guilty.

McCORNICK v. SADDLER.1

(Supreme Court of Utah. June 29, 1894.)
Assignment of Claim—Subsequent Payment by
Debtor—Justification—Burden of Proof—
Mechanics' Liens—Hearbay.

1. Where a building contractor's only knowledge as to the amount of lumber purchased from a firm, and which went into the construction of a house, was received from certain bills and drayage checks, and it appeared that he did not know that the bills or checks—some of which had been lost—were correct, and was not present when all the lumber was delivered, and did not measure it, nor order all of it, his evidence as to such amount is hearsay. Miner,

J., dissenting.

2. Where in an action by the assignee of the claim of a building contractor for the balance of the contract price of a building, defendant owner acknowledges that a certain sum was unpaid at the time of the notice to him of the assignment, but claims that such sum has been paid to a person who furnished lumber for the building, and who had a mechanic's lien therefor, the burden is on plaintiff to show the amount of lumber actually furnished, in order to show that defendant was not warranted in paying such amount. Miner, J., dissenting.

Appeal from district court, Salt Lake county; before Justice G. W. Bartch.

Action by William S. McCornick against Henry Saddler. There was a judgment for plaintiff, and defendant appeals. Reversed.

Chas. Baldwin and Sutherland & Howat, for appellant. C. S. Varian, for respondent.

SMITH. J. This action is to recover the sum of \$2.325.26, alleged to be due plaintiff from the defendant upon a certain assigned account, which was assigned to plaintiff by Taft & Kropfganz. The money was due Taft & Kropfganz as balance on the contract price of building a house for defendant. Atter the assignment was made, defendant agreed with plaintiff that he would pay plain-

¹ Rehearing granted July 27, 1894.

tiff any balance that might be due the contractors, after paying all subcontractors and material men who had or might obtain liens on the house. There was a balance at the time due the contractors, of \$2,320.80, subject to the claims of subcontractors and material men. A few days afterwards, defendant paid to certain parties, claiming to be subcontractors and material men, this entire sum, leaving nothing for plaintiff. Among others, defendant paid to Mason & Co. \$1,-814, claimed to be due for lumber used in the construction of the house. He also paid Irwin & Buse \$100, claimed for material. The whole controversy arises as to these two payments. The plaintiff claims that they were not claims for which liens could legally be obtained against defendant's house. On behalf of the plaintiff, John O. Taft, one of the original contractors, was introduced, and produced certain bills and drayage checks, and testified that only \$1,546.60 worth of lumber was obtained from Mason & Co., and that \$1,116.60 of this amount had been paid, leaving only \$430 due, that might become a lien on the house. Having stated that he knew these matters of his own knowledge, he was asked on cross-examination as follows: "Q. How do you know? A. From the computation of the bills. Q. From the information you got from those bills? Yes, sir; and the checks that were delivered with the lumber. Q. Is that the only way? A. That is enough. Q. I ask if that is the only way. A. That is the only way." The defendant's counsel then moved the court to strike out the testimony of the witness, as to the amount of lumber received from Mason & Co. This motion was overruled, and defendant excepted. On further cross-examination of this witness, it appeared that he had measured none of the lumber; that he might have been present when some of it was delivered; that neither he nor his partner was present when portions of it were delivered; that some of the bills were lost. The witness again stated that his testimony was based on the bills and checks, and defendant's counsel again moved that his testimony be stricken out. The motion was overruled, and defendant excepted.

These rulings present the first question for our consideration. It will be seen that this testimony was received to show that no more than \$1,546.60 worth of lumber from Mason & Co. was used in building the house of defendant, and this was the only testimony of plaintiff on that point. It will be observed that the witness did not profess to have any personal knowledge as to how much lumber was received from Mason & Co.; that practically his entire knowledge was derived from certain invoices and drayage checks. He does not pretend to know who made out the bills or checks. Much less does he pretend to know or say that they are correct. If the bills were competent to prove that the articles described in them went into the house, and that none others were used, then the bills should have been introduced. If they were not competent in themselves, then we are at a loss to know how a witness could know, and testify from a computation of the bills as to, the exact amount of lumber that was used in the house. The witness had ordered some lumber, but only a part of it. He had been present when only a small part was delivered. It is perfectly plain that his entire testimony on this subject was purely hearsay. This was the principal issue in the case, and this testimony was the only evidence offered by plaintiff.

On behalf of defendant, two witnesses, Carroll and Kern, the architects in charge of the erection of defendant's house, testify that the lumber and material obtained from Mason & Co.. and used in the house, was worth from \$2,700 to \$3,000. The jury returned a verdict for plaintiff for \$1,513.70. In view of the verdict and the state of the proof, we must hold that the ruling of the court in refusing to strike out the testimony of Taft was an error that necessitates a reversal of the judgment.

One other matter is presented that we think proper to notice in this opinion. The court charged the jury, on its own motion, as follows: "The court charges you that in this case the burden is upon the plaintiff to prove the assignment, and notice thereof to the defendant, substantially as alleged in the complaint, by a preponderance of the evidence; and, if you find from the evidence that the plaintiff has so proved the assignment and notice, then you must further find from the evidence, before the plaintiff is entitled to recover, that the claims which the defendant paid after such notice from plaintiff were claims which were not liens against the house in question, and for wnich the claimants were not entitled to liens on said house. If you find for the plaintiff on both these points, then he is entitled to recover such sum as, from all the evidence, you find the defendant has wrongfully paid out on the assigned claim of Taft & Kropf-The court further charged the jury. ganz." at the request of plaintiff, as follows: "The answer of the defendant admits the sum of \$2,320.80 to have been due from the defendant to Taft & Kropfganz on January 10, 1891, and alleges that defendant paid out the fund in controversy to certain firms for materials furnished, and for which defendant's house was, or could have been, charged with liens under the mechanic's lien law, as follows: To Mason & Co., \$1,844; to Irwin & Buse, \$100; to Spencer, Bywater & Co., \$71; and to Culmer & Bro., \$305.80. The plaintiff concedes the fact and legality of the payments to Spencer, Bywater & Co. and Culmer Bros. You are instructed that if it shall be established by a preponderance of the evidence that the assignment, as claimed by the plaintiff in the complaint, was made,

and notice thereof was given to defendant, the burden is cast upon the defendant to prove by a preponderance of the evidence that payments made to Mason & Co. and to Irwin & Buse were for materials or labor furnished in the building of the defendant's house, and for which liens could have been filed; that is to say, that the times for such filings had not expired. In ascertaining the amounts of such claims, the defendant, after notice of McCornick's claim, was bound to be diligent and cautious; and no agreement or consent of either Taft or Kropfganz to payments made can justify defendant, or relieve him from liability, if in fact he paid claims for which his house was not liable, unless he used proper care and diligence to ascertain the fact, and by competent evidence, and paid in good faith, or unless plaintiff consented to such payment." We think these two charges are somewhat in conflict, and left the jury in doubt as to whether the burden was on the plaintiff or defendant to show that the claim of Mason & Co. was or was not a claim that might be a lien on defendant's house. In other words the jury must have been in doubt as to whose duty it was to show the amount of material obtained from Mason & Co. that was used in defendant's house. We are of opinion that the burden was on the plaintiff, and that the instruction given by the court on its own motion correctly stated the law.

It is due to the trial judge to say that the exceptions to the charge were not taken at the trial, but, by stipulation between the parties, were taken when the statement on motion for a new trial was made up. We do not approve this practice, but, if parties indulge in it, they must take the consequences. No doubt the charge would have been corrected if the attention of the trial judge had been called to the matter at the time. The judgment and order denying a new trial are reversed, and the cause remanded, with directions to grant a new trial; appellant to recover the costs of appeal.

MERRITT, C. J., concurs.

MINER, J. (dissenting). I cannot agree with my brothers in this case. The amended answer of the defendant sets up an affirmative defense, and the defendant offered evidence upon that defense. The plaintiff was therefore entitled to the instruction given,-that the burden was on the defendant to establish the allegations of his affirmative defense. The charge should be construed as a whole. The charge, as given, is not, in my opinion, contradictory, but properly covered the issues presented by the pleadings and proofs. Hamer v. Bank, 9 Utah, 215, 33 Pac. 941, and cases cited; People v. Hart, 10 Utah, -, 37 Pac. 330; Smith v. Maben (Minn.) 44 N. W. 792; Smith v. Carr, 16 Conn. 450; U. S. v. Wright, 1 McLean, 509, Fed. Cas. No. 16,775; Ocheltree v. Carl, 23 Iowa, 394. Neither should the testimony of Taft have been stricken out. The record shows that he was present when nearly all the lumber was delivered and put into the house of defendant; was present at the settlement between Taft & Kropfganz, McCornick, and Saddler. He had charge of the bills and accounts connected with the building of Saddler's house. The material was bought from Mason & Co. and put into the defendant's house and other houses. He testifies that he had gone over its bills of material furnished, and that they did not reach the amount claimed by Mason & Co. to be charged against Saddler's house; that he knew the amount to be charged to Saddler's house separate from other houses, and it reached \$1,500; that \$700 and other amounts were paid on the order. The witness states the payments made by Saddler to Taft & Kropfganz, and that a balance was left unpaid, of \$430, to Taft & Kropfganz; and these facts and figures were presented to Saddler at or about the time of the settlement between him and Taft & Kropfganz. He further states: That he knew of his own knowledge how much lumber was bought from Mason & Co. for Saddler's house. He knew from the bills and from the checks delivered with the lumber at Saddler's house when he was in charge. That he was there nearly every day, looking after the job, and the materials that were received. Checks were delivered to him with each load of material delivered,-that is, a delivery check came with each load,—and he was constantly looking after the material delivered for Saddler's house. He was a member of the company, with Taft & Kropfganz, and ordered this material for the firm for the defendant's house. The bill of lumber delivered he verified by the delivery checks that came with the lumber. Other testimony was given, showing that the witness was acquainted with the amount of lumber delivered from Mason & Co. to defendant Saddler, and that payments were made from time to time, and that he advised Saddler there was only \$430 due on the Saddler house. A motion was made to strike out this proof, which was denied, and defendant assigns error upon it. I am of the opinion that the court would have been clearly in error, had he struck out the testimony. While it may have been contradictory in part, yet the credibility of the witness was for the jury. It certainly cannot be contended that it is the duty of the court to strike out the testimony of every witness who may seemingly give contradictory testimony, yet these are the principal grounds upon which a reversal is ordered. I think the court correctly refused to strike out Taft's testimony, and that the instructions given by the court were proper, under the pleadings and the proof given in the case. The judgment of the court below should be affirmed.

PEOPLE v. SCOTT.

(Supreme Court of Utah. June 19, 1894.)

Arson—Evidence as to Insurance of Building

—Instructions.

1. On the separate trial of a defendant indicted jointly with the owner of a building for burning the same, in the absence of any evidence connecting such defendant with the owner in any way, evidence that the building was insured is inadmissible.

2. Where the evidence is entirely circumstantial, it is the duty of the court to charge upon the law of the subject, though a request

for such a charge was erroneous.

Appeal from district court, Utah county; before Justice H. W. Smith.

John Scott was convicted of burning a building, and appeals. Reversed.

Brown & Henderson and Warner & Warner, for appellant. The United States District Attorney, for the People.

MINER, J. The defendant John Scott was jointly indicted with Patrick Condon on the charge of having burned an inhabited building, known as the hotel and dwelling house of one Frederick Scott. The defendant John Scott was tried separately, and convicted. The building was occupied at the time as a hotel by Frederick Scott, a tenant of the other defendant, Patrick Condon, who owned the building. Exceptions were taken by the defendant to the refusal of the court to charge as requested, and to the admission of certain testimony offered to connect Condon with the burning, and also to testimony showing the building was insured by the owner. The defendant Scott was a stranger in that locality, and on the day preceding the fire had put up at the hotel in question. The testimony against him was circumstantial. The prosecuting attorney, in his opening statement to the jury, stated, among other things, that he would show that the motive for the burning was to obtain insurance; that Scott and Condon had an understanding by which the building was to be burned in order to obtain the insurance of \$3,000. On the trial, J. W. Rutlidge was allowed to testify, against the objection of the defendant as to competency and irrelevancy, that, some considerable time before the fire, Condon had taken out a policy of insurance for \$3,000 on the building and contents (this insurance had been reduced before the fire. but the policies of insurance were not produced); that the hotel was not paying; and that the furniture had been moved out of the house some time prior to the fire. This testimony as to insurance was taken, under objection and exception, out of its order, with the statement that the prosecution would connect it thereafter with the defend-At the close of this witness' testimony the defendant's attorney moved to strike out his testimony in relation to insurance on the ground that it was hearsay, not the best evidence, and that the indictment does not charge the burning with intent to defraud the insurance company, which motion was denied, and the ruling excepted to. Other testimony was given concerning the statement of Condon, in which the defendant Scott in no way participated, and it was subsequently stricken out. No other testimony was received, in any manner connecting Condon with the defendant Scott in the burning, nor did it appear that these parties ever met, or knew each other, prior to the fire. At the close of the people's testimony the defendant's counsel moved to strike out of the record all the testimony relative to the insurance upon the property, and that the jury be instructed to disregard the testimony about insurance, on the ground that the tesmony was immaterial and incompetent, that it was admitted on the ground that the defendant Scott would be connected with the defendant Condon in the burning, and that no evidence had been given, in any manner connecting defendant Scott with Condon or the insurance. The court remarked that if the motion was separated he would strike out the evidence as to who insured the building, but would leave the fact that it was insured before the jury. Defendant's attorney insisted upon the motion, and it was overruled, and exception taken. No further testimony was given, showing Condon's connection with the transaction in any manner. At the close of the testimony the defendant's counsel requested the court to instruct the jury that there was no evidence in the case connecting the defendant Condon, and the jury should not consider any relation between them. This request was refused, and exception taken. The charge of the court was silent upon this subject, and upon the subject of insurance.

Upon the argument in this court, and in the brief of the prosecution, it is admitted that the people failed to connect defendant Scott with defendant Condon, in any manner, with reference to the burning, or with the insurance, and the record discloses no such combination or connection between the two parties. The indictment does not charge the defendant with the burning with intent to defraud any insurance company, and the evidence in no manner connects Scott with Condon, so as to make him responsible for the acts, statements, or disclosures of Condon, either with reference to the insurance, or any other fact in the case. So far as the record shows, the testimony that Condon had procured insurance upon the property was a fact that was wholly unknown to Scott, who was then, and had been, a stranger to Condon, and to that neighborhood. If there was no combination between the two, the mere fact of an insurance being placed upon the property by Condon without Scott's knowledge could in no way tend to show motive on the part of Scott to burn the building.

It is claimed by the district attorney that the court offered to strike out the fact as to

who or which company insured the building, but refused to strike out the fact that an insurance covered the property, and that, if any error existed before that, this offer cured it. We think not. If such ruling had any tendency, it was to emphasize the error in the ruling. It will be remembered that the district attorney claimed in his opening statement to the jury that he would show that Condon had an insurance upon the property of \$3,000; that a combination and conspiracy existed between Condon and the defendant to burn the building, and obtain the insurance money; and that the building was paying Condon no rent. Upon the trial the theory of the prosecution seemed to be that the building was burned to obtain the insurance. Taking all this with the fact that the insurance to Condon was shown and admitted under objection; that when a motion was made to strike it out the motion was denied; that the court refused to give the instruction asked, that such fact should not militate against the defendant; and the fact that the court finally emphasized the importance and relevancy of the testimony, in the presence of the jury, by offering, in case a motion was made, to strike out of the record who insured the building, but refused to strike out the fact that an insurance existed upon the building at all,-taking the whole transaction together, the jury must have been impressed with the fact that as Condon held the insurance upon property that was not paying him rent, and the court had refused to strike out this evidence, or give the request asked for, such evidence tended to connect the two parties with the transaction, and that they had the right to consider such evidence as a fact connecting the two, and as bearing upon the guilt of the defendant, upon the theory claimed for it by the prosecution. We are satisfied that this testimony should have been stricken out, and that the request asked for should have been given.

We do not think that any error was committed in refusing to give the defendant's second and third requests, as presented. U. S. v. Gough, 8 Utah, 428, 32 Pac. 695; People v. Biddlecome, 3 Utah, 208, 2 Pac. 194; Thomp. New Trials, § 2349; Comp. Laws 1888, § 5033, subd. 6.

When the testimony in a criminal case is entirely of a circumstantial character, as it was in this case, and a request is made to charge upon the subject of circumstantial evidence, but such request is erroneous, it is still the duty of the court to give the law upon the subject. Comp. Laws, \$ 5033, subd. 6; People v. Murray, 72 Mich. 10, 40 N. W. 29; Ward v. State, 10 Tex. App. 293; Crowell v. State (Tex. App.) 6 S. W. 318; Willard v. State (Tex. App.) 9 S. W. 358; Crowley v. State (Tex. App.) 10 S. W. 217; Barr v. State, 10 Tex. App. 507. In a criminal case the court should see that the case goes to the jury in a clear and intelligent manner, so that they may have a correct understanding !

of what it is that they are to decide, and it should state to them fully the law applicable to the case. It is to the court that the accused has a right to look to see that he has a fair trial. Circumstantial evidence may be quite as conclusive as direct evidence, but It is incumbent upon the prosecution, not only to show by a preponderance of evidence that an offense was committed, and that the alleged facts and circumstances are true, but they must also be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than the defendant's guilt. The chain of circumstances must be complete and unbroken. A jury of inexperienced laymen could hardly be expected to apply the rules applicable to this class of testimony without some assistance from the court. For the errors referred to, we are of the opinion that the judgment of the court below should be set aside, and a new trial granted.

MERRITT, C. J., and BARTCH, J., concur.

(10 Utah, 228

COOK v. HIGLEY et al.

(Supreme Court of Utah. June 28, 1894.)
CONVEYANCE OF HOMESTEAD.

Where the statute provides that in case a debtor is the head of a family a homestead to be selected by him shall be exempt from execution, and does not forbid the sale of the same by him (Comp. Laws 1888, § 3429, subd. 11), a husband can convey his homestead without the wife's consent, subject only to her dower right on his death.

Appeal from district court, Weber county; before Justice James A. Miner.

Action by Phyllis M. Cook against George Higley, Jr., and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

T. R. O'Connelly (A. R. Heywood, of counsel), for appellant. Evans & Rogers, for respondents.

BARTCH, J. The court below sustained a demurrer to the complaint in this case on the ground that it does not state facts sufficient to constitute a cause of action. The plaintiff elected to stand by her complaint, which was thereupon dismissed, and the costs taxed against her. The only material question raised in the record by this appeal is whether, in a case where the husband conveys, by deed, premises occupied by himself and family as a homestead, without being joined in the conveyance by the wife,-the same being against her will,-the wife is entitled to the possession of, and to occupy as a home for herself and family, the premises thus conveyed, during the term of her life, as against the rights of the grantee of the husband.

There are no homestead estates at common law. Such estates are created, and can ex-

ist, only by statute. In this territory there is no separate and independent homestead law. The only statutory provision creating homestead rights, and which is decisive of the rights of the plaintiff, is found in section 3429. subd. 11, Comp. Laws Utah, 1888, and reads as follows: "If the debtor be the head of a family, there shall be a further exemption of a homestead, to be selected by the debtor, consisting of lands, together with the appurtenances and improvements thereon, not exceeding in value the sum of one thousand dollars, for the judgment debtor, and the further sum of five hundred dollars for his wife, and two hundred and fifty dollars for each other member of his family. If the homestead selected by the debtor, is of greater value than is exempted under this section, it shall be optional with the judgment debtor to permit the same to be partitioned or to be sold, and to receive in money the value of the homestead, as provided in this section. If the debtor so elect, the homestead may be sold, as other lands are sold, on execution. and, after paying the debtor the value of the homestead, the balance of the money shall be applied upon the judgment,"-and then provides how the sale may be effected under the execution, and for the disposition of the money, etc. An examination of this statute reveals no intent on the part of the legislature to restrain the debtor from alienating the homestead. It merely provides that if he be the head of a family this homestead shall be protected by exemption from execution, to the extent therein set forth. This right of the debtor thus to preserve a home for his family is inviolate and absolute. If, however, he chooses to sell and abandon it, there appears to be no provision of law which will prevent him from so doing, even if the wife refuse to join him in the conveyance. The statute law of this territory expressly provides that all property acquired and owned by either husband or wife may be held, managed, controlled, and in any manner disposed of, by the one so owning or acquiring, without any limitation or restriction by reason of marriage. Comp. Laws Utah 1888, § 2528. The general purpose of the statute does not appear to be the creation of an estate which cannot be conveyed without the concurrence of those who are entitled to enjoy its benefits, but to preserve it for occupation by the debtor and his family, as against his creditors. Therefore, independently of the husband, who is the head of the family, the wife has no claim upon the homestead, so long as he is living, except her right of dower, unless it be her separate property. Whatever claim she has arises because of the marital relation, and can only be enforced with the concurrence of the husband. The law affords the protection to him, and, through him, to the wife and family. It does not interfere with the natural dependence of the wife upon the husband. As she is bound to live with him, under her marital obligations, so she is bound to accompany him when he abandons the homestead, and selects another place of residence. His home is her home, and there is no obligation which compels him to reside permanently in one place; nor should there be such an obligation, for the best interests of himself and family may require an abandonment of the homestead to promote the health and comfort of his family, or the education of his children. Doubtless, the privilege thus conferred upon the husband may in some cases become the subject of abuse; but the wife takes that risk when she enters into the marriage relation, and assumes her dependent position, which is essential to the peace and happiness of the family, and to the well-being of society. The law protects the actual, not the former, homestead; and therefore, when the husband abandons it, and permanently changes his place of residence, the wife has no claim for possession which she can enforce against the grantee of the husband, in the absence of any statute restraining its alienation. Such restraint is in derogation of the general policy of the law, which encourages rather than abridges the right of alienation, and will operate and have effect so far only as is determined by the legislature. Tied. Real Prop. § 158; Wap. Homest. & Ex. p. 43, § 9; Thomp. Homest. & Ex. § 2; Finley v. McConnell, 60 Ill. 259; Guiod v. Guiod, 14 Cal. 506; Knudsen v. Hannberg, 8 Utah, 203, 30 Pac. 749.

In this case it appears from the record that the title to the premises in controversy was in Thomas Cook, the husband of the plaintiff. He sold the land to the defendant Higley without the knowledge or consent of his wife. Higley then went into possession, and, so far as appears from the record, without objection on the part of the vendor, who, it appears, quit the premises. While, under these circumstances, the plaintiff still retains her right of dower in the land, which will accrue at his death, yet we are of the opinion that she has no right of possession therein which will entitle her to recover in this action. The demurrer, therefore, was properly sustained, her husband being still living. There appears to be no error in the record. The judgment is affirmed.

MERRITT, C. J., and SMITH, J., concur.

GARMS v. JENSEN et al. (No. 19,402.)
(Supreme Court of California. July 17, 1894.)
MORTGAGE — PAYMENT OF TAX—INVALID AGREEMENT BY MORTGAGOR—CONSTITUTIONAL LAW.

1. Under Const. art. 13, § 5, which provides that all contracts requiring the mortgager to pay any tax on the mortgage shall be void as to any interest specified therein, and as to such tax, a provision in a mortgage that the mortgage may include in the mortgage all taxes and assessments on the premises, "including

taxes on the interest of the mortgagee therein by reason of the mortgage," renders the mortgage void as to the interest on the notes secured thereby.

thereby.

2. The fact that the mortgagee did not attempt to make the mortgagor pay the tax on the

mortgage is immaterial.

Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by one Garms against Jensen and others to foreclose a mortgage. From a judgment declaring defendant Upton's mortgage a prior lien, plaintiff appeals. Modified.

J. Marion Brooks, for appellant. H. E. & F. J. Upton, J. M. Voss, and Willis & Appel, for respondents.

HARRISON, J. The plaintiff seeks herein the foreclosure of a mortgage executed to him by the defendants Jensen, bearing date June 20, 1889, and made Mrs. Upton, one of the respondents herein, a party defendant, under the allegation that she claimed some interest in the premises, subject to the lien of the plaintiff's mortgage. A cross complaint was filed on behalf of Mrs. Upton, in which she alleged that the defendant Jensen had executed to her a mortgage upon the same premises on the 10th day of January, 1889, which was a lien thereon prior to that of the plaintiff, and asked a judgment for its foreclosure, and that out of the proceeds of sale the amount of her claim should be paid prior to that of the plaintiff. To her cross complaint was annexed a copy of the mortgage, which contained a provision that in case of foreclosure the mortgage "may include in such foreclosure a reasonable counsel fee, to be fixed by the court, together with all payments made by the mortgagee for taxes and assessments on said premises, including taxes on the interest of the mortgagee therein by reason of this mortgage, and for the insurance of the buildings on said premises, and for any adverse claims to the mortgaged property, all of which payments the mortgagee is hereby authorized to make, and the same, with interest thereon at the same rate as said promissory note, shall be deemed to be secured by this mortgage, and payable to the mortgagee, in U. S. gold coin, out of the proceeds of the sale under said foreclosure." The plaintiff filed a general demurrer to this cross complaint, and, his demurrer having been overruled, he filed an answer, in which he averred that this provision contravened the provisions of the constitution and laws of this state, by reason of which his mortgage became a first lien upon the land. The court below held that the provision was not in violation of any provision of the constitution or laws of this state, and rendered a judgment in favor of Mrs. Upten for the full amount of the principal and interest upon the note for which the mortclaim be first paid out of the proceeds from the sale of said property. From this judgment the plaintiff has appealed directly upon the judgment roll alone.

The foregoing provision in the mortgage to Mrs. Upton does not differ materially from the provision in the mortgage which was under consideration in Harralson v. Barrett, 99 Cal. 607, 34 Pac. 342. In that case the provision with reference to the payment of the tax on the mortgage was almost identical in terms with the provision in the present mortgage, the agreement being that in case of foreclosure the mortgagee might include therein all payments made by him "for taxes on said premises, and the taxes of this mortgage, or the money hereby secured," and in the present case the agreement is that he may include in such foreclosure all payments made by him "for taxes and assessments on said premises, including taxes on the interest of the mortgagee therein by reason of this mortgage." It was held in that case that this provision in the mortgage fell within the penalty of section 5 of article 13 of the constitution, and that the plaintiff should not have been allowed any interest on the note for the payment of which the mortgage was given as security. Under the rule there established this provision in the mortgage to Mrs. Upton must be held to contravene the foregoing section of the constitution, and to be subject to the penalty therein provided. The constitution does not, however, declare that all of the provisions of the mortgage containing such agreement shall be invalid, but merely that the contract to pay the tax "shall as to any interest specified therein, and as to such tax or assessment, be null and void." The mortgage of Mrs. Upton was therefore a prior lien upon the premises, to the extent of the principal sum for which it was given, but it was void "as to the interest specified therein," and the court erred in holding that the amount of such interest was a lien upon the premises.

The proposition of the respondent that this provision of the constitution cannot be invoked against her by the plaintiff, for the reason that she does not seek to recover for any taxes paid by her upon the mortgage. cannot be maintained. Whether the mortgagee has paid the tax or not is immaterial. The constitution does not limit the penalty to an attempt by him to enforce the payment of the mortgage tax, but affixes it to the contract itself. Its object is to prevent the making of such an agreement, and not merely to prevent its enforcement. Hence, it strikes at the agreement itself, by providing that if made it shall be void, not only as to the tax agreed to be paid, but also as to any interest specified therein.

rendered a judgment in favor of Mrs. Upten for the full amount of the principal and interest upon the note for which the mortgage was given as security, and that her executed, and as so modified the judgment will stand affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(103 Cal. 174)

RYAN v. AL/TSCHUL. (No. 15,392.)¹ (Supreme Court of California. June 23, 1894.)
ASSESSMENTS FOR STREET IMPROVEMENTS—VA-LIDITY.

Laws 1885, p. 147, \$7, subd. 1, provides that the expense of street work "shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided." Subdivision 8 provides that, where any work mentioned in section 2 (sewers, manholes, cesspools, culverts, cross walks, crossings, curbing, grading curbing, piling, and capping excepted) is done on one side of the center line of streets, the lots fronting on that side only shall be assessed to cover the expenses of the work. Held that, where an assessment included charges for macadamizing as well as grading and curbing, the imposition of the whole expense of grading and curbing on a lot on one side of the street renders the whole assessment void, not only as to the grading and curbing, but also as to the macadamizing.

Department 1. Appeal from superior court, city and county of San Francisco; Walter H. Levy, Judge.

Action by James Ryan against Ludwig Altschul to recover for improving a street in front of defendant's lot. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

Sullivan & Sullivan, for appellant. J. C. Bates, for respondent.

PER CURIAM. On the 11th day of June. 1888, the board of supervisors of the city and county of San Francisco made and passed a resolution of intention declaring their intention to order "redwood curbs, plank sidewalks, and rock gutters to be laid on the southerly side of Post street, commencing at the southwesterly corner of Broderick and Post streets, for a distance of 275 feet; and that the southerly one-half of the roadway opposite to the above-described portion of Post street be regraded and remacadam-In regular course of the procedure thus inaugurated, the board ordered the work to be done February 11, 1889, and March 18, 1889, awarded to plaintiff a contract for the work. Plaintiff duly entered into a contract with the street superintendent, and proceeded to do the work, and on May 8, 1889, the assessment upon which this suit is brought was made and assigned to The specifications stated: "That portion of Post street is to be graded by the removal of all loose sand or earth until the old macadam shall have been reached, or to a depth of not less than twelve (12) inches at the center or crown of the street should the original macadam be entirely gone." Plaintiff's bid was for macadamizing (including regrading), per square foot, 5% cents; for

sidewalks, per front foot, \$1.20; for curbs, per lineal foot, 25 cents,—which shows that the grading was charged for in the charge for macadamizing. The assessment was:

5,828 square feet macadam, at \$0.05\% per foot	\$306	36
\$0.25 per foot	68	75
per foot Printing Engineering	33 0 94	20
	\$828	31

The diagram shows one lot assessed, to wit, defendant's lot on the south side of the street, 275 feet frontage. It is contended that the assessment is void; that it charges defendant with the entire cost of grading and curbing, while the law required that the expense of this work should be assessed upon the lots fronting upon the work on both sides of the street. Subdivision 1, \$ 7, of the Vrooman act (St. 1885, p. 147) provides that the expense of street work "shall be assessed upon the lots and lands fronting thereon, except as hereinafter specifically provided." Subdivision 8 of that section reads as follows: "Where any work mentioned in section 2 of this act (sewers, manholes, cesspools, culverts, cross walks, crossings, curbing, grading curbing, piling and capping excepted) is done on one side of the center line of said streets, lanes, alleys, places or courts, the lots or portions of the lots fronting on that side only shall be assessed to cover the expenses of said work, according to the provisions of this section." Whether other parts of the street within this block had been graded, macadamized, curbed, or otherwise constructed the record does not disclose. It is difficult to discover any reason for putting curbing or grading in the list of exceptions in subdivision 8, and this was changed by the amendment to the act made in 1889. The proceedings here had been commenced and had proceeded up to the reception of plaintiff's bid before that act was passed. In that act it was expressly provided "that any work or proceedings commenced under the act of which this is amendatory shall in no wise be affected thereby, but shall in all respects be finished and completed thereunder, and this act shall in no wise affect such work or proceedings." The effect of a street assessment is to put a burden upon a property holder against his will. No such lien can be put upon his property save by a substantial compliance with all the provisions of the statute, and in no way can a burden be put upon him against the provisions of the statute. We may not be able to comprehend the reason for this exception as to curbing and grading, but the language is not ambiguous, and the legislative power is not in this court. So far as the act of grading and curbing is concerned, the assessment is illegal. Does it render the whole assessment void? The following cases

seem to hold that it has that effect: Dyer v. Chase, 52 Cal. 440; Schirmer v. Hoyt. 54 Cal. 280; Donnelly v. Howard, 60 Cal. 291.

Respondent contends that appellant's only remedy was to appeal to the board of supervisors, and have a new assessment made. The same point was made in Donnelly v. Howard, supra, and expressly overruled. In fact, each of the above cases is an authority for appellant upon this question, as is also the case of Dorland v. Bergson, 78 Cal. 637, 21 Pac. 537. See, also, Dyer v. Harrison, 63 Cal. 447; Diggins v. Brown, 76 Cal. 318, 18 Pac. 373. The last two cases are utterly inconsistent with respondent's contention. Evidently, however, if he had appealed, and the board had refused relief, their conclusion could not be final, for neither as an appellate board nor otherwise can it transcend its power in making contracts to become a charge upon private property. If the assessment includes expenses which, under any circumstances, might have been a charge upon the property assessed, and the alleged error is to be determined by matters outside of the assessment itself, it has been held that the owner must first seek its correction by an ap-McDonald v. Coniff, 99 Cal. 386, 34 Pac. 71. If, however, the assessment is void upon its face, it does not constitute an apparent lien upon the property; and, as its invalidity is always apparent, the owner is not "aggrieved," and is not required to seek its correction by an appeal, but may defend upon this inherent invalidity, whenever an attempt is made to enforce it, or any right is asserted by virtue of its existence. An assessment is void upon its face if it purports to be for work which is not included in the contract upon which it is made, or which has not been authorized in the resolution of intention (Donnelly v. Howard, 60 Cal. 291; Partridge v. Lucas, 90 Cal. 519, 33 Pac. 1082), or if it appears from the diagram attached thereto to be upon lands which the statute does not make chargeable with the expense of the work (Parker v. Reay, 76 Cal. 103, 18 Pac. 124), or which lie outside of the district to be assessed (Schumaker v. Toberman, 56 Cal. 508). The assessment is to be regarded as an entirety, and is equally void if it appears upon its face that a portion or the whole of it is for the expense of work which is not legally chargeable upon the property assessed (Partridge v. Lucas, supra), or that the statute required a portion of the expense incurred to be assesed upon other property (Diggins v. Brown). It appears upon the face of the present assessment that the lot of the defendant is charged with a portion of the expense for the work done that the statute declares must be assessed upon other lots, and which cannot, under any circumstances, be imposed upon the lot of the defendant. must, therefore, be regarded as invalid for any purpose. The judgment and order are reversed.

ZINTEK et al. v. STIMSON MILL CO. (Supreme Court of Washington. July 11, 1894.)

VICE PRINCIPAL—CONTRIBUTORY NEGLIGENCE.

1. A person who has charge of a mill yard, whose duty it is to superintend the piling of lumber therein, and under whose orders are the workmen engaged in the piling, and who does none of it himself, is a vice principal, though, in hiring and discharging workmen, he reports to the general superintendent, and obtains his sanction therefor, and occasionally renders services as tallyman in measuring lumber.

2 A workmen in a lumber vard is not

2. A workman in a lumber yard is not guilty of contributory negligence in not examining a lumber pile to see if it is properly constructed, so that he may safely work around it.

Hort, J., dissenting.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by Francisca Zintek and others against the Stimson Mill Company for the death of Alexander Zintek while in defendant's employ. Judgment for plaintiffs. Defendant appeals. Affirmed.

For former reports, see 32 Pac. 997, and 83 Pac. 1055.

Charles W. Seymour, for appellant. Isaac D. McCutcheon, for respondents.

SCOTT, J. Upon a former trial of this action a judgment of nonsult was rendered by the superior court, from which the plaintiffs appealed. The judgment was reversed (6 Wash, 178, 32 Pac. 997, and 33 Pac. 1055), and upon the second trial plaintiffs recovered, and the defendant appeals. This appeal is based upon three grounds: (1) The proof is insufficient to charge the defendant with any negligence; (2) the proof shows conclusively that the deceased was guilty of centributory negligence; and (8) any negligence beyond that of the deceased was the negligence of a fellow servant.

As to the last point, the facts developed at the second trial are not sufficient to materially alter the situation, or take it outside the former ruling. The facts developed at the former trial are qualified, according to the testimony of defendant, to the extent that, in hiring and discharging workmen, Nelson reported to Dorman, the general superintendent, and obtained his sanction therefor. It also appears that Nelson occasionally performed some services as tallyman in measuring lumber, but otherwise the facts are the same. He was an assistant superintendent, having charge of the yard, and it was his duty, according to his own testimeny, to superintend and look after the plling of lumber; and the workmen engaged therein were under his orders, and subject to his control, and he performed no such services himself.

As to the first ground alleged, there was evidence of the negligence of the defendant. There was testimony to show that lumber, properly piled, should stand by itself, independent of other piles; that this particular

pile had been constructed between two other piles, and that the foundation consisted of narrow strips thrown in between said two piles, without any cross-pieces; that it was built up gradually from time to time, and carried in this condition to the height of several feet (the testimony showing a variance of from 3 to 7 feet); that then cross-pieces were placed thereon, and the pile thereafter was carried up in the regular manner to a height of from 12 to 17 feet,-to give the two extremes mentioned in the testimony. The injury was caused by a portion of the lower part of the pile, which had been constructed as afcresaid, crushing out some three or four feet from the ground, whereby the upper portion split in two, and fell over upon Zintek, causing his death. According to the testimony of plaintiff's witnesses, the foundation of this pile was improperly and negligently constructed, and it was an unsafe and insecure foundation.

We fail to find any testimony in the record upon which a charge of contributory negligence can be based. There is no testimony to show that Zintek knew the character of the foundation of the pile in question. Two witnesses testified that they saw Zintek placing lumber upon this pile, but it was at a time after it had been carried up to the extent of some 10 feet from the ground, and where it was properly constructed. no testimony whatever to show any actual knowledge upon the part of Zintek as to how the foundation of the pile had been built. One witness testified that the pile of lumber which had been placed at the ends of the piles in question—the one which fell, and the one which Zintek and Marzillger removedhad been placed there by Zintek and Marzillger, but this was contradicted by Marzill-Even if it were so, it is not entirely certain that the defective condition of the foundation of this pile would have been visible from the end, if this other pile had not been there, or that it was visible at all after its construction; and, even if the defects were visible, there is nothing to show that Zintek's attention was drawn thereto in any manner. It cannot be said that it was his duty to inspect every pile of lumber in the yard, and see that it was safely constructed, so that he might safely work around the same in case he should be ordered to do so by the yard boss. While appellant's attorney contends that Zintek was guilty of contributory negligence, he points to no place in the record where any testimony is found upon which such a charge can be based; and, after a careful inspection of the record, we find ncne. The claim that Zintek knew anything about the construction of this pile is mere assumption, not sustained by any proof. The most that can be said is that he might have known, and this would be but an inference. After a careful inspection of the record, we are satisfied that there is not sufficient testimony therein upon which a verdict for the defendant, based upon a finding of contributory negligence upon the part of the deceased, could be sustained, let alone the question of a conflict therein. But if it could be held, by the most liberal intendments, that there was any proof tending to show this, it was at least a disputed question of fact, which has been settled by the finding of the jury in favor of the plaintiff, and it is not within our province to disturb the same. Affirmed.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT, J. (dissenting). In my opinion it more clearly appeared from the proofs offered on this trial that the plaintiff had been guilty of contributory negligence than it did upon the former one, and, for the reasons stated in the dissenting opinion when this case was here before, it must follow that the verdict and judgment cannot be sustained. I am, therefore, compelled to dissent from the opinion of the majority affirming the judgment.

(9 Wash. 120)

MITCHELL V. TACOMA RAILWAY & MO-TOR CO.

(Supreme Court of Washington, June 11, 1894.)

STREET RAILWAYS — ACCIDENTS AT CROSSINGS —
NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE —
QUESTION FOR JURY—INSTRUCTIONS — REMARKS
OF COUNSEL

1. In an action for personal injuries sustained by an eight year old child by being run over by a cable car while playing on the track, there was some evidence that the gripman did not keep a proper lookout in front, and that he might have stopped the car, if the brakes were in proper condition, sooner than he did. Held, that the questions of negligence and contributory negligence were for the jury.

tributory negligence were for the jury.

2. Where plaintiff herself testified that she was playing tag, and ran out to the track and stopped to look for her playmate just before the accident, and the conductor testified that plaintiff, unexpectedly to him, jumped in front of the car, a charge that all persons have a right to be on and pass along the streets, and that one is not a trespasser because he happens to be on the line or track of a street car, was im-

be on the line or track of a street car, was improper.

3. The court charged that, in determining whether plaintiff or defendant was guilty of negligence, the jury should consider the age and intelligence of plaintiff, and that the degree of caution required is to be determined by the maturity of the child. Held, that the instruction was faulty, because it was not alone necessary for the jury to ascertain the capacity of plaintiff to observe and avoid danger, but was equally necessary to know whether or not she made such use of that capacity as the law required.

4. A charge clearly defining the duties imposed by the law on street-railway companies, but nowhere stating that there was any duty whatever resting on plaintiff, is erroneous.

5. An instruction that defendant owell plain-

5. An instruction that defendant owed plaintiff no other duty than to warn her to keep off the track, by shouting to her immediately before she got upon the track and was struck by the car, was properly refused.

6. Though there was no positive evidence that the brakes or grip on the car which struck the child were out of repair, the mere circumstance that the car ran an unusual distance be

fore it was stopped was some evidence thereof.

7. The mere fact that plaintiff knew something of the street cars, and that defendant's cars were frequently passing down the street on which she was injured, is insufficient to warrant a charge that she was guilty of contributory negligence if she attempted to cross the street without looking to see whether there was

a car approaching.

8. It is not negligence per se to be upon a railrond track at a place other than that where pedestrians usually cross a street.

9. The mere fact that plaintiff was playing on the street when injured does not necessarily

deprive her of a recovery.

10. Where the gripman was subpoenaed in a distant county, and refused to attend, it was error to refuse an instruction that the fact that such gripman was not present, and did not tes-tify, could not be considered.

Appeal from superior court, Pierce county;

John C. Stallcup, Judge.

Action by Edna L. Mitchell, by her guardian ad litem, Emily H. Mitchell, against the Tacoma Railway & Motor Company, to recover for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

The following are defendant's requests for instructions numbered 6, 9, 16, 17, 19, 20, and 21: "If you should find that Edna Mitchell saw the car approaching, but she got upon the track, believing she had sufficient time to cross the same before the car would reach her, the accident was simply the result of an error of judgment on her part, and she was guilty of contributory negligence, and cannot recover." "If you find that the gripman was sitting down while the girl was crossing Tacoma avenue, you are instructed that this was no evidence of negligence on the part of defendant. If you should find that the gripman was sitting down after the car had crossed Tacoma avenue and had started down Thirteenth street, below the crossing on Tacoma avenue, no recovery could be had against the defendant, even though you should further find that the girl Edna Mitchell, while at play or sport below the crossing on Tacoma avenue, got upon the track in front of the car, and was immediately afterwards struck by the moving car, and was injured." "If the jury finds from the evidence that the accident occurred on Thirteenth street, below the crossing between Tacoma avenue and Thirteenth street, and that the girl Edna Mitchell was first struck by the car below the usual place of crossing for pedestrians between Tacoma avenue and Thirteenth street, and at a place where pedestrians do not usually cross the street, and at a place where there is no cross walk, plaintiff cannot recover, she being guilty of contributory negligence in being upon the track at such point." "If you find that the girl Edna Mitchell was using a part of the street for sport or play, and while so using the street got upon the track of the defendant company, in front of a moving car, plaintiff cannot recover." "There is no evidence in this case in any way tending to show that the brakes and grip, or either of them, upon

the car which struck Edns Mitchell, were, at the time, out of repair, and you cannot find any negligence of the defendant on the ground that the brakes or grip, or either of them, were out of repair, and were not in good condition." "There is no evidence in this case tending to show that the defendant negligently or carelessly omitted its duty to have the car which struck Edna Mitchell so constructed and equipped that it could be stopped, in case of an accident, within reasonable time; and, in ascertaining whether the defendant was guilty of negligence, you are instructed that you cannot consider the question as to whether the car was properly constructed or equipped, or so constructed or equipped that it could be stopped within a shorter distance than that in which it was stopped." "You are also instructed that you cannot find any negligence against this defendant for any act occurring after the girl was first struck. After the girl Edna Mitch ell was struck by the car, the undisputed evidence shows that the car was stopped as soon as it could be done by the gripman."

Crowley & Sullivan, for appellant. Ben Sheeks and F. G. Merrill, for respondent.

ANDERS, J. On April 27, 1892, the appellant was the owner of a cable-car line, and was operating the same, on certain streets in the city of Tacoma, one of which was Thirteenth street. It appears that Thirteenth street crosses Tacoma avenue on a level, but from the eastern side of the avenue it suddenly descends, causing a steep grade upon the line of the railway at that place. On the day above mentioned, the respondent, a girl of the age of eight years and four months, while on Thirteenth street, at or below the crossing on Tacoma avenue, was struck, knocked down, and shoved along the track for some distance by one of appellant's cars which was passing eastward down Thirteenth street, and thereby severely in jured. Subsequently this action was instituted to recover damages for the injuries thus received, and which the plaintiff claimed were caused by the negligence of the defendant. The alleged negligence is set forth in the complaint as follows: That on the 27th day of April, A. D. 1892, the plaintiff was traveling on said Thirteenth street. where the said street and the said cable line crossed Tacoma avenue, and, while plaintiff was on said street, the defendant carelessly and negligently caused one of its cable cars to pass rapidly over its said track along said street, and negligently and carelessly omitted its duty, while passing said crossing, to give any signal by ringing the bell, or to keep watch for persons on the street, and negligently and carelessly omitted its duty to have its said car so constructed, equipped, controlled, and managed that it could be stopped, in case of a possible accident, within a reasonable distance; that, in consequence thereof, the car struck the said plaintiff, and

knocked her down, and dragged her along its track for a distance of 68 feet before the said car was or could be stopped, whereby plaintiff's head and face were bruised, injured, permanently disfigured, and other serious injuries inflicted on her body. These averments of the complaint were denied in the answer of the defendant, and the defendant affirmatively alleged that on said date the plaintiff carelessly and negligently, at a point on said Thirteenth street where the same is very steep, and the grade heavy, ran in front of the cable car of defendant then being operated upon its said line of street railway, and was struck by said car, without any fault or negligence on the part of the defendant or its servants, agents, and employes, and that defendant did not and could not see plaintiff in time to stop said cable car on said grade and prevent the same from striking her; and averred that the plaintiff, Edna L. Mitchell, darted onto said track in front of said car suddenly, and while it was so close to her-and while the car was in motion-that the same could not be stopped in time to avoid striking her. It was further alleged in the answer that the injuries complained of were occasioned solely by reason of the carelessness and negligence of the plaintiff, and the carelessness and negligence of her parents and guardians in allowing her to play on said street, and without any fault, negligence, or want of care on the part of the defendant.

A trial was had upon the issues thus formed by the pleadings, and a verdict was returned by the jury in favor of the plaintiff. A motion for a new trial was duly filed by the defendant, and denied by the court, whereupon judgment was entered upon the verdict against the defendant for the sum of \$12,000. At the close of the testimony, counsel for the defendant requested the court to instruct the jury to return a verdict for the defendant, which request the court refused, and this ruling of the court is assigned as error. It was a disputed question at the trial whether, when the plaintiff was struck by defendant's car, she was on the cross walk on Tacoma avenue, or on Thirteenth street below the crossing provided for pedestrians. Some of the witnesses thought the accident occurred at the former place, while others were equally positive that it happened at the latter. But there is no dispute that the respondent, when struck, was standing on or near the car track, and was knocked down in front of the car, and that a portion of the car passed over her before it was stopped. The testimony discloses that the car first struck the respondent either upon her back or her side, but when she was extricated from beneath the car it was discovered that her skull was fractured, and one side of her face very seriously mangled and torn, and that there was a pool of blood upon the track about seven or eight feet above where she was picked up. It is, therefore, almost cer-

tain that the principal injuries received by . the respondent were not inflicted until the car had moved some distance after first striking her. According to the testimony of the conductor, the car was stopped 54 feet below the crown of the hill, or lower side of Tacoma avenue, and 28 feet from the point where it first came in contact with the respondent. And Harvey Johnson, one of the respondent's witnesses, who was on the sidewalk on Thirteenth street just below the avenue, and who started down the hill at the same time the car did, says he saw the occurrence, and that the girl was struck by the car on Thirteenth street, about 25 or 30 feet below the crossing. On the other hand, the respondent claims that she was on the crossing on Tacoma avenue when she was struck, and in this she is corroborated by two other witnesses, who saw the collision, but were at the time a considerable distance from where it occurred. The exact place of the accident, however, is material only in so far as it may affect the question of whether or not the appellant was exercising due care and caution at the time it happened. care required of those operating street cars is such as ordinarily cautious and prudent men would exercise under like conditions and circumstances, and is proportioned to the danger to be guarded against, and the fatal consequences which are likely to result if it is omitted. And hence a greater degree of vigilance and caution is exacted at street crossings, and places known to be frequented by persons generally, and especially by children, than at places where danger of injury is not so apparent. Now, it is contended, on behalf of the appellant, that, no matter at which of the two places described by the various witnesses the accident occurred, the evidence is wholly insufficient to sustain any of the allegations of negligence contained in the complaint, and that, therefore, it was manifest error to refuse the request to direct a verdict for the defendant. But after a careful consideration of all of the testimony and circumstances in the case, and giving the respondent the benefit of all just inferences that might be drawn therefrom in her favor. as we are required to do under the well-established rule of law in such cases, we have concluded, though not without some degree of hesitation, that the request was properly refused. There is some evidence tending to show that the gripman, at and just below the crossing of the avenue, did not keep such a lookout in front of his car as the place and circumstances demanded, and that he might have stopped the car, if the brakes were in proper condition, sooner than he did. It appears that he did not see the respondent until the car was within about 5 feet from her, though one of the witnesses stated that she might have been seen for a distance of 35 feet. And although he "hallooed," and applied the brakes, as soon as he discovered the girl near the track, the car almost instantly

struck her, and threw her forward on the track about 8 feet, and afterwards ran from 28 to 60 feet before it was stopped. Whether, under all of the circumstances, including the fact that the respondent was seen by the conductor and gripman playing "tag" with another little girl, and running back and forth to and from the car track, the injury might have been averted by the exercise of reasonable diligence and watchfulness on the part of the appellant's employés, and whether the respondent was guilty of contributory negligence in placing herself in dangerous proximity to the track without seeing the approach of the car, were questions which, we think, were properly submitted to the consideration of the jury. It does not appear from the evidence that there was any municipal ordinance requiring the ringing of a bell at street crossings, or elsewhere, by street-railway companies in the city of Tacoma, but it does not necessarily follow that under no circumstances the omission to do so would constitute negligence. It is the duty of those having charge of street cars to give warning of their approach to all persons who may be dangerously near the cars, and especially those who may not be aware of their presence, whether required so to do by ordinance or not, and a failure to give such warning will render the company liable for injuries resulting therefrom. Elliott, Roads & S. p. 586.

The next ground urged by the appellant for the reversal of the judgment is that the court erred in giving certain instructions to the jury at the request of the plaintiff. The following are those especially complained of: "(1) All persons have a right to be on and pass along the streets, and one is not a trespasser because he happens to be on the line or track of a street car." "(3) In determining whether the plaintiff or defendant was guilty of negligence, if either of them was, you should take into consideration the age and intelligence of the plaintiff. The law does not require the same degree of caution from a child of tender years as would, under like circumstances, be required of an adult; but the degree of caution required is to be determined by the maturity and capacity of the child. So that what you might consider, under the same or similar circumstances, would be negligence on the part of a grown person, would not necessarily be so considered by you in case of a child of tender years. (4) If you find that the contributory negligence of the plaintiff did not cause the injury, and you come to consider whether or not the injury was caused by the negligence of the defendant, you should take into consideration. not only the age and capacity of the child, but also the nature and character of the line of cars the defendant was operating, as being dangerous or otherwise to persons on the streets. The law requires those operating dangerous implements to exercise vigilance, care, and caution, and especially at such

places as are known to be frequented by persons generally. The law requires greater care and caution towards a child of tender years than it does towards an adult; so that what you might not consider negligence towards a grown person you might consider negligence towards a child of tender years." We entertain no doubt of the correctness of the propositions of law contained in the first of these instructions, abstractly considered. but we are, nevertheless, of the opinion that the instruction, without any qualification or any explanation of the relative duties of the railway company and of the plaintiff, was misleading, and may have been highly prejudicial to the defendant. It was not claimed by the defendant that the plaintiff was a trespasser upon its track, or that she had not a right to be on and pass along the street, but it was claimed that she was guilty of contributory negligence in suddenly running in front of the car while it was in motion, and so near to it that it could not be stopped before striking her. The testimony of the plaintiff herself showed that she was playing "tag" in the street, and ran out to the track, and stopped to look for her playmate, just prior to the accident; and there was also other testimony to the same effect. And the conductor of the car testified that the plaintiff, unexpectedly to him, jumped in front of the car as quick as lightning. But no intruetions were given to the jury as to what acts, if any, on the part of the plaintiff, would constitute contributory negligence, and the jury might well have inferred, from the clear and positive language used in this instruction, that the plaintiff would not be guilty of negligence in being upon the track of defendant's railway, even if they believed that she voluntarily "jumped" immediately in front of an approaching car. The third and fourth instructions are also faulty, not especially because they do not state the law correctly as far as they go, but because they do not go far enough in some particulars. They are too general to furnish proper guides for the jury. It is undoubtedly true that the law does not require the same degree of caution from a child of tender years as would, under like circumstances, be required of an adult, and that the degree of caution required is to be determined by the maturity and capacity of the child. But it was not alone necessary for the jury to ascertain the capacity of the plaintiff to observe and avoid danger. It was equally necessary to know whether or not she made such use of that capacity as the law required, and the instructions furnished no rule by which that fact was to be determined. The plaintiff was bound to use the care and caution which, under the circumstances, might be reasonably expected of one of her age and capacity, and the court should have so instructed the jury. Eswin v. Railway Co., 96 Mo. 290, 9 S. W. 577; Barr v. Kansas City, 105 Mo. 550, 16 S. W. 483. While the duties of the company were clearly

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and explicitly set forth, in general terms, in the fourth instruction, and the jury were told that the law requires greater care and caution towards a child of tender years than it does towards an adult, and that what might not be considered negligence towards a grown person might be considered negligence towards a child of tender years, the jury were given no criterion by which to determine whether the defendant exercised proper care and caution under the circumstances of this particular case. It is obvious that more care would be required from persons operating street cars towards a child of the age of two years, who might be on or near the track, than would be required towards one of the age of eight or ten years, and hence the care and caution required towards any particular child is proportioned to its age, and its apparent want of capacity to take care of itself. If, therefore, the defendant was guilty of negligence, it was not merely because the law imposed upon it the exercise of a greater degree of care towards children of tender years than towards adults, but because it failed to discharge its duty towards this very child, and that duty was to exercise ordinary care, vigilance, and caution to prevent injury to her by its cars, taking into consideration her age and apparent maturity and capacity. The court charged the jury, generally, that if the plaintiff was guilty of contributory negligence she could not recover, and that and the first, third, and fourth instructions were the only ones given by the court touching the negligence of either party. In them the duties imposed by the law upon streetrailway companies are clearly and unequivocally indicated, but the charge nowhere suggests or states that there was any duty whatever resting upon the plaintiff. The plaintiff's theory of the case was thus made prominent before the jury, while that of the defendant was measurably concealed. The question of the contributory negligence of the plaintiff was one of vital importance on the trial of this case, and should have been fully, fairly, and intelligently submitted to the jury. But the learned counsel for the respondent insists that at most the instructions given were incomplete, merely, and did not amount to a positive misdirection, and that they therefore afford no grounds for reversal, for the reason that the court was not requested to make them more specific. The principle contended for is a sound and reasonable one, and has often been justly recognized and applied by the courts, generally, however, in cases where the trial judge did not, of his own motion, instruct the jury upon every question raised by the evidence. In such cases it is the duty of the party claiming to have been injured to request proper supplementary instructions. But in this case we do not think the learned counsel for the respondent is entitled to the benefit of the rule he invokes. He asked for instructions on the whole case, and the court charged the

jury as requested, and hence all errors therein are imputable to the respondent, rather than to the appellant. And, besides, the errors indicated were not altogether unchallenged, and cannot, therefore, be attributed to mere oversight. Having undertaken to present the law applicable to both sides of the case, it was the respondent's duty to do so as fully and impartially for one side as for the other, which, as we have seen, was not done.

Error is also predicated upon the refusal of the court to give certain instructions requested by the defendant. On account of the great number of these requests, we find it impracticable to set them all out here in haec verba, and therefore content ourselves with a somewhat general discussion of the points raised by them. The first request was for a verdict, and has been disposed of already. The third instruction was to the effect that, if it appeared from the evidence that the injury to the plaintiff may have been the result of either mere accident or of negligence on the part of the defendant, no recovery could be had, as in such case there would not be a preponderance of proof showing negligence on the part of the company. We think this request was proper, and should have been given. Negligence will not be presumed, but must be proved as alleged, and is not made out merely by showing a state of facts which tends equally to prove negligence or mere accident. The fourth request was properly refused, for the reason that it in effect told the jury that the defendant owed the plaintiff no other duty than to warn her to keep off the track by shouting to her immediately before she got upon the track and was struck by the car. The question whether the defendant was in the exercise of due care at and before the plaintiff was struck was one for the jury to determine from all the evidence. Whether certain facts do or do not constitute negligence is generally a question to be determined by the jury, and not by the court, though we do not wish to be understood as saying that this is a universal rule. And hence many of the requests which asked to have the jury directed that certain facts would be no evidence of negligence were properly refused. Instructions 5, 7, 8, 13, 14, and 15 were of this character. It may or may not be evidence of negligence not to ring a bell at a particular time or place, or not to slacken the speed of the car, or not to anticipate that a person would attempt to cross the track in front of a moving car; but these were all questions for the jury, under the circumstances of this case. It is not proper to charge juries with respect to the facts, and counsel for the respondent contends, and not wholly without reason, that requests 19, 20, and 21 were objectionable on that ground. But, however that may be, we think it would have been error to have given them precisely as tendered: for, while it is true that there was no posltive testimony showing that the brakes or

grip upon the car which struck the respondent were out of repair, or that the car was so constructed and equipped that it could not be stopped, in case of an accident, within a reasonable distance, yet it would not have been strictly correct to have told the jury that there was no evidence at all tending to establish those facts. The mere circumstance that the car ran an unusual distance before it was stopped was some evidence either of improper management, or that it was out of repair, or that the brakes were defective.

It is claimed by appellant that, inasmuch as the evidence discloses that the plaintiff was familiar with the operation of street cars, and knew that the cars of the defendant were frequently passing down Thirteenth street, she was guilty of contributory negligence if she attempted to cross the street over the track without looking to see whether or not there was a car approaching, and that the court therefore erred in not giving the jury the tenth instruction asked for by defendant. Ordinary prudence and common sense suggest to every one who is aware of the present character and operation of street cars that it is dangerous to pass immediately in front of them while in motion, and one who does so, without looking or listening, when, if he had looked and listened, he could have discovered the car, is presumptively guilty of negligence. See Booth, St. Ry. Law, § 312, and cases cited. But the request under consideration, although based upon this doctrine, was rightly refused, for the reason that it was for the jury, and not the court, to judge what the knowledge of the plaintiff was as to the character and movement of the cars. We perceive no valid objection to the ninth instruction requested by the defendant, but the sixteenth and seventeenth, as well as the sixth, were properly withheld from the jury. It was not negligence per se to be upon the railway track at a place other than that where pedestrians usually crossed the street, as suggested in the seventeenth request, because all persons have a right to cross a public street at any place. Nor was the plaintiff necessarily deprived of a recovery because she was injured while engaged in playing on the street, as was implied in the sixth request. See Donaho v. Iron Works, 75 Mo. 401; McGuire v. Spence, 91 N. Y. 303.

It appears that Metcalf, the gripman who was on the car at the time the plaintiff was injured, was not present at the trial, but it also appears that he was subponaed in a distant county, and failed and refused to attend the trial and testify as a witness for the defendant. In their argument to the jury, counsel for the plaintiff commented on the absence of Metcalf, and asserted, in effect, that the company might in some way have secured his attendance, if it believed that his testimony would be favorable to the defense. The defendant, by its attorneys, objected to the re-

marks of plaintiff's counsel, whereupon the court directed counsel to confine himself to the testimony, and to proceed no further with his argument on that point. At the close of the trial, the defendant requested the court to instruct the jury that "the fact that Metcalf, the gripman who was on the car at the time Edna Mitchell was injured, was not present and did not testify as a witness in the trial of this action, cannot be considered by you as a circumstance either favorable or unfavorable to the plaintiff or to the defendant." The court refused to so charge the jury, and the defendant excepted. We are of the opinion that, under the circumstances mentioned, the instruction should have been given. It may be stated, as a general rule, that counsel has a right to comment on the fact that a person who has been shown to be an important witness for the adverse party, and within reach, was not called on his behalf. Gavigan v. Scott, 51 Mich. 373, 16 N. W. 769; Gray v. Burke, 19 Tex. 228. But this rule is not applicable in a case like this, where the adverse party employed the usual means to procure the attendance of the witness, and failed. If the defendant had not, in any way, endeavored to secure the testimony of this witness, the omission would have been a circumstance for the consideration of the jury. Reynolds v. Sweetser, 15 Gray, 78. The only available witness, the conductor, was called, and testified for the defendant, and, even if the defendant had made no effort to secure the testimony of the gripman, it would not have authorized the jury to infer that his testimony would be prejudicial. Bleecker v. Johnston, 69 N. Y. 309. We think the instruction tendered was entirely fair to both parties, and, for the reasons indicated, should not have been refused.

Inasmuch as there must be a new trial of this action, we do not deem it proper to express any opinion upon the further point made by the appellant, that the verdict was excessive, and we will leave that question to the unbiased judgment of the jury. We see no prejudical error in the ruling of the court upon the objections to the introduction of testimony on behalf of the plaintiff. The judgment is reversed, and the cause remanded for a new trial.

STILES and HOYT, JJ., concur.

BROWN et al. v. PARSONS.

(Supreme Court of Utah. June 23, 1894.)

JUDGMENT BY DEFAULT—VACATION—UNAUTHOR-IZED INSTITUTION OF SUIT.

After the rendition, in an action of claim and delivery, of a judgment against plaintiffs. ordering the return of the goods or the payment of a certain sum, they moved to set it aside on the ground that the action was brought without their authority. It appeared that M., a traveling salesman of plaintiffs, engaged the attorneys to bring the suit, and defendant's at-

torney stated that he saw M. packing the goods, which were shipped to O., a town where plaintiffs had other goods stored, and also that he saw M. unpack the goods in O., and place them with other goods of plaintiffs. There was no affidavit on the part of M. filed, though he was still in plaintiffs' employ. Plaintiffs stated that they had not authorized M. to bring the action, and one witness stated that he had charge of plaintiffs' goods in the town of O., and that the replevined goods were not brought there. It also appeared that M. had been authorized to bring a similar action against other persons. Held, that M. had authority to bring the action, and that plaintiffs, by accepting the goods, ratified his acts.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Claim and delivery by Louis Brown Bros. & Co. against E. H. Parsons. There was a judgment for defendant, and from an order denying plaintiffs' motion to set aside the same they appeal. Affirmed.

S. H. Lewis, for appellants. J. N. Judd and Smith & Smith, for appellee.

MINER, J. The record in this case shows that E. H. Parsons, as United States marshal, seized the goods in question in this case by virtue of a writ issued in the case of L. Lisheimer et al. v. Louis Lapiner. Marcus Metz, acting as agent for the plaintiffs, then employed Rhodes & Nelson as attorneys to bring this action in claim and delivery to obtain possession of the goods so seized by Parsons. The goods were replevined upon the writ, and delivered over to Metz. Upon the trial of this case, S. S. Markham appeared as attorney for the plaintiffs. The defendant obtained judgment for the return of the goods, and, in default thereof, for their value, assessed at \$1,000. Soon after this judgment was obtained, the plaintiff moved the court to set aside and vacate the judgment on the ground that neither Rhodes & Nelson, Marcus Metz, nor S. S. Markham were employed or authorized by them to commence suit or prosecute the same; that the plaintiff never authorized said action to be commenced, and that the court had no jurisdiction to render judgment therein. Upon the hearing of this motion, several affidavits were filed in support and in opposition thereto. Each of the four partners of the plaintiff firm testify that no authority was given to said attorneys or to Metz to bring said action, or to appear for the plaintiffs Upon the part of the defendant the therein. affidavit of L. R. Rhodes was filed, showing that he was employed in said action by Marcus Metz, and brought such action under his authority. The affidavit of H. W. Smith was also filed, wherein he testified, in substance, that when the goods were replevined he was acting as the attorney for the defendant, and that they were turned over by the sheriff to Marcus Metz; that he saw Metz packing said goods at Salt Lake City, and at that time Metz stated that he was going to send them to Ogden, and place them with other goods of the plaintiffs; that a short time after this he saw Marcus Metz unpacking said goods in the store at Ogden, where the plaintiffs had other goods. Mr. Pingree testifies that, as assignee of Lapiner, he sold to Brown Bros. & Co. all the stock of goods belonging to said assignor at Ogden, and delivered them to plaintiffs at Ogden. Abe Brown testifies that no goods were brought from Salt Lake by Metz or any one else, and placed with the goods purchased from the assignee, and that plaintiffs never had or saw said goods referred to by H. W. Smith. Charles Goodstein testifies that he had charge of the goods purchased from the assignee at Ogden during all the time the goods were at Ogden, and that neither Marcus Metz nor any other person brought any goods from Salt Lake City or elsewhere, and placed them with the stock of goods purchased from the assignee; and that neither himself nor the plaintiffs ever had or received any of said goods referred to in the affidavit of H. W. Smith, and that, if said goods had been brought to Ogden, or placed in his store, he would have known it. It appears from other testimony that Metz was acting as salesman of the plaintiffs at this time, and that by authority of plaintiffs he acted in their behalf in the settlement or purchase of the goods in the first instance, from the assignee, and commenced a suit against Lapiner at Ogden, and that Rhodes and Nelson were paid for their services in such matters, but not for any services in this suit. Upon an examination of the testimony we find that Marcus Metz. who was the principal actor in the whole transaction, does not file any affidavit, nor in any manner explain the testimony in the case, nor is the absence of his testimony in any manner accounted for. He was the traveling salesman for the plaintiffs. He commenced a suit for the plaintiffs against Lapiner and garnished several preferred creditors of Lapiner by the direct authority of the plaintiffs. The goods purchased in this action are supposed to have been a part of the same stock purchased by plaintiffs from Pingree, the assignee of Lapiner, through the agency of Metz. The testimony is very conflicting. The total absence of the testimony of Metz concerning matters in which he was the principal actor, or in explanation or contradiction of the testimony of Mr. Smith, looks suspicious. He was still in the employ of the plaintiffs, yet no explanation is given for his absence at the hearing, nor why his affidavit was not procured. If the plaintiffs had the benefit of the results of this action, and appropriated the goods obtained by the writ issued by the direction of Metz, thereby ratifying his acts, and affirming his agency, they should not now be heard in repudiation of his authority. From the whole transaction, we are inclined to the belief that Metz had authority to commence the suit, and that plaintiffs subsequently ratified his acts by receiving the goods into their stock

at Ogden, and received the proceeds thereof.

The judgment of the district court is affirmed, with costs.

BARTCH, J., concurs.

MAMMOTH MIN. CO. v. JUAB COUNTY et al.

(Supreme Court of Utah. June 28, 1894.)

TAXATION—MINING CLAIM—FIXTURES.

Under 1 Comp. Laws, § 2009, providing that "mining claims" are not taxable, an engine and boiler built into a brick foundation, and firmly affixed by bolts leaded down and used in working a mine, are part of a mining claim, and not taxable.

Appeal from district court, Utah county; before Justice H. W. Smith.

Action by the Mammoth Mining Company against the county of Juab and another to recover a tax paid under an unlawful levy. Judgment for defendants, and plaintiff appeals. Reversed.

Bennett, Marshall & Bradley, for appellant. O. W. Powers and E. D. Hoge, for respondents.

MERRITT, C. J. In this case it appears, from the allegations of the complaint, which are not denied by the answer, and from the findings of fact of the trial court, that, during the year 1890, appellant was the owner of certain mining claims in Juab county, Utah; that on and beneath the surface of these mining claims, and in the underground workings, there was situated certain machinery attached to and appurtenant to appellant's mines, so as to constitute a part thereof: and that such machinery was necessary for the proper working of said mines. The evidence shows that the machinery in the underground workings of the mines consisted of an engine and boiler firmly affixed to the rock in place by bolts leaded down, and by being built into a brick foundation. This machinery was placed in a tunnel, and about 300 feet vertically beneath the surface of one of the claims. It also appears that the county assessor of Juab county assessed for taxes, for 1890, all of the machinery of appellant, including that so affixed to the claims, at the sum of \$30,000, and the tax levied thereon amounted to the sum of \$690: that, in making this assessment, the different items of machinery were not segregated, so that it could be ascertained what value was placed on that which was a part of the mining claims or on that which was not so attached. Under the tax so levied and assessed, respondents levied on certain personal property of appellant, and, to save such property from sale, appellant, under protest, paid to said respondents said sum of \$690, together with \$11, costs of such levy. Appellant then instituted this suit to recover the sum so paid, less \$92, admitted by appellant to be due for machinery not attached to the mines, and, in support of such suit, contends that all improvements situated on or in any of the mining claims in question, and so attached thereto as to be fixtures at common law, are, by the statutes of this territory, exempt from taxation. 1 Comp. Laws Utah, § 2009, provides that "all property, real and personal, situate and being in this territory, is taxable, except * * (11) mining claims and the products of mines and the ore in the mines."

The question, then, is, do the words "mining claims" include common-law fixtures on or in such claims? Of course, it is the general rule that the intent to exempt should be expressed in clear and unambiguous terms, and that such exemption should be strictly construed; that is, should not be enlarged by construction. But the rule of strict construction is not violated by attributing to the words of a statute their full meaning. In the case of Smelting Co. v. Kemp, 104 U. S. 649, the supreme court of the United States defines a mining claim "as a parcel of land containing precious metal in its soil or rock." Such parcel of land extends by common-law principles usque ad coelum in one direction. and usque ad orcum in the other. It is settled law that machinery annexed to a mining claim for mining purposes becomes a part of the soil. Treadway v. Sharon, 7 Nev. 37; Fisher v. Dixon, 12 Clark & F. 312; Roseville Alta Min. Co. v. Iowa Gulch Min. Co., 15 Colo. 31, 24 Pac. 920. The exemption of the real estate, then, would seem necessarily to embrace the exemption of the permanent improvements thereon, used for the purpose of enjoying the real estate; and this seems to be in accordance with the current of authority. There is nothing in the statute in question, nor in the circumstances surrounding its adoption, which would lead to a different conclusion. To construe "mining claims" as describing the surface simply would leave a very valuable portion of every mine to taxation, and without any warrant in the statute for so curtailing the ordinary meaning of the words. The subsequent exemptions have a legitimate scope outside of the usual meaning attached to "mining claims," and hence do not limit such meaning. There seems to be no possible legislative intent that could be subserved by exempting from taxation the surface of a mine. taxing the soil, rock, and works beneath the surface; and, if it be admitted that the words "mining claims" mean more than the surface ground, there is no reason for limiting their full significance. It follows from what has been said that the assessment complained of embraced machinery which was exempt from taxation, and afforded no means to the taxpayer or the court of apportioning the total value between taxable and exempt machinery. This wrongful mingling in one assessment of taxable with exempt property was the act of respondents, Appellant sought to correct this by applying to respondents to segregate the tax, so that it could pay whatever was due on its taxable machinery. This application was denied. This assessment, being void in part, and not being capable of correction, is void in toto. 2 Desty, Tax'n, 642; Axtell v. Gerlach, 67 Cal. 483, 8 Pac. 34; Harper v. Rowe, 53 Cal. 233. We deem it proper, however, to say that, in our opinion, the pipe line conducting water to plaintiff's mine and town of Mammoth is taxable, but there should have been a separate assessment of the same.

But it is contended by respondents that appellant did not, within the time provided by section 4, p. 51, Laws 1890, return to the assessor of Juab county, duly verified under oath, a statement of its taxable property, and hence is prohibited from objecting to the assessment thereafter made. But, so far as its property was exempt from taxation, appellant was not required to return it; and the only penalty fixed by the statute for a failure to return the statement is that "the value so fixed by the assessor must not be reduced." The appellant did not object to the valuation of this property, nor ask to reduce it. Appellant simply claimed that, admitting the property to have the value fixed by the assessor, it was exempt from taxation. We see nothing in the statute which precludes Judgment reversed, and this contention cause remanded to court below, with directions to grant a new trial.

MINER and BARTCH, JJ., concur,

(4 Idaho, 145)

ELMORE COUNTY et al. v. ALTURAS COUNTY et al.

(Supreme Court of Idaho. May 30, 1894.) DIVISION OF COUNTY-APPORTIONMENT OF DEBT-LACHES OF OFFICERS-CONTINUING DUTY - DE-MAND OF PERFORMANCE.

1. When a county is divided by act of the legislature, and said act contains a provision that the boards of commissioners of the counties so created shall apportion a debt that may exist, to ascertain what portion each shall pay, hdd, that it is a perpetual, continuing duty, incumbent upon the commissioners then in office

incumbent upon the commissioners then in office and their successors, until it is performed, and that a right of action does not abate by reason of the persons holding the office of commissioners refusing or neglecting to perform such duty during their term.

2. Where the duty to be performed or the right to be enforced is of a strictly public nature, it is not subject to the law of limitations.

3. Where a duty of a strictly public character is by law required to be performed by a public officer, and there is no one specially empowered to make the demand for its performance, therefore such demand is not necessary. The law itself is a continual demand, and neglect of performance is a continual refusal.

(Syllabus by the Court.)

(Syllabus by the Court.)

Petition by the counties of Elmore, Logan, and Bingham against the county of Alturas and commissioners of said county, and others, for a writ of mandate. Writ granted.

Complainants file petition for writ of man-

date against the commissioners of Alturas county et al., and state: That on the 7th day of February, 1889, the county of Aituras, then of the territory of Idaho, was divided by act of the legislature. There were erected therefrom the counties of Elmore and Logan, and part of said original county was attached to Bingham county, and part thereof was still to be and remain the county of Alturas. That at the time of and prior to the time of said division the said county of Alturas was indebted to various parties in the sum of more than \$250,000, in interestbearing bonds and county warrants. By the provisions of section 7 of said division act, it was provided that the debt of Alturas county, as it then existed, "shall be apportioned between the counties of Alturas, Elmore, Logan and Bingham counties in the same proportion that the taxable property of the three counties have acquired from Alturas county," and that the four counties bear to each other. as shown by the assessment roll of the year 1888 in Alturas county; and at their meeting in April, 1889, the boards of commissioners of the four counties mentioned shall, respectively, appoint each a competent accountant, who shall meet at the town of Hailey, and proceed to audit and ascertain the amount of indebtedness to be paid by each of the aforesaid counties to Alturas county, etc. That in accordance with said section 7 the boards of commissioners of the counties of Elmore. Logan, and Bingham did each, respectively, appoint a competent accountant to audit said indebtedness, and to perform all other duties required of them. That Alturas county refused and neglected to appoint such accountant at that time, and ever since has refused and neglected so to do, or to do any act towards the same, or to allow or permit the apportionment of said indebtedness, and, as an excuse therefor, claims that the apportionment so directed and required by the statute would be unjust to the county of Alturas. That no part of said indebtedness, principal or interest, has been paid. That much of it is past due. The answer of Alturas county admits the material allegations of the complaint, and pleads-First, the statute of limitations; second, that there has been no demand made upon the commissioners of Alturas county for such appointment, nor any refusal to appoint such accountant; and. thirdly, claims that an apportionment of the said indebtedness as required by said section 7 of the act dividing Alturas county would result in great injustice to Alturas county; that the method pointed out by said statute would be unconstitutional, as in violation of a contract.

Johnson & Johnson and S. B. Kingsbury, for petitioners. R. F. Buller and F. E. Ensign, for Alturas county.

MORGAN, J. (after stating the facts). We will first examine the claim that the action is barred by the statute of limitations. We are referred to Wood on Limitations (section

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53), wherein he states that the maxim, "nullum tempus occurrit regi," only applies in favor of the sovereign power, and has no application to municipal corporations deriving their powers from the sovereign, although their powers, in a limited sense, are governmental, and refers in support thereof to County of St. Charles v. Powell, 22 Mo. 525. This was a case where a county attempted to recover from an individual money due the county on bond for money loaned, and it was held that limitation had run against the county. In Baker v. Johnson Co., 33 Iowa, 151 (also referred to), the case was on claim of a private individual against the county for money, and it was held that the statute run in favor of the county. ln Evans v. Erie Co., 66 Pa. St. 222, the county sought to recover possession of a tract of land which had been in possession of a private individual for 33 years, and it was held that the statute run against the county. Of the same character are the other cases referred to by counsel for respondent. They are cases where it was sought by a county to recover a private right from an individual, or (vice versa) an individual sought to recover a private right from a municipality, and are not similar to the case at bar.

The following causes and principles show distinctions that must be drawn: It is a principle of the common law that the government-and therefore, by parity of reasoning, a county-cannot be guilty of laches. It is also well settled that a state is not barred by a statute of limitations, unless expressly named. Madison Co. v. Bartlett, 1 Scan. 70; Bank v. Brown, Id. 107. Agents of the county are not acting for themselves, but for the county, and therefore the county is not barred by their neglect. Bank v. Brown, supra. As respects public rights or property held for public use upon trusts, municipal corporations are not within the operation of the statute of limitations; but with regard to mere private rights or contracts the rule is different, and such corporations may plead, and have pleaded against them, the statutes of limitations. Logan Co. v. City of Lincoln, 81 Ill. 156-159; County of Piatt v. Goodell, 97 Ill. 90 et seq. In the latter case, quoting from Dillon: "Municipal corporations, as we have seen, have a double character,-the one public, the other private. As respects property not held for public use, as streets, commons, etc., and as respects contracts and rights of a private nature, there is no reason why such corporations should not fall within the limitation statutes, and be affected by them. It will perhaps be found that cases will arise of such a character that justice requires that an equitable estoppel shall be asserted as against the public; but, if so, such cases will form a law unto themselves, and do not fall within the legal operation of limitation enactments. The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes." In Wait's Actions and Defenses (volume 7, p. 234), the author says: "The privilege of the maxim, 'nullum tempus occurrit regi,' does not aply to any of the subdivisions of a state, such as counties. cities, or other municipal corporations." "This statement, in its application to municipal corporations, must, we think, be confined to cases involving mere private rights, and it should be accepted with this limitation," says Mr. Justice Mulkey in above cause of County of Piatt v. Goodell, supra. The court states the general doctrine and the better opinion "to be that municipal corporations, in all matters involving mere private rights, as contradistinguished from 'public rights,' strictly so called, are subject to limitation laws to the same extent as private individuals. On the other hand, in all matters involving strictly public rights, they are not subject to the limitation laws, as such." But in the latter class of cases the courts occasionally, under special circumstances which would make it highly inequitable or oppressive to enforce such public rights, interpose by holding the municipality estopped from doing so.

In the case at bar the legislature (section 7, p. 35, 15 Sess. Laws) commands the county commissioners of each of the four counties of Alturas, Elmore, Logan, and Bingham, at their regular meeting in April, 1889. respectively, to appoint each a competent accountant, who shall meet at the town of Hailey, and proceed to audit and ascertain the amount of indebtedness to be paid by each of the aforesaid counties to Alturas county, etc., specifying particularly the duties of these auditors, when so appointed. The appointment of these accountants is a public duty to be performed by the commissioners of each of these counties. It is due to the people of these counties that this appointment should be made. There is a large indebtedness, estimated variously at \$290,-000 to \$325,000, which was due from Alturas county to various parties at the time of the division of the county, February 7, 1889. This large amount is drawing interest. This interest is accumulating, and is much of it past due. The counties are each required to levy a tax each year for the payment of this interest. They cannot do this without knowing the proportion of indebtedness each is to pay. This they cannot know without an apportionment. Each county is interested in knowing its share at the earliest practicable date. In this proceeding we have nothing to do with the basis of this apportionment. It is the clear duty of this court to put in motion the machinery necessary to bring about an apportionment of the debt. The question as to the correctness of the apportionment, or of the legality of the proceedings in making it, is not before the court; and it is apparent that the court has no facts before it now upon which to act,

further than to require an apportionment. It is apparent, also, from an inspection of the sections of the law involved in this division of the indebteaness, to wit, section 3605, Rev. St., and section 7 of the division act (15 Sess. Laws, p. 35), that the legislature intended that each of the counties should bear a portion of the indebtedness in proportion to the amount of taxable property each received from Alturas county as it existed in the year 1888, except as to bonds issued for the erection of courthouses and other public buildings, concerning which a different provision is made; and necessarily some testimony must be taken, in order to ascertain what amount of taxable property went to each. No evidence is before this court in this regard, and therefore no intimation is given or intended, in this opinion, as to the burden each county should take. The appointment of these accountants is a public duty devolving upon the several counties, as pointed out in the law, and a public duty in the performance of which all the people are vitally interested; and it is a public duty and a public right, in the sense spoken of by the court in the cases of Logan County v. City of Lincoln and the County of Piatt v. Goodell, supra; and such matters, involving strictly public rights, as distinguished from private rights and duties, are not subject to the limitation laws, as such.

It is contended that sections 4060 and 4061, Rev. St. Idaho, make the statute of limitations applicable to the state and to the counties thereof, and to actions of the character of the one at bar. Section 4060 states: "An action for relief not hereinbefore provided for, must be commenced," etc. It will be noticed that all the sections preceding section 4060 apply to actions by or against private individuals for the enforcement of a private right or correction of a private wrong, and therefore we must conclude that section 4060 refers to actions of the same character which have not been specially enumerated in the other sections. It would seem to be clear that, if actions of a public nature to enforce the performance of a public duty or obligation were intended to be included in this section, the legislature would have said so, as this would include actions of an entirely different nature from those specified in the other sections of the chapter, and, if so construed, would include a large class of cases of which nothing is said in the limitation statutes, and which are clearly not barred by lapse of time. We cannot thus undertake to extend the statute, by construction, beyond what the legislature seem to us evidently to have intended. The same is true with reference to section 4061. The state, in the enforcement of a right against private individuals, would not ordinarily be barred, and not at all unless specially named; and therefore section 4061 says (as amended): "The limitations prescribed in this title apply to actions brought in the name of

the state, or for the benefit of the state." This section is specifically restricted to the limitations "prescribed in this title:" that is. to actions of a private nature, and against private individuals. To hold that it applied to actions such as the one at bar would seem to be extending the limitation beyond either the words or meaning of the statute, and therefore beyond the intention of the legislature. If the court did this in this case, where a public duty is involved and required, why may the court not be called upon to extend the statute to other duties and rights of a public nature, which are not included, and not intended to be included, in the statute of limitations? People v. Melone, 73 Cal. 574, 15 Pac. 294. It is true, in certain cases, courts have held and do hold that the limitation laws take effect, when called upon after long lapse of time, when the enforcement of the duty or right, on account of changed conditions, would work great injustice; but in the case at bar great injustice must result from longer postponement of the duty enjoined by the statute, as interest is accumulating which must eventually be paid by the counties liable therefor. Under the said seventh section of the law dividing Alturas county, the appointment of these accountants by the commissioners of the respective counties, and the making of this apportionment, is a continuing duty and obligation, until it is performed.

As to demand and refusal, there is the same distinction between public and private rights and duties. In the latter case, demand on the part of the party entitled to have the duty performed, and a refusal or neglect on the part of the party who is under obligation to perform the duty, must be made; but when the duty to be performed is strictly of a public nature, as when it is due by a public officer or officers, there is no one specially empowered to make the demand for its performance, and there is no necessity for demand and refusal. State v. County Judge, 7 Iowa, 186; Shortt, Inf. § 249. In such case the law imposing the duty is a continual demand, and neglect of performance a continual refusal. Id.; Beach, Pub. Corp. 1599, note; 2 Spell. Extr. Rel. § 1381.

We have been referred to U.S. v. Boutwell, 17 Wall. 604, as a case sustaining the contention of the respondents that the cause of action was and could be against the county commissioners of Alturas county in office in 1889 only, and that right of action abated with the expiration of their then present term of office. This case is explained in Commissioners v. Sellew, 99 U. S. 626: also. in Thompson v. U. S., 103 U. S. 483, 484. This action is not in any sense a personal action. It is an action against the county and the commissioners of a county, as officers, and not as persons; and the cause of action does not abate by any set of officers going out of office, as it is a continuing duty, devolving upon the commissioners as such. So the right of action continues until the duty is performed. It is a perpetual duty, devolving upon the commissioners of 1889, and their successors, until it is performed.

It is our opinion that the said commissioners should, without unnecessary delay, proceed to appoint accountants, as directed by section 7, whose duty it will be to meet with other accountants of the counties named, and apportion the indebtedness of Alturas county as it existed at the time of the division of the county. A peremptory writ is ordered to issue, commanding and requiring the boards of county commissioners of Alturas, Elmore, Logan, and Bingham counties, respectively, to appoint accountants in accordance with section 7 of an act entitled "An act creating the counties of Elmore and Logan" (15 Sess. Laws, p. 35), without delay, whose duties shall be to apportion the said indebtedness of Alturas county, as it existed at the time of said division, to wit, February 7, 1889, between the said above-named counties.

HUSTON, C. J., and SULLIVAN, J., con-

SABIN et al. v. BURKE et al.

(Supreme Court of Idaho. Jan. 31, 1894.) REVIEW ON APPEAL-WEIGHT OF EVIDENCE-NOTE PAYABLE AT BANK-SUIT ON DAY OF MATURITY.

1. On appeal, this court can only notice error committed against the appellant, not those

committed against the successful party.

2. In causes heard by the court below without a jury, the decision of the court on questions of fact takes the place of the verdict of the jury in jury trials, and will not be disturbed where there is a substantial conflict in the testimony, unless the decision is clearly against the weight of the testimony.

3. A note without grace, made payable in a bank, placed and remaining therein for collection until due, may be sued upon after bank-ing hours on the evening of the day it falls due, where the opening and closing hours are well known to the maker.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Suit by R. L. Sabin and others against John Burke, H. K. Barnett, and others to set aside certain judgments as being in fraud of creditors. Decree for defendants, and plaintiffs appeal. Affirmed.

R. L. Sabin and others allege that they were creditors in the sum of about \$25,000; Murphy, Grant & Co. for the sum of \$5,-962.07; W. & I. Steinhart & Co. in the sum of \$1,367.86; W. C. Noon & Co. in the sum of \$3,091.14,-together with various other amounts for attorney's fees, costs, etc.; on nearly all of which indebtedness attachments were issued at various dates, during the month of September, 1889. Plaintiffs further allege that on each of the above judgments execution had been issued to the sheriffs of the respective counties, and has been

returned nulla bona; that H. K. Barnett did on the 2d day of September, 1889, make his promissory note to John Burke for the sum of \$24,350, due one day after date; that said Burke commenced suit thereon after 4 o'clock on the 3d day of September, 1889, but did not issue or serve summons or attachment thereon until the 23d day of September, 1889; that, on September 23d, said Burke caused an attachment to be levied upon all the goods and chattels of the said Barnett in Latah and Nez Perces counties; that on the 21st day of September, 1889, the said H. K. Barnett executed his certain other promissory note to John Burke for the sum of \$7,300; that an attachment was issued September 23d on the latter note, and levied on the goods and chattels of the said H. K. Barnett on the 24th day of September, 1889. Plaintiffs further allege that both said notes were executed in furtherance of an agreement made and entered into by and between the said H. K. Barnett and the said John Burke, for the purpose of aiding, abetting, and assisting the said H. K. Barnett to delay, hinder, and defraud his creditors, and particularly the plaintiffs and their assignors; that the said notes were for sums largely in excess of the amounts due the said John Burke from the said H. K. Barnett; that they were without adequate or any consideration; also, that said suits were commenced, and attachments levied upon all the goods and chattels of the said Barnett, for the said purpose of hindering, delaying, and defrauding his creditors. Plaintiffs further allege that, at the time said attachments were issued, the said John Burke had in his possession a large amount of promissory notes belonging to the said H. K. Barnett, which were indorsed and transferred to said Burke as collateral security for the payment of said first-mentioned notes, which said notes were also attached by virtue of the attachment of the said John Burke; that the said Burke and the said Barnett were the owners of a large quantity of wheat, of the value of \$100,000; that the interest of the said Barnett in said wheat was held by the said Burke as a pledge or security on whatever sum should become due on the said notes. The plaintiffs further allege that during the month of September, 1889, and for a long period prior thereto, the said H. K. Barnett was insolvent. That said fact was known to both the said Burke and the said Barnett. That the execution of the said notes to the said John Burke, and the judgment thereon and of execution thereon, were and are fraudulent and void as against these plaintiffs and their assignors, and pray that they may be so declared by the court. That the property taken under the attachment of the said John Burke constituted all the property of the said Barnett, so far as the plaintiffs have been able to ascertain, and may be properly described as follows: One lot and store building and warehouse thereon,

in the town of Genesee, Idaho; a stock of I general merchandise in the town of Genesee; an undivided one-half interest in a warehouse in Lewiston, owned by White and Barnett; a stock of general merchandise in the town of Lewiston, Idaho; sundry sums in notes from parties in or near Lewiston, Idaho; sums of money due upon account against other persons living in or near Lewiston and Genesee, Idaho. That the said Burke caused all of the said property to be attached and seised for apparent claims amounting to \$32,608.17. Said plaintiffs pray that the lien of the said Burke upon said property and money be declared void, and the same be applied in payment on the indebtedness due to the said plaintiffs. An order was made by the court, upon the commencement of the suit of the said plaintiffs, appointing P. M. Davis receiver, and a writ of injunction enjoining the further disposal of the goods by the said sheriffs, and restraining and preventing the payment of any of the moneys arising therefrom to the said John Burke. Demurrers were filed by the said John Burke and H. K. Barnett, which demurrers were overruled by the court on the 20th day of November, 1891. Thereupon the said John Burke filed his answer to the said amended complaint, denying all of the allegations thereof, and alleging that the amount specified in said notes was due and owing from the said Barnett to the said Burke; denies all design to hinder, delay. and defraud creditors. Said Burke further alleges that all of the several steps, from the inception of the said actions down to the levy of the said writs of execution, were taken and done by this defendant without the knowledge of the said H. K. Barnett. and for the sole purpose of protecting himself in the collection of his just debts, and that, on the proper sale of said property, there can be realized the sum of \$45,000. H. K. Barnett files his separate answer, denying, on information and belief, indebtedness to any of the said plaintiffs; denies the intention to defraud, delay, and hinder his creditors; admits the giving of the notes to the said Burke; that the same was justly and fully due to him, the said Burke, for moneys before that time had and received from said Burke, and used by the said Barnett in his business of merchandising. H. K. Barnett further denies any conspiracy between himself and Burke, and any inclination on his part to hinder, delay, or defraud his creditors, and denies specifically and at length all the other allegations of the said amended and supplemental complaint. The supplemental complaint alleges as facts arising since the commencement of the several suits as follows: Stoppage of goods in in transitu, and allowance of proper creditors therefor; prosecution of the several suits to judgment; issuance of executions upon some of the judgments; return of the same nulla bona by the sheriff,-all of which

facts, with various others set forth, occurred after the filing of the original complaint, and since the commencement of the suits, and all of which were proper matters for the consideration of the court. To the amended and supplemental complaint, the defendants John Burke and H. K. Barnett filed demurrers, as before stated, upon the ground of misjoinder of parties; that said complaint does not state facts sufficient to constitute a cause of action; and that plaintiffs had not legal capacity to sue. These demurrers were overruled by the court, to which exception was taken by the defendants.

We think the amended and supplemental complaint sufficiently states a cause of action. As to misjoinder of parties, each one by the statement of facts as set forth would be entitled to bring a separate creditors' bill for the purpose in his complaint set forth. such course had been pursued, the cause set forth would have been properly consolidated by order of the court, not only to prevent unnecessary accumulation of costs, but all substantially resting upon the same facts could have been tried better together than separately. The district court, after hearing the testimony, found as facts, among others, the following: Finding No. 14: "The court further finds that all the transactions between H. K. Barnett and John Burke prior to the commencement of this action, and up to the time of the entry and docketing of judgments, and up to this time, by John Burke against H. K. Barnett, and at all times, were without fraud, collusion, and all of the said transactions were made in good faith, and that the said H. K. Barnett was justly and truly indebted to the said John Burke, and is now, in the sum of \$32,608.17, upon the two several causes of action in the said two several suits of John Burke against Barnett. heretofore mentioned herein: that all of the entries upon the books and all of the transactions between the said Burke and Barnett are wholly free from fraud, collusion, or corrupt methods or means; and that the suits brought by John Burke against the said Barnett, and the obtaining of the judgments and the levy of the attachments, and the issue and levy of executions, were wholly and entirely without fraud or collusion." Finding No. 15: "That, the plaintiffs, all and each of them, being simple contract creditors, at the time of the commencement of this action, of said H. K. Barnett, and there being no fraud or collusion between John Burke and the said H. K. Barnett, the plaintiffs cannot attack the several judgments obtained by the said John Burke against the said H. K. Barnett in these proceedings. The evidence shows that there was a good, adequate, valuable. full, and perfect consideration for the note of \$24,350, and also for the note of \$7,300, executed and delivered by H. K. Barnett to John Burke, and the court so finds." As conclusions of law, the court finds and decrees that "the injunction in said cause be dissolved; that John Burke retain out of the moneys in his hands the sum of \$32,710.47, in satisfaction of his two several judgments against the said H. K. Barnett; that the said executions of John Burke be declared prior liens on the property of H. K. Barnett; that the attachments, judgments, and executions of the plaintiffs in this action, and the whole thereof, be postponed and held subsequent to the judgments, attachments, and executions of John Burke; that the securities of John Burke be exonerated from all liability," etc. Decree was entered accordingly. Motion for new trial was made by plaintiffs. which motion was overruled by the court, and an appeal taken to this court by R. L. Sabin, W. & I. Steinhart & Co., Joseph A. Ford, and W. C. Noon & Co., plaintiffs herein, from the judgment and from the order overruling the motion for new trial.

Jas. W. Reid, D. C. Mitchell, and Cox, Teal & Minor, for appellants. Philip Tillinghast and Thomas C. Griffitts, for respondents.

MORGAN, J. (after stating the facts). The following substantially are the errors assigned by the attorneys for the appellants in the findings of fact placed on file by the court, to wit: "They allege as error the finding that on the 2d day of September, 1889, the defendant H. K. Barnett was indebted to the defendant John Burke in the sum of \$24,350; that at that time the said John Burke was engaged in general banking business at Lewiston; that said indebtedness was then past due, and that it was payable at the Bank of Lewiston, in Lewiston, Idaho, during banking hours, of the 3d day of September, 1889; that demand was made for the payment of said note after the close of banking hours on the 3d day of September, 1889; the finding that the papers for the commencement of the suit on this note were placed on file in the clerk's office on the 3d day of September, 1889, and that no concealment whatever was practiced with regard thereto; that the defendant H. K. Barnett was further indebted to the said Burke in the sum of \$7,300, for which sum he gave the defendant John Burke his promissory note on the 2d day of September, 1889; that all of said proceedings, from the taking of said notes, and including the issue and levy of said attachment, procuring of judgment, and issuance and levy of execution, were taken, done, and had by the said John Burke without any fraud or collusion on the part of said Burke, or on the part of the said H. K. Barnett, or at all. plaintiffs further allege as error the finding of fact that the attachments of the said I. R. Dawcon, R. L. Sabin, Murphy, Grant & Co., W. & I. Steinhart & Co., Joseph A. Ford, W. C. Noon & Co. had no lien or claim upon the property of the said H. K. Barnett by judgment or execution, except by the levy of the said writs of attachment and writs of execution issued upon the claims of the said plaintiffs, which said levy and lien were all subject and subordinate to the levy and lien of the said John Burke; the finding of fact that there was no understanding, fraudulent or otherwise, between Burke and Barnett in making and delivering said notes, or in the commencement of the action by John Burke against Barnett, or in levying the attachment, taking the judgments, or any of the proceedings therein.

The principal questions arising in this case may all be reduced to three: First. Did the plaintiffs, by reason of commencing suits, issuing attachments, and levying upon the same stock of goods and other property of H. K. Barnett as was levied upon by defendant Burke, place themselves in a position where they could properly bring a creditors' bill to test the good faith of Burke and Barnett, and the validity of the proceedings in procuring a lien upon the property? Second. Was there sufficient evidence of fraud in the transactions of Burke and Barnett to justify the court in dismissing the suits of Burke, or in postponing his lien upon the property, and making it subsequent to those of the plantiffs? Third. Were the suits of Burke v. Barnett, or either of them, prematurely brought?

The court, having overruled the demurrers to the amended and supplemental complaint, necessarily decided that the plaintiffs had legal capacity to bring said creditors' bill, as one of the causes of demurrer was that the said complaint did not state facts sufficient to constitute a cause of action. If the plaintiffs had not legal capacity to sue, it would be impossible for them to state facts which would constitute a cause of action. Another of the causes of demurrer set forth by both of the defendants was that the plaintiffs R. L. Sabin, Thomas F. Osborn, H. Bryant, Sarah A. Neville, A. M. Osborne, and W. C. Noon have no legal right to sue. The court, having overruled the demurrer, again necessarily held that said plaintiffs had legal capacity to sue. Again, the defendant Barnett moved the court to strike from the files the said amended and supplemental complaint. This motion was overruled and denied by the court. This motion would seem to again involve the question of the plaintiffs' right to bring this action, and, having been determined in favor of the plaintiffs, the court again judicially determined in favor of the plaintiffs' legal capacity to sue. It is true that the court recites in the fourteenth finding of fact that the plaintiffs cannot attack the several judgments obtained by the said John Burke against the said H. K. Barnett in the proceedings. The question as to whether the plaintiffs could attack the judgments of Burke v. Barnett in these proceedings is a question of law, and not one of fact, and a question of law which had already been decided by the court in the affirmative, as above stated. The court not only so decided, but permitted such attack to be made, and took a very large amount of

testimony, as the transcript of several hundred pages shows, and decided in the end that the evidence heard therein was not sufficient to make such attack successful. The conclusions of law filed by the court do not include any determination that the plaintiffs have no legal capacity to bring this action, nor does the judgment of the court so determine. The court dismisses the complaint, it is true; but this judgment would necessarily follow the decision of the court that there was no fraud in the giving of the promissory notes to John Burke; that none of the proceedings of either Burke or Barnett were fraudulent, or were intended to hinder, delay, or defraud the creditors of the said H. K. Barnett. The judgment of the court is that said defendant Burke is entitled to the full amount of his judgments out of the first moneys coming into the hands of the receiver, and that the liens of such plaintiffs as have liens are subordinate to and postponed in favor of the lien of the said Burke, and that the latter is a prior and superior lien to any and all of the liens of the plaintiffs. No appeal having been taken by the defendants, the question determined against him cannot be reviewed by this court. Jones v. Irrigating Co., 2 Idaho, 58, 3 Pac. 1. question of the legal capacity of the said plaintiffs to bring this action is eliminated by the decision of the court and the judgment thereof. There remains, then, the correctness of the decision of the court as to fraud. and the question of the premature bringing of the suits upon the notes by John Burke.

As to the question of fraud and conspiracy of Burke to hinder, delay, and defraud, the first matter that attracts the attention of the court is the question of the insolvency of Barnett. The attorneys for appellants state on page 6 of their brief that Barnett was insolvent, had been for a long time, and was all the year 1889, and this fact was well known to both Burke and Barnett, and refer to testimony of Davis' transcript. We have carefully examined said testimony, and find no evidence in it stating that Davis knew anything about the solvency or insolvency of Barnett before he was appointed receiver, and absolutely no evidence therein that Burke knew that he was insolvent. Again, on same page, counsel state that, on September 14th, Barnett, with Burke's knowledge, represented to Newstadter Bros., one of the parties whose claims are sued on, that he (Barnett) owed no one in Latah or Nez Perces counties except Burke, and owed him not exceeding \$15,000; and reference is made to Teal's testimony, and we fail in such testimony to find any statement by Teal that Burke knew anything about the written statement that Barnett had made. Again (page 7), counsel say, after September 2d, Barnett, with Burke's knowledge, purchased on credit, of plaintiffs and their assignors. goods amounting to over \$5,000, and refer to Barnett's testimony, and this testimony

neither states nor intimates that Burke knew anything about Barnett's purchases at that time. On the contrary, Barnett states that Burke knew nothing about his order for goods during September prior to September 24th, and we find no substantial contradiction of this testimony.

As to the consideration for the note given Burke by Barnett on the 2d day of September, 1889, Burke and Barnett swear positively to the fact that the whole amount was then fully due and owing from Barnett to Burke. W. W. Brown, bookkeeper in Burke's bank, also swears that Barnett was indebted on the 2d day of September to the full amount of this note for \$24.350, and gives the items of this indebtedness. The same may be said of the note for \$7,300. Brown testifles specifically what formed the consideration of both of these notes. There can be no reasonable doubt that the amounts were due Burke, and the court below has so found, and that he was justified by a preponderance of testimony in so finding cannot be doubted. There is scarcely any testimony even tending to show a contrary state of facts. statement of Barnett of his assets and liabilities, made by Barnett himself, without the knowledge of Burke, not in his presence, cannot bind Burke, and is not proper evidence against him, and cannot in any way affect his right to recover. This applies to both the statement to Newstadter Bros. and that made to Murphy, Grant & Co. If, however, this court had any doubt of the validity of this indebtedness, or if the evidence concerning it was conflicting, the court below has found from the evidence that this amount was fully due and owing. The decision of a court when sitting in the trial of a cause is of the same force and effect as the verdict of a jury in a jury trial, and, where there is a substantial conflict in testimony, it is the duty of the appellate court to affirm the decision.

Counsel for plaintiffs contend that because Barnett, in his statement to Teal, on the 14th of September, 1889, put his indebtedness to Burke at \$15,000, therefore this was evidence tending to show that he did not owe Burke more than \$15,000 at that time. It is probable that Barnett would have admitted to Burke, if questioned upon the subject, that he owed the plaintiffs one-half of what his real indebtedness was to them. The plaintiffs would hardly admit that this would be proper evidence against them, or that it would have any tendency even to prove that the indebtedness to the plaintiffs was less than the promissory notes they might have from Barnett indicated. Such evidence could certainly have no effect whatever in reducing the claims of any person.

Counsel also claimed that the fact that Burke commenced suit for the \$24,000 on the 3d day of September, and that the summons and attachment issued thereon were not placed in the hands of the sheriff until the

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23d or 24th day of September, is evidence indicating that Burke intended this note, the action and attachment thereon, as a secret mortgage, to be held so secretly that no one should know of it, and to be used to secure the payment of Barnett's indebtedness to himself. No one knows better than counsel for the plaintiffs that this arrangement of the attorney of Burke did not amount to a secret mortgage, nor as a lien of any kind. It was evidently done for the purpose of enabling Burke to secure a levy upon the goods of Barnett before a levy could be made by any other attaching creditors, in case Barnett should not succeed in making the collections, which he states he expected to make, of the \$20,000, which was to be paid upon his debts, this note included, within the ensuing 30 days. It indicated on the part of Burke a willingness to give Barnett an opportunity to make these collections, and apply them on his debts, if he could do so. We cannot assume from this that Burke was party to a scheme to give Barnett an opportunity to purchase and secure other goods upon which Burke might make a levy to secure his It appears from the evidence in this case that Barnett had abundant property upon which Burke could have levied on the 4th day of September, and from which he could have secured the payment of his whole claim; and therefore we may just as well assume that Burke intended, by refraining from issuing and levying his attachment, to give Barnett an opportunity to pay this indebtedness, if he could; otherwise he would have made the levy at once. It is sufficient to say that, while Burke, Barnett, and Brown all swear positively that there was no fraud or collusion between Burke and Barnett in regard to giving Burke the two notes in question, there is, on the contrary, nothing but circumstantial evidence tending to show fraud, and this is of such a character that it might as well occur in the case of a diligent creditor, seeking to put himself in a position where he could get a levy in advance of other creditors in case of a collapse; and we are forced to the conclusion that it falls far short of being sufficient to justify this court in setting aside the judgment of the lower court upon the facts appearing herein.

We come now to the question as to whether suit was prematurely brought upon the notes, or either of them. Section 3483, Rev. St. Idaho, states: "It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him." This fact renders demand of payment upon the maker of a promissory note at maturity an unnecessary form in this state, in order to bring suit against the maker. The note of Barnett to Burke, in controversy in this case, was given on the 2d day of September, 1889, and due one day after, without grace, and was payable at the office of the said Burke, in Lewiston, Idaho

territory. The evidence is conclusive that the office of John Burke was the Bank of Lewiston, of which he was the sole owner and manager; that he transacted all his commercial business there; that the business hours of said bank were from 9 o'clock a. m. to 4 o'clock p. m. each day; that the note was deposited there, and remained in the bank until after 4 o'clock p. m. of the 2d day of September, 1889; and after that time the attorney went to the bank, procured a copy of the note, and the papers for the commencement of the suit were made out the same evening, and after that time. It is clearly the law that, where a note is payable at the place of business of the payee, the maker has the whole or all of the business hours of the day it falls due in which to make payment. If it is the custom of the payee to close his office or store or place of business at 6 o'clock in the evening. the maker has until that time to make a tender of payment on the note. If the note is made payable at the bank, and the bank opens at 9 o'clock in the morning, and closes at 4 o'clock in the evening, the maker has until that time to make payment on the note. The time of closing being well known to the payee, it is clear that, in the first instance given, the maker would have no right to make a tender of payment at the place of business of the payee at 8 or 10 o'clock in the evening; neither would it avail him, in the latter case, to make tender of payment at half past 4 o'clock at a bank where it was the custom to close its doors at 4 o'clock. In short, the maker of a note has until the expiration of the office hours of the institution where the note is made payable within which to make payment of any note. It is in evidence that Barnett did all his business. or nearly all, at the banking house of defendant Burke, and well knew the hours of opening and closing. No tender of money after that time, even at the place of business designated, would be of any avail. The time given within which he was to make payment has expired. The question now is whether suit can be brought upon the note after the time limited by the maker of the note himself in which the payment is to be made has fully expired, and on the same day of its expiration. All the papers filed at the commencement of the suit on the note for \$24,350 in Nez Perces county indicate, beyond a reasonable doubt, that said suit was commenced on the 3d day of September, 1889, and the court so found. All the papers placed on file at the commencement of the suit on the note for \$7,300 indicate that suit was commenced on this note on the 23d day of September, 1889. The attachments in both cases appear to have been levied upon the goods of the defendant Barnett on the 24th day of September. It appears reasonably certain also from all the testimony and exhibits that the suit on the note for \$24,350 was commenced after 4 o'clock on the 3d

day of September. In some cases, dates have been changed in papers, but, on examination of original papers, we find no place where date of filing has been changed. It is also equally clear that where a note is payable in bank, and it has remained in the bank all of the banking hours of the day specified, suit may be brought on it on the day it falls due, after the close of the bank; and the necessity for demand in order to bring suit on said day is obviated where the note is payable in bank. Greeley v. Thurston, 16 Am. Dec. 288; Shed v. Brett, 11 Am. Dec. 216, and cases there cited, and note; Bank v. Carneal, 2 Pet. 543. If a note be payable at a particular time and place, it is well settled, independent of commercial usage, that if the holder be at the place during the time stipulated for the payment, and no one called to make payment, the contract is forfeited, and a right of action immediately accrues to the payee. Bank v. Napier, 44 Am. Dec. 310. Where a note is made payable at the bank, and the note is in the hands of the cashier for collection, there is no necessity for his making a specific demand. The legal requirements as to presentment and demand are complied with if the note was in bank at the time it fell due in the hands of the cashier, ready to receive the money. Ogden v. Dobbin, 2 Hall. 112; Folger v. Chase, 18 Pick. 63. Where the time and place of payment are fixed on the face of the note, if the holder be at the place during the time stipulated for the payment, and no one called to make payment, the contract is forfeited, and a right of action immediately accrues to the payee. Apperson v. Bank, 4 Cold. 456. It is scarcely necessary to multiply authorities on this subject. We are aware that a different doctrine has been held in a number of cases, but we regard the weight of authority and the better doctrine to be as stated herein.

Plaintiffs take exception to the ruling of court in excluding testimony of Grierson as to papers getting wet. We have the original papers for examination, and they are perfectly legible, and the testimony was therefore Immaterial. Conversations between Maxwell, attorney for Burke, and Grierson, the clerk, after the suits of Burke v. Barnett were brought and prosecuted to judgment, not in the presence of Burke, are not evidence, and were properly excluded. A large number of exceptions were taken during the trial to the admission and rejection of testimony, but the above comprised substantially all appellants have noticed in their brief, and therefore the court does not deem it necessary to notice those exceptions which appellants do not consider of sufficient importance to notice in their brief. Judgment of the court below is affirmed; costs awarded to respondents.

HUSTON, C. J., and SULLIVAN, J., con-CI.

Petition for Rehearing. (March 13, 1894.)

MORGAN, J. In above cause, attorneys for appellants file petition for rehearing, and desire to resubmit, first, the question "as to whether or not a note without grace, made payable in a bank, placed and remaining therein for collection until due, may be sued upon after banking hours, on the evening of the day it falls due, when the opening and closing hours are well known to the maker." We shall examine this question in the light of the law as we understand it to exist to-day, and, in doing so, will be obliged to pass over some of the same ground partially covered by the original opinion.

Daniel on Negotiable Instruments states: "If payment has been demanded and refused, on the day of maturity we should say that the action would lie, for the contract to pay on demand within reasonable hours is then broken, and, in the language of Parsons, he has declared he will not pay, and can want further delay only to arrange the means of avoiding payment." In this state no demand of payment is necessary before bringing suit. Then it follows that, as soon as the time has fully expired within which the maker contracted to pay, suit may be brought at once. The maker contracted to pay this note of \$24,350 at the office of John Burke, which the evidence shows was the banking house of John Burke, in Lewiston, on the 3d day of September, 1889. The custom of this bank was to open at 9 a. m., and close at 4 p. m. The defendant had transacted all, or nearly all, his business at this bank for years, and the hours of opening and closing were well known to him (Barnett). Knowing these facts, he (the defendant) makes his note payable there on the 3d day of September, 1889; and if he desired to pay, or was able to pay, he well knew that he must appear at the bank before 4 o'clock on the afternoon of September 3d. He therefore contracted to pay before 4 o'clock p. m. of said day as effectually as if he had so stipulated in the note. After that hour, the bank would be closed, the papers locked up, and the officers gone. If the maker has contracted to pay his note at a certain time, can he complain if suit is brought after that time has fully expired and he has neglected to pay? In law, a neglect to pay is precisely the same as a refusal, and it is so denominated.

Daniel on Negotiable Instruments (section 1208) says: "When the maker of a note, or the drawer or acceptor of a bill, makes it payable on a day certain, his contract is to pay it, on demand, on any part of that day within reasonable hours. The protest must be made on that day, which presupposes a default, as no protest can be made until default is made; and whether it be the last day of grace, or the day of maturity, when there is no grace, it is clear, upon principle, that, as soon as payment is refused, the action may be commenced." Bank v. Winn, 40 Me. 62. In this case, Tenney, J., says: "A suit may be properly brought against the maker upon a negotiable promissory note on the last day of grace, after the demand of payment, made at a reasonable hour of that day, and a refusal; and, if a note is payable at a bank, a suit may be properly commenced on the last day of grace, after banking hours, without demand of notice." The court adds substantially that it seems to be regarded as settled in this state (Maine) and in Massachusetts, and also in other states, upon what is considered the weight of authority in England, that an action can be maintained if brought on the last day of grace, where there has been a previous demand and refusal, or where the note is made payable in bank, on that day. There is now no distinction in principle between a note payable without grace and one payable with grace; the one being due on the day of maturity, and the other on last day of grace, the time in both cases being given voluntarily by the creditor, and the contract to pay at the time specified being voluntarily entered into on the part of the debtor. The distinction is sentimental, not real. It is stated by some courts that, "as grace was originally matter of indulgence and courtesy, and not of contract, it, perhaps, may be contended that, although a debtor has the whole of the last day of the credit stipulated for by contract to make payment, yet a different rule may apply to grace, which is not a part of the contract." This position is not now tenable, as the three days of grace, where they are allowed, are either provided for by statute or commercial law, and are as much a part of the contract as the time limited in the note. 3 Rand. Com. Paper, § 1054; Chit. Bills, p. 407. The reason for the distinction having failed, therefore the distinction itself ceases; and certainly, in the law, where there is no longer any sense in a distinction that was formerly held, the distinction itself should be swept away. It is clear that a demand may be made upon the maker of a note during business hours on the day it falls due, or on the last day of grace; and, if payment is refused, the note may be at once protested, and, if protested, suit may be brought thereon. In this state no protest is necessary, of course, where there are no indorsers and no sureties,-that is, no persons to be affected; and, as stated, in this state no demand is necessary before bringing suit. The maker having himself fixed the time of payment, and, in effect, the time of the expiration of such day of payment, there would seem to be no reason why suit may not be brought after the expiration of such time, and on the day of its expiration. To hold otherwise would be to give the maker more time than he had contracted for, and to compel the payee to wait before bringing suit beyond the time limited by the maker himself, and, in effect, to make a new contract for him.

Randolph on Commercial Paper (volume 3, § 1057) says: "To support an action on the day of maturity, or before the end of banking hours on that day, if the paper is made payable at bank, there must, of course, have been a previous demand and refusal of payment," and quotes Vandesand v. Chapman, 48 Me. 262, which is precisely in point. This suit was brought on note entitled to grace; whether by the terms of the contract or by statute the opinion does not inform us. but in either case the note is the same, and the law and the reason of the law applicable thereto are the same as if the note was made payable on the date of the last day of grace. The case of Greely v. Thurston, 4 Me. 479 is to the same effect, and is a still stronger case. In the latter case the grace was allowed in the terms of the note, and was therefore by contract. Coleman v. Ewing, 4 Humph. 241; 3 Rand. Com. Paper, § In Church v. Clark, 21 Pick. 310, Chief Justice Shaw, speaking for the court, says: "By making a note payable at bank, the effect of the contract is that the note shall be paid at some time during the usual bank hours at such bank, and there is no default on which an action can be commenced until the close of such bank hours." In this case an attachment was served at one minute past 12 o'clock on the morning of the last day of grace, in effect holding that an action might have been properly brought after the hour of closing the bank had arrived. The learned justice goes on to say "that, if no bank is named, the hour will be determined by the usual banking hours at the bank or several banks in the place where the note is payable," it being payable at a bank. But, as we have seen, there is now no difference between notes with grace and notes without; therefore, etc.

It is contended that the case of Bank v. Carneal, 2 Pet. 543, is not in point, and yet the supreme court of the United States, speaking through Mr. Justice Story, uses the following language therein: "Upon the first point, the evidence is that, on the day when the note became due, the note was in the bank at Cincinnati, the bank being the holder thereof, and it being payable there; and that, after the usual banking hours were over, it was delivered to a notary by the officers of the bank for protest, they informing him, at the time, that there were no funds there for the payment of the note. We are all of opinion that this was a sufficient proof of a due demand of payment. Where a note is payable at a bank, it is not necessary to make any personal demand upon the maker elsewhere. It is his duty to be at the bank within the usual hours of business to pay the same; and if he omits so to do, and a demand is there made of payment by the holder within those hours, and it is refused or neglected to be made,

the holder is entitled to maintain his action for such dishonor. But, where the bank is itself the holder of the note so payable, no formal demand is necessary to be made of payment." This does not make one rule of law applicable to one class of holders, and a different rule as to others. It makes a distinction between one class of notes, where the maker has by his contract fixed the hours within which payment is to be made, and a class of notes in which he has not so fixed the time. The court makes no distinction where the contract makes none. Rev. St. Idaho, § 3484, par. 5, makes the same distinction.

The question as to when suit may be brought upon a note in which the time of payment is not so fixed is not before this court, and no opinion is intended to be given therein. If it is desired to make one rule as to all notes, without reference to the contract of the parties therein, it should be done by the legislature, as the court does not conceive it to be its duty, nor that it has the authority to so change the contract of the parties. We only hold that, when the time has fully passed in which the maker has contracted to pay his note, and he is in default, suit may then be brought.

The first case of which a report is published in this country, and which is directly in point, is a nisi prius decision of Chief Justice Parsons, and is reported in an American edition of Chitty on Bills (page 225, note y), published in 1809, and edited by Mr. Story, afterwards Mr. Justice Story, of the supreme court of the United States,-that of Pork v. Page. Suffolk, November term, 1808. He says: "The note is due on the last day of grace, and, if payment is refused, the maker may be sued on that day. I have examined the record of that case, and find that it was a suit by the indorsee against the indorser of a promissory note, dated 7th of July, 1807; payable at sixty days, with customary grace. The last day of grace was therefore the 8th day of September. The writ is dated the 8th day of September, and was served by an attachment of real estate at 11 o'clock on that day." To this opinion, at nisi prius, no exception appears to have been taken, and parties and counsel acquiesced. The only difference between the case thus appearing and the note cited is that the action was against the indorser; but if the action would lie against the indorser, who is only provisionally liable on the default of the maker, a fortiori it seems would lie against the maker who is the principal To the same effect substantially is the case of Henry v. Jones, 8 Mass. 453. This was a case where grace was not allowed, as the law then stood. The note was dated March 4, 1809, due in 60 days. The note was therefore due May 3d on May 2d. Demand was made on the maker, and on May 3d demand of payment was made on indorser, which was refused. Suit was

thereupon commenced, and writ of attachment served at once, at 5 o'clock a. m., on the 3d. The court nonsuited, because demand had not been made on the maker on the 3d, when the note was due, instead of the 2d, of May; in effect holding that action would have been sustained if demand had been made upon the maker on the day the note was due. Here the rule was held the same on a note without grace as on one with grace. Hon, Isaac Parker was then on the bench (supreme court of Massachusetts, 1812), and was chief justice of the same court when the case of Shed v. Bret, 1 Pick. 401, was decided (1823), and delivered the opinion. We have, then, as approving this doctrine, Chief Justice Parker, Chief Justice Shaw, Chief Justice Parsons, Chief Justice Story, and Chitty in his works on Notes and Bills, as well as the other authors,-an array of legal ability which would seem sufficient to settle any question of commercial law. Chief Justice Parker says also, in Bank v. Cutter, 3 Pick. 418, "that the doctrine was always practically recognized that suit may be brought on the very day the note falls due, after demand and notice; for then there is a breach of promise, and if the note is to be paid into a bank, and is not paid during the business hours of the day, a right of action has accrued."

Two matters were settled by these authorities,-no difference is made between notes with and without grace, and a suit may be commenced on the day a note falls due, after default. We are referred to Wilcombe v. Dodge, 3 Cal. 260. In this case the note was not made payable at any bank, nor any particular place, and no demand and refusal were proven. In McFarland v. Pico, 8 Cal. 626, the note was not made payable at any place where business hours were established, and it appeared on the trial that there were no regular business hours in the town where the note was made payable. Neither case is similar to the one at bar. In Davis v. Eppinger, 18 Cal. 379, the facts are the same as in the two former cases, and not at all similar to the case at bar. In Bell v. Sackett. 38 Cal. 407, the note was dated November 4, 1864, and was payable on demand at no particular time or place, and the court held that as the suit was commenced on November 7, 1868, that being the last day of grace. the statute of limitations had not run, and the suit was in time. This case is further removed from similarity with the one at bar than the others. These are all the cases cited from California courts. We do not deem it necessary to review all the cases cited, as the rule given in this case, and the reasons therefor, seem satisfactory to us, and seem, as was said before, to be supported by the weight of authority. This review of a portion of the authorities relating to the questions involved has covered more ground than we had anticipated, but we have been moved thereto by the zealous persistence of

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the distinguished counsel engaged in the cause on the respective sides.

The second question presented is: "Was the action on the note dated September 2, 1889, for \$24,350, commenced on the morning or the evening of September 3, 1889, and after banking hours?" We had already examined this question, as we thought, fully, before writing the original opinion, and we have again examined the testimony, and must adhere to the original opinion. The court below found that the suit was commenced in the evening after banking hours of the 3d day of September, and we think the testimony supports the court in so finding.

The third question is: "Was the action on the note dated September 21, 1889, commenced on the morning or the evening of September 23, 1889, and after banking hours?" A rehearing on the first and second questions submitted is denied. As to the third, the court finds that suit was commenced on the \$7,300 note on September 23, 1889. The note was dated September 21st, which was Saturday. It was due one day after date. The court grants a rehearing on the question as to whether suit upon this note was prematurely brought.

HUSTON, C. J., and SULLIVAN, J., con-

On Rehearing. (July 21, 1894.)

SULLIVAN, J. A rehearing was granted in this case upon one point, to wit: "Was the action on the note dated September 21, 1889, commenced on the morning or the evening of September 23, 1889, and after banking hours?" See above decision on petition for rehearing. The evidence shows beyond question that the complaint was filed on September 22, 1889, as of September 23d; that on the afternoon of September 22d, after filing said complaint, the attorney for respondent and the clerk of the district court left Lewiston for Rathdrum; that they took with them certain papers, and among them the alias writ of attachment in this case; that said writ of attachment got wet in crossing the Clearwater river, on the afternoon of the 22d of September, and shows plainly the physical fact of having been wet; that said alias writ of attachment was placed in the hands of the sheriff of Latah county for levy at 9 o'clock a. m. of September 23d, and bears the following indorsement: "Recvd. Sept. 23, 1889, 9 o'clock a. m. Geo. Langdon, The evidence clearly shows that said action was prematurely brought, and that no lien was created by the levy of said attachment. It will be observed that the 21st day of September, 1889, the date of said note, came on Saturday; and under the provisions of section 12, Rev. St. 1887, it is declared that where an act is appointed by contract to be performed on a particular day, which falls on a holiday, such act may be performed upon the next business day. Under the provisions of said section, said note became due on Monday, the 23d day of September, and the maker had until the close of banking hours on that day in which to make payment. The suit, having been brought as early as 9 o'clock a. m. of that day, was prematurely brought.

The judgment of the court below is modifled to the effect that the attachment lien of respondents upon the property of H. K. Barnett, created by virtue of the suit brought upon said note for \$7,300, is vacated and set aside, and the cause is remanded to the court below, with instructions to so modify its judgment, and that it direct the receiver to first pay the judgment of John Burke upon the note for \$24,350, together with interest and costs, and to pay all other judgments in the order of their legal priority, as shown by the records and files in the case. The prior judgment of this court with reference to costs is hereby set aside, and it is directed that each party to this appeal pay the costs made by him therein.

HUSTON, C. J., and MORGAN, J., concur.

DEEGAN v. DEEGAN et al. (No. 1,409.) (Supreme Court of Nevada. July 28, 1894.)

GUARDIAN—JUDGMENT OF REMOVAL—COLLATERAL ATTACK—JURISDICTION—PRESUMPTION—ACTION ON BOND—PARTIES—NONJOINDER—DEMURRER—ANSWER—SUFFICIENCY.

1. In an action by a guardian on the bond of a former guardian who had been removed, an objection by defendants that the court had an objection by defendants that the court had no jurisdiction to remove such former guardian, and appoint plaintiff, cannot be sustained, being a collateral attack on the judgment.

2. Where a guardian appears by attorney in a proceeding to require the guardian to account, the court has jurisdiction, though no citation is served on such guardian.

3. On collateral attack on a judgment removing a guardian, the authority of an attorney to appear for the guardian is conclusively

ney to appear for the guardian is conclusively presumed.

4. Gen. St. \$ 588, provides that all laws relative to the accounts of administrators shall govern in regard to the accounts of guardians, so far as applicable. Section 2897 provides that, if an administrator fails to render an exhibit if an administrator fails to render an exhibit after being cited, an attachment may issue against him, or his letters may be revoked, in the court's discretion. Held that, in a proceeding to compel a guardian to account, the court has jurisdiction to remove him for failure to account after being cited to do so.

5. Unless the judgment of removal is reversed or modified by some proceeding impeaching it, it is conclusive both as to the guardian and the sureties on his bond.

6. In an action on a guardian's bond which

6. In an action on a guardian's bond which is joint and several as to the obligers, but several as to the obliges, the question of non-joinder of parties plaintiff cannot be raised by demurrer unless the complaint shows that the obligers not joined were living when suit was commenced.

7. Nor is an answer setting up nonjoinder sufficient in such case where it fails to show that the omitted party or parties were living when the petition was filed.

8. Where a guardian of several minors

gives but one bond, the sureties cannot escape liability, in an action on the bond, on the ground that it is not such a bond as the law requires, in that it is joint instead of several as to the obligees, nor on the ground that only one of the obligees is a party to the action.

Appeal from district court, Storey county; Richard Rising, Judge.

Action by Thomas H. Deegan, an infant, by Henry Neligh, his guardian, against Thomas Deegan and others, on the bond of defendant Deegan as the former guardian of such infant. From a judgment for plaintiff, defendants appeal. Affirmed.

W. E. F. Deal, for appellants. C. E. Mack, for respondent.

MURPHY, C. J. By his last will and testament, M. W. Deegan, deceased, nominated and appointed Thomas Deegan to be the guardian of the person and estates of his minor children, to wit, John J. Deegan, Thomas Deegan, and Michael Deegan On or about the 23d day of July, 1888, the said Thomas Deegan qualified as such guardian, by the filing of a bond in the penal sum of \$5,000 for the faithful discharge of his duties as such guardian, and entered upon the discharge of his duties. This action is brought upon the bond for a failure of the guardian to discharge the duties of his trust. The defendants first contend that the court had no jurisdiction to remove the former guardian, and none to appoint the present guardian. On June 27, 1893, the plaintiff filed a petition in the district court stating that the guardian had never filed any account of his guardianship, and asking that he be compelled to do so. An order was thereupon made that a citation issue requiring the guardian to file such an account on or before July 15, 1893, or then show cause why he should not do so. On that day, F. M. Huffaker, Esq., an attorney at law, appeared for the guardian, and asked for further time in which to file the account. The time was accordingly extended to July 22d, the court stating in the order extending the time that, if the accounts were not then filed, the letters of guardianship would be revoked. July 25th, Mr. Huffaker again appeared; but, no account being forthcoming, an order was made revoking the letters, and removing the guardian. On the same day the present guardian was appointed.

The objection in this case to the orders revoking the letters of the former guardian, and appointing the present one, is a collateral attack upon the judgment of the court in the guardianship matter. Van Fleet, Coll. Attack, §§ 2, 3. In such a case the jurisdiction of the district court is conclusively presumed, and evidence to the contrary is not admissible. Black, Judgm. § 271; Van Fleet, Coll. Attack, § 841. Upon another ground, also, the jurisdiction is sufficiently shown. The same as in case of a summons, service of a citation is only necessary to

bring the party into court. If he voluntarily appears without it, such service is unnecessary. Here it appears from the record that the guardian did appear by attorney. To be sure it was sought to be shown that the attorney had no authority to appear for him, but, upon collateral attack, such authority is presumed, and the contrary cannot be shown. Carpentier v. City of Oakland, 30 Cal. 446; Weeks, Attys. at Law, §§ 196, 212. It is, however, argued that the proceeding in the guardianship matter was simply to compel the guardian to account, and that in that proceeding the court had no jurisdiction, without further notice, to remove the guardian. Section 583, Gen. St., provides that all the laws relative to the accounts of executors and administrators shall govern in regard to the accounts of guardians, so far as the same can be made applicable. Section 2897 directs that if any executor or administrator neglects or refuses to appear and render an exhibit, after having been duly cited, an attachment may be issued against him, or his letters may be revoked, in the discretion of the court. That was the situation here. After having been, presumptively, duly cited to render an account, and appearing upon the hearing of the matter by attorney, he still neglected or refused to do so. This authorized the court to remove him. Deck's Estate v. Gherke. 6 Cal. 668. Section 6 of article 6 of the constitution vests in the district court jurisdiction in all cases relating to the persons and estates of minors; and its judgment cannot be successfully resisted until reversed or modified by some proceeding impeaching it. It is conclusive, not only against the guardian himself, but also against the sureties upon his official bond. Whatever binds and concludes the guardian equally binds and concludes his sureties. Brodrib v. Brodrib, 56 Cal. 563; Holland v. State, 48 Ind. 391; Garton v. Botts, 73 Mo. 276; Candy v. Hanmore, 76 Ind. 125; Lynch v. Rotan, 39 Ill. 20; State v. Slauter, 80 Ind. 597.

The appellants contend that, the bond given by Thomas Deegan as guardian of the persons and estates of the minors being joint and several as to the obligors, but joint as to the obligees, this plaintiff cannot maintain this action without joining his co-obligees with him; and they interposed a demurrer to the complaint on the ground of defect of parties plaintiff, which was overruled. An objection of nonjoinder of parties plaintiff cannot be taken by demurrer unless the complaint shows that the party for whose nonjoinder the demurrer is interposed was living when the suit was commenced. And it is held that it is not enough that the complaint is silent on the subject; the fact must affirmatively appear. Estee, Pl. & Pr. § 3102; Bliss, Code Pl. § 411. If it does not appear upon the face of the complaint, the objection must be taken by answer. This the defendants attempted to do by an al-

legation in their answer that they were not liable to the plaintiff, but, if any liability existed, it was to the obligees named in the bond jointly, and not severally to plaintiff. This allegation is defective, in that it does not show that the omitted party or parties were living at the date of filing the complaint. Wilson v. State, 6 Blackf. 212; Stockwell v. Wager, 30 How. Pr. 273; Levi v. Haverstick, 51 Ind. 236; National Distilling Co. v. Cream City Importing Co. (Wis.) 56 N. W. 866; Palmer v. Field (Sup.) 27 N. Y. Supp. 737; State v. Goodnight, 70 Tex. 688, 11 S. W. 119; Furbish v. Robertson, 67 Me. 38. Pleas in abatement have always been regarded with disfavor, by reason of the fact that they are dilatory in their nature, and seek to defeat the action upon technical grounds. The rule, therefore, in relation to the degree of certainty required, both as to form and substance of such pleas, requires fullness and particularity in the statement, leaving nothing to be supplied by intendment or construction; and the pleadings should show that it was necessary, in order to protect the rights and interest of the pleader, that the omitted party should be brought into court.

The appellants argue that the bond given in this case is not such a bond as is required to be given by law, and is for that reason null and void. There is no allegation in the answer, nor is there any statement in the points and authorities submitted to us by the counsel, pointing out wherein this bond is defective, except, as we can infer from his argument, that it is so by reason of the fact that it is joint in so far as the obligees are concerned. It has been held in a number of well-considered cases that a guardian's bond, though inartificially drawn or slightly defective, will be held sufficient to bind the obligors; and we cannot but think that there is manifest wisdom in the rule that the law will regard in transactions like the present, not the form, but the substance, of the instrument; nor does it seem to us that such a rule is ever, in any of its numerous applications, of more worth than when it is employed as a safeguard to persons who are unfortunate, and must of necessity be represented by agents appointed by the court and designated guardians. It must strike any one as preposterous that the bond given by a guardian can be defeated by a slight inaccuracy,-by the addition or omission of a word or sentence. The present case will afford a fair illustration of the practical operation of such a pernicious principle. This guardian had the bond prepared by an attorney of his own choosing. The principal and his bondsmen signed it knowing that they were obligating themselves,the principal that he would faithfully perform all the duties of his trust, in accordance with law and the orders of the court; and the bondsmen binding themselves that they would be responsible for any defalca-

tion or neglect of duty on the part of their principal. This instrument was presented to the judge for his approval. It was approved by the judge, and filed in the office of the clerk; and now, after the lapse of many years, when it becomes necessary to sue the bondsmen, the property of the minors having been misappropriated by the guardian, the bondsmen endeavor to avoid their obligation by raising the technical objection that one of the obligees cannot maintain the action without joining all others named in the bond with him. As the said bond was given subject to conditions prescribed by the statute, which conditions have not been fulfilled, in our judgment, law and public policy demand that such defenses should not prevail in this character of cases. The case of Ordinary v. Heishon, reported in 42 N. J. Law, 17, was an action upon a guardian's bond. The defense was that the bond did not conform to the statute, by reason of the fact that but one bond was given for the guardianship of two minors, and was defective in other particulars. It was admitted that the statute of the state required a separate bond with respect to the estate of each minor. The court said: "The act of tendering such a bond as this, as the security called for by the statute, was an act of great carelessness on the part of the guardian and his sureties, and the acceptance of such instrument by the surrogate or the court was conduct still more censurable; but it would seem to be irrational in the extreme to conclude that, by reason of such improprieties, these sureties are to be absolved from all responsibility, and these innocent minors be left without redress. We have not adopted in this state the doctrine that, because a bond of this class does not conform to the statutory definition, it becomes, for that reason alone, unenforceable. In such a condition of things, the strong leaning of the courts has been to hold such instruments valid, to the full extent of their terms, so far as they embody the statutory policy, as voluntary obligations." The case of Pursley v. Hayes, 22 Iowa, 28, was a proceeding to set aside a guardian's sale. One of the objections raised was that the bond was a joint bond, and hence void. In passing on this point, the court said: "Next is the objection that the guardian was appointed for the wards jointly, and the bonds are for their security in the same manner, * * * and certainly nothing has been more common in our practice than to appoint one guardian for all minors thus interested, and no rule of the statute can be found forbidding it." The case of Hooks v. Evans, 68 Iowa, 54, 25 N. W. 925, was an action by one ward against her guardian and his sureties. On the trial of the case in the nisi prius court, the sureties were released, and judgment entered against the guardian. The plaintiff appealed. In reversing the judgment, the appel-

late court said: "One question remains to be determined, and that is as to the amount for which these sureties are liable in this case. The judgment against the guardian was for \$736.12. The penalty of the bond is \$600. The judgment against the sureties might be for the amount of the penalty of the bond, but for the fact, which remains to be stated, that Evans was appointed guardian, not only for the plaintiff, but for three others, and the bond in question was given for their benefit, and was the only one given for the four. It is manifest that the aggregate liability of the sureties to the four wards could not exceed \$600. The other three wards are not made parties, and without them no judgment can be rendered by which their rights can be impaired. It follows that the court below should have rendered judgment against the sureties for \$150, and only that."

Although the bond in this case is not in strict conformity to the statute, yet the fact that it was given for the benefit of more than one minor does not vitiate it. The practice in this respect appears to be general and uniform in all courts authorized to take such bonds. The omission of the word "severally" does not weaken the bond, release the sureties, nor, in our opinion, deprive the individual ward from maintaining an action either against the guardian or his sureties. The nature of the guardian's duties is several, and would require a several inventory, a several accounting, and payment over to the wards, as they severally arrive at full age.

The appellants contend that there is no allegation in the complaint that the decree in the guardianship matter found the sum for which judgment is given to be due the plaintiff; but in this counsel is mistaken, for the complaint distinctly charges "that the final account of Thomas Deegan as former guardian of plaintiff has been settled in the above court, and \$574.10 found to be due plaintiff thereon."

Counsel also contends that there is no allegation of a breach of the conditions of the bond; that there is no allegation that the money has not been paid to the plaintiff; and that, consequently, the complaint does not state facts sufficient to constitute a cause of action. To this contention, however, we think there are two sufficient answers: First. The complaint does allege "that, after qualifying as such guardian, the said defendant Thomas Deegan received as said guardian, of the person and estate of plaintiff, the sum of \$1,286.40 of the moneys belonging to plaintiff, and has unlawfully converted the sum of \$574.10 thereof to his own use." The demurrer is general so far as this point is concerned, and the defect now relied upon is not specially pointed out as There can be no question that the allegation just quoted was intended as charge of a breach of the conditions of the bond. Admitting that it is not sufficient as such, it is still more a defect of form than of substance, and is quite different from a complaint that contains no allegation of a breach. As such it was waived by the general form of the demurrer. Grant v. Sheerin, 84 Cal. 197, 23 Pac. 1094; Bliss v. Sneath (Cal.) 36 Pac. 1029. Second. The office of guardian is one of trust and obligation. He is bound to act for the best interest of his ward, and not for his own; and, whenever he seeks to gain an advantage at the expense of his ward, such act is fraudulent. It was the duty of the guardian to keep the money of his ward separate and intact from his own funds, and invest the same for the best interest of his ward. He had no right to use it in his own private business, nor for his own purposes; and, if he did so, such use was a breach of his duty. 1 Perry, Trusts, § 275. The bond was that he should faithfully execute the duties of his trust according to law; and if he converted the money to his own use, as charged in the complaint, there was clearly a breach of his duty as such guardian, and consequently a breach of the condition of the bond, for which his sureties are responsible. State v. Roberts, 21 Ark. 263; Irwin v. Backus, 25 Cal. 221.

It follows that Thomas Deegan was legally removed as guardian, and by such removal his trust expired, and the conditions of his bond were broken. Henry Neligh, having been selected by the minor, and at his request appointed by the court, is the legal guardian. The judgment and order appealed from are affirmed, and it is so ordered.

BIGELOW and BELKNAP, JJ., concur.

DEEGAN v. DEEGAN et al. (No. 1,410.) (Supreme Court of Nevada. July 28, 1894.)

Appeal from district court, Storey county;

Richard Rising, Judge.
Action by Michael M. Deegan, an infant, by
Henry Neligh, his guardian, against Thomas
Deegan and others, on the bond of defendant
Deegan as the former guardian of such infant.
From a judgment for plaintiff, defendants appeal. Affirmed.

W. E. F. Deal, for appellants. C. E. Mack, for respondent.

PER CURIAM. This case turns on the same questions presented in the case of Deegan v. Same Defendants (No. 1,409; this day decided) 37 Pac. 360, and it must be decided in the same way. Judgment and order appealed from are affirmed.

THAMLING v. DUFFEY.

(Supreme Court of Montana. July 16, 1894.)
Action on Note-Answer-Sufficiency.

In an action on a note by the indorsee against the maker, an answer alleging fraud in the inception of the note states a prima facie

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defense, and throws the burden of proving bona fides, which includes want of knowledge of the alleged fraud, on plaintiff.

Appeal from district court, Meagher county; Frank Henry, Judge.

Action on a note by Siegmund Thamling against J. H. Duffey. From a judgment for plaintiff, defendant appeals. Reversed.

Thompson & Maddox, for appellant. Smith & Gormley, for respondent.

PEMBERTON, C. J. The complaint in this case alleged that on March 6, 1893, the defendant executed and delivered his negotiable promissory note to Hatch Bros. & Co. for \$5,000, with interest, payable five months after date; that on or about the 1st day of April, 1893, and before the maturity thereof. the said Hatch Bros. & Co. indorsed the same to plaintiff, who, in this action, demands judgment for the amount of said note. In his answer, defendant admits the execution and delivery of said note, as alleged, but resists the recovery of judgment thereon, on the ground of fraud practiced upon him by said Hatch Bros. & Co. in the inception of said instrument. The answer does not allege that plaintiff, the indorser of said note, participated in the alleged fraud, or had knowledge thereof at the time of the indorsement of said note to him. It is not denied that the fraud alleged in the inception of the note would defeat a recovery thereon in an action by the original holders. The plaintiff filed a replication denying any knowledge of the fraud alleged in the answer. After filing said replication, the plaintiff moved the court for a judgment on the pleadings, on the ground that the answer did not state facts sufficient to constitute a defense. This motion was sustained by the court, and judgment rendered in favor of the plaintiff for the amount of said note and interest. From this judgment this appeal is prosecuted.

The question presented by this appeal is, was it essential to the sufficiency of the answer that it should allege that plaintiff had knowledge of the fraud alleged in the inception of said note at the time it was indorsed by him? In other words, did the allegation of fraud in the inception of the note, contained in the answer, place the burden of proof of bona fides upon the plaintiff, or was the defendant required to allege and prove knowledge of such fraud on the part of plaintiff at the time the note was indorsed to him? Mr. Bliss, in his work on Code Pleading (2d Ed., § 395), says: "In an action upon negotlable paper, the defendant may plead fraud or illegality, or that the bill or note was lost or stolen; and it is well settled that, in showing such fraud, etc., he makes a good prima facie defense, and that the plaintiff must show affirmatively that he is a bona fide holder for value. But, in such case, how should the issue be made on paper? Upon principle, every pleader who, in submitting evidence, holds the affirmative of an issue, must plead the facts upon which the issue is made. It is, however, common. in pleading fraud, illegality, or other matter going to the validity of a bill or note in the hands of an indorsee, to also aver a want of consideration, and to charge notice. Is this averment necessary? Is it sufficient for the plaintiff to traverse it, if made, or should he affirmatively allege the facts he is required to prove? I do not find these questions settled upon authority. In the analogous cases of a bill to enforce an equity against one who has obtained the legal title, whether to land or chattels, it is sufficient for the plaintiff to show the equity; he thereby makes a prima facie case against the world. A purchaser for consideration without notice will, however, be protected. In his plea or answer, the purchaser of land must aver expressly that the person who conveyed was selsed, or pretended to be seised, when he executed the conveyance, and that he was in possession; must state consideration, and its actual payment; and must deny notice, whether it has been averred by the opposite party or not. The purchaser of stock, if he would defend against a plaintiff's prima facie title, must affirmatively state in his answer, and must prove, the facts showing that he was a bona fide purchaser for value. In the matter under consideration, the plaintiff, after the defendant's showing, can only protect himself by his relation to the paper. In itself, it is good for nothing; but, when one has put his name to a negotiable instrument, the law merchant, for commercial reasons, will protect the innocent holder, the person who has obtained it in good faith and for value. As we have seen, he must prove that he has obtained it, as must the holder of a legal title to property as against the holder of an equity. It would seem, both from analogy and upon principle, that he should be required to affirmatively plead the facts that thus protect him, which he is required to prove, and that the allegation of notice, etc., in the answer, is unnecessary." And see authorities cited. In Vosburgh v. Diefendorf, 119 N. Y. 357, 23 N. E. 801, a case involving the doctrine involved in the case at bar, the court says: "The learned counsel for the plaintiff contends that in this case the burden of proving notice to the plaintiff of the facts connected with the execution of the note, and of the fraud, if any, was upon the defendant, and that, in the absence of such proof by the defendant, the plaintiff was entitled to recover. We think that this proposition cannot be maintained. Doubtless some support may be found for it in certain elementary books, and in some of the adjudged cases in other states. But in this state it must be regarded now as a settled rule that, when the maker of negotiable paper shows that it has been obtained from him by fraud or duress, a subsequent transferee must, before entitled to recover on it, show that he is a bona fide purchaser. Bank v. Green, 43 N. Y. 298; Bank

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v. Noxon, 45 N. Y. 762; Bank v. Carll, 55 N. Y. 440; Wilson v. Rocke, 58 N. Y. 643; Bank v. Penfield, 69 N. Y. 502; Nickerson v. Ruger, 76 N. Y. 279; Seymour v. McKinstry, 106 N. Y. 240, 12 N. E. 348, and 14 N. E. 94; Stewart v. Lansing, 104 U.S. 505; Smith v. Livingston, 111 Mass. 342; Sullivan v. Langley, 120 Mass. 437. The plaintiff did not satisfy this rule by showing that he paid value for the note; it was necessary, in order to entitle him to recover, to go further, and show that he had no knowledge or notice of the fraud with which the instrument was tainted from its origin." In Bank v. Diefendorf, 25 N. E. 402, a recent and well-considered case, the court of appeals of New York say: "The plaintiff claims that the proof showing it purchased the notes before maturity, paying value therefor, conclusively establishes its character as a bona fide holder, and entitles it to recover, in the absence of proof showing that it had notice or knowledge of facts constituting a defense to the action. The plaintiff's contention eliminates the element of good faith from the transaction, and assumes that the language, 'a holder for value,' as used in the authorities, is satisfied by proof that the notes were purchased before maturity, and value paid therefor. We think this contention is contrary to the weight of authority in this state, even if it is not wholly unsupported by it. The payment of value for negotiable paper is a circumstance to be taken into account, with other facts, in determining the question of the bona fides of the transaction, and, when full value is paid, is entitled to great weight; but that fact is never conclusive, except in the absence of evidence tending to show notice of bad faith. Those who seek to secure the advantages which the commercial law confers upon the holders of bank bills and negotiable paper must bring themselves within the conditions which the law prescribes to establish the character of a bona fide holder. They are entitled to the benefits of that rule only when they have purchased such paper in good faith. in the usual course of business, before maturity, for full value, and without notice of any facts affecting the validity of the paper. This has been the law in this state since the case of Bay v. Coddington, 5 Johns. Ch. 54, 20 Johns. 637. The fact that they took the paper before maturity, and paid the full value thereof, in the absence of other facts, undoubtedly affords a presumption of the good faith of the transaction; but where it further appears that such property has been fraudulently or illegally obtained from its owner or maker, and under such circumstances that the person putting it in circulation could not maintain an action thereon, it is incumbent upon the holder, in order to succeed, to go further, and show the circumstances under which it came into his possession, and that he has acted in good faith in the transaction. What constitutes good faith in such transactions has been the subject of frequent discussion in the books; and, while differences of opinion may exist on some points, there is perfect uniformity among them upon the point that a want of good faith in the transaction is fatal to the title of the holder, and that gross carelessness, although not of itself sufficient, as a question of law, to defeat title, constitutes evidence of bad faith. The requirement of good faith is expressed in the very term by which a holder is protected, and is fundamental in the maintenance of the character claimed to be protected. 1 Pars. Notes & B. 258. * * * A sufficient number of authorities have been cited to show the uniformity with which the cases in the highest courts of the state hold that, upon proof by the defendant that his obligations have been fraudulently or illegally obtained, and put in circulation, the person seeking to recover upon them must show, not only that he bought before maturity and paid value, but also the circumstances under which he acquired the paper, with the view of enabling the jury to determine whether he acted in good faith or not. It makes no difference, in the question presented, whether the plaintiff pursues the orderly course of first presenting and proving his note, relying upon the presumptions of bona fides which accompany the possession of the paper, and delays making proof of the circumstances of his purchase until after the defendant gives evidence of his defense, or, as in this case, he makes the proof of such circumstances as part of his affirmative case. The burden of making out good faith is always upon the party asserting his title as a bona fide holder, in a case where the proof shows that the paper has been fraudulently, feloniously, or illegally obtained from its maker or owner. Such a party makes out his title by presumptions, until it is impeached by evidence showing the paper had a fraudulent inception; and, when this is done, the plaintiff can no longer rest upon the presumptions, but must show affirmatively his good faith. The question of law involved in this case was considered in the case of Vosburgh v. Diefendorf, 119 N. Y. 360, 23 N. E. 801, and there received the unanimous approval of the court." In Stewart v. Lansing, 104 U. S. 505, Mr. Chief Justice Waite, speaking for the court, says: "It is an elementary rule that, if fraud or illegality in the inception of negotiable paper is shown, an indorsee, before he can recover. must prove that he is a holder for value. The mere possession of the paper under such circumstances is not enough. Smith v. Sac Co., 11 Wall. 139. Here the actual illegality of the paper was established. It was incumbent, therefore, on the plaintiff, to show that he occupied the position of a bona fide holder, before he could recover."

It cannot be said that the authorities are uniform or harmonious upon the questions involved in this case. But we are of the opinion that the authorities cited contain the better and sounder reason on the questions involved. It might frequently occur that a defendant in such a case would be powerless to allege or prove knowledge in the plaintiff of the fraud which tainted the note sued on, at its inception,-this knowledge being peculiarly within the breast and possession of the plaintiff,-whereas it would very rarely be a hardship upon an indorsee to require him to show his bona fides by proving the circumstances and facts under which he became the owner and holder of the paper on which he sues. From the foregoing authorities and consideration, we are of the opinion that the allegation of fraud in the inception of the note sued on, contained in the answer, contained a prima facie defense, and placed the burden of proving bona fides, which includes a want of knowledge of the fraud alleged, upon the plaintiff in this case; and, if so, the burden of pleading such want of knowledge was upon him, necessarily. It therefore follows that the action of the trial court in rendering judgment on the pleadings was error. The judgment is reversed, and the cause remanded for trial. Reversed.

GALVIN v. MAC MINING & MILLING CO. (Supreme Court of Montana. July 2, 1894.)

ATTORNEY'S FEES - EVIDENCE - PLEADINGS AND PROOFS-VARIANCE.

1. Where defendant assumes payment of a note executed by plaintiff, which provides for the recovery of attorney's fees if its payment be enforced by the legal holder by action, defendant is not liable for attorney's fees in an action by plaintiff to compel defendant to

pay the note.

2. Plaintiff indorsed on his certificates of stock an assignment to one D., and left them in the hands of defendant's secretary, explaining that he was about to borrow money from D.; and that he indorsed them in advance, to facilitate the transaction. The loan was not consummated, and plaintiff made a demand or the certificates, but the secretary said, "You have no stock in this company." The defense was that, plaintiff having indorsed them, in contemplation of transferring them to D., the secretary was justified in withholding them until D. reassigned them, or ordered their delivery to plaintiff Hold, that a variet for delivery to plaintiff. *Held*, that a verdict plaintiff was warranted.

3. Where a complaint is in assumpsit Held, that a verdict for

contract of sale and purchase, and the proof discloses a tortuous detention and unwarranted refusal to deliver the property to plaintiff on his demand therefor, there is no variance.

4. Such action not being an action for money had and received by defendant through the sale of goods unlawfully taken from plaintiff, it is not necessary to allege or prove a sale of the conversed property. of the converted property.

Appeal from district court, Lewis and Clarke county; William H. Hunt, Judge.

Action by Patrick Galvin against the Mac Mining & Milling Company to recover for shares of stock sold to defendant, and to compel defendant to pay a note executed by plaintiff, which defendant had assumed to pay. From a judgment for plaintiff, defendant appeals. Affirmed.

McConnell, Clayberg & Gunn, for appellant. C. B. Nolan and T. J. Walsh, for respondent.

PER CURIAM. In this action plaintiff alleges sale and delivery by him, and purchase by defendant, of 7,468 shares of the capital stock of the defendant company, of the reasonable value of \$2,340.40, but that defendant has failed to make payment therefor; wherefore judgment is demanded for recovery of that sum. And for a second cause of action plaintiff alleges a transaction whereby he claims defendant became indebted to him in the sum of \$1,226, with certain interest thereon, by reason of defendant having assumed and agreed to pay plaintiff's promissory note for that amount, which he and another had executed and delivered to Henry Klein. It appears this note provided for attorney fees, to be recovered, in case its payment was enforced by action at law, by the legal holder thereof; and, in addition to the demand for \$1,226 and interest, plaintiff demands an attorney's fee of \$60, presumably (but not expressly by allegation) predicating such demand upon a condition in said note that, if payment thereof was enforced by an action at law, reasonable attorney fees for prosecuting such action should be recovered also.

As to this second cause of action it is admitted that defendant, before filing its answer. had fulfilled its obligation to pay the principal and interest of said note, but in its answer denies liability for any attorney fee for prosecuting plaintiff's action to compel it to pay said note. The question concerning this attorney fee is therefore the only point, respecting the cause of action, involved in this appeal. As to this attorney fee it is plain that the defendant company was not liable therefor. It was not directly a party to said note, but in the arrangement between plaintiff and defendant the latter agreed to pay the note. and, not having paid the whole thereof when this action was brought, plaintiff assumed that he could, by this action, compel defendant to pay him the amount of said note, together with reasonable attorney fees for prosecuting his action to enforce such payment. Before the action came to trial, however, and before answer, defendant paid the amount of said note to the holder thereof. It is not shown that defendant had agreed to pay attorney fees for prosecuting an action at law to compel it to pay said note, and we are, without hesitation, of opinion that defendant is not liable for such demand. Lang v. Cadwell, 13 Mont. --, 34 Pac. 957.

As to the first cause of action, for the recovery of the reasonable value of said stock. it appears that plaintiff relied upon the fact that defendant had tortiously assumed, held, and converted said stock to his own use, and therefore plaintiff alleges purchase thereof by defendant, on the theory that he could waive the tort, and sue as upon contract for purchase. Defendant specifically denied

every allegation of plaintiff's complaint relating to the sale and purchase of said stock. It was developed on the trial that said stock had been placed in the custody of defendant's secretary, with an assignment indorsed thereon, transferring the same to A. McLain, under the condition that the same, with other stock, might be purchased by the latter on or before a certain date fixed, on payment of a certain sum per share. That, such arrangement having expired, or been entirely revoked, leaving plaintiff's stock in the possession of the secretary of said company, subject to plaintiff's withdrawal or control, the plaintiff went to the secretary of defendant, and obtained his shares of stock, and indorsed thereon an assignment thereof to D. Galvin, and left the same in the hands of said secretary, explaining to him that plaintiff was about to borrow a sum of money from D. Galvin, and proposed to assign and place said stock as security for such loan. That he expected D. Galvin to arrive on a train, and consummate the loan and delivery of the security, and, in order to facilitate the transaction, as D. Galvin would have but a few moments to devote thereto, plaintiff had made this indorsement of assignment in advance of consummating such loan. That, as appears to be conceded, the loan in question was not consummated at all, and thereafter plaintiff called upon the secretary of defendant, and sought to obtain possession of his shares of stock, but defendant's secretary, as appears, did not deliver the same, saying there would be some new blank certificates of stock in possession of the company in a few days, and that when the same arrived he would issue plaintiff a clean certificate, representing his shares, in lieu of the old ones which had been indorsed by the assignments above mentioned. Being agreeable to that suggestion, it appears plaintiff left his stock in the custody of the secretary for some time; and, as appears from the testimony of plaintiff, in the meantime said secretary personally sought to purchase said stock from plaintiff, but such purchase was not effected. That after said certificates of stock had remained in possession of said secretary for some time, plaintiff demanded the delivery thereof to him, but the secretary refused to deliver the same to plaintiff, saying, "You have no stock in this company." On this state of facts plaintiff based his right to recover from defendant the reasonable value of said stock; and defendant appears to have undertaken to defend and justify the action of its secretary on the ground that, the plaintiff having made said indorsements on the certificates in contemplation of transferring them to D. Galvin as security for a loan, the secretary was justified in withholding said certificates of stock from plaintiff until D. Galvin reassigned them, or ordered their delivery to On this theory of defense the acplaintiff. tion was tried, and instructions were given

to the jury, and the jury found against defendant, in effect finding that its attempted defense or justification of its secretary's action was not well founded. Considering the theory of defense, and the evidence introduced in the action, we think the verdict of the jury is well supported.

Certain instructions of the court to the jury are complained of as being inconsistent. On the theory of the defense interposed by defendant, and on the facts shown, these instructions are entirely correct, and are favorable to defendant. Nor do we think the point that certain instructions are inconsistent is well taken. They merely set forth alternative views which might be adopted in the case, according to the conclusion which the jury reached from the testimony, and properly leave the jury in an attitude to adopt one or the other of such conclusions from the evidence.

The point is raised by appellant that there is a fatal variance between the proof and the allegations of the complaint, because the complaint alleges a sale of personal property described, and seeks to recover the reasonable value thereof, but the proof shows a tortious taking and conversion. The complaint is in the nature of assumpsit upon contract of sale and purchase, but the proof discloses a tortious assumption, detention, and unwarranted refusal to deliver said stock to plaintiff on his demand therefor; and these facts, together with the implication which the law draws therefrom, are relied upon to support the complaint alleging a sale. No variance can be maintained on such a situation. The authorities at common law, and also those relating to code procedure and remedies, hold that a declaration in assumpsit is supported by proof of the wrongful taking and conversion of personal property; but there is a line of cases which confines the right of election to waive the tort and sue and recover the value of the goods converted as if sold to the wrongful taker to cases where the latter had himself disposed of the property. This distinction has received very careful consideration and extended discussion by courts of last resort, and we think the great weight of reason and authority-especially of decisions under the reformed procedure—disregard that distinction as immaterial in cases where the owner of the goods sues to recover the reasonable value thereof, on the very proper and rightful assumption that the taker proposed, not to take the same without compensation to the owner, but to pay him the reasonable value thereof. If, however, the action was not for the reasonable value alone, but to recover for money had and received to the use of the owner by the wrongful taker through the sale of the goods, the plaintiff ought certainly to allege and prove the sale and amount received, because that shifts the measure for accounting from that of the reasonable value to the proceeds actually received by the wrongful taker through the sale

of the goods. Bliss, Code Pl. (2d Ed.) §§ 13, 153; Pom. Rem. & Rem. Rights §§ 567-573, and cases cited.

It is also urged by appellant that the evidence is insufficient to support the verdict, because there is no evidence showing a sale by defendant of the property converted. This not being an action for money had and received by defendant through the sale of goods wrongfully taken from plaintiff, and it not being necessary to allege a sale, the point that the verdict is not supported because of want of proof of sale is not available in this action, for the reasons just shown.

It was urged in the closing argument on behalf of appellant (but not made a point in the brief of its counsel) that defendant could not be held liable for the conduct of its secretary in the matters herein involved, on the ground that the secretary had no authority to involve the company in the implied purchase of said stock; that such acts were not within the realm of his duties as such secretary, or within the scope of his authority in any manner. This seems to the court to be an important question, in view of the evident relations and duties of a secretary to a corporation; and very likely such a defense would have been decisive of this case, so far as the defendant company was concerned, had it been interposed. But plainly no such defense was interposed at all in this action, and the argument of such a proposition on this appeal is entirely inconsistent with the defense interposed as disclosed by the record. Therefore, inasmuch as defendant appears to have undertaken to espouse the conduct of its secretary, and justify his action in this respect, although it may have been outside of his authority or duty in his relations with defendant, still, if defendant wished to adopt his conduct complained of in this action, and rest its defense solely upon that ground throughout the trial, and in presenting the motion for new trial, and in presenting the case on this appeal, in the brief and argument of its counsel, until the closing, we see no reason why the defendant should not be allowed to adopt its secretary's action as its own, and as within the scope of his authority, and the liability which follows. It is proper to further remark that it is exceedingly doubtful that a corporation, without special authorization, can become purchaser of its own stock, which has been sold and outstanding in the hands of individual stockholders. It may, however, commit damage by wrongfully preventing a stockholder from having the use and benefit of his stock. But, as before remarked, the corporation in this case appears, as far as can be ascertained from the record, not to have relied upon such grounds of defense. We may therefore very properly presume, for the purposes of this action, that all concerned in the corporation-officers and stockholders-concurred in adopting the conversion of said stock by its secretary as their own act. If that be the case, it includes all who have any rights involved. A principal may adopt as its own the unauthorized act or transaction of an agent; and, having taken that position in defense of a suit, they could not afterwards, on appeal, be heard to deny the agent's authority. The foregoing remarks upon this view of the case are made in order that this case may in no manner be regarded as affirming that an incorporated company may be held liable under such circumstances, if the proper defense was presented, repudiating the transaction, as well as the authority of its officer to bind it therein. Ordered that judgment be modified by disallowing recovery of attorney's fee on the second cause of action; otherwise judgment affirmed.

PEMBERTON, HARWOOD, and DE WITT, JJ., concur.

TERRITORY v. TURNER. (No. 90.)
(Supreme Court of Arizona. March 8, 1894.)
CONSPIRACY—EVIDENCE—INSTRUCTIONS.

1. On a trial for conspiracy to commit a misdemeanor, the conspiracy must be established before proof of acts and declarations of a defendant, relative to the commission of the misdemeanor, is admissible.

nshed before proof of acts and decarations of a defendant, relative to the commission of the misdemeanor, is admissible.

2. On a trial for conspiracy to slaughter cattle, by persons not engaged as butchers, with intent not to preserve the hides for 21 days, as provided by Laws 1889, No. 5, it is error for the court to assume that defendants were not butchers.

3. Proof of the commission of the misdemeanor is not sufficient, as the state must show that it was committed in pursuance of the conspiracy charged.

Appeal from district court, Cochise county; before Justice R. E. Sloan.

Henry B. Turner was convicted of conspiracy to commit a misdemeanor, and appeals. Reversed.

Allen R. English, for appellant. Atty. Gen. Heney, for the Territory.

HAWKINS, J. The appellant was indicted, with others, for conspiracy to commit a misdemeanor, viz. they, being persons not engaged as butchers, did conspire, etc., to kill cattle for sale, and not retain in their possession the hides taken off said animals, with the earmarks attached thereto, without any alteration or disfiguration of the brands or marks on said hides, for 21 days, etc., free to the inspection of all persons (paragraph 973, Pen. Code 1887, as amended 1889, p. 21), and then charges several overt acts, substantially in the language of the said statute, of said parties, not being engaged as butchers in killing cattle, and not retaining the hides. This statute makes the crime a misdemeanor, and the penalty for not so retaining the hides, etc., is a fine not exceeding \$200. Conspiracy is punishable by imprisonment in the territorial prison not exceeding one year, or by a fine not exceeding \$1,000. The stat-

ute regarding the crime of conspiracy provides that no agreement, except to commit a felony upon the person of another, or to commit arson or burglary, amounts to a conspiracy, unless some act besides such agreement be done to effect the object thereof by one or more of the parties to such agreement. Pen. Code, p. 701, par. 266. And upon a trial for conspiracy, in a case where an overt act is required by law to constitute the offense, the defendant cannot be convicted unless one or more overt acts be expressly alleged in the indictment, nor unless one or more of the acts alleged be proved. Id. par. 1654. The appellant, in his motion for a new trial, alleges various grounds of error.

The main question for us to consider seems to be: Were there any facts showing a conspiracy? If not, the motion of appellant to direct a verdict of acquittal should have been granted. In a charge of conspiracy, the corrupt agreement is usually the gravamen of the offense. Under the statute in this case, it is necessary, however, to prove the corrupt agreement, and one or more of the criminal acts charged, and, after these are both charged and proved, it becomes conspiracy. After a full examination of the evidence, we are unable to find that any such agreement was proved, either directly or by circumstances. It is true it was permitted, over the objection of the defendants, for the prosecution to prove a conversation between witness Taylor and Lyall regarding Mart Taylor selling witness an interest in the XL cattle, saying, by working together, and branding everything, they could soon make up a good herd. This was in the absence of the defendants, and no evidence had been introduced showing that a conspiracy had taken place, and could only prejudice the jury. It is said to be a rule of ancient standing that the conspiracy should be first established, prima facie, before the acts and declarations of a co-conspirator can be admitted in evidence against another. The most that can be said, from the testimony in the case, is that the territory has tried to prove one or more of the overt acts alleged. This proof also falls short of what would be required if the defendants were being prosecuted for the misdemeanor alleged as the criminal act. There is no evidence as to whether defendants were butch-This was a material matter, and would have to be proved. The overt act charged is a statutory misdemeanor. Such statutes are to be strictly construed. If the defendants were butchers, the law only required the hides to be kept five days.

The court also charged the jury, the defendants "not being butchers," etc. It was clearly material to prove this. The allegation in the indictment was no proof against the defendants. It was all there was before the jury on this point. But, if one or more of the

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overt acts had been proved, that alone would not have been sufficient to convict the defendants. It is primarily necessary to prove the corrupt agreement, and then such overt act. It is made so by the law. It would be a dangerous thing to hold otherwise. If two persons together commit a misdemeanor, then all that would be necessary to do would be to indict them for a conspiracy, prove the commission of the misdemeanor, and convict them of a felony. It was the intention of the statute making a conspiracy a felony to prevent just such a thing. All that can be said of the facts and circumstances in this case is that they all tend solely towards connecting defendant with the commission of the misdemeanor charged, or some other crime. In Loggins v. State, 8 Tex. App. 434, it is held that, "ordinarily the mere proof that two or more parties were actually engaged in the commission of a crime does not lead to the necessary inference that, days or weeks or months before its commission, they had mutually undertaken and agreed to its commission." And again, in the same decision, it is stated that "it would be a doctrine fraught with mischievous results if the mere proof of an actual commission of a criminal act by two or more parties was sufficient, in itself, to justify the conclusion that a conspiracy had been formed, a week or a month before, by the same parties, to commit the particular offense in question." We must therefore conclude that the court erred in not sustaining the motion to direct a verdict for defendant. The judgment is therefore reversed.

BAKER, C. J., concurs.

TERRITORY v. LYALL. (No. 91.)

(Supreme Court of Arizona. March 8, 1894.)

Appeal from district court, Cochise county; before Justice R. E. Sloan.

John Lyall was convicted of conspiracy to

commit a misdemeanor, and appeals. Reversed.

Allen R. English, for appellant. Atty. Gen. Hency, for the Territory.

HAWKINS, J. Indictment for conspiracy with Henry B. Turner et al. The defendants Turner and Lyall severed on the trial. The testimony is substantially the same as that in case of Territory v. Turner (No. 90) 37 Pac. 368, and fails to show the conspiracy charged. Indictment for conspiracy ner et al. The defendants The defendants may have been guilty of a misdemeanor, charged as the overt acts, or, from the testimony,—if the cattle killed at the time of their arrest were not their property, and the same were unlawfully and feloniously taken,—of grand larceny. They were not tried for these offenses. The motion to direct a verdict of not guilty should have been sustained. For these and reasons stated (Territory v. Turner, supra), the judgment is reversed.

BAKER, C. J., concurs.

In re DELINQUENT TAX LIST OF PIMA COUNTY.

Appeal of MAISH et al.

(Supreme Court of Arizona. Jan. 17, 1894.)

EXCESSIVE TAXATION—TENDER OF AMOUNT DUE—
PROPERTY SUBJECT.

1. A taxpayer cannot object to a tax on unconfirmed Mexican grants on the ground that the title thereto is in the public, without first tendering the taxes due on other property included in the assessment.

2. A tax assessment as follows: "Land and improvements. San Ignacio La Canoa, private land claim,"—is an assessment upon the equitable claim, not upon the fee, and is therefore valid, though the land belong to the public domain.

Appeal from district court, Pima county; before Justice Richard E. Sloan.

Action by the territory of Arizona against the persons and property described in the delinquent tax list of Pima county for 1891. From a judgment for plaintiff, Maish and Driscoll, objectors, appeal. Affirmed.

C. W. Wright, for appellants. Frank H. Hereford and Wm. M. Lovell, for appellee.

BAKER, C. J. The appeal is taken from a judgment for delinquent taxes for the years 1889 and 1891. The objectors, Maish and Driscoll, urge a number of reasons why the taxes are invalid. They relate mostly to the manner of assessing the taxes, preparing and returning the delinquent list, and similar questions; all of which we deem mere irregularities, and covered by paragraph 2688, Rev. St., which was in force at time of judgment. As to all of these objections we are content with the reasons given in the case of Atlantic & P. R. Co. v. Yavapai Co. (Ariz.) 21 Pac. 768, and therefore overrule them. There is one objection, however, which goes to the validity of the tax levy, and this we will notice. Some of the property listed to the objectors consists of "unconfirmed Mexican land grants," and as to these it is contended that the tax levy is void, because such "grants" belong to the public domain until confirmed by proper authority, and are not subject to local taxation. If we concede this, we still ought to decide adversely to the appeal. There was other property, real and personal, listed to the appellants that year, the taxes upon which were certainly valid. The appellants neither paid such taxes nor offered to pay them. It is certainly not just and equitable that a taxpayer be suffered to retain taxes which he ought to pay, and at the same time be heard to complain of taxes which he claims he ought not to pay. He must first pay or offer to pay the taxes which are justly due the government. This the appellants did not do. Railroad Co. v. Patterson (Mont.) 24 Pac. 704. Besides, we are inclined to view the levy in this case as being upon the equitable claim or possessory right of the objectors in the "grants," and not upon the fee. If this is all that is taxed,—"the possessory right or claim,"—the tax is valid, though the land belong to the public domain. Rev. St. par. 2631; Colorado Co. v. Commissioners, 95 U. S. 265; People v. Donnelly, 58 Cal. 144. It is a part of appellants' argument that the "grants" are a portion of the public domain until segregated and confirmed by proper authority, which has not been done. If this be so, an assessment of taxes to individuals. as follows: "Land and improvements. San Ignacio La Canoa, private land claim,"—may be construed as an assessment upon the equitable claim or "possessory claim" thereto, and not as an assessment upon the fee or land itself. Hale & N. G. & S. M. Co. v. Storey Co., 1 Nev. 106. Judgment affirmed.

HAWKINS, J., concurs. ROUSE, J., dissents.

In re DELINQUENT TAX LIST OF PIMA COUNTY.

Appeal of SANFORD.

(Supreme Court of Arizona. Jan. 17, 1894.)

Appeal from district court, Pima county; before Justice Richard E. Sloan.

Action by the territory of Arizona against the delinquent tax list of 1891. From a judgment for plaintiff, D. A. Sanford, objector, appeals. Affirmed.

Maxwell & Satterwhite, for appellant. Frank H. Hereford and Wm. M. Lovell, for appellee.

BAKER, C. J. This is an appeal from a judgment for delinquent taxes for the year 1891. The questions presented relate mainly to the manner of making the assessment and making up the delinquent list. We do not think any of them fatal to the taxes, and deem them irregularities only. This case is governed by the one decided at the present term,—In re Delinquent Tax List of Pima Co., ubi supra,—and the case of Atlantic & P. R. Co. v. Yavapai Co. (Ariz.) 21 Pac. 768. The judgment is affirmed.

HAWKINS, J., concurs. ROUSE, J., concurs in result.

BOARD OF COM'RS OF ALBANY COUNTY v. CHAPLIN et al.

(Supreme Court of Wyoming. July 25, 1894.)

LIABILITY OF COUNTY — PUBLICATION OF TAX NOTICE.

Rev. St. § 1791, empowers each county to make all contracts as to the property and concerns of the county. Section 1793 provides that the power of a county shall be exercised by a board of county commissioners. Section 1817 provides that when there is more than one paper in the county the commissioners shall designate which shall be the official paper. Section 3822 provides that "the treasurer shall give notice of sale of real property for delinquent taxes by publication thereof * * in a newspaper in his county." Held, that the treasurer was not obliged to publish such notice in the official paper, but could publish it in any other paper, and that the county was liable for its publication. Clark, J., dissenting.

Error to district court, Albany county; J. W. Blake, Judge.

Action by William E. Chaplin and another against the board of commissioners of Albany county to recover for publishing tax notices. Judgment for plaintiffs, and defendant brings error. Affirmed.

Nellis Corthell and W. H. Bramel, for plaintiff in error. Brown & Arnold, for defendants in error.

CONAWAY, J. On the 4th day of February, 1893, the treasurer of the county of Albany delivered to the defendants in error the "notice for the sale of lands and improvements for taxes," and requested its publication in the Laramie Weekly Republican, a newspaper published by defendants in error in the county of Albany. The notice was so published weekly for five successive weeks, the first publication being made on the 9th day of February, 1893. On the 3d day of January, 1893, plaintiff in error had declared the Laramie Boomerang to be the official paper of Albany county. This order was published in the Boomerang on the 5th day of the same month. On the 9th day of February, 1893, plaintiff in error "instructed" the county treasurer "to cause the tax sale and all printing of the county to be published in the Laramie Boomerang, the same having been designated as the official paper of the county, pursuant to law." The notice of the tax sale was not published in the Laramie Boomerang. Plaintiff in error refused to pay defendants in error for this publication. Defendants in error thereupon gave notice of appeal, brought their action in the district court, and recovered judgment. It is assigned as error that this judgment is contrary to law.

Counsel for plaintiff in error say in their brief: "The case presents a single proposition of law, to wit: When the board of county commissioners of a county, acting under section 1817, Rev. St. Wyo., have designated which shall be the official paper of the county, has the county treasurer the right to publish the tax sale notice in another paper, so as to charge the county with the ex-pense of such publication?" Taking the word "right," as equivalent to "power," this may be considered as a correct statement of the question. The power of the county treasurer in the premises is conferred by section 3822 of the Revised Statutes in these words: "The treasurer shall give notice of the sale of real property for delinquent taxes, by publication thereof, once a week for four weeks, in a newspaper in his county, if there be one, the first insertion of which notice shall be at least four weeks before the day of sale, and by a written notice posted on the door of the court house, or building commonly used therefor, for four weeks before the sale, and if there be no newspaper published in the county, the like notice shall be

given by posting one written notice in each of the five most public places in the county in which any land to be sold is situated, and one on the court house door, or door of the county building. Such notice shall contain a notification that all lands on which the taxes of * * * have not been paid will be sold and the time and place of such sale, with a list of the lands. Ten per cent upon the amount of taxes due shall be added when the lands are advertised." The county treasurer did just what this statute requires him to do. This is not questioned. But it is urged that the authority and duty of the county treasurer in the collection of delinquent taxes under this statute is materially restricted by other statutes upon other subjects. Counsel for plaintiff in error seem to rely upon the general power of the board of county commissioners to contract for the county, and to manage its business. This general power is derived from sections 1791, 1793, and 1801 of the Revised Statutes. Section 1791 provides that each organized county in the territory shall be a body corporate and politic, and as such be empowered, among other things, "to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate or administrative power." Section 1793 provides that "the powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." These sections are parts of an act of the legislature of 1869, approved on December 10th of that year. But section 3822 was enacted by the same legislature, and approved the same day, and it makes special provision that the county treasurer shall give notice of the sale of real property for delinquent taxes by publication thereo.", etc. So the legislature did not include the publication of this notice in the "acts in relation to the property and concerns of the county necessary to the exercise of its corporate or administrative powers," which acts were to be done by the county itself, as a body politic and corporate, through its board of commissioners. Or, if the power of the county conferred by section 1791 is sufficiently broad to include the publication of this notice in its scope, then the legislature, by section 3822, excepted it out of that general grant of power, which it is always competent for the legislature to do. The special provision made by section 3822 for the publication excepts it out of the general provisions of the statutes. This is a general rule of law, independent of statutory provisions; and it is also fully recognized by our statute. Rev. St. § 1801, subd. 5. Plaintiff in error must have acted upon one or the other of these views of the law, for it made no attempt to contract for the publication of the notice of tax sale, nor any direct attempt to cause it to be published in any particular paper. Plaintiff in error merely instructed the treasurer to publish the notice in the

Boomerang, recognizing that the publication should be made by the treasurer; and this instruction is without warrant of law. It seems clear that under these statutes alone the authority of the county treasurer to cause the notice of the sale of real property for delinquent taxes to be published in any newspaper published in his county is unquestionable. But on December 15, 1877, an act was approved entitled "An act concerning the publication of the county commissioners' proceedings and for other purposes." Neither in the title nor in the body of the act is any reference made to the county treasurer, or to any of his duties, nor to the collection of delinquent taxes, or the proceedings for that purpose. It would seem that none of these matters were in the contemplation of the legislature in passing the act. The act requires some publications to be made that were not formerly required, but says nothing of the publication of the notices of tax sale. It requires the territorial superintendent of public instruction to cause a notice of the meeting of the annual teachers' institute to be published in one paper in each county; the clerk of the district court to furnish a copy of the grand jury's report to a newspaper in the county for publication, and the board of county commissioners of the several counties to cause to be published in some newspaper published in their county the commissioners' proceedings, the delinquent tax list, and a notice of all general and special elections. The section requiring the publication of the delinquent tax list was repealed by the first state legislature. Section 6 of the act appears in the Revised "Sec. 1817. Statutes as follows: there is more than one paper published in any county the board of county commissioners shall designate which shall be the official paper of the county." There are two more sections in the act specifying prices and kind of type to be used in county and legal advertising. There is nowhere in our statutes any provision requiring any publication to be made in the newspaper designated as the official newspaper of a county. In order to sustain the contention of plaintiff in error the court must supply a provision requiring the county treasurer to publish the notice of the sale of real property for delinquent taxes in the official paper of his coun-We must go further, and make this judicial legislation mandatory, as though it read that he should make the publication in the official paper of the county, and not in any other. We must go further, in this case. and make it mandatory to the extent that, if the treasurer should make the publication in another paper, and not in the official paper, the county should not pay for such publication, though it accepted and retained the resulting benefit in the collection of its delinquent taxes with 10 per cent. added. This is utterly inequitable and unreasonable, and it is a result not to be sought by forced

construction. And if the courts may, in effect, supply such provisions, where shall they stop? An official paper of a county is a thing unknown to the common law. Our statutes do not define it, or prescribe what use shall be made of it; and this is a legislative, and not a judicial, function. What use, if any, the legislature intended should be made of the official paper of a county, is a profound secret. Such papers are of recent date. Their functions are not established either at common law or by custom. They are purely statutory. The general functions and duties of most county officers are quite well established by common law and custom. But it is not within the scope of judicial authority to assign these official functions and duties to the officers respectively. This is the business of the legislatures, and not of the courts. So far as we are aware, no court or judge or law writer has attempted to define what an official newspaper of a county may be. The American and English Cyclopedia of Law furnishes a definition, rather in the nature of a description, of an official newspaper. It reads: "Official newspapers are those designated by state or municipal legislative bodies, or agents empowered by them, in which the public acts, resolves, advertisements, and notices are required to be published." Then it would seem that an official newspaper of a county must be one in which the public acts, resolves, advertisements, and notices of the county are required to be published. No such requirements and no such paper is known to the laws of Wyoming. Requiring these things, or any of them, to be published in any paper, is a legislative act. It is not within the scope of judicial authority. Our legislature has not done this, and the courts have not authority to do it. And it must be observed that the public acts, resolves, advertisements, or notices of the county are not the acts, resolves, advertisements, or notices of the county treasurer, or of any other county official or officers, except the board of county commissioners. Rev. St. \$ 1793. The county is defined by statute to be a body corporate and politic, and its powers as such are exercised by its board of commissioners. The acts, resolves, advertisements, and notices of the treasurer, sheriff, clerk, or other county officer are clearly to be distinguished from the acts, resolves. advertisements, and notices of the county it-

But it is urged that it is necessary for the courts to specify and provide something to be published in the paper designated as the official paper of the county, in order to give effect to section 1817 of the Revised Statutes. As to this, it must be said that the board of county commissioners of Albany county have already given to that section its full effect. It simply provides that, where more than one paper is published in a county, the board shall designate which shall be the official

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paper of the county. The board of commissioners of Albany county have done so. and in so doing have fully exercised and exhausted their power in the matter. But if the courts should undertake to supply material for the paper designated as the official newspaper of the county, why extend the judicial dragnet so as to reach the acts, resolves, advertisements, or notices of the county treasurer, or other county officers, who are not authorized to exercise the powers of the county as a body politic and cor-Why not confine the supply of material to the acts, resolves, advertisements, and notices of the county itself? Indeed, why not confine it to the very publications which the act of 1877 requires the county commissioners to cause to be made? Among all these speculations, and many others, are we wandering without a guide when we attempt to supply material for the official newspaper of a county. It is not for county commissioners or courts to go beyond the statute. If the courts attempted to supply material for the official papers of the counties, in the absence of statutes specifying the material, they sail upon unknown seas. It is as if the legislature should create a new court unknown to the law, but should give it no jurisdiction, and this court should be called upon to define its jurisdiction; or as if any new office should be created without assigning to it any duty, and this court should be called upon to define its duties; or as if, the laws for the maintenance of jails remaining in force, all laws for imprisoning any one in them should be repealed. This court could not supply jurisdiction to the new court, duties for the new officers, or prisoners for the jails, the statute having failed to do so. Neither can this court supply material for the official paper of a county, the statute having failed to do so.

In addition to this, there is the overpowering equitable consideration that the county has accepted and is enjoying the benefit of the publication; that it took no legal measures to prevent it, but refuses to pay for it. It is not a question which of two newspapers shall be paid. The publication was made in but one. It is not a question whether the county shall pay twice. It is whether the county shall pay once. It would seem that section 3822 of the Revised Statutes is the law prescribing the duties of the county treasurer in giving notice of the sale of realty for delinquent taxes; that for the performance of these duties in the manner therein specified he, and he alone, is officially responsible. That section is not affected by other legislation, and in following its provisions the defendant in error has simply discharged his official duty. The judgment of the district court is affirmed.

GROESBECK, C. J., concurs. CLARK, J., dissents,

STATE ex rel. BOOMERANG CO. v. Mc-GIBBON, Treasurer.

(Supreme Court of Wyoming. July 25, 1894.)

Error to district court, Albany county; J. W. Blake, Judge.

Petition by the state of Wyoming, on the relation of the Boomerang Company, for a writ of mandamus to compel James McGibbon, as treasurer of Albany county, to publish notices of tax sales in the Laramie Boomerang, the official paper of the county. Writ denied, and petitioner brings error. Affirmed.

Nellis Corthell, for plaintiff in error. Brown & Arnold, for defendant in error.

CONAWAY, J. Relator petitioned the district court for the writ of mandamus to compel defendant in error to publish the notice of sale of real property for the delinquent taxes of 1893 in the Laramie Boomerang, a newspaper published in Albany county by relator, this newspaper having been previously designated by the board of commissioners of that county as the official newspaper of the county, and the board of commissioners having also made a written contract with relator for the publication of this notice in said paper. The district court denied the writ of mandamus, and this action of that court is assigned as error. In accordance with the views expressed in the case of Board of Com'rs v. Chaplin (decided at the present term), 37 Pac. 870, the majority of this court is of the opinion that the matter of the publication of the notice of sale of realty for delinquent taxes is under the control of the county treasurer, and is an official duty, for which he is officially responsible as for other duties in the collection of delinquent taxes, and that the attempted interference of the county commissioners is without warrant of law. The judgment of the district court is affirmed.

GROESBECK, C. J., concurs.

CLARK, J. (concurring specially). I concur in the judgment of affirmance for the reason that in my judgment the relator has mistaken its remedy. As a taxpayer of Albany county, it was, under the facts stated in its petition, entitled to an injunction restraining the publication of the tax-sale notice in a newspaper other than the one designated as the official paper of the county by the board of county commissioners. Sinclair v. Board Com'rs, 23 Minn. 404. But it was not entitled to a writ of mandamus, as prayed for in its petition, requiring the defendant, as treasurer of said county, "immediately to cause the said notice of sale to be published once a week for four weeks in the Laramie Boomerang, as the official paper of said county." This action was commenced in the court below on the 14th day of March, 1894. Under the statutes of this state (Rev. St. § 3809) taxes are made due and payable on the third Monday in September of each year, and by section 3812, Rev. St., it is made the duty of the county treasurer, as collector of taxes, to collect all taxes within one year after they become due and payable. By section 3810, Rev. St., it is provided that taxes not paid before the 30th day of November of each year become delinquent on that day; and section 3811, Rev. St., authorizes and empowers the collector to collect the taxes by distraint and sale of property after they become delinquent. Reading all these sections together, it seems clear that, while power is given the collector to enforce the collection of delinquent taxes by sale of property at any time after they become delinquent, he is still given one year from the third Monday in September in which to perform this duty, and, as the delinquent taxes concerned in this case were the taxes for the year 1803,

which became due and payable the third Monday of September, 1893, to wit, September 18, 1893, and delinquent on the 30th day of November, 1893, it is clear to my mind that at the time of the commencement of this action the law did not specially enjoin up the defendant, as a duty resulting from his office, the duty of then publishing the notice of tax sale in the Laramie Boomerang, or any other paper; and hence I think the judgment of the court below refusing the writ applied for was entirely correct. While I am clearly of the opinion that under our statute it is the duty of the county treasurer, as collector of taxes, to publish the notice of tax sale in the newspaper designated by the board of county commissioners as "the official paper of the county," and also that under the facts alleged the relator would, in a proper proceeding, have been entitled to a writ of injunction restraining the publication of the notice in any other than the paper so designated, it seems to be well settled that in such cases the courts will simply deny the writ asked for, and not go further, and issue an injunction, which is not asked for, upon the ground that the facts stated show that to be the proper remedy. Legg v. Mayor, etc., 42 Md. 203-225; Crawford v. Carson, 35 Ark. 565-583.

RAUB v. LOS ANGELES TERMINAL RY. CO. (No. 19,317.)

(Supreme Court of California. Aug. 1, 1894.)

CARRIERS—INJURY TO PASSENGER—QUESTION FOR JURY.

In an action for personal injuries, it appeared that defendant had a station in Los Angeles known as D., and that it was on defendant's time-table, and fnat trains all stopped there for passengers; that plaintiff was in the habit of traveling from a point outside of Los Angeles to this station, and that she had been told by the conductor that all trains stopped there, though the tickets sold were to Los Angeles, and did not mention the station; that on the day in question one of defendant's trains, on which plaintiff was traveling, stopped a short distance beyond the station, and while she was alighting the train started, without warning, and threw her to the ground. Held, that a nonsuit was improperly granted.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Sarah Raub against Los Angeles Terminal Railway Company to recover damages for personal injuries. Judgment was rendered for defendant, and plaintiff appeals. Reversed.

J. L. Murphey, for appellant. Burnett & Gibbon, for respondent.

HARRISON, J. The plaintiff took passage upon a car of the defendant to be transported from Glendale to De Camp station. De Camp station is a station upon the road of the defendant within the limits of the city of Los Angeles, and is printed upon the published time-table and list of its stations. The defendant does not issue tickets from Glendale for that station, but for all stations or stopping places within the limits of Los Angeles tickets are sold to Los Angeles. The trains of the defendant always stop at this station, and passengers are accustomed to get off and on at that place.

The plaintiff had frequently taken passage from Glendale, and got off and on at this station, and had been informed by the conductor that he always stopped there. On the morning of May 6, 1892, she purchased a ticket at Glendale for Los Angeles, and took passage on the defendant's road. When the train reached De Camp station, it stopped a short distance beyond the platform, and while the plaintiff was in the act of getting off, and had reached the lower step of the car, the train started without any warning, and she was thrown to the ground, and received injuries for which this action was brought. At the trial the court granted a nonsuit, and the plaintiff has appealed.

We think that the nonsuit should not have been granted. Whether the plaintiff was entitled to a recovery depended upon her ability to show that her injury resulted from negligence on the part of the defendant. The negligence of the defendant in the present case was not attempted to be shown by any single act or omission on its part, of which the import or character was in no respect uncertain, but it was an ultimate fact resulting from other facts and circumstances in the case, and was to be ascertained upon a consideration of these facts and circumstances viewed in connection with the respective relations of the parties. In such a case the issue of negligence is so much a question of fact, or is so dependent upon the determination of controverted facts, that its existence must be left to the jury. It is the duty of a railroad corporation to afford a reasonable time for passengers to alight from its cars at the station to which it has assumed to carry them, and if a passenger is injured while attempting to alight at such station, by reason of the sudden and unannounced starting of the train, the burden is thrown upon the company of showing that the injury was not the result of its own act or negligence. The defendant's permission to its passengers to get on and off its trains at De Camp station would counteract its claim that the plaintiff was negligent in attempting to get off at that station, and the fact that passage tickets which it sold for Los Angeles were recognized by it as equally available for all stations within the limits of Los Angeles must be considered as a permission, if not an invitation, to get off at any of those stations. The defendant cannot avail itself of the failure of the conductor to announce the station before reaching it as evidence of negligence on the part of the plaintiff. The evidence tended to show that it was a regular station upon the road, at which passengers were wont to get on and off every day, and, as the plaintiff had always been informed by the conductor that he always stopped there, she was authorized to consider the stopping of the train at the station as an invitation by the defendant to get off. We held in Carr v. Railroad Co., 98 Cal. 366, 33 Pac. 213, that it was not

negligence per se for a passenger to get off from a moving train that had carried him beyond the station called for by his ticket; and, under the principles of that case, it cannot be considered to have been negligence on the part of the plaintiff herein to attempt to get off from the train after it had stopped at a point beyond the platform. Under the principles of that case, the question of the plaintiff's negligence should have been sub-The judgment and ormitted to the jury. der denying a new trial are reversed.

GAROUTTE, J.; VAN We concur: FLEET, J.

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GRANNIS v. LORDON. (No. 19,378.) (Supreme Court of California. Aug. 1, 1894.) PRELIMINARY INJUNCTION-REVIEW ON APPEAL.

Granting or continuing preliminary injunctions is a matter within the discretion of the trial court, and will be disturbed only for abuse of discretion.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by R. W. Grannis against M. H. Lordon to quiet title and to enjoin defendant from interfering with plaintiff's possession. From a decree dissolving the injunction, plaintiff appeals. Affirmed.

H. H. Appel, for appellant. John T. Jones, for respondent.

BELCHER, C. This is an action to quiet the plaintiff's title to a certain 40-acre tract of land in Los Angeles county. Upon filing the complaint, a preliminary injunction was issued, restraining the defendant from interfering with the plaintiff's possession of the said land. The defendant answered, denying all the equities set up in the complaint, and alleging that the said land was unsurveyed government land, and that he had been in the actual possession of the same, and had cultivated a portion of it, for more than two years prior to the filing of the complaint. He afterwards moved for a dissolution of the injunction, and based the motion upon his verified answer, and nine affidavits. At the hearing, the plaintiff filed a counter affidavit made by himself, and the affidavits of several other parties who deposed that the reputation for truth and veracity of one of the affiants for the defendant was bad, and that they would not believe him under oath. After due consideration, the court below granted the defendant's motion, and dissolved the injunction, and from that order the plaintiff appeals.

The dissolution or continuance of a preliminary injunction is a matter largely within the discretion of the trial court, and, unless it appears from the records in the case that the discretion has been abused, the action of the court will not be disturbed on appeal. Rogers v. Tennant, 45 Cal. 184; Patterson v. Santa Cruz, 50 Cal. 344; Parrott v. Floyd, 54 Cal. 534; White v. Nunan, 60 Cal. 406. After carefully going over the record presented in this case, we fail to see that the court below in any way abused its discretion in making the order appealed from. We advise, therefore, that the order be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

LOS ANGELES CEMETERY ASS'N v. CITY OF LOS ANGELES. (No. 19,337.)

(Supreme Court of California. July 31, 1894.) CITY-GRADING STREETS-CULVERTS FOR SUR-PACE WATERS.

1. Where surface water, owing to the natural conformation of the country, has formed for itself a definite channel, in which it is accustomed to flow, a city is bound to build culvet s, sufficient to discharge the ordinary flow of water, in grading streets.

2. Where a city, under the superintendence of a competent engineer, builds a culvert sufficient to discharge the ordinary quantity of surface water flowing through a definite channel, it is not liable when, because of a flood caused by an unusually heavy rain, the culvert is unable to discharge the water, and lands are overflowed.

3. In an action against a city for damages by the construction of an embankment across an alleged water way, plaintiff asked the court to submit to the jury the question of whether the embankment caused the water which "nat-urally" flowed down the water way to overurally" flowed down the water way to over-flow, etc. The question was submitted with the substitution of the word "ordinarily" for "naturally." Held not error, as in a deluge all water naturally flows to a lower level, and

defendant was bound to provide for only such water as ordinarily flowed.

4. In such an action, evidence of freshets occurring after the action was brought is not admissible, as the necessity for providing for the discharge of water in the construction of the embankment could only be predicated on past experience.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by the Los Angeles Cemetery Association against the city of Los Angeles for damages for constructing an embankment over an alleged water way, whereby their lands were overflowed. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

A. J. Hudson and M. C. Hester, for appellant. C. McFarland, for respondent.

SEARLS, C. The plaintiff and appellant here is a corporation, and the owner of some 35 acres of land situate within the city of Los Angeles and devoted to the purposes of a cemetery. The action is brought against the city of Los Angeles, a municipal corporation, to recover damages alleged to have been auf

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fered by the construction of an embankment | across an alleged water course, near to and below the cemetery, in which a culvert was constructed of such small size, and at such an elevation above the natural surface, that it was insufficient and unable to carry off the water which in time of storms flows down said water course, whereby the water was backed up upon and over a portion of said cemetery grounds, depositing mud, débris, and filth thereon, and rendering such portion of said grounds unfit for cemetery purposes, and causing a deposit of mud, etc., washed from adjoining land, in an artificial lake owned by plaintiff in said cemetery grounds. The answer denied the material allegations of the complaint. Defendant had a general verdict in its favor. There were also submitted to the jury certain special issues, at the request of the respective parties, upon which they found. The appeal is from a final judgment in favor of defendant The following are the special issues sub mitted to the jury, with their answers there-

"Special issues by plaintiff: The jury are instructed to answer the following questions of fact: '(1) Is there and has there been, during the time plaintiff owned said land, a natural water course for the passage of storm water, extending across a portion of said land, through which a large amount of water naturally runs whenever a heavy fall of rain occurs? Ans. There is. (2) Did the defendant cause an embankment to be constructed across said water course immediately below the line of said land of plaintiff, tending to obstruct the natural flow of water therein, without providing a sufficient culvert or passage through the same for the storm water that ordinarily flows down said water course? Ans. It did not. (3) Did the said embankment across said water course, at any time within the two years immediately prior to the 21st day of November, 1891, cause the storm water that ordinarily flowed down said water course to overflow an artificial lake on plaintiff's said premises? Ans. It did not.' '(5) Did said embankment, within the time mentioned in the last question, cause the said waters to overflow any of the lots of land laid out in said grounds for cemetery purposes? Ans. It did.' '(7) If you answer that said waters were so caused to overflow any of said cemetery lots, then what damage, if any, did plaintiff sustain by reason of the overflow of said cemetery lots? Ans. No damage.'

"Special issues presented to the jury at the request of the defendant: '(1) Was the filling up of First street caused by the grading of the street by the city authorities? Answer. It was. (2) Was the water which was backed up on plaintiff's property water of a running stream, running in a channel between well-defined banks? Answer. No. (3) Was the water which was backed up upon plaintiff's property surface water caused by a

rain? Answer. Yes. (4) Was the culvert across First street of sufficient size to carry off the ordinary flow of surface water? Answer. Yes. (5) Was the city official who designed the culvert a person competent to judge of the size and dimensions which the same should be constructed? Answer. Yes. (6) Was the culvert constructed in a good workmanlike manner? Answer, Yes.' Was the overflow caused by an extraordinary or unusual rain? Answer. Yes. (9) Could plaintiffs have prevented their ground from being overflowed or damaged by filling up their property to a level with the grade of the street? Answer. No. (10) Did water flow across plaintiff's premises at any other time except in times of rains or floods? Answer. No.'

"[Indorsed:] Filed March 21, 1893."

A water course is defined to be "a running stream of water; a natural stream, including rivers, creeks, runs, and rivulets." Black, Law Dict. tit. "Water Course." There must be a stream usually flowing in a particular direction, though it need not flow continually. It may sometimes be dry. It must flow in a definite channel, having a bed, sides, or banks, and usually discharge itself into some other stream or body of water. It must be something more than a mere surface drainage over the entire face of a tract of land, occasioned by unusual freshets or other extraordinary causes. It does not include the water flowing in the hollows or ravines in land, which is the mere surface water from rain or melting snow, and is discharged through them from a higher to a lower level, but which at other times are destitute of water. Such hollows or ravines are not, in legal contemplation, water courses. Ang. Water Courses, pp. 8-7; Shields v. Arndt, 7 N. J. Eq. 234; Hoyt v. City of Hudson, 27 Wis. 656; Luther v. Winnisimet Co., 9 Cush. 171; Washb. Easem. §§ 209, 210. The complaint does not in terms aver that the stream in question is a natural water course. The allegation is that it is "a natural water course for the passage of storm water, extending across a portion of the said lot two, over which a large amount of water naturally runs whenever a heavy fall of rain occurs."

The first finding submitted to the jury by plaintiff, upon which they found in the affirmative, is in almost the exact language of this allegation. As will be seen, the subsequent findings establish the following propositions: (1) The water which backed upon plaintiff's land was not that of a running stream running in a channel between welldefined banks. (2) It was surface water caused by rain. (3) Water did not flow across plaintiff's premises except in times of rain or floods. These findings are supported by the evidence, and show that the alleged stream is not a water course. In order to constitute a water course, "it must have a source independent of that fitful and occasional character that results from the falling of rain or the melting of snow." Wood, Nuis. (3d Ed.) p. 415, citing Eulrich v. Richter, 37 Wis. 226; Barnes v. Sabron, 10 Nev. 217; Shields v. Arndt, supra, and many other cases, are to like effect. "And this would be the case," says Wood, at page 416, "so far as water arising from the melting of snow and the falling of rain is concerned, even though at such seasons it took a definite channel." Indeed, it may be said that in all regions of country having a broken surface, and subject to heavy rainfall, surface water does make for itself or assume definite channels in seeking, pursuant to the law of gravitation, a lower level. The law may be thus stated:

1. At common law, no natural easement or servitude existed, as between conterminous owners of land, in favor of the owner of the superior or higher land and against the owner of the lower tenement, for the flow of mere surface water, or such as falls or accumulates by rains or the melting of snow; and the proprietor of the inferior or lower tenement or estate might, at his option, lawfully obstruct or hinder the flow of such surface water thereon, and in so doing might turn it back or off of his own lands, and onto and over the lands of other proprietors, without liability by reason of such obstruction or diversion.

2. Under the civil law, the owner of the upper or dominant estate had a natural easement or servitude in the lower or servient estate to discharge all surface waters falling or accumulating on his higher land upon or over the lower lands of the servient owner as they were accustomed to flow in a state of nature; and such natural flow could not be interrupted or prevented by the lower proprietor or servient owner to the detriment or injury of the estate of the dominant proprietor. Washb. Easem. (4th Ed.) p. 573, and authorities cited; Hoyt v. City of Hudson, 27 Wis. 659; Wood, Nuis. (3d Ed.) § 385; Gillham v. Railroad Co., 95 Am. Dec. 627.

3. In a considerable number of the states of our Union, California included, the doctrine of the civil law has been substituted for the common-law rule, and it is held, as in Ogburn v. Connor, 46 Cal. 347, that where two parcels of land belonging to different owners are adjacent to each other, and one is lower than the other, and the surface water from the higher tract has been accustomed by a natural flow to pass off over the lower tract, the owner of such upper tract of land has an easement to have the water flow over the land below, and the lower tract is charged with a corresponding servitude. Gray v. McWilliams, 98 Cal. 157, 32 Pac. 976.

4. The doctrine of the civil law, in reference to a servitude in the lower tenement in favor of the upper or dominant tenement, for the flow of surface water, had no application to lots held in cities and towns, where changes and alterations in the surface were essential to the enjoyment of such lots; and

this rule has been very generally adopted in this country. Ogburn v. Connor, supra, at page 351, and cases there cited; Corcoran v. City of Benicia, 96 Cal. 1, 30 Pac. 798; Dill. Mun. Corp. §§ 1039-1044.

5. An apparent exception to the general rule that municipal corporations, in the grading and improvement of streets, are not bound to provide for the escape of mere surface water, has been hinted at in some of the cases, and established in others, in that class of cases where the surface water, owing to the conformation of the adjacent country, has formed for itself a definite channel in which it is accustomed to flow, in which cases it is held, as in Conniff v. San Francisco, 67 Cal. 45, 7 Pac. 41, that the municipal corporation had no right, pursuant to a general plan for the grading and improvement of Montgomery avenue, to erect a solid embankment, without a culvert or water way, so as to obstruct the flow of a water course which flowed in a well-defined channel, although it served only to discharge the drainage or surface water from the adjacent hills, and, according to the statement of the case, did not come within the common-law definition of a water course. Hoyt v. City of Hudson, at pages 663 and 664; Dill. Mun. Corp. subd. 3, §§ 1051 and 1051a; Lehn v. City and County of San Francisco, 66 Cal. 76, 4 Pac. 965; Corcoran v. City of Benicia, 96 Cal. 1, 30 Pac. 798; Gibbs v. Williams, 25 Kan. 214; Palmer v. Waddell, 22 Kan. 852.

In the case last quoted, it was said: "The rule that the owner of a tract of land may obstruct the flow of surface water across his land appears to and does have an exception, which is where surface water having no definite source is supplied by the falling rains and melting snow from a hilly region or high bluffs, and, owing to the natural formation of the surface of the ground, is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite or natural channel, and escapes through such channel regularly during the spring months of every year, and in seasons of heavy rains; and such has always been the case, so long as the memory of man runs;" and it was held that such channel so far possessed the attributes of a water course that the owner of lands through which such water course ran could not lawfully turn the flow upon adjacent lands to their injury and damage.

The facts of this case bring it within the exception stated. It therefore remains to inquire whether, conceding the case within the exception noted, the municipal corporation is liable. It appears that as early as 1885 the board of public works recommended to the city council that the superintendent of streets be instructed to lay a cement pipe 30 inches in diameter across Alviso (now First) street at the point in question. The matter was for some cause referred back to the board and city engineer, and on the 10th day of November, 1885, they reported to the council.

recommending a brick culvert, which report was adopted, and a culvert of brick, say 70 feet in length, and 30 inches in diameter, was in 1886 or 1887 constructed across the street, and a fill of, say, 5 feet was made over the culvert to bring the street up to grade. The evidence tends to show that the work was well done, according to a regular plan, and in accordance with lawful municipal authority in the necessary improvement of the street, and that the city engineer was a competent per-The culvert served to carry all the water coming down the ravine until about Christmas, 1889, when, in consequence of an unusually heavy rain, a flood came, and the culvert, although in good order, proved insufficient to carry the water, and it was backed up over a portion of the cemetery grounds, with the result as complained of, or found by the jury. But three witnesses testified as to the character of the flood. One said: "The flood of 1889 was an extraordinary flood. * * * The brick culvert through First street was not large enough to let the water of heavy rains through." Another tes-"I remember the rains about Christmas of 1889. They were unusually heavy. So much water came down the ravine where I live that we thought there had been a cloudburst. I have lived in Los Angeles over thirty years, and never saw as heavy a rain as the storm about Christmas, 1889." third testified he had lived in Los Angeles many years, had noticed the rainfall, and never saw such a rainfall in as short a space of time as that of Christmas, 1889.

Assuming, as was said by Chief Justice Gray, in Hill v. Boston, 122 Mass. 344: "If a city or town negligently constructs or maintains the bridges or culverts in a highway across a navigable river or a natural water course so as to cause the water to flow back upon and injure the land of another, it is liable to an action of tort to the same extent that any corporation or individual would be liable for doing similar acts."—and still we fail to see, in the face of the findings here, how the defendant can be held liable. A municipal corporation is not liable at common law for the consequential damages of authorized acts. Dill. Mun. Corp. § 989. The findings of the jury negative the charge of negligence in the construction or maintenance of the sewer built by the defendant. Where, as in the present case, the overflow was occasioned by an extraordinary flood, which could not have been reasonably foreseen, it does not at common law give a right of action, and does not constitute a damage to private property for a public use, within the purview of section 14 of article 1 of our state constitution. If the immediate, direct, and necessary effect of the embankment had been to damage plaintiff's property, it might with propriety be said the liability of the defendant would arise, under the constitution; but for an unforeseen calamity, beyond the ken of human foresight, without the pale of previous experience, there is no such liability.

The court did not err in striking out from the issue presented to the jury (No. 3), at the request of plaintiff, the word "naturally," and inserting the word "ordinarily." No doubt the water, in case of a deluge, "naturally" flows to a lower level through fixed channels or otherwise, but it was the water which "ordinarily" flowed in times of storm for which defendant was bound to provide. Had the evidence showed that the water way in question had previously been subject to great freshets, it would have been the duty of defendant to provide adequate means to meet them; but there was no such showing. Mayor, etc., of City of New York v. Bailey, 2 Denio, 433.

The evidence offered to show that an equally great freshet had occurred in the same place in 1891, and after this action was brought, was inadmissible. The experience which dictated to defendant the necessary size of the culvert to accomplish the object in view was that of the past, at the date of its construction, and the possibilities or probabilities of the future could reasonably be predicated only upon the past, subject, of course, to such future changes as experience might dictate to be reasonably necessary.

The fourth instruction given by the court at the request of defendant, to the effect that if the injury to plaintiff was caused by the grading of a public street to its established grade, and that plaintiff could grade its property so as to conform to the established grade, whereby the surface water would flow off. and not stand upon, its property, the plaintiff could not recover, was erroneous, as applied to the facts of the case. Such is no doubt the rule as to ordinary surface water, but it has no application to a case where surface water assumes the form of a regular stream or water course, and comes within the exception hereinbefore stated. The error, however, caused no injury to the plaintiff, as the jury found specially that plaintiff could not have prevented its ground from overflow by filling it to grade.

The objections to other instructions need not be specially noticed, for the reason that if erroneous, and if a general verdict had been found in favor of plaintiff, it would have been controlled by the facts specially found by the jury, upon which facts it would have been the duty of the court to have entered a judgment in favor of the defendant, notwithstanding such general verdict in favor of plaintiff. Code Civ. Proc. § 625. The judgment appealed from should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed. 103 Cal. 425

PEOPLE v. ROSS. (No. 21,054.) (Supreme Court of California. July 26, 1894.)

SUBORNATION OF PERJURY - INDICTMENT - WAIV-ER OF DEFECTS.

1. An indictment for subornation of perjury, which alleges that defendant, in the contest of which anges that defending in the convex of a will in which I. was contestant, procured one N. to falsely swear that she, said N., was the wife of the testator, and does not allege that I. and N. were the same person, is insufficient, as it does not show that the testimony was mate-

2. Such an indictment, which alleges that the witness defendant procured did "falsely" and "contrary to her oath" swear, etc., is insuffi-

and "contrary to her oath" swear, etc., is insum-cient, as it should allege that the witness did so "willfully" and "knowingly."

3. Such an indictment must not only al-lege that defendant knew that the testimony of the witness would be false, but also that the witness knew her testimony was false also.

4. Defects of substance in an indictment are not cured by a failure to demur.

Department 1. Appeal from superior court, San Joaquin county; Joseph H. Budd, Judge. A. J. Ross was convicted of subornation of perjury, and appeals. Reversed.

A. V. Scanlan, Nicol & Orr, and Swinnerton & Rutherford, for appellant. Atty. Gen. Hart, for the People.

VAN FLEET, J. The information in this case does not state a public offense. The crime with which it seeks to charge defendant is subornation of perjury, and it is well established that to constitute this offense all the essential elements constituting the crime of perjury must be stated. 2 Bish. Cr. Proc. §§ 1020, 1021; U. S. v. Wilcox, 4 Blatchf. 393, Fed. Cas. No. 16,693; Coyne v. People, 124 Ill. 17, 14 N. E. 668; U. S. v. Evans, 2 West Coast Rep. 611; U. S. v. Dennee, 3 Woods, 39, Fed. Cas. No. 14,947. In several essentials the information falls short of this requirement. It is lengthy, and somewhat confused, and contains much redundant matter and many immaterial recitals and repetitions, but the substance of the charge is that in a contest in the superior court of San Joaquin county of the will of one Joseph McKenney, deceased, in which Isabella McKenney was contestant, the defendant, Ross, in the interest of said contestant, and for the purpose and end of having her declared and adjudged the widow of said deceased, and entitled to share in his estate, procured one Ida Maud Nicholaus to appear as a witness at the trial, and falsely swear on behalf of said contestant, Isabella McKenney, that she, said Ida Maud Nicholaus, was married to the said Joseph McKenney in his lifetime, and was then at the time of said trial the widow of said deceased. From this it sufficiently appears, perhaps, that the issue upon which the false testimony was given was material; but it is nowhere alleged that the evidence of the suborned witness was material to that issue, nor is that fact made manifest from the evidence alleged to have been given. In one form or the other this fact must be made to appear,—either by direct averment, or by stating evidence given by the witness, which the court can judicially say was material. People v. Brilliant, 58 Cal. 218; 2 Bish. Cr. Proc. § 921; Com. v. Pollard, 12 Metc. (Mass.) 225; Hoch v. People, 3 Mich. 534. How can we say that the false testimony here alleged was necessarily material? It is alleged that defendant procured the witness to falsely testify that she, the witness, was the widow of the deceased, Mc-Kenney, for the purpose of establishing the fact that Isabella McKenney was the widow of the deceased. This testimony would not have any necessary tendency to prove that fact, and, if not, it would not be necessarily material. If the fact had been alleged, which appears elsewhere in the record, that Ida Maud Nicholaus and Isabella McKenney, the contestant, were one and the same person, the materiality of the evidence might be apparent on the face of the pleading; but, there being no such averment, that fact cannot be regarded in testing the sufficiency of the information.

After alleging the administration of the oath to the witness, the information then proceeds, "and said Ida Maud Nicholaus did then and there," etc., "falsely and contrary to her oath, depose, swear, testify, state," etc. (reciting the alleged false testimony). language does not charge perjury. It is not the equivalent of saying that the witness willfully or knowingly did the act. To say that a witness testified falsely does not necessarily imply that he did it willfully or knowingly, and saying that he so testifled contrary to his oath is merely to say in another form that he testified falsely. The language of the statute is, "willfully, and contrary to such oath, states as true any material matter which he knows to be false." Pen. Code, \$ 118. This, or language of like import, must be employed to satisfy the statute. U.S. v. Evans, supra; People v. Parsons, 6 Cal. 487.

It is further alleged that at the time of said procurement "he, the said A. J. Ross, well knew that the said Ida Maud Nicholaus would not give her evidence according to the truth, and that the said evidence so to be given by her was false, feigned, and altogether fictitious;" but it is not alleged that at the time of said procurement or the giving of said false testimony the defendant knew that the witness was aware of the falsity of her evidence. This averment was essential. The rule and its reason are well stated in U.S. v. Evans, above cited, where it is said: "To sustain an indictment for procuring a person to commit perjury it is obviously necessary that perjury has in fact been committed. It cannot be committed unless the person taking the oath not only swears to what was false, but does so willfully and knowingly. He who procures another to commit perjury must not only know that the statements to be sworn to are false, but also that the person who is to swear to them knew them to be false; for, unless the witness has that knowledge, the intent to swear falsely is wanting, and he commits no perjury. It is, therefore, essential that the indictment should aver not only that the statements made by the witness were false in fact, and that he knew them to be false, but also that the party procuring him to make those statements knew that they would be intentionally and willfully false on the part of the witness, and thus the crime of perjury would be committed by him." The several defects in the information above pointed out, being matters of substance, and not of form, were not waived by failure to demur (Pen. Code, §§ 1004, 1012, 1185), and, being fatal to its sufficiency, the defendant's motion in arrest of judgment should have been granted. Judgment and order reversed, and cause remanded, with directions to the lower court to arrest its judgment.

We concur: HARRISON, J.; GAROUTTE, J.

4 Cal. Unrep. 724

GRAY v. LONG et al. (No. 18,237.)

(Supreme Court of California. July 26, 1894.)
SALE—VALIDITY—ACTION FOR PRIOR.

1. Plaintiff sold to defendant certain trees. It was provided that, on account of a disease with which the trees were affected, a certain percentage should be excepted. Defendant selected the trees, and they were shipped to him in another county. On account of an ordinance of the county to which the trees were shipped, adopted after the sale, defendant was prohibited from planting therein any of the trees which were diseased, and returned the same to plaintiff, who refused to receive them. Held, that plaintiff could recover for all of the trees selected by and shipped to defendant.

and shipped to defendant.

2. The fact that an ordinance of a county to which trees are shipped prohibits the planting of any diseased trees therein does not invalidate a sale of trees as to any diseased once included therein, where the sale was made in another county before the ordinance was adopted

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by H. P. Gray against one Long and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Frank H. Short, for appellants. George E. Church, for respondent.

HARRISON, J. The plaintift and the appellants made the following agreement at Armona, in the county of Tulare, December 2, 1891: "This is to certify that I have this day sold Long Bros. & Co., of Fresno county, California, all my budded one year old nursery stock, amounting in all to about 25,000 trees, except what I wish for my own use, to the amount of 5,000 trees, more or less, assorted, and 10 per cent. deduction for black knot; trees to be f. o. b. cars at Armona, Cal., at the rate per tree of 14 cents, amounting to about \$2,494.80, on which I acknowledge the receipt of \$500; stock to be delivered by the 1st day of January, 1892. Long Bros. &

Co. agree to be on the ground to examine and accept the stock. H. P. Gray. Long Bros. & Co." On or about the 1st of January, 1892, the defendants went to the nursery of the plaintiff at Armona, and examined the stock of trees covered by the agreement, and, after such examination, accepted 15,058 of them, and the same were thereupon shipped by railroad to the defendants at Fresno. After the trees had been received at Fresno, one of the members of the county board of horticultural commissioners of Fresno county examined them, and, finding that many of them were affected with black knot, notified the defendants that the trees could not be planted in that county, and, under his di rections, the defendants shipped back to the plaintiff, 6,153 of the trees. The plaintiff refused to recognize the right of the defend ants to return the trees, and the defendants refused to pay for them; whereupon this action was brought to recover the amount due for all the trees that had been accepted by the defendants at the price named in the contract. Judgment was rendered in favor of the plaintiff, and the defendants have appealed.

By the terms of the contract between the parties, the plaintiff sold to the defendants his entire stock of one year old trees, reserving the right to retain about 5,000 for his own use. It was understood by them that some of the trees would be affected with black knot, and they thereupon agreed that a deduction on that account to the extent of 10 per cent. of the entire amount should be made from the stock which was sold. The contract does not provide that the trees which might be affected with black knot shall not be embraced in the sale, but that all of the trees are sold save such as were reserved for the plaintiff's use, and that a deduction of 10 per cent. shall be made on that account, whether the number of trees so affected should amount to that quantity or not. The price per tree was fixed upon this estimate, and whether the affected trees exceeded or fell below the estimate cannot change the amount which the defendants agreed to pay. This is not only the natural construction to be given to the words of the agreement, but it is the construction which the defendants themselves placed upon it when they accepted the trees. Instead of objecting to all the trees that were affected with the black knot. after those so affected had been sorted out from the others, they culled these over, and took their choice of them, in order that only 10 per cent. of the stock might remain, and accepted them in fulfillment of the contract. After the contract had been made, the county of Fresno passed an ordinance, to take effect December 80, 1891, requiring an inspection of all fruit trees that should thereafter be brought into the county, and directing the destruction or removal from the county of such as should be found to be affected with any live scale or insect posts injurious thereto. It was under the provisions of this ordinance that the defendants were directed to return to the plaintiff a portion of the trees, as above stated; and it is now urged by them that they are not liable, therefore, for such trees, upon the ground that the contract for their purchase was in violation of this ordinance. contract, however, was not made within the county of Fresno. By its terms the sale was made, and the trees were to be delivered in pursuance thereof, within the county of Tulare; and it is not contended that there was any ordinance of the county of Tulare by which such contract would be affected. Moreover, at the time the contract was entered into, the ordinance had not been adopted in the county of Fresno. For these reasons, this contention of the appellants cannot be maintained. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

(103 Cal. 381)

QUINT v. McMULLIN. (No. 18,834.) (Supreme Court of California. July 20, 1894.) QUINTING TITLE—DECREE.

In an action to quiet title, defendant denied any interest in the land, except that he held a tax certificate thereon. The court rendered judgment that plaintiff was the owner in fee, and that defendant had no interest in the land; that there was no adverse claim of defendant's to be determined in the action; and that any right which defendant might have acquired could not be determined in the action; and that defendant was entitled to costs; and that the rights of defendant under the certificate were not to be affected by the judgment. Held, that plaintiff was entitled to a judgment either refusing or granting his prayer to quiet title.

Department 1. Appeal from superior court, Glen county; Seth Millington, Judge.

Action by Fred Quint against John McMulin to quiet title. Judgment was rendered that plaintiff was owner in fee, and that defendant had no adverse claim which could be determined in the action, and awarded costs to defendant, and plaintiff appeals. Reversed.

Maxwell, Dorsey & Soto and R. A. Long, for appellant. R. Percy Wright, for respondent.

daroutte, J. This is an action to quiet title, and the complaint is in the usual form. The answer denies that the defendant claims, or has at any time claimed, to have or to own any estate or interest in the land, and avers that he claims nothing as to said land, except as disclosed by the following facts: He thereupon alleges that said lands are situated within the boundaries of Central irrigation district, and that said district is a public corporation. He further alleges in detail all the steps and proceedings leading up

to and including the sale of the aforesaid land to the defendant, and the issuance of a certificate of sale thereon to him on account of an assessment, levy of a tax, and delinquent sale thereunder, for the benefit and at the instance of the aforesaid irrigation district. The case went to trial upon these pleadings, and the court made findings of fact to the effect that defendant had never claimed any interest in the said real estate, and that he now claims nothing respecting said land except that on the 16th day of October, 1893, he purchased said land at a sale of the same for delinquent assessments, etc. As conclusions of law, the court found the plaintiff to be the owner in fee; that the defendant had no estate or interest therein: that there is no adverse claim of defendant to be determined in this action; that any rights which the defendant may have acquired through his purchase at the said delinquent sale cannot be determined in this action; and that defendant is entitled to his costs. The judgment followed the conclusions of law, and plaintiff now appeals from that portion of the judgment awarding costs against him, and also from that portion reading as follows: "That any right which said defendant, John McMullin, may have acquired by or through the purchase of said pieces or parcels of land at a sale thereof on October 16, 1893, by the collector of Central irrigation district, for delinquent assessments on said pieces or parcels of land, levied on the same for the purposes of said district. is not in any manner affected or determined hereby."

The course followed by the learned judge of the trial court in the rendition of this form of judgment is certainly somewhat out of the ordinary, and the defendant's answer is likewise a pleading of peculiar construction. Respondent now insists that plaintiff is appealing from a judgment rendered in his own favor, and that the portion of the judgment from which the appeal is taken is pure surplusage, and entirely harmless. If such be the fact, we are at a loss to understand why defendant set up these things in his answer, for, believing as he does, he should have appeared, disclaimed any interest, and allowed judgment to be taken against him quieting plaintiff's title. But we think his contention is unsound. The only object of plaintiff's cause of action was to quiet his title against this delinquent assessment sale: and to quiet his title, expressly reserving as an open question the status of the property as affected by such sale, was a fruitless victory. Theoretically the judgment was in his favor; practically it decided nothing, for, after the judgment of the trial court, he knew no more as to the status of his realty than he did before he brought this action. Under the foregoing circumstances, we think, the plaintiff has a proper appeal before the court. The right of appeal is remedial in its character, and in doubtful cases the right should always be

granted. Plaintiff was entitled to a judgment, without any reservations or exceptions, either refusing or granting his prayer to quiet title. The eservation in this judgment is the portion of which he makes complaint, and he is necessarily injured and aggrieved thereby, for in effect it renders the judgment in his favor a nullity. We think the principle leclared in People v. Mining Co., 66 Cal. 155, e Pac. 1150, justifies this appeal. Inasmuch as the trial court expressly refrained from considering the merits of the special defense set up by the defendant, the merits of that defense are not before us for review; but It was the duty of the trial court to pass upon that question and all other questions raised by the pleadings, and to thereupon grant or deny plaintiff's demand that his title be quieted. For the foregoing reasons, it is ordered that the judgment be reversed, and the cause remanded.

We concur: VAN FLEET, J.; HARRI-SON, J.

4 Cal. Unrep. 723

MACOMBER v. CONRADT et al. (No. 13-259.)

(Supreme Court of California. July 20, 1894.)
BOND ON APPEAL.

Where a surety on an appeal bond disposes of his property pending the appeal, the court cannot require appellant to file a new bond, in the absence of a statute authorizing it to do so.

In bank. Appeal from superior court, city and county of San Francisco; Wm. T. Wallace, Judge.

Appeal by Julius Conradt and another from a judgment in favor of C. A. Macomber. Motion by respondent to require appellants to file a new appeal bond. Motion denied.

John H. Durst, for appellants. Henley & Swift, Henley & McSherry, and S. V. Costello, for respondent.

PER CURIAM. Respondent recovered a money judgment against appellants in the superior court, and the case is pending before this court upon appeal. He now makes a motion to this court wherein he prays that an order be made requiring the appelants to forthwith file a new bond upon appeal herein, with sufficient sureties for the payment of the judgment in the above-entitled action, and that such sureties qualbefore a justice of this honorable ify court, and in default of the filing of such bond, or in default of the sureties upon such bond to justify as may be ordered by this court, that this appeal be dismissed. In support of this motion, he filed an affidavit, the material portion of which is to the ef-"ect that Maria Conradt, one of the sureties upon the aforesald bond and undertaking, had disposed of all her property since she qualified thereon, and that, in consequence thereof, said security had become wholly insufficient and inadequate as a guaranty for the payment of the judgment, together with costs, appealed from. No statute has been called to our attention which authorizes us in making the order here prayed for, and we know of none. For this reason, the motion and application is denied.

103 Cal. 387

CHILDS v. LANTERMAN et al. (No. 19,333.)

(Supreme Court of California. July 20, 1894.)
JUDGMENT AGAINST INFANT—WAIVER OF OBJECTIONS.

1. A judgment rendered against an infant without the appointment of a guardian ad litem is voidable only; and if, after the judgment is entered and the infant becomes of age, he makes no objection thereto, he waives his right to make such objection.

such objection.

2. An infant was one of the defendants in an action to quiet title, and no guardian ad litem for him was appointed. Judgment was entered in favor of plaintiff, and, after the infant came of age, he joined with the other defendants in a motion for a new trial, and filed his own affidavit in support thereof. The motion was denied, and, on appeal, the order denying it was affirmed. He then moved to set aside the judgment, on the ground of his infancy. Held that, by joining in the motion and appeal, he submitted himself to the jurisdiction of the court, and was bound by the judgment.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Barbara Childs against F. D. Lanterman, Roy S. Lanterman, and others to quiet title. Defendant Roy S. Lanterman made a motion to set aside judgment entered in favor of plaintiff, on the ground that he was an infant pending suit. Motion denied, and defendant Roy S. Lanterman appeals. Affirmed.

Edwin A. Meserve and M. W. Conklin, for appellant. Will D. Gould, for respondents.

HARRISON, J. The plaintiff brought this action to quiet her title to certain lands in the county of Los Angeles, making Roy S. Lanterman, the appellant herein, one of the defendants. An answer to the complaint was filed by Stephen M. White, as attorney for all the defendants, including the appellant, and upon a trial of the cause judgment was rendered in favor of the plaintiff. When the action was commenced, and at the time of the trial, the appellant was an infant, and did not attain his majority until July 20, 1890. No order of court was made appointing a guardian ad litem for him, and the record does not contain any evidence that the summons in the action was served upon him, although it is not alleged or shown that service was not in fact made upon him. The findings of the court were filed July 12, 1890, but the judgment, although signed as of that date, was not filed or entered until July 21st. Thereafter a motion for a new trial was

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made in behalf of the defendants, Roy S. Lanterman, the appellant herein, making and filing an affidavit in support thereof, and, this motion being denied, the defendants appealed from the order and also from the judgment. Upon this appeal the order and judgment affirmed. 95 Cal. 369, 30 Pac. 553. were After the remittitur had been filed in the court below, viz. March 9, 1893, a motion was made on behalf of Roy S. Lanterman to set aside the findings and judgment against him, and to strike out the answer filed on his behalf, upon the ground of his infancy at the time the answer was filed and trial had, and the want of any authority in the attorney to appear in his behalf. This motion was denied, and the present appeal is from that or-

Although it is provided in section 372, Code Civ. Proc., that, when an infant is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court, yet a judgment rendered against an infant in which no guardian ad litem has been appointed is not for that reason void (1 Black, Judgm. § 195; Emeric v. Alvarado, 64 Cal. 600, 2 Pac. 418; Kemp v. Cook, 18 Md. 130); and a judgment rendered against him in an action in which he has appeared by an attorney will be upheld as fully as though he had appeared in person (Barber v. Graves, 18 Vt. 290; Marshall v. Fisher, 1 Jones [N. C.] 111; Townsend v. Cox, 45 Mo. 401). The appearance by an attorney in his behalf will be assumed as authorized by him, so far as the direction and consent of the infant can give authority (18 Mo. 138); and if, after reaching majority, he would repudiate such appearance, it is incumbent upon him, when he takes any action with reference to the judgment, to indicate his repudiation, rather than do some act which assumes that the authority was given. If he then treats the judgment as having been regularly entered, and makes no objection upon the ground of irregularity or want of jurisdiction, he waives his right thereafter to make such objection. As the judgment is not void, but is merely voidable at his instance, it may be affirmed by him; and, as in the case of any other obligation that he has assumed during infancy which is susceptible of ratification, it will be considered as affirmed by him if he takes any action in reference thereto after he comes of age, which is consistent only with assuming .ts validity.

At the time the judgment herein was entered, the appellant had reached his majority. He could then have sought relief therefrom upon the ground of irregularity in the service of process upon him, or want of authority in the attorney to appear for him, by reason of his infancy, instead of which, however, he moved the court for a new trial, and failing therein appealed to this court, not only from this order, but also from the judgment; and it was not until after the affirmance of that judgment (nearly three years subsequent to

rendered was brought to the attention of the court. Nor did he upon the hearing of the present motion make any personal showing or affidavit in his own behalf, the motion having been presented through an attorney without any affidavit by himself in support thereof indicative of his desire to avoid the judgment. It is also to be observed that the appellant does not deny that the appearance of the attorney in his behalf was with his full knowledge and concurrence. We are of the opinion that by these acts the appellant submitted himself to the jurisdiction of the court, and is bound by its judgment. It is well settled that if a defendant, though not served with process, takes such a step in an action, or seeks such relief at the hands of the court as is consistent only with the hypothesis that the court has jurisdiction of the cause and of his person, he thereby submits himself to the jurisdiction of the court, and is bound by its action as fully as if he had been regularly served with process. Coad v. Coad, 41 Wis. 26; Wood v. Young, 38 Iowa, 102; Orowell v. Galloway, 3 Neb. 215; Foote v. Richmond, 42 Cal. 443. "A party cannot come into court, challenge its proceedings on account of irregularities, and, after being overruled, be heard to say that he never was a party in court or bound by those proceedings. If he was not in fact a party, and had not been properly served, he can have the proceedings set aside on the ground of want of jurisdiction, but he must challenge the proceedings on that single ground. This is familiar doctrine." Burdette v. Corgan, 26 Kan. 104. The motion of the appellant herein for a new trial, and his appeal from the judgment, upon the ground that the court erred in rendering such judgment, assumed that the court had jurisdiction of him, and was a waiver of his right to question that fact. Fee v. Iron Co., 13 Ohio St. 563; Mason v. Alexander, 44 Ohio St. 329, 7 N. E. 485. The order is affirmed.

its entry) that his infancy at the time it was

We concur: GAROUTTE, J.; VAN FLEET, J.

KUMLER v. BOARD OF SUP'RS OF SAN BERNARDINO COUNTY. (No. 19,463.)

BERNARDINO COUNTY. (No. 19,463.)
(Supreme Court of California. July 21, 1894.)
CONSTITUTIONAL LAW — CLASSIFICATION OF COUNTIES—LOCAL ACTS—CENSUS OF COUNTY.

1. Laws 1893, § 235, which provides that when the population of any county shall have been reduced, by the creation of any new county from the territory thereof, below the class first assumed under the act, the supervisors of such county shall designate by order the class to which such county has been reduced, is not in conflict with Const. art. 11. § 5, which provides that the legislature, by general laws, shall classify the counties by population, as it does not delegate to supervisors the power to classify counties, but simply authorizes them to determine how many people are left within the old county after the new county is created.

2. The section is not in conflict with Const.

art. 4, § 25, which provides that the legislature shall not pass local or special laws affecting the fees or salary of any officer, as it applies to every county of the state whose class is changed.

3. In arriving at the population, the board need not be controlled by the federal census of 1890, but may determine the same from such

3. In arriving at the population, the board need not be controlled by the federal census of 1890, but may determine the same from such source as it sees fit, as the matter to be determined is the population at the time of creation of the new county, and not that at the time of census.

Department 1. Certiorari to superior court, San Bernardino county; George E. Otis, Judge.

Abe N. Kumler applied for a writ of certiorari to annul an order of the board of supervisors of San Bernardino county reclassifying that county. A demurrer to the petition was interposed and sustained, and the petitioner appeals. Affirmed.

Henry W. Nisbet, for appellant. Frank F. Oster and Curtis, Oster & Curtis, for respondent.

PER CURIAM. The appellant made application to the court below for a writ of certiorari to annul an order of the board of supervisors of San Bernardino county reclassifying that county, and reading as fol-lows: "Whereas, by reason of the creation and organization of the county of Riverside, the population of the county of San Bernardino has been reduced below the class and rank of a county of the tenth class; and, whereas, the population of said county of San Bernardino is now over twenty-three thousand and under twenty-four thousand,now, therefore, it is hereby ordered, by the board of supervisors of said county of San Bernardino, that said county of San Bernardino has been reduced to and is a county of the twelfth class, and that the population of said county is now over twenty-three thousand, and under twenty-four thousand." The order was made on January 12, 1894. and it is alleged, upon information and belief, that the population of the territory then within the boundaries of the said county was, in the year 1890, according to the federal census of that year, not greater than 19,000; that the board, in making the order, disregarded and ignored the federal census, and the population shown thereby, and attempted to classify the county on the basis of the population it contained when the order was made; and that in doing so the board exceeded its jurisdiction, and acted without any authority of law. A demurrer to the petition was interposed and sustained, and, the petitioner declining to amend, judgment was entered dismissing the proceeding, from which he appeals.

The constitution (section 5, art. 11) provides: "The legislature by general and uniform laws * * * shall regulate the compensation of all such officers in proportion to their duties, and for this purpose may classify the counties by population. * * *" And the county government act (St. 1893, p. 346) has the following provisions:

"Sec. 10. The several counties of this state are hereby classified, and shall hereafter remain classified, according to their population, as ascertained by the federal census taken in the year eighteen hundred and ninety."

"Sec. 162. For the purpose of regulating the compensation of all officers hereinbefore provided for, the several counties of this state are hereby classified, and shall hereafter remain classified, according to their population, as ascertained by the federal census taken in the year eighteen hundred and ninety as follows. * * **

"Sec. 235. When the population of any existing county shall have been reduced, by reason of the creation of any new county from the territory thereof, below the class and rank first assumed hereunder, it shall be the duty of the board of supervisors of such county to designate by order the class to which such county has been reduced by reason thereof, and such county shall thereafter encer the list of such class."

1. It is claimed for appellant that the section last quoted, under which the order in question was made, is in conflict with the section of the constitution quoted, because it delegates to the board of supervisors power which, under the constitution, can be exercised only by the legislature. There is nothing in this point. The section does not delegate, or attempt to delegate, to boards of supervisors, the power to classify counties, but simply, in effect, authorizes and directs them to find out and determine how many people are left within the boundaries of the old county after the new county is created. This is merely finding a fact, and is not a legislative act; and, when found, the classification follows as declared by the statute. Nor is the said section of the statute in conflict with section 25 of article 4 of the constitution, which provides that "the legislature shall not pass local or special laws * affecting the fees or salary of any officer." It is not a local or special law, for the reason that it applies to every existing county of the state whose class is changed by having a portion of its territory detached and put into a new county.

2. It is further claimed that the board of supervisors, in determining what was the population of the county, was limited to an inquiry as to what was the population within its present boundaries in 1890, as shown by the federal census of that year. It will be observed that sections 10 and 162 make the census of 1890 controlling as to the classification of the several counties of the state as they then existed, but in section 235 no reference is made to that census, and the action of the board is not expressly, nor, as we think, impliedly, limited thereby. The failure to so limit the action of the board must be treated as intentional, and it doubtless arose from the fact that, in the cases provided for by the section, it would often

be difficult, if not impossible, to determine what was the census population in 1890, since the new boundary lines may not follow any township or precinct lines then established. See De Camp v. Eveland, 19 Barb. 81. The same section provides for the classification of all newly-created counties, and in Sanders v. Sehorn, 98 Cal. 227, 33 Pac. 58, a question as to the classification of the newlycreated county of Glenn was involved. In deciding the case, it was said: "According to the county government act, the population of the various counties, for the purposes of the act, is to be determined from the last preceding federal census; but in the case of newly-organized counties, especially when the boundary lines of the new county do not follow township lines, such census would not furnish the data contemplated, and for that reason the legislature, for the purpose of classification, would well declare the population of Glenn county to be over 6,500, and under 6,600, receiving its information for such declaration from whatever source it saw fit." And, again: "Glenn county came into existence as a county, fully organized and equipped, May 11, 1891. At that time, under the terms of the act creating it, as we have construed that act, it had a population of more than 6,500, and less than 6,600, and, consequently, came within the limits prescribed for countles of the forty-first class." This language plainly implies that the population of the county at the time of its creation, and not its population as ascertained by the federal census, was a proper basis upon which to determine its classification. The same rule must be held equally applicable to an old county under like conditions. It follows that the judgment appealed from must be affirmed; and it is so ordered.

103 Cal. 897

In re JONES. (No. 21,149.)

(Supreme Court of California. July 23, 1894.)

CONTEMPT—WHAT CONSTITUTES.

Where the statute does not authorize a change of venue for bins, prejudice, or partiality of a judge, it is a contempt of court to present an affidavit for a change of venue on that ground.

In bank.

Petition for habeas corpus by David Jones. Writ denied.

John L. Boone, for petitioner. J. A. Cooper, for respondent.

McFARLAND, J. The petitioner, David Jones, asks to be discharged from the custody of the sheriff of the county of Mendocino, and alleges that he is illegally imprisoned under an order of the superior court of said county adjudging him guilty of contempt of court. It appears that upon the hearing in said court of a motion made by petitioner, Jones, for the change of the place of trial of

a certain civil action, to which said petitioner was a party, the petitioner filed, presented, and read a certain affidavit, and that he was adjudged guilty of contempt for and on account of certain language and statements used and made in said affidavit. It is not necessary to set forth the affidavit here, but it is quite clear that it is of such a character that the act of petitioner in presenting it was disorderly, contemptuous, and insolent behavior towards the judge of said court while holding the same, and, as such, was a contempt of said court. If the matter of the affidavit had been material and relevant and pertinent to any issue before the court, a different question might be presented. If bias, prejudice, or partiality on the part of a judge was a ground for a change of venue, a party seeking such change upon such ground would have the right to state in an affidavit the facts upon which he based his charges of such bias; but the only ground for a change of venue which has any relation to the judge of a court of record is found in subdivision 4, § 397, Code Civ. Proc., which is as follows: "When from any cause the judge is disqualified from acting,"-and the only disqualifications of a judge are those stated in section 170, by which he is disqualified when he is a party to or interested in the action pending, when he is related to either party or his attorney within the third degree, and when he has been an attorney for either party in the action. "These are the only causes which work a disqualification of a judicial officer." McCauley v. Weller, 12 Cal. Bias or prejudice on the part of a judge is not a ground for a change of the place of trial. McCauley v. Weller, supra; People v. Williams, 24 Cal. 31; People v. Mahoney, 18 Cal. 186; People v. Shuler, 28 Cal. 495; Hibberd v. Smith, 39 Cal. 148. The affidavit, therefore, was entirely irrelevant and immaterial, and there is no excuse for or justification of its presentation. The petitioner is remanded to the custody of the said sheriff, and the proceeding is dismissed.

We concur: BEATTY, C. J.; GAROUTTE, J; VAN FLEET, J.

103 Cal. 404

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BATES v. TOWER et al. (No. 19.323.) (Supreme Court of California. July 24, 1894.)

Supreme Court of California. July 24, 1894

Proof of Agency—Reception of Evidence.

It is not error to admit evidence of what an agent did and said while acting for his principal, before proof of his authority, where it is admitted on condition that his authority will be subsequently proved.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by F. E. Bates against Virginia A. Tower and another for damages for breach of contract. Judgment for plaintiff, and Virginia A. Tower appeals. Affirmed.

Shaw & Holland, for appellant. Clarence L. Barber, for respondent.

VANCLIEF. C. The defendants are husband and wife, and this action was brought against them to recover damages for a breach of an alleged written agreement, of which the following is a copy: "This agreement, made and entered into this 27th day of September, 1888, by and between Virginia A. Tower and Frank E. Bates, both of the city and county of San Diego, state of California. Whereas, the said Virginia A. Tower agrees to deliver all the said personal stock and property sold by the said F. E. Bates to F. C. Tower on the 25th day of July, 1888, in consideration of a certain promissory note of \$2,500 now in the possession of said F. E. Bates,-the said stock and personal property to be delivered to the said F. E. Bates upon the surrender of the said promissory note,the said F. E. Bates agrees to deliver to the said Virginia A. Tower a certain promissory note for \$2,500, made and executed by F. C. Tower, payable to the order of F. S. Jones, and indorsed by F. S. Jones, the same being in possession of and owned by the said F. E. Bates. Witness our hand this 27th day of September. Virginia A. Tower. F. E. Bates." The court found the execution of the agreement, and a breach thereof by the defendant Virginia A. Tower, substantially as alleged. and gave judgment against her for damages in the sum of \$3,100, from which judgment, and from an order denying her motion for a new trial, she alone appeals.

The appellant contends that in several specified particulars the findings of fact by the court are not justified by the evidence. But the sufficiency of the evidence in each of the other specified particulars depends upon its sufficiency to justify the finding that, in dealings leading up to the execution of the agreement above set out, Frank C. Tower was authorized to act as the agent of his wife, Virginia; and that this finding is amply justified is so obvious that it would be a waste of space and time to make a detailed statement of the direct and circumstantial evidence tending to prove it.

It is further insisted that the court erred in admitting evidence of what the husband did and said, while ostensibly transacting certain business for appellant, before proof of his authority to transact such business. When objected to on this ground, the court admitted the evidence pro tempore, and upon the express condition that it should not be considered unless the authority of the husband should thereafter be proved; and, as above stated, the husband's authority was afterwards satisfactorily proved. The general rule is that the mere order in which evidence may be introduced is very much in the discretion of the court, and will not be interfered with by the appellate court except in cases of abuse of such discretion. Crosett v. Whelan, 44 Cal. 200; People v. Shainwold, 51 Cal. 468. But appellant contends that subdivision 5 of section 1870 of the Code of Civil Procedure is an exception to this general rule, and permits the acts and declarations of agents to be proved only "after proof of agency." Conceding this to be as contended, though I have found no case in which the Code has been so construed, yet it is clear that appellant was not injured by the alleged error. I think the order and judgment should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order and judgment appealed from should be affirmed.

CONRAD et al. v. ARROWHEAD HOT SPRINGS HOTEL CO. et al. (No. 19,376.)

(Supreme Court of California. July 24, 1894.)
POLLUTION OF WATER COURSE.

A nonriparian appropriator of the water of a stream has no right of action for the pollution of the water of said stream by a prior riparian owner, who, in the interest of sanitary conditions, discharges sewage into said stream.

Commissioners' decision. Department 2. Appeal from superior court San Bernardino county; George E. Otis, Judge.

Action by F. W. Conrad and others against the Arrowhead Hot Springs Hotel Company and others to abate a private nuisance, and for a perpetual injunction against its continuance. Judgment for plaintiffs, and defendants appeal. Reversed.

H. C. Rolfe and Chapman & Hendrick, for appellants. Rowell & Rowell, for respondents.

SEARLS, C. This action was brought to abate a private nuisance, and for a perpetual injunction against its continuance. Plaintiffs had judgment granting them a perpetual injunction, and for nominal damages. Defendants moved for a new trial, which was refused. Two separate appeals are taken,-one from the final judgment, and the other from the order denying a new trial. Both appeals are elucidated by the same transcript. There is also a separate appeal in the same case-No. 19,193 (37 Pac. 388)from an order refusing to dissolve a preliminary injunction issued in the cause, the result of which depends upon the decision of the other appeals, which will be considered together.

Plaintiffs are the owners of certain tracts of nonriparian lands in the county of San Bernardino, forming a part of a larger tract known as the "Orange Grove Tract." Defendant the Arrowhead Hot Springs Hotel Company (a corporation) is, and it and its grantors have been since 1882, the owners in fee of a tract of land situate upon both sides of

and including the bed and banks of East Twin creek, an unnavigable stream, which lands the court finds "are, and from time immemorial have been, riparian to said creek and its flow." There are upon the lands of said defendant a large number of springs.hot, cold, and medicinal,—and also what are designated "mud baths." Defendant has upon said land, and for ten years prior to the commencement of this action had, an hotel thereon, as a resort for invalids, with bath houses, mud baths, etc., all of which are used for the entertainment of guests and treatment of invalids generally, whether suffering from rheumatic troubles, diseases of the blood, or During all of said 10 years, other diseases. defendant has discharged from its kitchen, bath houses, hotel, privies, etc., the drainage and accumulation of filth and refuse matter therein accumulating, by means of sewers, pipes, etc., into certain ravines contiguous thereto, from and through which ravines it flows by natural channels into and down East Twin creek and pollutes the waters thereof so that they are unfit for drinking, or for any domestic purpose. Plaintiffs have a ditch which diverts the water from East Twin creek about one-half mile below where defendant discharges its sewerage into the stream, by which, and a pipe line connected therewith, they conduct the water of said creek to their land for domestic purposes, and for irrigating their land. Plaintiffs aver, and the court finds, that they have been using, and had a right for one year before the commencement of this action to use, the water of the creek for irrigation and domestic purposes upon their land. There is no allegation or finding as to the date of construction of the ditch through which plaintiffs take the water from the creek, or the source or origin or character of their right thereto. The evidence shows that in 1887 John Hancock conveyed the land now owned by plaintiffs to certain grantees, and in his deed of conveyance included "all the right, title, and interest of John Hancock, the party of the first part therein, in and to the waters of East Twin creek and its tributaries, acquired either by appropriation or otherwise, and then owned or held by him as riparian proprietor of the lands aforesaid, or otherwise; also, ditches held by him, or to which he was entitled, and a right of way for said ditches and such pipe line as the grantees desired to construct over a tract of land held by the grantor on East Twin creek as a timber culture claim," reserving to the grantor five inches of water to be taken from the ditch, which it recites was constructed in 1885, and is, say, one mile in length. Plaintiffs have constructed a pipe line from the end of the ditch to their several lots of land for a distance of, say, one-half mile. The ditch through which the water furnished to plainriffs' land is diverted and conducted thereto taps East Twin creek, so far as can be determined from the record, about one mile above

the Orange Grove tract of land. Defendants, in their answer, plead a prescriptive right to the use of East Twin creek as a place of deposit for the refuse from their hotel, baths, etc. There was evidence to show that until a period within four years next before July 19, 1892, the land of plaintiffs was wholly unoccupied and vacant, not settled upon or improved, and that the pipe system had not, at the last-mentioned date, been in use more than two years. The court found against the prescriptive right of the defendants.

Judging from the record, and the conclusion is drawn that the rights of the plaintiffs are those of the ordinary locators who divert water for a useful purpose from a stream in this state. In other words, they are appropriators. The defendants, as riparian proprietors upon the same stream, have a right thereto prior in time, and, as to the acts complained of, are prior in user, to any rights of plaintiffs. As against other riparian owners below them on the same stream, defendants have no right to pollute the water to the material injury of the former. Locators and appropriators of the waters of a stream have no rights antecedent to the date of their location. If others have, prior to their location, decreased the quantity of the water flowing in such stream, or caused a deterioration of its quality, the subsequent locator cannot complain. Familiar examples of the application of this rule, as between appropriators, are of frequent occurrence in the mining regions of this state, where water is diverted from flowing streams, upon which mining has destroyed the purity of the water. In such cases the appropriator takes the water with his eyes open,—takes it as he finds it, and as to him the like continued deterioration is damnum absque injuria. Drainage and the discharge of the sewerage from the hotel of the defendants is shown by the evidence to have been necessary, in the interest of sanitary conditions, and to have been for 10 years accomplished by the only feasible plan, of discharging into the ravines contiguous to and upon their own premises. This was not, nor was its continuance as against subsequent locators and appropriators of the water of the stream, a wrongful act. "Every person who constructs a drain or cesspool upon his own premises, and uses it for his own purposes, is bound to keep the filth collected there from becoming a nuisance to his neighbors." Wood, Nuis. (3d Ed.) § 114. This doctrine is well settled, and applies as between parties who have equal rights to the enjoyment of their own property, and to be protected from injury arising from the undue use by their neighbors of their property. In the case of appropriators of running water, there is no mutuality of right. Their titles or rights are not coextensive as to time, or equal in rank. The second appropriator simply takes the residuum in quantity, subject to the changed conditions existing by reason of the prior user. If the water of East Twin creek was so contaminated by the acts of defendants as to be detrimental to the public, or to individuals living upon the stream below, a very different question would be presented. But as an individual who should collect the refuse from a slaughter yard, and haul it to his home, would not be heard to complain that the odor constituted a nuisance, so the locators of this ditch, who have diverted the water of the stream to their homes, a mile or more away, cannot be heard to complain that the water continues after their diversion, as it was before, noxious to the senses, and unfit for domestic use.

Two results follow from the position assumed:

1. The finding of the court that "the defendant corporation has not any right, and at the time this action was commenced had not acquired any right, to drain or sewer its said premises by conducting its sewerage matter accumulating on said premises, from any source or cause, into East Twin creek," is contrary to the evidence.

2. The conclusions of law and judgment are unsupported by the findings.

The judgment and the order denying a new trial, and each of them, should be reversed, and a new trial had.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial, and each of them, are reversed, and a new trial ordered.

CONRAD et al. v. ARROWHEAD HOT SPRINGS HOTEL CO. et al. (No. 19,193.)

(Supreme Court of California. July 24, 1894.)
Department 2. Appeal from superior court,
San Bernardino county; George E. Otis, Judge.
Action by F. W. Conrad and others against
the Arrowhead Hot Springs Hotel Company and
others to abate a private nuisance, and for a
perpetual injunction against its continuance.
Judgment for plaintiffs, and defendants appeal.
Reversed.

H. C. Rolfe and Chapman & Hendrick, for appellants. Rowell & Rowell, for respondents.

PER CURIAM. The order appealed from in the above-entitled cause is reversed for the reasons given in No. 19.376 (37 Pac. 386), in the same cause, and between the same parties.

103 Cal. 409

PEOPLE v. SHERMAN. (No. 21,097.)
(Supreme Court of California. July 25, 1894.)
HOMICIDE—SELF-DEFENSE.

Deceased was a large man, and quarrelsome when drinking. Under the influence of liquor, he assaulted defendant with a knife, threatening to "cut him in two." Defendant declined to fight, and begged him to desist. A friend took deceased away about 30 feet, but he broke away, drew a pistol, and pointed it at defendant. Defendant fired several shots. Deceased fired none, but kept advancing towards defendant while he was shooting. *Hcki*, that the killing was done in self-defense.

Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

- J. D. Sherman was convicted of manslaughter, and appeals. Reversed.
- J. A. Cooper and J. G. White, for appellant. Atty. Gen. Hart and J. H. Seawell, for the People.

PER CURIAM. Upon information accusing the defendant of the crime of murder, he was convicted of manslaughter, and sentenced to the state's prison for the term of six years. He appeals from the judgment and from an order denying his motion for a new trial. It was proved, and not disputed, that about 1 o'clock a. m., on June 20, 1893. in Mendocino county, he shot and killed G. W. Parker, but it is claimed for appellant that the killing was done in self-defense, and therefore was justifiable; and so it appears from the evidence without conflict. It appears that six witnesses were present at the time of the killing. Of these two were called by the people, and four by the defendant; and all concur in testifying substantially that, without provocation, the deceased assaulted defendant with a small clasp knife, threatening "to cut him in two;" that defendant tried to pacify him, declined to fight him, and begged him to desist; that Scott Howard (a mutual friend) interfered, took the knife from deceased, and led him to another part of the room, about 30 feet from defendant, and endeavored to pacify him; but soon after he broke away from Howard, drew his pistol, and started towards defendant, pointing his pistol in the same direction. Mr. Howard, the first witness for the prosecution, described this scene as follows: "I took Parker away and went down to the billiard table at the south end of the room. I was watching deceased. Defendant could see myself and deceased. * * * I was standing talking to deceased, trying to get him to go home, and he just jumped up all at once, and jerked out a gun, and ran around the billiard table. The bar of the saloon is near the north end of the saloon. The billiard table is near the south end, some thirty feet from the bar. I was at the end of the billiard table, where I had taken deceased, and was trying to pacify him. He just jumped out as quick as he could. I ran to catch him, and did catch hold of his sleeve, but I slipped, and he got past. I says, 'Look out up there. boys!' Just about that time I jumped back by the billiard table, and the first shot was fired. At that time the deceased was going around the billiard table towards the north end of the room, and towards where the defendant was. I could not tell the distance he was from defendant, but fifteen to twenty feet, or may be thirty feet. Parker had a silver-mounted pistol in his hand. I do not

know how many shots were fired. I was facing the bar when the first shot was fired. I jumped through the partition, and ran out of the building. * * * Defendant fired the first shot. * * * He put his arm over Dick Simmons' shoulder, and fired. Sherman was standing by the bar, and near the door, within five feet of the entrance. A screen was in front of the door. The crowd was there by the bar. Simmons was in front of defendant, and between him and Parker. Defendant advanced towards deceased, and fired over Simmons' shoulder." Gus Henry, on the part of the people, after describing the knife scene, said: "Finally Scott Howard took Parker away. * * Defendant, myself, and Simmons were standing near the bar, and not far from the door. I thought the matter was all over. The defendant was standing by the bar talking. All at once Scott was running; Scott Howard hollered: 'Look out, boys!' Deceased was coming towards the defendant. He said, 'God damn you-' Just got that far when defendant shot. He had his pistol up, and was advancing towards defendant. As he advanced he said, 'God damn you, I'll-' I heard no more, and the shots were fired, After I saw Parker start towards the defendant with his pistol, his hand was moving up and down. I could not tell whether he was trying to work the trigger or not. There were four or five shots fired as fast as the pistol could be fired; looked like a stream of fire. After the first shot, the deceased kept advancing towards the defendant till he got to the beer chest. He kept coming, and the shots kept going. As the deceased advanced towards defendant, defendant could not have shot without putting his hand out towards Simmons. Just as the shooting commenced, Simmons dropped on the floor. Deceased was drinking at the time. He was always wanting to scuffle and monkey around when he was drinking. He slapped a man's face before that evening. He wants to fight when he is drinking. He could walk as straight as anybody although drinking. Deceased was a very strong man; more than an average man for strength. He always prided himself on being the best man in the saloon when drinking." pistol of deceased was found fully charged, and it was admitted that he did not fire a shot, though some of the witnesses thought he did at the time of the shooting. The testimony for the prosecution of the witness Schoonover, as to an asserted declaration made by defendant previous to the homicide, contradicted, as it was, by two other witnesses, was of too little importance to affect the result above reached. It is not necessary therefore to determine whether the objection to Schoonover's testimony should have been sustained, or whether the offered evidence of defendant's witness Hughes upon the same subject was properly excluded. Judgment and order reversed.

(108 Cal. 407)

PEOPLE ▼. CHAVEZ. (No. 21,065.)
(Supreme Court of California. July 25, 1894.)
RAPR—Instructions.

Where the evidence is convincing that a rape has been committed, it is proper to refuse to charge that defendant might be convicted of an assault with intent to rape.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Jose Antonio Chavez was convicted of rape, and appeals. Affirmed.

Daney & Wright, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The defendant was convicted of the crime of rape upon Rebecca A. Foss, a widow, aged 57 years. He appeals from the judgment and from an order denying his motion for a new trial.

The court refused to give the jury an instruction, at the request of the defendant, to the effect that under the information charging the crime of rape the defendant might be convicted of an assault with intent to commit rape. The ruling of the court in this regard rested upon its opinion that there was no evidence to support an instruction of that character. This is the only assignment of error demanding any special consideration, and the proper disposition of it depends upon the nature of the evidence placed before the jury at the trial, for while it may be conceded that an assault with intent to commit rape, as well as a simple assault, are included in the offense here charged, still, if there was no evidence tending to reduce the offense from that charged in the information. the court was entirely justified in refusing to give the instruction requested. This principle has been repeatedly recognized and approved by this court in the trial of defendants charged with murder, where instructions have been asked and refused pertaining to the offense of manslaughter. People v. Turley, 50 Cal. 469; People v. Lee Gam, 69 Cal. 552, 11 Pac. 183.

Upon an examination of the record we think the court committed no error in refusing the instruction asked. The evidence upon the part of the prosecution is direct, clear. and convincing that the crime of rape was committed. The outrageous and brutal manner in which the defendant's victim was maltreated and assaulted need not be detailed. Upon the part of the defense there is no evidence contradictory to that introduced by the prosecution, save the testimony of certain medical gentlemen who were placed upon the witness stand as experts upon the probability of an actual penetration having occurred. We think the evidence wholly insufficient to create any conflict in this particular. The slightest penetration is sufficient to constitute the offense, and the expert evidence cannot be said to cast a doubt upon the fact of such penetration having occurred. The judgment and order are affirmed.

(103 Cal. 412)

Ex parte AHERN. (No. 21,153.) (Supreme Court of California. July 25, 1894.)

CRIMINAL LAW-FORM OF JUDGMENT.

A judgment in a criminal case need not run in the name of the people of the state, under Const. art. 6, 20, which provides that the style of all process shall be "The People of the State of California," and that all prosecutions shall be conducted in their name and by their authority, as "process," as used in that section, does not include such a judgment.

In bank.

Michael Ahern made application for a writ of habeas corpus. Motion denied.

Alfred Clarke, for petitioner.

BEATTY, C. J. This is a petition for a writ of habeas corpus, in which the petitioner, Michael Ahern, alleges that he is imprisoned by W. E. Hale, in the state prison at San Quentin, "in violation of the constitution and laws of the United States and of this state, in this: that the paper of commitment on which he is held is not due process of law, because it does not run in the name of the people." It does not appear from the allegations of the petition whether W. E. Hale is or is not warden of the state prison, whether the petitioner has or has not been convicted of a felony punishable by imprisonment in the state prison, or whether or not Mr. Hule has a duly-certified copy of a judgment showing such conviction. But, putting the best construction we can on a petition which, for looseness and vagueness, is rather worse than usual in the productions of its class, we assume that the petitioner is in the custody of the warden of the state prison, who detains him under the authority of a duly-certified copy of a judgment convicting him of an offense punishable by imprisonment in the state prison, and that the supposed illegality of his imprisonment arises out of the fact that the warden has no commitment running in the name of the people of the state. The idea of counsel for petitioner seems to be that no one can be lawfully held a prisoner in the state prison without "process," in the sense in which that word is used in section 20 of article 6 of the constitution, which provides that "the style of all process shall be 'The People of the State of California,' and all prosecutions shall be conducted in their name and by their authority." This provision was contained in the old constitution, and has been in force for more than 30 years, but has never been supposed to apply to the warrant by which prisoners are held after conviction. By the old criminal practice act (section 463), it was provided, as it is now provided by the Code (Pen. Code, \$ 1213), that a certified copy of the judgment, as entered in the minutes, should be the only warrant or authority necessary to justify or require its execution. Under these provisions of the old constitution and the statute,-exactly the same as the existing provisions of the new constitution and the Code,—the question arose in several cases as to the sufficiency of process, in the form which counsel deems so essential; and it was uniformly held to be insufficient, and a certified copy of the judgment declared to be the proper, essential form of warrant. In re Ring, 28 Oal. 248; Ex parte Dobson, 31 Cal. 498; Ex parte Gibson, Id. 620; In re Brown, 32 Cal. 49. It is true the constitutional provision invoked by counsel was not discussed in those decisions, for the reason, probably, that it was not deemed applicable. But, whatever may have been the reason it was not referred to, we cannot suppose that the framers of the new constitution were ignorant of the point decided, or that they intended the provision readopted from the old constitution to have an operation theretofore uniformly denied to it. In short, we consider that the question which counsel raises, besides being trivial and technical to the last degree, has been settled by the decisions of this court, and the universal practice under those decisions for the last 30 years.

We concur: VAN FLEET, J.; McFAR-LAND, J.; FITZGERALD, J.; HARRISON, J.; GAROUTTE, J.

(4 Cal. Unrep. 726)

LUCE et al. v. SAN DIEGO LAND & TOWN CO. (No. 19,375.)

(Supreme Court of California, July 26, 1894.)

MASTER AND SERVANT—CONTRACT OF EMPLOYMENT.

Plaintiffs, by letter, offered their services to defendant for \$5,000 a year. Defendant replied that plaintiffs' "names shall appear on the pay roll at the rate of \$416.66 per month." Later, defendant's president inquired if the salary was satisfactory, and plaintiffs replied that they did not know whether they were employed by the month or year; that they would accept no employment except by the year, to which defendant's president consented. Held, that the employment was by the year, at \$5,000, payable monthly.

Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by M. A. Luce and another against the San Diego Land & Town Company for a balance due on salary. Judgment for plaintiffs, and defendant appeals. Affirmed.

Works & Works, for appellant. E. W. Britt, for respondents.

GAROUTTE, J. This is an action to recover the sum of \$4,166.68, alleged to be the balance due on the annual salary of respondents as the attorneys of appellant, from the 1st day of March, 1892, up to and including the last day of February, 1893, with interest thereon. On the 1st day of March, 1889, the law firm of Luce, McDonald & Torrance, which up to that time had been acting as the attorneys of appellant, at a salary of \$83.33 per month, wrote a letter to the land and town company, appellant, explaining the con-

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dition of the corporation's legal affairs at that time, and asserting that for some time thereafter an extra amount of labor would devolve upon them as attorneys of the company, by reason of important cases then pending. Among other matters this letter contained the following statement: "We have, as before stated, given the matter very careful consideration, and have concluded that, until these important matters in litigation are disposed of, an annual salary of \$5,000 is the least sum for which we ought to take upon ourselves the labor and responsibilities incident to continuing our position as general attorneys for the company in this county and state." In due course, the plaintiffs, in reply, received from the president of the defendant a letter containing, among other matters, the following: "In view of the coming litigation, and the trial of the causes which are enumerated by Judge McDonald, I think that their statement that their present compensation is not adequate is correct. * * * I note, however, the suggestion of our attorneys that they shall receive on and after March 1st compensation at the rate of \$5,000 per annum; the same, I suppose, to be payable monthly, in conformity to the precedent hitherto. I think this is carrying our legal expenses rather beyond the limit which we ought to incur, especially as many of the cases enumerated may never come to trial. This is not a matter, however, in which we can afford to resort to dickering. You may therefore inform Messrs. Luce, McDonald & Torrance that on and after March 1st, until a change shall be made, their names shall appear on the pay roll at the rate of \$416.66 per month." Within a few days subsequent to the receipt by plaintiffs of this letter, William G. Dickinson, general manager of the defendant (appellant), held a conversation with plaintiffs, wherein the following occurred, as appears by the uncontradicted testimony of the plaintiff McDonald: "Col. Dickinson inquired if we had received his letter in regard to our proposition for salary. I informed him that we had. He then inquired if the proposition was satisfactory. Judge Torrance replied that we didn't know exactly whether it was satisfactory or not. Col. Dickinson replied by inquiring wherein it was unsatisfactory. Judge Torrance replied that 'we had made a proposition for a yearly employment, and that the letter which we had received in reply stated that we would be placed on the pay roll at the rate of \$416.66 per month,' and that he (Torrance) 'didn't know whether the company meant by that to employ us by the month, or whether it had accepted our proposition for a yearly employment.' Col. Dickinson replied: 'Why, Judge McDonald knows how that is. He has been on the pay roll before, and knows that we always pay by the month. In his case he has been receiving a thousand dollars a year. divided into twelve monthly payments of \$83.33 a month.' Judge Torrence replied:

Well, there might possibly be some contention with regard to the terms of the employment, and we would under no circumstances accept an employment other than by the year.' Col. Dickinson replied: 'We would no more employ you by the month than you would be employed by it; for we are no more anxious to have you leave us in the lurch at some time in the future, or jump your salary on us,-raise it again,-than you are willing that we should have the right of discharging you at any day that we saw fit.' Judge Torrance said: 'Well, we are perfectly willing, as stated in our letter, to be employed by the year at five thousand dollars per annum. But,' he said, 'I think the proper construction of the two letters means a yearly employment, and nothing else, but I didn't want to leave it in any doubt. I want it distinctly understood that the employment is by the year.' Col. Dickinson replied: 'If it is a monthly payment that you object to, we will pay you by the year, if you want to be paid that way instead of by the month. But,' he said, 'we have always been paying by the month, and I supposed that would be more agreeable to you.' Both Judge Torrance and myself stated that it would be more agreeable to us to be paid in monthly installments than any other way. Col. Dickinson then made some reference to the business of the National City and Otay Railway Company. We told him that that was perfectly satisfactory: that we would attend to the business of the National City and Otay Railway Company, and all other matters or interests in which the land and town company was interested, for the salary of five thousand dollars a year. said it was all right." The case was tried by the court, without a jury, and the only contention at the trial was as to whether plaintiffs' employment by the defendant was by the year, at an annual salary of \$5,000, payable in monthly installments of \$416.66; and the findings were in favor of such contention. This appeal is prosecuted from the judgment and order denying a motion for a new trial, and it is now insisted that the evidence is insufficient to support these findings of fact made by the court.

There is no substantial conflict in the evidence, and we have quoted the important and controlling portions of it. Viewing this evidence from any standpoint, we think the case before us a very simple one. Plaintiffs, by letter, offered their services to defendant at an annual salary of \$5,000. If defendant's letter be construed as constituting an acceptance of their offer, then plaintiffs' cause of action is complete, and the judgment is right. If defendant's letter does not constitute an acceptance of plaintiffs' offer, then the two letters, taken together, do not constitute a binding contract, and no recovery to any extent could be based thereon. It cannot be successfully urged that defendant's letter was an offer to hire plaintiffs by the month, and that plaintiffs accepted such offer

and rendered services thereunder; for they at all times asserted to Dickinson, the general manager of defendant, that they would not enter into a contract of that character. Again, if the letters did not constitute a contract of hiring by the year, they constituted no contract at all, for certainly the minds of the contracting parties never met upon any other terms and conditions. If these letters constituted no contract, then a contract for employment by the year was entered into with plaintiffs by the general manager of the That the general defendant corporation. manager of a corporation doing business in California (its president and directors living in a distant state) had the right to make the contract here sued upon is too clear to demand the citation of authority. It is thus apparent from any aspect of the case that plaintiffs are entitled to recover. For the foregoing reasons, it is ordered that the judgment and order be affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

103 Cal. 350

In re BLYTHE'S ESTATE.

WELSH et al. v. PENNIE. (No. 15,284.)
(Supreme Court of California. June 29, 1894.)

APPEAL—PARTIES IN INTEREST.

Where, on the death of an administrator, his successor sues his executor for an accounting, and such successor is directed to pay the executor money, to be paid an attorney for services, this does not make the attorney a party to the suit so as to authorize him to prosecute, in his own name, an appeal from an order refusing to allow interest on such sum.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Application by Elizabeth G. Welsh, executrix of the will of Philip A. Roach, and John A. Wright, for an order requiring James C. Pennie, administrator of the estate of Thomas H. Blythe, to pay a sum of money allowed on accounting in equity. Order made that amount be paid without interest, and Elizabeth G. Welsh and John A. Wright appeal. Affirmed.

Wm. F. Herrin, Smith, Wright & Pomeroy, and John A. Wright (Isaac Frohman, of counsel), for appellants. Naphtaly, Freidenrich & Ackerman, for respondent.

PER CURIAM. Philip A. Roach, deceased, died while administrator of the estate of Thomas H. Blythe; and James C. Pennie succeeded him as such administrator. Afterwards, Pennie brought a suit in equity in the superior court, against the executor of said Philip A. Roach, for an accounting of the acts and doings of said Roach as such administrator; and on January 15, 1891, a judgment was rendered in said suit, in which it was adjudged, among other things, that the estate of Roach be allowed the sum of \$95,000 as a counsel fee for the services of

John A. Wright rendered to said Roach as such administrator, and that Pennie pay the same, out of the moneys of the estate of said Blythe, to the executor of said Philip A. This judgment was affirmed on appeal to this court. Pennie v. Roach, 94 Cal. 515, 29 Pac. 956, 30 Pac. 106. Afterwards, Elizabeth G. Welsh (present executrix of the will of said Phillip A. Roach) and said John A. Wright made a motion in the probate court for an order that Pennie, administrator of the estate of said Blythe, deceased, pay to the said executrix, for the use and benefit of said Wright, the said sum of \$95,000, with interest thereon from the 15th day of January, 1891, at 7 per cent. per annum. On the hearing of the motion, it appeared that Pennie had already paid \$5,000 of said amount; and the probate court on August 5, 1892, made an order that Pennie pay to Wright \$90,000, without interest, in full satisfaction of the services of said Wright. The executrix, Welsh, and said Wright, appeal from so much of said order as refuses to allow inter-

It is not necessary to determine whether or not the order appealed from, or any part thereof, is appealable. The appeal of the executrix certainly need not be considered; for she is not, in any sense, an aggrieved party. So far as Wright is concerned, assuming that the order sought to be appealed from is appealable, we see no error committed by the probate court. As Roach, the former administrator of Blythe, had died, his successor as such administrator, Pennie, was compelled, under well-settled practice, to go into a court of equity for an accounting; and, in the suit which he brought there against the executor of Roach, he and the said executor were the only parties. That part of the judgment in that case which allowed said executor, in his settlement, the amount of said attorney's fee for the services of Wright, was in favor of There was no judgment in said executor. that case in favor of Wright, who was not a party to the action; therefore, when the said order of the probate court was made, from which this appeal is taken, the said Wright had no judgment or claim which bore interest. The order appealed from is affirmed.

103 Cal. 287 MERRILL v. MERRILL. (No. 19,223.)

(Supreme Court of California. June 27, 1894.) In bank. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by Mattie H. Merrill against F. H. Merrill to recover money paid under contract for the purchase of land, in which there was a judgment for plaintiff. From a refusal of the court to allow her a lien on the land, plaintiff appeals. Affirmed.

John D. Pope, for appellant R. Duningan, J. M. Voss, and W. H. Henning, for respondent.

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PER CURIAM. Upon further consideration of this cause, after submission in bank, we are satisfied with the conclusion which was reached by department 2, in its opinion filed January 26, 1894 (35 Pac. 768); and, for the reasons stated in said opinion, the judgment appealed from is affirmed.

103 Cal. 325

SHEEHY v. SHINN. (No. 15,237.)
(Supreme Court of California. June 29, 1894.)
SALES ON MARGINS—GAMBLING CONTRACTS.

1. Const. art. 4, § 26, provides that all contracts for the sale of corporate shares on margin, or for future delivery, shall be void, and any money paid on such contracts may be recovered by the party paying it. Held, that whenever the purchaser of stock paid the vendor, or his broker, a percentage of the price upon an agreement that the stock should be held as security for the balance, the amount so paid was "margin."

2. An agreement between vendor and vendee for the sale of stock upon payment of a part of the agreed price—the stock to be retained by the vendor as security for the balance, and

2. An agreement between vendor and vendee for the sale of stock upon payment of a part of the agreed price—the stock to be retained by the vendor as security for the balance, and only to be delivered upon full payment, with the right in the vendor to sell it at any time, without notice to the vendee, if it should so depreciate in the market as to be worth less than three times the unpaid balance—is a sale of stock on margin, and for future delivery.

3. An agreement that defendant should act as agent for plaintiff in buying stock for her from third parties, and pay the whole price hereof, two-thirds of which is advanced by plaintiff,—the stock to be held by defendant until the balance is paid, and as collateral security for the balance due on other stock, the title to remain in defendant while so held by him,—is a sale on margin of such stock by the defendant to plaintiff.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Anne M. Sheehy against Howard H. Shinn to recover money paid defendant upon contracts for the sale of stocks on margin. Judgment for plaintiff for part of her claim. Both parties appeal. Affirmed.

Wm. F. Herrin and Pillsbury, Blanding & Hayne, for plaintiff. John P. O'Brien, for defendant.

BEATTY, C. J. This is an action founded upon the following clause of section 26 of article 4 of the constitution of 1879: "All contracts for the sale of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction." The plaintiff sues to recover money alleged to have been paid to defendant upon contracts for the sale of stocks "on margin." The cause was tried in the superior court without a jury, and, on the facts found, judgment was given for the plaintiff for \$648 and costs. From this judgment both parties appeal, the plaintiff contending that on the findings the judgment in her favor should have been for about \$1,200, and the defendant insisting that the decision of the superior court is contrary to the evidence set out in his bill of exceptions, and also that the specific findings of fact are inconsistent with the general finding to the effect that the transactions between him and the plaintiff "were sales of stock of incorporated companies on margin, or to be delivered at a future day," upon which finding the judgment against him is based.

We are of the opinion that our decision in both appeals must depend wholly upon the proper construction of the findings of the superior court and of the constitutional provision above quoted. The evidence contained in the defendant's bill of exception relates exclusively to the meaning of the terms "on margin," "future delivery," etc., according to the usage of brokers and other dealers in stocks at San Francisco during the years immediately preceding the adoption of the new constitution; and, although it has been carefully read and considered, it can only be regarded as one among various sources of information to which the court may resort for the purpose of ascertaining a fact of purely judicial cognizance. Whatever may have been the evidence in the superior court, and whatever effect it may have been allowed, this court must now decide, as matter of law, what the framers of the constitution intended by the terms they have employed; and this construction does not depend upon the evidence of the witnesses in a particular case, for if it did we should be compelled to affirm one construction in one case, and a different construction in another case,—an absurdity which can only be avoided by giving effect to the rule that courts take judicial notice of the true meaning of all legal expressions (Code Civ. Proc. § 1875), and this, of course, includes all the terms used in the constitution or in acts of the legislature.

Looking, therefore, to the evidence in this case only so far as we may find that it affords us some aid in arriving at the actual intention of the framers of the constitution. we proceed to inquire what that intention was. For this purpose the language of the constitution is necessarily the first thing to be considered, and if its meaning is plain there is no occasion to resort to extraneous aids. With respect to the clause under consideration, it does not seem to be very obscure in its terms or intent. It declares that certain contracts shall be void, and that any money paid in pursuance of them may be recovered back by the party paying it, in any court of competent jurisdiction. The provision is evidently self-executing, needing no act of the legislature to give it its intended effect. Contracts of the class designated are rendered void by the constitution itself, and money paid in pursuance of them is recoverable by actions commenced in the superior or justice's courts, according as the amount claimed is greater or less than \$300. The only question of construction which can possibly arise is upon the meaning of the phrase, "on margin or to be delivered at a future day," but even as to this there is little difficulty, so far as the present case is concerned. There are some transactions which are clearly and plainly within the designated class, although there are others with respect to which it may be doubtful whether they are included or not. The meaning of the word "margin," as ordinarily used in connection with stock sales, has long been well understood. As most frequently employed in this state at the time of, and for many years prior to, the adoption of the constitution, it meant the sum deposited by a purchaser of stock with his broker, being a certain percentage of the purchase price of the stock, the broker agreeing to advance the balance of the purchase price upon condition that he should hold the stock as security for his advances, with the right to sell it in case of depreciation in value, and failure of the purchaser to keep the margin good. This, we say, was the sense in which the word was most frequently employed, but it was also employed to describe deposits made by sellers and purchasers of stock for future delivery upon a variety of conditions, and in various ways, which need not be considered here. It is enough for all the purposes of this case to say that whenever the purchaser of stock paid to the vendor of the stock, or to his broker, a percentage of the purchase price upon an agreement that the stock should be held as security for the balance, the amount so paid was "margin," in the sense in which the term was used by the framers of the new constitution. If the mere language of the instrument did not make this sufficiently manifest, it is made so by reference to the arguments of both the advocates and opponents of the provision in the constitutional convention (2 Debates, pp. 806-810), and by the evidence in this record. This being so, it follows that an agreement between vendor and vendee for the sale of stock upon payment of a part of the agreed price-the stock to be retained by the vendor as security for the balance, and only to be delivered upon full payment, with the right in the vendor to sell it at any time, without notice to the vendee, if it should so depreciate in the market as to be worth less than three times the unpaid balance-is a sale of stock on margin, and for future delivery. That such was the agreement between the plaintiff and defendant in this case, and that he (the defendant). though nominally a mere broker for the plaintiff, was in reality her vendor, is, in effect, the finding of the superior court, as a conclusion, not of law, but of fact, and upon this fact the judgment is based. Unless, therefore, the more specific findings of fact are inconsistent with this general finding, the right of the plaintiff to recover the amount paid by her npon such margin sales cannot be denied. To determine whether there is any such in-

consistency, it will be convenient to quote the more material portions of the findings in full. They are as follows:

"Between the 1st day of April, 1890, and the 1st day of July, 1891, the defendant was a stockbroker, engaged in business as such, in the purchase and sale for customers at the city and county of San Francisco of the stocks of incorporated companies. That on the 10th day of April, 1890, the plaintiff opened an account with the defendant, as such broker, and from that time onward until about July 1, 1891, continued said account with him, and to transact business with him, as such broker; having him purchase and sell, for her account with him, stocks of incorporated companies, as such broker. That on each occasion that the plaintiff ordered defendant to buy or sell any of such stock, as aforesaid, she made, signed, and delivered to him a written order therefor in the following form:

"Howard H. Shinn, member S. F. Stock Exchange Board, stockbroker, No. 318 Pine street, will buy and sell stocks for cash, with the express understanding that all stocks purchased, or which are held by him as collateral, may be sold by him, in his discretion, at any time, without any demand upon the customer for the payment of the balance of account then due, or without any demand whatever, or without any notice of the time or place of said sale, and without any notice whatever at the San Francisco Stock and Exchange Board, at any regular or informal session thereof, or at private sale, whenever the lowest market value of such stock or stocks is less than thrice the amount of such balance of account due him by the customer, or whenever, in his judgment, the stock is liable to depreciate so as to make the security insufficient; and if such sale or sales do not cover such balance of account then the undersigned will pay the remainder, with interest, and any taxes levied on such indebtedness, or on the securities held as collateral, shall be charged to the account, and become a part thereof. Rates of interest to be 11/2 per cent. per month, compounding monthly. When stocks are borrowed or sold on account of the undersigned, H. H. Shinn has the right to buy such stocks without any demand upon, and without any notice to, the customer, on street, or in said San Francisco Stock and Exchange Board, at any regular or informal session thereof, whenever he thinks he has not sufficient money or security on hand to protect himself against loss. H. H. Shinn shall not be required to keep on hand the identical certificates of stock purchased or pledged, but it shall be sufficient if they have the same number of shares of stock to deliver when properly deliverable and properly called for. All customers' stock on hand shall be held as collateral for customers' entire account. If at any time the funds in the hands of H. H. Shinn, belonging to the customer, are insufficient to pay the

purchase price of any stock purchased for him, then H. H. Shinn, if he sees fit to do so, may advance the deficiency, and the money so advanced shall immediately become due and payable from the customer to him; and if not immediately paid, without demand, he shall have the right, at any time after such advance, to sell any or all stocks in his hands, without notice or demand upon said customer, to repay such balance, such sale to be made in the manner hereinabove provided. All stocks purchased or held under this agreement may be placed absolutely in the name of any person selected by H. H. Shinn. This agreement shall not be varied by any oral agreement, but can only be varied by a written agreement indorsed hereon. and subscribed by the parties hereto. Stocks bought and delivered, as received, to customers, at their risk, unless transferred at office. H. H. Shinn is hereby constituted and appointed my attorney in fact, to purchase or sell stocks for my account in accordance with the foregoing conditions, and his signature to this order, as a contract between us, is hereby expressly waived. For value received, I hereby agree that the foregoing terms and conditions do and shall apply to and govern all future transactions and accounts with the undersigned, unless varied by a subsequent written agreement.

"'San Francisco, ——, 1890. Please ——, for my account and risk, subject to the above terms, and also subject to the rules of the San Francisco Stock and Exchange Board: ——. This order good for street, or any session, until ——. (Unless time is expressed, orders good until countermanded.)'

"The foregoing is one of the orders given, all of which were in the same form, with the insertion in the particular order of the word 'buy' or the word 'sell,' as the case required, and the particular stock and number of shares intended to be bought or sold. Each order was signed by the plaintiff, and delivered to and accepted by the defendant.

"The course of dealing and the proceedings upon such orders and said account were as follows: Upon receipt of the order the defendant, in all cases, went into the next meeting of the stock board, and bought or sold the stock requested for the account of the plaintiff. The stock so purchased was always actually delivered by the seller to the defendant, for the plaintiff's account, on the day following the purchase, and upon such delivery the whole purchase price was paid by the defendant to the seller. In some instances the plaintiff furnished to the defendant the whole purchase price of the stock ordered to be purchased. In such cases the stock was actually, at once, delivered to her, or she was notified by defendant that it was at her disposal when she chose to call for it, whereupon she sometimes called for such stock at once, and sometimes left it for a few days in the hands of the broker, and then took is away. But in some of the instances, though the particular stock was paid for, the defendant claimed and asserted a right to hold it, under his contract, as security for the general balance due upon plaintiff's general account with defendant, as such broker, which account existed at all of the times aforesaid, and as hereinafter shown. In the general account which defendant, as such broker, opened with plaintiff, and conducted through the aforesaid period, there were in general daily transactions of purchases and sales, and often many of such transactions on the same day, either purchases or sales, or both, for said account, throughout said period during which said account was continued as aforesaid; and the defendant, in order to keep plaintiff advised of the state of said account, furnished ner a pass book, in which he entered the particulars, showing the different transactions in said account as they occurred; namely, on the debit pages of said pass book was entered by defendant the date of each purchase, with the kind and number of shares purchased, and the price paid for the stock; also, the commissions charged by defendant for executing the order; also, any moneys which defendant paid to plaintiff directly out of said account, and the date of its payment; also, monthly, at the end of each month, the amount of interest charged by defendant on any balance of said account in his favor during that particular month. And on the credit pages of said pass book were entered the date of each sase of stock, with the number of shares and kind of stock sold, the price obtained therefor, and the commissions charged by defendant for executing the order; also, the different amounts of money which plaintiff paid to defendant to be applied, and which defendant received from plaintiff directly, and applied on said account, with the date of its payment. When, during said account, plaintiff executed to defendant an order as aforesaid to buy a particular lot of said stock for her said account. he bought the stock so ordered on the day of the date of the order, and on the following day the stock was delivered to him by the seller; and thereupon defendant furnished and paid to the seller the price of the stock so bought, and thereupon the defendant received from the seller the said stock, and held the same under the provisions of the agreement above set forth, and defendant charged to plaintiff's said account in said pass book the amount advanced on her account to make said purchase, and also the commissions charged by him for executing the order. In the cases where the order was to sell, the defendant, on the day of the date of the order, sold the stock so ordered sold, and the following day he furnished and delivered it to the purchaser, and received from the purchaser the price obtained; and defendant thereupon entered to plaintiff's credit, in said account in said pass book, the amount so received by him, less his commissions for executing the order. From time to time, during said account, defendant paid to plaintiff, out of said account, sums of money, and upon making any such payment he made entry in said pass book, on the debit side, of the amount so paid, with the date of its payment. From time to time, during the continuance of said account, defendant made calls upon plaintiff, requiring her to pay him money or further security on said account to keep the balance of said account due him within the limits as agreed in said orders,namely, so that the market value of the stocks and security in his hands on said account should be equal to thrice the amount of such balance due him on the said account, -and plaintiff, at various times, and for that purpose, paid to defendant, on said account, sums of money, and upon any such payment being made the defendant entered the amount and date thereof to plaintiff's credit in said account, on the credit side of said pass book. The aggregate monthly purchases of stocks on said account with the expenditures made by defendant therefor, also, the aggregate monthly sales and receipts therefor in said account, are given below; and also, below, are set out the items, with amounts and dates, of money either paid by defendant to plaintiff out of said account. or paid by plaintiff to defendant on said account, as above stated. It was always understood that the plaintiff could at any time have possession of the stock purchased as aforesaid, upon payment to the defendant of the full sum due on her account, as above stated; but, on the other hand, it was always understood that the stock should be held by defendant as security, as above stated, until all of plaintiff's obligations on the account should be paid to defendant, or the stock should be disposed of to satisfy the same, and in all these cases the plaintiff never saw the stock. In all cases, at the time when the orders were given, and the advances and purchases made, the plaintiff intended to buy and sell, as the case might be, the stock she ordered to be bought or sold, and intended that the defendant should actually purchase or sell it, and should hold it, when bought, subject to her orders, but subject also to his rights of security upon it for his advances, interest, and commissions, and all plaintiff's obligations to him, and the defendant had the same intention; and it was understood that plaintiff could buy or sell what stocks she pleased on said account, so long as she kept the security sufficient in defendant's hands. In many of the cases the plaintiff ordered the defendant to sell stock held by him for her as aforesaid in the course of said account, and in such cases the defendant went into the market, and sold the stock in pursuance of the order, receiving and crediting the plaintiff's account with the proceeds. In some cases, for purposes of convenience, the defendant substituted one certificate of stock for another of an equal number of

shares of the same kind of stock, but always kept on hand, for the account of the plaintiff, the requisite number of shares of the particular stock. Such substitutions were in accordance with the agreement of the parties and the usages of the business."

The succeeding findings set forth in detail payments by and to plaintiff, the purchases and sales of stock, the prices paid and realized, the commissions and interest charged, etc., from which it appears that the plaintiff paid in during a period of 14 months the sum of \$3,034.35, and drew out \$1,441.00, leaving a balance in her favor of \$1,593.35; that the defendant bought 787 shares and sold 7,530 shares, which, presumably, were the shares fully paid for and delivered to plaintiff. Then comes the general finding to which reference has been made, as follows: "But the court find that the transactions between plaintiff and defendant, as shown on said account, in that a part only of the purchase price was advanced by defendant, and the stock retained by him as aforesaid, were sales of stock of incorporated companies on margin, to be delivered at a future day." Here, as above stated, the court finds as a fact that the transactions between the plaintiff and defendant were, in substance and effect, a sale of stocks on margin, and for future delivery; and the question is whether this conclusion is invalidated by the more specific findings which precede it. We do not find any inconsistency. It is not to be denied that the defendant did all that was possible to give to the transactions between him and the plaintiff the form and color of dealings between her and third parties, in which he was a mere agent; but it is equally true that the court might properly find, from the terms of their contracts and their course of dealing, that the form under which they sought to conduct the business was one thing, and its substance a different thing.

Counsel for defendant, in their argument, lay great stress upon the provision of the contract that "all customers' stock on hand shall be held as collateral for customers' entire account," and upon the findings that, on every order of plaintiff, defendant actually went into the next meeting of the stock board, and bought the stock for plaintiff's account, paid for it in full, and had it actually delivered by the seller for plaintiff's account, and held it under the provisions of the agreement above set forth; that "in all cases, at the time when the orders were given and the advances and purchases made. the plaintiff intended to buy or sell, as the case might be, the stock she ordered to be bought or sold, and intended that the defendant should actually purchase or sell it. and should hold it, when bought, subject to her orders, but subject also to his rights of security upon it for his advances, interest, and commissions, and all plaintiff's obligations to him, and the defendant had the

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same intention. In some cases, for purposes of convenience, the defendant substituted one certificate of stock for another, of an equal number of shares of the same kind of stock, but always kept on hand, for the account of plaintiff, the requisite number of shares of the particular stock. Such substitutions were in accordance with the agreement of the parties." But none of these things are inconsistent with the conclusion that the real transactions between the plaintiff and defendant were sales on margin by him to her, except in those instances where she paid in full, and received the stock. The fact that by the contract it was stipulated that all customers' stock should be held as collateral, etc., amounts to nothing, when you can see from other portions of the contract that the customer would never in fact become the owner of any stock not fully paid for. Nor is it anything to the purpose that defendant actually bought the stock ordered, paid for it, and received it for the account of the plaintiff. It is quite consistent with a sale by him to her that he should do all these things. By buying the stock he would protect himself from loss in case of a rise, and the margin of 66% per cent., which, by the terms of the contract, she was obliged to keep good (though the word "margin" is not used), would protect him from loss in case of a fall. The purchase and delivery of the stock for her account would be a mere formality, meaningless and delusive, in view of the provisions of the contract which left him the practical owner of it, and deprived her, not only of all the rights ordinarily pertaining to ownership, but of all the ordinary rights of a pledgor. By the express terms of the contract, she was never to acquire the title to any specific shares until they were fully paid for and delivered. As to all other shares, she was merely to have a credit on account for a certain number; the title and possession of the certificates remaining in the defendant, with absolute right of disposition whenever the margin was not kept good.

Nor is it inconsistent with a sale from defendant to plaintiff that she intended to buy the stock which she ordered, and that he should buy it and hold it subject to her orders and his own rights under the contract. and that he had the same intention, and that he always kept on hand the requisite number of shares. She, of course, intended to buy the stock on margin, subject to all the contingencies provided for in their agreement, and he intended that she should have it subject to the stipulated conditions; but, until those conditions were performed, he was substantially the owner of the stock and the certificates. She was not the owner, and was never to become the owner unless she paid for them. Counsel, of course, would not contend that a contract for the sale of stocks on margin and for future delivery would be placed beyond the reach of the constitutional provision by the mere fact that the seller under such a contract purchases the stock from a third party, and holds it pending the time given to complete the purchase; but they are contending that the court should shut its eyes to all the indicia of the real nature of these transactions, and treat them as if they were in fact what the parties have chosen to call them. But this we cannot do. The provision of the constitution was aimed at the substance of these abuses, and not at the form. Its framers meant to put an end to the stock gambling then prevalent, and for this purpose declared void all margin sales, or sales for future delivery. To hold that a broker may make and enforce such sales, and retain the payments made under such contracts, by the simple device of going through the form of buying from a third party for the account of the purchaser, when by his contract he has made elaborate provision that the title to the shares shall remain in himself, and never pass to the purchaser until full payment is made, would render the provision in question utterly nugatory. To give effect to the constitution, it is as much the duty of the courts to see that it is not evaded as that it is not directly violated. This is the principle of the decision in Cashman v. Root, 89 Cal. 373, 26 Pac. 883,-a case which cannot be distinguished from this in any essential particular. Counsel attempt to establish a distinction by pointing to the fact that in that case the defendant expressly admitted that the object of the transaction there in question was a course of dealing in stocks on margin. But what was there admitted in terms is here amply established in substance, the pame only being suppressed. It would, indeed, have been sufficient to have affirmed this judgment on the authority of that decision; but the importance of the subject, and the numerous cases which have arisen, or may arise, out of similar dealings, has induced us to reconsider the whole question, and the arguments advanced by counsel, not only in this case, but in a number of other cases pending here, which involve a similar state of facts. After such reconsideration, we are entirely satisfied that the decision in Cashman v. Root was right, and that it must stand. We are, at the same time, convinced that it involves none of the mischiefs which counsel insist will flow from it. It will not prevent any legitimate transfer of stock, whether through the agency of a broker or otherwise, nor will it prevent any legitimate and bona fide pledge of stock certificates as security for borrowed money, whether borrowed for the purpose of paying for the stock, or any other purpose. Where such is not only the form, but the substance, of the transaction, the inhibition of the constitution does not apply.

With respect to the defendant's appeal, to which we have thus far confined our attention, our conclusion is that the judgment must be affirmed. The plaintiff's appeal demands but little attention. She contends that on the findings she is entitled, as a simple matter of bookkeeping, to a judgment for the difference between what she paid defendant and what she received from him, and her counsel states the balance at \$1,-243.75. As a simple matter of bookkeeping, the balance seems to us to be \$1,593.35, but the right of plaintiff to demand that amount is not so clear. The findings show that defendant purchased 340 shares more than he sold, and also that, for some shares, plaintiff made full payment, and received the certificates. It is entirely consistent with the findings to assume that the price of these fullpaid shares makes up the difference between the balance claimed and the amount allowed by the superior court, viz. \$602. If it be contended that we have no right to assume this, as against the defendant, it may be replied that we have no right to assume anything else against the plaintiff. The judgment is in her favor, and the findings must support it. Really, they do not show conclusively that she was entitled to recover as much as \$602, and it is only by the presumptions in its favor that it can be sustained at all. The judgment is affirmed.

We concur: FITZGERALD, J.; GAROUTTE, J.

McFARLAND, J. I concur in the judgment, and in the opinion of Chief Justice BEATTY. I see no other possible construction of the constitutional provision in question. It is proper to remark, however, that the judiciary cannot avoid the consequences of a provision of constitutional law which allows a party to a contract to profit by it as long as it pays, and to repudiate it by boldly ignoring his solemn obligations as soon as it begins to show loss.

VAN FLEET, J., not having heard the argument herein, and Justices HARRISON and DE HAVEN, being absent, did not participate herein.

103 Cal. 278

GREENZWEIG v. STRELINGER. (No. 15,168.)

(Supreme Court of California. June 27, 1894.)
ACTION ON FOREIGN JUDGMENT — IMPEACEMENT—
FAILURE TO SERVE WRIT.

1. In an action on a judgment rendered in another state, such judgment may be impeached by showing by extrinsic evidence that no summons had been served therein.

2. In such case it cannot be shown that the summons was not read to defendant when it is not shown that the reading was necessary to effect a service.

Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.
Action by George Greenzweig against Marie

Action by George Greenzweig against Marie A. Strelinger on a judgment rendered in another state. Judgment for plaintiff, and defendant appeals. Reversed.

H. H. Lowenthal, for appellant. Wm. Rigby, for respondent.

DE HAVEN, J. This is an action to recover \$706.35 and interest alleged to be due upon a judgment recovered against defendant in one of the courts of general jurisdiction of the state of Illinois. The complaint is unverified, and the answer contains a general denial. The plaintiff obtained judgment in the superior court, from which and an order denying her motion for a new trial defendant appeals. The record shows that the defendant was sworn as a witness in her own behalf upon the trial, and was asked whether any summons was served upon her in the action in which the judgment sued upon was rendered. The court sustained an objection to this question, upon the ground "that the judgment on which this suit was brought could not be attacked collaterally; that it could only be attacked in a supplemental proceeding in the suit itself in the court in which it was rendered, or by suit in equity directly aimed to set aside the judgment; that all evidence of defendant tending to show the want of service of such process or summons, or to contradict the return of the sheriff of Cook county, Ill., as to such service, was inadmissible, and should be excluded on that ground." This ruling was erroneous. In Re James' Estate, 33 Pac. 1122, we said that it was competent to collaterally impeach a judgment rendered in another state by extrinsic evidence showing want of jurisdiction in the court pronouncing the judgment, and this, too, notwithstanding the record of the judgment sought to be impeached might contain a recital of the existence of such jurisdictional facts. See, also, as sustaining this rule the following cases, which were cited in that opinion. Thompson v. Whitman, 18 Wall. 457; Machine Co. v. Radcliffe, 137 U. S. 287, 11 Sup. Ct. 92; Starbuck v. Murray, 5 Wend. 148; Eager v. Stover, 59 Mo. 87.

There was no error in sustaining the objection to the other question in relation to the omission of the sheriff to read to the witness the writ of attachment and summons issued in the action resulting in the judgment sued upon. There is nothing in this record to show that it was necessary to read those papers to the witness in order to effect their service. Judgment and order reversed.

We concur: FITZGERALD, J.; McFAR-LAND, J.

103 Cal. 314

MOWRY v. MOWRY et al. (No. 15,119.) (Supreme Court of California. June 27, 1804.) POWER OF ATTORNEY—VALIDITY OF EXECUTION.

In an action to quiet title and for a writ of possession, it appeared that S., in 1873, gave O. a power of attorney to convey lands; that O., in 1877, as attorney, made a deed of the land to his own son, who paid no considera-

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tion therefor; that, when this deed was made, O. held notes of S. for \$4,500. which were marked "Paid" the day the deed was dated; that, shortly afterwards, S. asked the son if he had received the deed; that, about the date of the deed, S. admitted his indebtedness to O., and said he would convey the property in payment. Held that, as there was evidence from which a jury might find a sale for a valuable consideration, the transaction was within the power, the only objection being that the agent who made the purchase and paid the consideration executed the deed, but that this was ratified by the principal by personal delivery of the deed.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Joseph C. Mowry against George B. Mowry and others to quiet title, and for a writ of possession. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

Percy R. Wright, for appellants. Frank Otis, for respondent.

PER CURIAM. The defendants are in possession of a certain lot in San Francisco, and the plaintiff brought this action to quiet his title thereto, and for a writ of possession. Both parties claim under Sylvester Mowry, deceased,—the plaintiff under a deed executed by Sylvester by his attorney in fact, Origin Mowry, and the defendants George B. and Ellen M. Mowry as the only children and heirs at law of Sylvester, of whose estate George B. is administrator. The other defendants are tenants under the administrator. Origin and Sylvester Mowry were brothers, and Origin is also dead. The power of attorney under which Origin executed the deed was made in 1873, and the conveyance thereunder to the plaintiff was dated July 21, 1877, and is claimed to have been delivered in August of that year. Several questions of fact were litigated, the principal of which were the mental capacity of Sylvester, the delivery of the deed, and whether there was any consideration therefor. The case was tried before a jury, and resulted in a general verdict for the plaintiff, and this appeal is from the judgment entered thereon, and from an order denying a new trial. The only exceptions to the sufficiency of the evidence relate to the conveyance to plaintiff. and not to the mental capacity of Sylvester Mowry.

It is contended by appellants that plaintiff gave no consideration for the conveyance, and that there was no sale to him. The facts shown by the evidence touching this transaction were that Sylvester owned the lot here in question, and also a 40-acre tract near Niles, in Alameda county. The plaintiff, at the time of the conveyance, was about 19 years of age, recently out of school, and was then working on his father's place. As between plaintiff, the grantee in the deed, and Sylvester Mowry, the grantor, it is clear there was no consideration, nor was there any agreement of sale between them; and,

as between the plaintiff and his father, who was the attorney in fact of Sylvester, it was a gift. It is not contended by respondent that an attorney in fact can, unless expressly empowered so to do, make a gift of his principal's property. The power here was to sell and convey. It is contended, however, that a consideration was paid by Origin to Sylvester, and that such consideration is sufficient to support the conveyance to the son. If there was a sale by Sylvester to Origin, it is insisted by appellant that Origin's relation of the transaction was such that he could not make a conveyance to himself; and as the son paid no consideration, and was in no way connected with the alleged sale, which, if made at all, was made to Origin, that Origin could not make a valid conveyance. The plaintiff introduced in evidence the power of attorney and the deed to the plaintiff, the latter being a grant, bargain, and sale deed, reciting a consideration. This made a prima facie case, and is sufficient to support the verdict, in the absence of evidence sufficient to overcome it. For the purpose of sustaining the deed against the attack of defendants, evidence was introduced tending to show that Origin held two promissory notes made by Sylvester,-one for \$500, and the other for \$4,000,-and that Sylvester was indebted to Origin for other moneys; and these notes were produced upon the trial, bearing an indorsement, "Paid, July 21, 1877," that being the date of the deed; that Sylvester, at or about the time of the transaction, admitted his said indebtedness, and said he had or would convey the property to Origin in payment of his debt; and, as to the delivery of the deeds, the evidence tends to show that, after the deeds were signed and acknowledged, they came to the hands of Sylvester, who examined them, and himself delivered the deed of the 40 acres to plaintiff's brother, and left the deed for plaintiff, who was absent, with Origin, to be delivered, and a few days thereafter asked plaintiff if he had received his deed. While the course here pursued is not to be commended, we think the evidence sufficient to justify the jury in finding that there was a sale by Sylvester for a good consideration, and that the deed was in fact delivered by Sylvester to the plaintiff. The case of Videau v. Griffin, 21 Cal. 390, cited by appellant, is not in point. There, there was no authority in writing given to the person who executed the deed as attorney in fact. The acknowledgment by the grantor did not cure the defect. If, in this case, there was no sale by Sylvester, the transaction was outside and beyond the power, and in such case Videau v. Griffin would apply; but, as there was evidence from which the jury might find a sale for a valuable consideration, the transaction was within the power, the only objection being that the agent who made the purchase and paid the consideration himself executed the deed; but this, we think, was rati-

fied by the principal by his personal delivery of it. The court did not err in receiving said promissory notes in evidence. It is true the indorsements thereon that they were paid did not of themselves show that they were in any way connected with the conveyance of the land, but the plaintiff testified that Sylvester told him that he owed Origin "some money on notes, and that these deeds were in payment." This evidence, and the indorsement of payment, coinciding with the date of the deed, sufficiently tended to show their connection with the transaction to justify their admission in evidence. The views we have expressed are in harmony with the instructions given to the jury, to which appellants excepted, so far as they relate to the conveyance of the premises to the plaintiff; and the instructions requested by appellants which were refused, being inconsistent therewith, were properly refused. Whether the court erred in striking out the testimony of Laura A. Mowry is immaterial, as that was directed to the mental incapacity of Sylvester Mowry, and no question is made here as to the fact of his capacity to make the conveyance. We have examined an the questions presented by appellant, but find no error which would justify a reversal. The judgment and order appealed from are affirmed.

103 Cal. 294

SMITH v. ELLIS et al. (No. 19,294.) (Supreme Court of California. June 27, 1894.) MOTION FOR NEW TRIAL — SPECIFICATION OF ER-RORS.

Where, upon a motion for a new trial, some of the specifications are inartificially expressed, but are sufficient to point out the particulars in which it is claimed the evidence failed to support the findings, and neither the court nor the opposing party is left in doubt as to this, it is error to disregard such specifications, and hear the motion on the remaining ones.

In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by W. A. Smith against M. E. Ellis and others to set aside a deed as fraudulent. Judgment was rendered for defendants, and upon a motion by plaintiff for a new trial the court struck out some of plaintiff's specifications, and heard the motion on the remaining ones, and also denied plaintiff's motion for leave to amend his specifications. The motion for a new trial was denied, and plaintiff appealed from the order denying same, the order striking out specifications, the order denying motion to amend specifications, and the judgment. Judgment and order denying motion to amend specifications affirmed, and orders striking out specifications and denying motion for new trial reversed.

J. T. Houx, for appellant. J. W. Ballard, for respondents.

VAN FLEET, J. This is an action on the part of a judgment creditor of J. N. Ellis, Sr.,

to set aside as fraudulent a deed of conveyance of certain land in the county of Orange, executed by said J. N. Ellis to his daughter, M. E. Ellis, and to satisfy plaintiff's judgment out of said land. Findings and judgment were in favor of defendants, and plaintiff moved for a new trial on a statement of the case, specifying, among other things, insufficiency of the evidence to justify the findings. At the hearing of the motion for new trial the defendants moved the court to disregard the statement of the case and the specifications of insufficiency of the evidence therein, upon the ground that the specifications were insufficient to authorize the court to review the evidence; which motion the court granted to the extent of disregarding, and, in effect, striking out, six of the several specifications relied upon by plaintiff. The plaintiff then moved the court for leave to amend his statement by correcting and restating said specifications, which motion the court denied. Thereupon the court, upon the statement thus emasculated, heard the motion for new trial, and denied the same. The plaintiff appeals from said several orders and from the judgment.

1. A careful examination of the specifications objected to satisfies us that the action of the court in disregarding them was erroneous; that, while perhaps inartificially expressed in some respects, they were in no substantial respect insufficient to point the particulars in which it was claimed the evidence failed to support the findings. "The specification is not required to be made in any particular form of words, but, in some form, should distinguish each particular proposition of fact excepted to from all others found by the court or involved in a general verdict of a jury." Dawson v. Schloss, 93 Cal. 200, 29 Pac. 31. These requirements are sufficiently met by the specifications here in question. Neither the court nor the defendants are left in doubt as to the particulars in which the plaintiff deems the evidence insufficient to sustain the findings excepted to. They are not opened to the objection raised in the cases cited by respondent, either as being too general or in being a mere recital of what the evidence does show. Without stating them in detail, we regard them as fully up to the specifications held sufficient in Harnett v. Railroad Co., 78 Cal. 32, 20 Pac. 154. This being so, the plaintiff was entitled on his motion for a new trial to a ruling by the lower court upon the sufficiency of the evidence to sustain its findings in the light of these specifications, and the action of the court in the premises was the denial to plaintiff of a substantial right. Brenot v. Brenot (Cal.) 36 Pac. 672.

2. We think the findings sufficient to sustain the judgment, and the order of the court denying plaintiff's motion to amend his statement, in view of the conclusion above reached, was without prejudice. The judgment and the order denying plaintiff's right to

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amend statement are affirmed. The order striking out and disregarding plaintiff's specifications, and the order denying motion for new trial, are reversed, with directions to the trial court to hear the parties upon the alleged insufficiency of the evidence suggested by the said specifications, and thereupon to pass upon the motion for a new trial.

We concur: BEATTY, C. J.; McFAR-LAND, J.; DE HAVEN, J.; FITZGERALD, J.; GAROUTTE, J.

168 Cal. 319
KENDALL v. PARKER et al. (No. 18,196.)
(Supreme Court of California. June 28, 1894.)
Nonnegotiable Note-Indorsement by PayerLiability to Second Indorses.

The payee of a nonnegotiable note, who transfers it by indorsement in blank, does not become liable, as the indorser of a negotiable note would, to the indorsee of his indorsee, where the second indorsement is also in blank, or "without recourse."

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action by William S. Kendall against J. A. Parker, E. F. Aiken, and J. F. Hill on a promissory note. From a judgment against him after his demurrer to the complaint was overruled, defendant Hill appeals. Reversed.

L. T. Hatfield, for appellant. Johnson, Johnson & Johnson, for respondents.

PER CURIAM. This is an appeal from a judgment entered after appellant's demurrer had been overruled, appellant standing upon his demurrer. The complaint is upon a promissory note, which is nonnegotiable, because it contains a stipulation for an attorney's fee. Suit is brought by the assignee of the first assignee against the makers and the payee as indorser. The complaint avers that Hill assigned the note by writing his name upon the back thereof, and by delivering the same to the Huntington-Hopkins Company before the maturity of the note. The Huntington-Hopkins Company, upon the maturity of the note, presented the same to the makers, and demanded payment thereof. The said makers refused and failed to pay the same, or any part thereof, of which demand and failure due notice was given to the defendant The note was transferred to plaintiff by the Huntington-Hopkins Company, without recourse, and after maturity. The complaint was demurred to on several grounds, all, however, founded upon the proposition that the complaint fails to show any liability on the part of Hill. Plaintiff had judgment, not only for the debt which the note was given to secure, but for \$100 attorney's fee. The stipulation in regard to an attorney's fee in the note is: "And in case suit is instituted to collect this note, or any portion thereof, we, or either of us, promise to pay such additional sum as the court may adjudge reasonable as attorney's fees in said suit."

The question here presented is whether, when the payee of a nonnegotiable note transfers the same by a simple indorsement in blank, he becomes liable as the indorser of a negotiable note would, not only to his immediate indorsee, but to the indorsee of his indorsee; the second indorsement being also in blank, or, as in this case, "without re-course." It was held in England, prior to the statute of 3 & 4 Anne, that by the custom of merchants, when the payee indorsed his name upon a negotiable note, intending thereby to transfer it, the indorsee was at liberty to write over the signature not only an assignment, but a conditional guaranty of payment. The law thus made for the indorser of such a paper a contract not expressed, and which, independently of the law, there was nothing in the nature of the transaction to indicate. Independently of statute law, there is no custom or rule of law which can add such a condition to the assignment of a nonnegotiable note. In many states, however, there are statutory provisions on the subject. In 1850 the legislature of this state passed an act in regard to bills of exchange and promissory notes (St. 1850, p. 247), the first and fourth sections of which are as follows:

"All notes in writing made and signed by any person, whereby he shall promise to pay to any other person or to his order or to the order of any other person or unto the bearer, any sum of money therein mentioned, shall be due and payable as therein expressed, and shall have the same effect and be negotiable in like manner as inland bills of exchange, according to the custom of merchants."

"The payees and indorsees of every such note, payable to them or their order, and the holders of every such note payable to bearer, may maintain actions for the sums of money therein mentioned, against the makers and indorsers of the same respectively, in like manner as in cases of inland bills of exchange, and not otherwise."

In Hamilton v. McDonald, 18 Cal. 128, this court had occasion to consider the liability of an indorser of a nonnegotiable promissory note, as affected by that act. There, as here. the action was against the first indorser by the indorsee of the first indorsee. It was contended that the action could not be maintained for want of privity. The court said. "The answer to this objection is to be found in the provisions of the statute regulating the rights and liabilities of the parties. fourth section of the act of April, 1850, relative to bonds, duebills, etc., makes every assignor of a nonnegotiable note liable upon his assignment to the assignee of such note; and it is evident from the language used that it was not the intention to limit this liability to his immediate assignee. The rule at common law was that, as between the assignor and his immediate assignee, the assignment created the same liabilities and obligations on

the part of the assignor as the indorsement of a negotiable note created on the part of the indorser. But in respect to subsequent holders, no privity or connection existed between them and the assignor, unless expressly created by the assignment; and, where this was not done, the immediate assignee was the only person who could maintain an action in his own name against the assignor. The statute places the subsequent holder upon the same footing with the original assignee, and gives him a right of action against every person from whom the instrument has passed by assignment." It is claimed that this statute was repealed by the Code, and a very different rule established. At common law, however, although the subsequent holder could only sue his immediate indorser in his own name, he could sue the more remote indorser at law in the name of his assignor, or could obtain relief against them in equity in his Story, Prom. Notes, § 128. own name. Whether the statute of 1850 is repealed or not under our practice, it cannot be doubted that such holder may still sue in his own name, if the liability of such indorser is admitted. It may be remarked here that neither under the statute of 1850 nor at common law would the instrument sued upon be considered a promissory note at all. Under the act of 1850 the note was required to be for the payment of a sum of money therein mentioned. According to Blackstone, a promissory note was an engagement in writing to pay a sum specified. 2 Bl. Comm. 467. Story says it is a written engagement to pay absolutely and unconditionally a certain sum of money (section 1, Prom. Notes); and the author expressly shows that the definition applies both to negotiable and nonnegotiable notes (section 3). See, also, Byles, Bills, 5-41: Chit. Bills, 548; 3 Kent, Comm. 74. The instrument is not a promissory note when there may be contingent additions. Smith v. Nightingale, 2 Starkie, 375; Clv. Code, § 3244. The note involved in Hamilton v. McDonald. supra, had all the elements of a negotiable note, except that it was not payable to bearer or to order. But has the Code made no change in this matter? Section 3087, Civ. Code, defines a negotiable instrument as "a written promise or request for the payment of a certain sum of money to order or bearer in conformity to the provisions of this Code," and all the provisions of the Code in relation to the liability of drawers and indorsers and in reference to demand, notice, and protest are expressly limited to such instruments. Moreover, section 1774, Id., defines what liabilities one incurs who sells or agrees to sell other choses in action. Originally this section contained a further provision, which was stricken out in 1874, that such seller thereby warrants the instrument to be what it purports to be, and to be binding according to its purport upon all the parties thereto. Some of the liabilities created by this section are identical with those created by section 3116, Id.,

as to the parties to the assignment of negotiable paper, and others are evidently in lieu of them.

In view of these sections, can it be said that the rule established by the act of 1850 is still in force? Bank v. Falkenhan, 94 Cal. 141, 29 Pac. 866, is cited as authority for the judgment entered in this case. That action was brought by the first indorsee against his immediate indorser, and the note was indorsed with an express waiver of protest. This was held to be an indication that the indorser expected to be held as a guarantor. The writer quotes a rule laid down in Gerard v. La Coste, 1 Hare & W. Am. Lead. Cas. 302, note, to the effect that a mere indorsement is but a transfer of the rote, and whether any and what liability is incurred by the transfer by indorsement and delivery of such a note will depend upon the intention of the parties and the circumstances of the transaction. It is expressly stated that this rule is sufficient for the case in hand. What follows in regard to an alleged further rule upon the subject must be regarded as obiter. The case does not support the position of respondent. The judgment against Hill is reversed, and the court directed to sustain the demurrer to the complaint.

103 Cal. 476

Ex parte MAIER. (No. 21,116.) (Supreme Court of California. Aug. 1, 1894.) VIOLATION OF GAME LAWS—CONSTITUTIONAL LAW.

1. Section 626, Pen. Code (as amended St. 1898, p. 280), providing that every person who shall at any time sell or offer for sale the hide or meat of any deer shall be guilty of a misdemeanor, prohibits the sale of deer meat brought from without, as well as that taken within the state.

state.
2. Such act is not in excess of the police power of the state.
3. Such act is not unconstitutional, as an

3. Such act is not unconstitutional, as an attempt to regulate interstate commerce, the meat not having been sold in original packages.
In bank.

Petition for habeas corpus by Simon Maier, who was arrested for unlawfully selling deer meat. Writ denied.

Hunsaker, Goodrich & McCutcheon, for petitioner. H. C. Dillon, Dist. Atty., for respondent.

VAN FLEET, J. Petitioner was arrested and is held in restraint under a warrant issued out of the police court of the city of Los Angeles, based on a complaint charging him, under section 626 of the Penal Code, with unlawfully selling, on the 18th day of December, 1893, at said city, one pound of deer meat, which meat, the complaint alleges, was then and there by said Simon Maier cut from the carcass of an entire deer, which said deer had been theretofore brought by said Simon Maier from the state of Texas, in which state said deer had been lawfully killed." Petitioner asks for his discharge on habeas corpus, upon the ground that the

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complaint does not state a public offense, and, if that be true, there is no question but that he is entitled to his discharge in this proceeding. Ex parte Corryell, 22 Cai. 179; Ex parte Harrold, 47 Cal. 129; Ex parte Kearney, 55 Cal. 212. Section 626 is one of the provisions of the Penal Code for the preservation and protection of the wild game of this state, and the particular paragraph or subdivision of the section under which petitioner is charged (as amended, St. 1893, p. 280) reads: "Every person in the state of California who shall at any time sell, or offer for sale, the hide or meat of any deer, elk, antelope or mountain sheep, shall be guilty of a misdemeanor." Petitioner contends that this provision of the statute, properly construed, does not prohibit the sale of deer meat lawfully taken without the state, but has reference solely to deer killed within this state; that the law is intended to protect game within the state, not to prohibit the importation and sale of game from other states. With this contention we are unable to agree. It is true the law is intended for the protection of the game within the state, but it by no means follows from that fact that it is not the intention, as a means to accomplish that very end, to prohibit the sale of the meat of the animals procured elsewhere. The statute is perfectly plain and unambiguous in its terms, and is sufficiently broad and comprehensive to include the inhibited article wheresoever taken or procured. It does not confine itself in terms or by implication to the meat of deer killed in this state, but denounces as unlawful the sale of the meat of any deer; and there is nothing elsewhere in the statute tending to give it a more restricted sense. The language is too plain to leave room for construction, and we are not at liberty, even if so disposed, to place a limitation upon the meaning of the legislature which its language will not support. But we have no doubt that the legislature intended exactly what its words import. Aside from the explicit language in which this particular provision is couched, an examination of the various changes which these sections of the Code relating to protection of game have undergone at the hands of the legislature is persuasively convincing of the intention to do just what this act does by its terms,—entirely prohibit traffic in the meat of these game animals within the state, no matter where killed. And it need hardly be suggested that such a provision, if enforced, will lend great aid to the attainment of the object sought. The facility and ease with which the statutes for the protection of game have been evaded in the past is a matter of common knowledge. Deer and other game have been slaughtered during the close season, and foisted upon the market as game procured without the state; and, owing to the practical impossibility in the great majority of cases of proving with

certainty the source from which it was procured, the attempted enforcement of the statutes for its protection has largely proven abortive. These and like considerations no doubt actuated the legislature in the premises, and induced the enactment of the statute in its present stringent form; and we know of no good reason why it should not be held to mean what it says.

Similar statutes in other states have received a like construction. In Magner v. People, 97 Ill. 331, involving a statute of Illinois making it unlawful to sell or have in possession quail and certain other game birds during the close season, and which was not in terms limited to birds taken in the state, it was contended, as here, that the statute did not condemn the possession or sale of the birds taken and killed beyond the limits of the state, and shipped into the state for sale. But the court held that the statute must be taken as comprehending within its terms the prohibited game, no matter where taken. It is there "But it is argued that this cannot be said: the fair construction, because such a prohibition does not tend to protect the game of this state. To this there seems to be two answers: First. The language is clear and free of ambiguity, and in such case there is no room for construction; the language must be held to mean just what it says. Second. It cannot be said to be within judicial cognizance that such a prohibition does not tend to protect the game of this state. It being conceded, as it tacitly is by the argument, that preventing the entrapping, netting, ensnaring, etc., of wild fowls, birds, etc., during certain seasons of the year tends to the protection of wild fowls, birds, etc., we think it obvious that the prohibition of all possession and sales of such wild fowls or birds during the prohibited seasons would tend to their protection, in excluding the opportunity for the evasion of such law by clandestinely taking them, when secretly killed or captured here, beyond the state, and afterwards bringing them into the state for sale, or by other subterfuges and evasions." The court of appeals of New York held to the same effect under a statute very like ours, saying: penalty is denounced against the selling or possession after that time [close of the open season] irrespective of the place of killing." Phelps v. Racey, 60 N. Y. 10. In Whitehead v. Smithers, 2 C. P. Div. 553, Lord Coleridge held that under an English statute for the protection of British game, which made it unlawful to sell or have in possession plover during the close season, a party who imported the dead birds from Holland and sold them in the British market came within the prohibition of the statute, and said: said it would be a strong thing for the legislature of the United Kingdom to interfere with the rights of foreigners to kill birds. But it may well be that the true and only mode of protecting British wild fowl from indiscriminate slaughter, as well as protecting

other British interests, is by interfering indirectly with the proceedings of foreign persons. The object is to prevent British wild fowl from being improperly killed, and sold under pretense of their being imported from abroad." See, also, State v. Judy, 7 Mo. App. 524, and State v. Farrell, 23 Mo. App. 176.

The cases relied upon by petitioner are clearly distinguishable from the cases referred to above. In most of them, as in Com. v. Hall, 128 Mass. 410, and People v. O'Neil, 71 Mich. 325, 39 N. W. 1, the statutes under consideration contained a provision making possession of the game during the close season prima facie evidence of a violation of the law, and the construction of the prohibitive features of the statute largely turned upon the effect of that provision. In Com. v. Hall, which is followed by the Michigan case, it is said: "Saying that possession should be prima facie evidence necessarily implies that it shall not be conclusive. If the mere possession of birds, during the time within which the taking or killing them is prohibited, of itself constituted an offense under the previous sections of the statute, to say that such possession would be prima facle evidence would be superfluous, if not absurd." And it is held that the statute must, therefore, be construed as referring only to game unlawfully taken within the state during the close season. As suggested by counsel for the people, our statute contained a similar provision up to 1883, when the legislature by an amendment (St. 1883, p. 80) eliminated it, thereby evincing an intention to remove from the law anything calculated to qualify or limit its otherwise plain and explicit terms. We have no doubt that the intention of section 626 is to prohibit the sale of deer meat brought from without, as well as that taken within, the state. Nor do we think that in giving the act this effect it contravenes the constitution of this state as being in excess of the police power of the state. The wild game within a state belongs to the people in their collective, sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good. To this extent it is conceded that the state may go. But it is contended that to go further, and prohibit the sale of game lawfully killed elsewhere and brought here as private property, is in effect to destroy private property, and that this is going beyond a proper exercise of the police power. While it is true that the power to regulate is not the power to destroy, in its absolute sense, it is nevertheless true that the right to regulate frequently and as a necessary sequence carries with it the right to so control and limit the use or enjoyment of private property as to amount to its destruction. In the case of Phelps v. Racey, supra, the same objection

was raised, and it is there said: "The objection of a want of power in the legislature to pass the act is not tenable. It is not in conflict with the state constitution, within the case of Wynehamer v. People, 13 N. Y. 378. That case involved the validity of the prohibitory liquor law, and determined that such law, so far as it applied to and substantially destroyed property in liquors owned or possessed at the time the act took effect, was in violation of the provision of the state constitution which declares that no person shall be deprived of life, liberty, or property without due process of law; but impliedly, if not necessarily, it affirmed the power if the law had only applied to liquors subsequently manufactured and acquired. Here the property was acquired subsequent to the passage of the act, and with the presumed knowledge of its provisions and conditions. The legislature may pass many laws the effect of which may be to impair, or even destroy, the right of property. Private interest must yield to the public advantage. All legislative powers not restrained by express or implied provisions of the constitution may be exercised. The protection and preservation of game has been secured by law in all civilized countries, and may be justified on many grounds, one of which is for purposes of food. The measures best adapted to this end are for the legislature to determine, and courts cannot re-view its discretion." And these principles And these principles have been repeatedly upheld. In some instances their enforcement may work hardship, but we see no such result here. statute does not prevent a party from importing all the venison he wants for his own use or consumption, if he desires to do so. It simply says that for the better protection of the rights of the people in these wild animals, and as a means of preventing their destruction, the meat shall not be a lawful article of There can be no serious injury to any one under such a regulation. If any person imports the meat of the deer into the state he does it with his eyes open, and a knowledge of the purposes for which the law permits it, just as the petitioner did here. Under such circumstances he cannot complain if he is prevented from making a use of the article which the legislature has declared to be detrimental to the well-being of the state. As suggested in Phelps v. Racey, supra, he acquired the property after the passage of the act, and his rights in it are necessarily subject to the regulations imposed upon its use.

It is further strenuously urged, however, that the act so construed violates the constitution of the United States, in that it is an attempt to regulate interstate commerce,—a subject wholly committed to congress. But, after a very careful consideration of the numerous authorities cited in support of this view, we do not think the statute open to this objection. It is true, its enforcement may indirectly or incidentally affect to some ex-

tent traffic in the inhibited article between the people of this and other states, but that of itself is not sufficient to bring it within the objection urged. The right of the states, under the very comprehensive police power reserved to them under our dual system of government to regulate and control their own internal affairs, including trade, to the reasonable advantage and good of their people is conceded and upheld in all the cases in which the questions growing out of the right of the federal congress to regulate interstate commerce has arisen. The only difficulty has been in defining the limitations of that power. In Railroad Co. v. Husen, 95 U. S. 470, it is said: "We admit that the deposit in congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated police power. What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. As was said in Thorp v. Railroad Co., 27 Vt. 149: It extends to the protection of the lives, limbs, comfort, and quiet of all persons and the protection of all property within the state according to the maxim "sic utere tuo ut alienum non laedas," which, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others.' It was further said that by the general police power of a state 'persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or, upon acknowledged principles, ever can be, made, so far as natural persons are concerned." "Many acts of a state," say the court further in that case, indeed affect commerce without amounting to a regulation of it in the constitutional sense of the term. And it is sometimes difficult to define the distinction between that which merely affects or influences and that which regulates or furnishes a rule for conduct." And in the celebrated cases commonly designated as "The License Cases." 5 How. 504, it is held that the fact that a regulation may incidentally and to a certain extent affect commerce between the states does not affect its validity. In Pierce v. New Hampshire (one of the license cases, supra,) Mr. Justice Woodbury, in one of the opinions of the majority of the court, in discussing this power of the states, says: "The subject of buying and selling within a state is one as exclusively belonging to the power of the state over its internal trade as that to regulate foreign commerce is with the general government, under the broadest construction of that power." "The idea, too, that a prohibition to sell would be tantamount to a prohibition to import does not seem to me.

either logical or founded in fact; for, even under a prohibition to sell, a person could import, as he often does, for his own consumption and that of his family and plantations; and also, a merchant extensively engaged in commerce often does import articles with no view of selling them here, but of storing them for a higher and more suitable market in another state or abroad." In the subsequent case of Bowman v. Railway Co., 125 U. S. 465, 8 Sup. Ct. 689, 1062, the same court held a statute of Iowa, which forbid any common carrier to bring into the state for any person or corporation any intoxicating liquors from any state or territory void, as being an unwarrantable interference with interstate commerce, and not a legitimate exercise of police power, in that it was more than a regulation of its own internal affairs or an exercise of the jurisdiction of the state over persons and property "It is an attempt," say the within its limits. court, "to exert that jurisdiction over persons and property within the limits of other states. It seeks to prohibit and stop their passage and importation into its own limits, and is designed as a regulation of commerce before the merchandise is brought to its border. • • It is not a regulation confined to the purely internal and domestic commerce of the state. It is not a restriction which only operates upon property after it has become mingled with and forms part of the mass of the property within the state. • • • But the right to prohibit sales, so far as conceded to the states, arises only after the act of transportation has terminated, because the sales which the state may forbid are of things within its jurisdiction." And it is held that the state cannot, under the guise of a police regulation, prevent the importation of legitimate articles of commerce and trade. And in the later case of Leisy v. Hardin, 135 U. 8. 100, 10 Sup. Ct. 681, it was held that, it not being within the power of the state to prohibit the importation of lawful commodities, neither can she prohibit the sale by the importer of such commodities upon their receipt by him, since the right to sell any article imported was an inseparable incident to the right to import it. But this right of sale was distinctly limited to the right of the importer to sell or dispose of the article imported in its original, unbroken package or condition as brought by him into the state, and the principle is in that case, as in Bowman v. Railway Co. and the other cases cited, distinctly upheld, that the authority of congress over any article of commerce imported into a state ceases "when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands," and that thereupon the property becomes subject to the jurisdiction of the state, and affected and controlled by its regulations. Tested by these principles, we cannot see wherein the

statute, applying its provisions to the case made in the complaint, is open to the objection that it attempts to or does regulate interstate commerce. Petitioner imported the meat into the state, broke the original package, and put the commodity upon the market. It thereupon became property strictly subject to state regulation and control, and falls within the denunciation of the statute. petitioner could have sold the meat as an entire carcass is a question which does not confront us, and which it is not, therefore, necessary to determine. We think the complaint states a cause of action, and it follows that the petitioner should be remanded. It is so ordered.

We concur: BEATTY, C. J.; McFAR-LAND, J.; GAROUTTE, J.; HARRISON, J.; FITZGERALD, J.

DE HAVEN, J., being absent, did not participate in the foregoing decision.

103 Cal. 342

In re FAIR'S ESTATE. (No. 15,311.)
(Supreme Court of California. June 29, 1894.)
WILLS—CONSTRUCTION—RIGHTS OF DEVISEES.

Testatrix devised her entire estate to executors in trust until complete disposition thereof as directed by the will. She then bequeathed to each of her two daughters a certain sum, to be paid to her when 25 years old; to her son J. \$500,000, to be paid to him when 35 years old; and to her son C. \$500,000, to be paid to him when 30 years old. She then directed that, in case J. should die without leaving a wife or lawful issue, his portion should be paid to C., if living; that, in case C. should die without leaving a wife or lawful issue, his portion should be paid to J., if living; and that, in case both J. and C. should die without wife or lawful issue surviving them, their portions should be paid to the daughters. J. died before he was 35 years old, leaving neither wife nor child. Held, that C. was not entitled to J.'s portion until the time when J. would attain the age of 35 if living.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Petition by Charles L. Fair for an order directing the executors of the estate of Theresa Fair, deceased, to pay to him the sum of \$500,000, bequeathed to his brother, James G. Fair, Jr., and which, by the terms of the will, was to be paid to petitioner in case of the death of the latter. From an order denying the petition, petitioner appeals. Affirmed.

W. S. Goodfellow, for appellant. R. S. Messick and Byron Waters, for respondents.

PER CURIAM. When this case was in department the following opinion was prepared by Commissioner HAYNES:

"Appellant petitioned the court below for an order directing the executors of the will of Theresa Fair, deceased, to pay to him the sum of \$500,000, bequeathed to his brother, James G. Fair, Jr., and which, in case of the death of James, was, by the terms of the will, to be paid to petitioner. This appeal is from an order denying said petition.

"The proper determination of the questions involves the consideration and construction of the whole of the will, which, omitting formal parts, is as follows: 'I hereby give, bequeath, and devise all my real and personal estate, of what nature or kind soever and wheresoever situated, to John W. Mackay and Richard V. Dey, the executors of my last will and testament, hereinafter nominated and appointed, in trust for the payment of my just debts and the legacies and charges upon the said estate hereinafter specified; to be held and possessed by them, with power to sell and dispose of the same, or any part thereof, at public or private sale, at such time or times and upon such terms and in such manner as to them shall seem meet, and to reinvest any surplus proceeds of such sales for the best interest of said estate until the full and complete disposition of said estate by them, which I hereby direct shall by them be made in compliance with the following: I give and bequeath to my daughter Theresa Alice Fair the sum of one million five hundred thousand dollars, and direct the same to be paid to her upon her attaining the age of twenty-five years, but not before then, and that meantime there shall be paid to her monthly the sum of twenty-five hundred dollars. I give and bequeath to my daughter Virginia Fair the sum of one million five hundred thousand dollars, and direct the same to be paid to her upon her attaining the age of twenty-five years, but not before then, and that meantime there shall be paid to her monthly the sum of twentyfive hundred dollars. I give and bequeath to my son James Graham Fair, Jr., the sum of five hundred thousand dollars, and direct the same to be paid to him when he shall have attained the age of thirty-five years, but not before then, and that meantime there shall be paid to him monthly the sum of five hundred dollars. I give and bequeath to my son Charles Lewis Fair the sum of five hundred thousand dollars, and direct the same to be paid to him when he shall have attained the age of thirty years, but not before then, but that meantime there shall be paid to him monthly the sum of five hundred dollars. The rest and residue of my estate I give and bequeath to my two daughters above named, to be divided between them equally, share and share alike, and to be paid to them when my said daughter Virginia shall have attained the age of twentyfive years. In case my said son James Graham Fair, Jr., shall die without wife or lawful issue surviving him, the portion allotted to him shall be paid to my said son Charles Lewis Fair, if living, and, if not living, then to his surviving wife or lawful issue, if any there be. In case my said son Charles Lewis Fair shall die without wife

or lawful issue surviving him, the portion allotted to him shall be paid to the said James Graham Fair, Jr., if living, and, if not living, then to his surviving wife or lawful issue, if any there be. In case both the said James Graham Fair, Jr., and Charles Lewis Fair shall die without wife or lawful issue surviving them, then the portions allotted them shall be paid to my said daughters, Theresa Alice Fair and Virginia Fair, share and share alike. In case of the death of my said daughter Theresa Alice Fair without husband or child surviving her, the portion allotted to her shall be paid one-half to my daughter Virginia Fair and the other half in equal portions to the said James Graham Fair, Jr., and Charles Lewis Fair. And in case of the death of my said daughter Virginia Fair without husband or child surviving her, the portion allotted to her shall be paid one-half to my daughter Theresa Alice Fair and the other half in equal portions to my sons, James Graham Fair, Jr., and Charles Lewis Fair, aforesaid.' The executors therein named were duly appointed, and qualified in October, 1891.

"The court found that appellant was of the age of 25 years, and no more; that James G. Fair, Jr., died on the 12th day of February, 1892, under the age of 30 years, and had never married; that the estate was but little indebted; and that the sum of \$500,000 prayed for by the petitioner might be allowed to him, if he were entitled thereto, without loss to the creditors of the estate. As conclusions of law the court found: 'That by the terms of said will the petitioner is not entitled to have or receive the sum of \$500,000 prayed for by him until he shall have attained the age of thirty years; that his petition is, therefore, premature, and should be denied. The order denying said petition was entered February 16, 1893.

"Appellant's contention is that, as survivor of his brother, he became entitled to said legacy immediately upon the death of James G. Fair, Jr.; and respondents contend, in their brief, that it is not payable to Charles until, by the terms of the will, it would have been payable to James, had he lived, nor until Charles had arrived at the age of 30 The will does not state the dates at years. which the several legatees will respectively arrive at the age at which their several legacies would become payable. Nevertheless the times for the payment of the several legacies are as definitely fixed, in case none of them should die before reaching the designated age, as though the year, month, and day of the payment of each had been stated in the will, instead of the age of the legatee, as these dates must be definitely ascertained before payment could be made of the several original bequests. These clauses of the will relating to the time of payment of the original bequests may therefore be read as though the dates of the payments were specified, instead of the ages of the several legatees; and the question is whether there is any provision in the will manifesting the intention of the testarrix that, in case of the death of the legatee, the legacy should be payable to the survivor at a different or earlier date. The will does not expressly state at what time the death of the original legatee should occur to entitle the survivor to the legacy which would otherwise have gone to the deceased brother or sister, nor whether the date of payment should thereby be changed, and therefore these questions must be left to construction. It is obvious, however, that the payment of any of these original legacies to the legatee upon arriving at the prescribed age takes the money so paid out of and beyond the operation of the will. which imposes no conditions or restrictions of any character upon it after its payment to the legatee; and therefore all facts and circumstances affecting its disposition must exist or occur at or before the death of the primary legatee.

"James having died unmarried, the provision relating to a surviving wife or lawful issue need not be considered.

"Recurring, then, to the question whether there is anything in the will authorizing the payment of the legacy in question to Charles at an earlier date than that fixed for the payment to James, I think the answer must be in the negative. The language of the clause principally in question does not require such earlier payment. If the language were 'upon' the death of James, or in case of the death of James, his portion shall 'then' be paid to Charles, there would be a reasonably clear expression of an intention to change the time of payment; but the language, 'in case of the death of James, his portion shall be paid to Charles,' does not enable us to say that the testatrix intended such earlier payment; and, if we look to the other provisions of the will, I think it clearly appears therefrom that such was not her intention. The will devised and bequeathed the entire estate to Mackay and Dey in trust, to be held and possessed by them, with power to seil and dispose of it and reinvest any surplus proceeds for the best interests of the estate. It was inevitable that all of the estate should remain in their hands for a time. and it was important that the times at which the trust should terminate as to the different portions or legacies should be definitely fixed, so as to enable them to best preserve and increase the estate, and be prepared to pay the different legacies when they became payable. This was done, and, in view of the interests of the estate as a whole, and the proper discharge of their duties by the trustees, it ought to require at least a reasonably clear expression of intention to make the time of payment depend upon the happening of contingencies in their nature uncertain to justify the court in holding that such change in the time of payment was intended. That the time of payment of the several legacies is not

changed by the accident of the death of any of them, but only the person to whom they are to be paid, is apparent from the several provisions of the will; provisions that cannot be complied with if appellant's contention is to prevail.

"It will be observed that there is a similar provision in favor of James in case Charles shall first die, and a further provision that, in case James and Charles both die without wife or lawful issue surviving them, the portions allotted to James and Charles shall 'be paid' to their sisters, Theresa and Virginia. In all these cases the money to 'be paid' is to be paid by the executors, and necessarily implies that the money must remain in their hands until the time arrives when no contingency could happen under the terms of the will making it payable to another than the first survivor. As each of the brothers had a contingent right to the legacy of the other, so the sisters have a contingent right to the legacies of both James and Charles: a right that could not avail them as to the legacy given to James if appellant's contention is correct. If, for example, the executors had paid to James the legacy in question in his lifetime, Charles could well insist, when the time arrived at which James would have attained the age of 35 years, that that sum should have been in their hands, as, upon the contingency of the death of James under that age, he was entitled to it; and so the sisters might well insist, if the executors had paid the legacy in question to Charles, and afterwards, and before James would have attained the age of 35, Charles had died, that they were entitled not only to the legacy of Charles which remained in the hands of the executors, but also to the legacy of James, since the contingency had happened upon which the executors were directed by the will to pay it to them; and to this claim, if the executors had voluntarily paid the legacy of James to Charles, they could oppose no possible defense. I do not think that the time of the payment of the legacy in question depends upon Charles' arriving at the age of 30 years, but that in no event is it payable until the date at which James would have arrived at the age of 35; for, if Charles should arrive at the age of 30 before that date, and the bequest to James should then be paid to him, and he should afterwards die before the date at which it was payable to James, the sisters would be deprived of the contingent bequest to them of the same legacy. Other possible contingencies, not arising upon the facts contained in the record, may yet arise, but none, I think, which can affect the conclusion stated. The conclusion of the court below that Charles would be entitled to the legacy in question if he were 30 years of age, I think, is erroneous, but, as the judgment of dismissal is right, it should be affirmed.

"We concur: VANCLIEF, C.; BELCHER,

After full consideration of the case in bank, we are satisfied with the foregoing opinion, and with the conclusions therein reached; and for the reasons therein given the judgment appealed from is affirmed.

102 Cal. 421

TAYLOR v. ABBOTT et al. (No. 19,392.) (Supreme Court of California. July 26, 1894.) Appropriation of Water — Sufficiency of Notice

1. A notice on surveyed public lands that a person had on a certain day "located" a spring and water right, and "claims" all the water in the spring and flowing from it, is not in conformity with Civil Code, § 1415, which provides for a notice at the point of intended diversion stating the number of inches, measured on a four-foot pressure, claimed, the purpose for which it is claimed, and the place of intended use.

which it is claimed, and the place of intended use, etc.

2. On December 17th, plaintiff posted a defective notice of his intention to divert water, and made an excavation in the spring three feet deep and three feet wide at the place of intended diversion. He also bought some pipe and lumber with which to complete the diversion, but never connected them with the spring. On December 28th, defendant, under the act of April 20, 1852, took possession of the land on which the spring was located, built himself a house thereon, and moved his family there, and filed the necessary affidavit. Held, that the work done by plaintiff did not constitute possession, and that neither his intentions, declarations, nor preparations were equivalent to actual possession.

Department 1. Appeal from superior court, Ventura county; B. T. Williams, Judge. Action by Taylor against Abbott and others to enjoin interference with plaintiff in constructing a diversion of water. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Daly & Toland, for appellant. H. L. Poplin and Blackstock & Ewing, for respondents.

HARRISON, J. The plaintiff posted a notice December 17, 1892, near a spring of water upon certain surveyed public lands in the county of Ventura, stating that he had that day "located" the spring and water right, and "claims" all water in the spring and flowing from it. On the same day he made an excavation in the spring, about three feet square and three feet in depth, for the purpose of marking the place of his intended diversion. A few days afterwards he bought some pipe and lumber with which to complete the means of diverting the water, but did not in fact make any connection with the spring, or complete his intended diversion of the water. On the 28th of December the defendant went upon the land where the spring was located, took possession thereof, built himself a house and moved his family into it, and thereafter held possession of the land, and on the 20th of February, 1893, filed an affidavit in conformity with the requirements of the possessory act of April 20, 1852.

After the defendant had taken possession of this land the plaintiff attempted to complete his diversion of the water from the spring, but was prevented from so doing by the defendant. The plaintiff brought this action February 21, 1893, to enjoin the defendant from interfering with him in completing such diversion. The cause was tried by the court, and judgment rendered in favor of the defendant. Plaintiff has appealed.

The plaintiff, by this action, seeks preventive relief for the future, rather than redress for a past wrong; and his right to this remedy is to be determined by the respective rights of the parties as they were at the commencement of the action. At that time the defendant was in possession and occupancy of the land which included the spring, and had filed his affidavit under the possessory act. Under the provisions of section 1 of this act (St. 1852, p. 158), he was entitled to "maintain any action for interference with or injuries done to his possession of said land against any person or persons so interfering with or injuring such land or possession," and would necessarily have the same right to defend his possession and rights the land in any action brought against him. After he had thus taken possession of the land, any threats or conduct on his part by which the plaintiff was prevented from completing his diversion of the water would be in support of his own rights, rather than a wrong against the plaintiff, unless the plaintiff had acquired a right to such diversion superior to the defendant's rights in the land. The court finds that on the 28th day of December, 1892, when the defendant settled upon the land, there was no other in the possession or occupation thereof. and that prior to the commencement of this action, viz. on the 20th of February, the defendant had filed his affidavit under the possessory act, and that his acts in preventing the plaintiff from completing his attempted diversion of the water were for the purpose of protecting his possessory claim. The evidence before the court was ample to sustain this finding, so that it is unnecessary to determine whether the specifications of its insufficiency are such as to preclude it from being considered. It may be conceded that, if the plaintiff had completed the diversion of the water before the defendant had acquired any rights in the land, the plaintiff's rights would have been superior to that of the de-Wells v. Mantes, 99 Cal. 583, 34 Pac. 324. There is, however, no allegation in the complaint that the plaintiff was in possession of the land upon which the spring was located, nor does he claim to have been in the actual occupancy thereof, or to have had any possession other than such as followed from his notice and the digging out of the spring on the 17th of December. His subsequent purchase of pipe, and causing it to be hauled to a point "towards said springs", and several hundred feet distant therefrom, did not tend to establish a possession of the spring, or of the land on which it was located. The notice posted by him at the spring did not conform to the requirements of section 1415 of the Civil Code, and he cannot therefore claim any rights thereunder as an appropriator of the water. The posting of this notice was admitted by the answer, so that its exclusion by the court when offered in evidence did not constitute any error.

The plaintiff is not entitled to the relief sought herein by virtue of the provisions of section 2339 of the Revised Statutes of the United States. That section does not confer the right to enter upon lands in the possession of another for the purpose of securing the water thereon, or of completing an attempted diversion of water, even though the person seeking so to enter had at some previous time manifested his intention to secure a water right thereon. It merely provides for protecting such rights to the use of water as may have "vested and accrued" by priority of possession, and as are recognized and acknowledged by the local customs, laws, and decisions of courts. Whether the defendant would have had the right to interfere with the plaintiff if, at the time of his entry upon the land, the plaintiff had been actually engaged in laying pipes for the diversion of the water thereon, depends upon other principles of law, and is not presented in the present case. De Necochea v. Curtis, 80 Cal. 400, 20 Pac. 563, and 22 Pac. 198, merely holds that when the diversion of the water has been completed before a subsequent pre-emptor acquires any right in the land, it is superior to the pre-emptor's right. The plaintiff was not in possession of the land when the defendant entered thereon, and neither can his intentions or declarations, any more than his preparations to complete the diversion, be regarded as equivalent to an actual possession. Digging at the spring did not constitute possession, but was merely an act indicative of an intention to claim the water, and was to be considered by the court, in connection with other evidence, for the purpose of determining whether the land was vacant. The finding of the court upon this subject must be regarded as determinative of the question.

There are other errors assigned in the admission and exclusion of evidence, but they are not of such a character as require consideration. The judgment and order are affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

103 Cal. 215

VALENTINE v. SLOSS et al. (No. 15,432.) (Supreme Court of California. July 26, 1894.) In bank.

Action by Thomas B. Valentine against Louis Sloss and others. Judgment for plaintiff, and defendants appeal. Affirmed.

For former report, see 37 Pac. 326.

PER CURIAM. Rehearing denied.

BEATTY, C. J. I dissent from the order denying a rehearing of this cause, and from the judgment of the department. The district court had jurisdiction to hear exceptions to the Matthewson survey, and to confirm it independently of the act of congress of 1860. It had this jurisdiction by virtue of the fact that the decree confirming the grant was its own decree, and not, as in the case of U.S. v. Sepulveda, 1 Wall. 104, the decree of the land commission. This case also differs from the Sepulveda Case in the important fact that the grant was not a floating grant within extensive and indefinite boundaries, but was a grant of a tract with specific boundaries, and therefore peculiarly and appropriately subject to definite location by the court, according to the doctrine of U.S. v. Fossatt, 21 How. 445, and the cases therein cited. Fossatt Case was cited in the Sepulveda Case; and, so far from overruling it, the court took especial pains to set forth the distinction upon which they held that in the Sepulveda Case the district court could acquire jurisdiction to correct the survey only under the act of 1860. I think the judgment of the superior court should have been reversed.

VAN FLEET, J., concurs.

103 Cal. 429

In re McLAUGHLIN'S ESTATE. (No. 15,-409.)

(Supreme Court of California, July 26, 1894.)
Public Administrator — Guardian of Incompe-

M. died in 1892, leaving, as her only heir at law, an incompetent person with a guardian. Code Civ. Proc. \$1368, which provided that a guardian of a minor was entitled to administration, was amended in 1893 so as to include the guardian of an incompetent person. Held, that the public administrator was not entitled to administration on the estate of M., in preference to the guardian, on the ground that at the death of M., and before the act was amended, he was so entitled, as his right to administration depended on his status at the time the letters were granted.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Kate Kenney, as guardian of James H. McLaughlin, an incompetent person, applied for letters of administration on the estate of Catherine McLaughlin, deceased. A. C. Freese, public administrator of the city and county of San Francisco, at the same time ap-

plied for such letters. An order was made granting the letters to Kate Kenney, and denying the petition of A. C. Freese, and he appeals. Affirmed.

J. D. Sullivan and Herbert Choynski, for appellant. Beverly L. Hodghead and S. Bloom, for respondent.

PER CURIAM. Catherine McLaughlin dled intestate, in the city and county of San Francisco, on October 20, 1892, leaving estate therein, and leaving as her sole heir at law a son, 37 years old, named James H. McLaughlin, who had been duly adjudged to be an incompetent person. On March 17, 1893, the respondent, Kate Kenney, the duly appointed, qualified, and acting guardian of said James H. McLaughlin, filed in the superior court of said city and county her petition asking that letters of administration on the estate of Catherine McLaughlin be issued to her. On March 20, 1893, A. C. Freese, the public administrator of the city and county of San Francisco, filed his petition in the same court asking that letters of administration on the said estate be issued to him. The two petitions were heard at the same time, and on April 4, 1893, the court made and entered an order denying the petition of said A. C. Freese, and granting that of said Kate Kenney. From that order, said Freese appeals.

The only question to be determined is, was the guardian of the incompetent son or the public administrator entitled to letters of administration on the estate? Section 1368 of the Code of Civil Procedure was amended on February 27, 1893, by inserting the words "or an incompetent person," and, as amended, it reads as follows: "If any person entitled to administration is a minor or an incompetent person, letters must be granted to his or her guardian, or any other person entitled to letters of administration, in the discretion of the court." It is clear that respondent was entitled to have the letters granted to her, if this section, as amended, was applicable to the case. It is claimed, however, for appellant, that the amendment was not retroactive, and was not applicable, because "the rights of the appellant had accrued, and were vested, at the date of the death of said deceased, and no subsequent act of the legislature could serve to divest the appellant of his right to letters of administration, and to invest the respondent with that right." This claim is not, in our opinion, supported by the authorities or reason. A public administrator does not, by virtue of his office, or by filing a petition for letters of administration upon the estate of a decedent, acquire any interest in the estate, or in the commissions to be earned by administering upon it. His status at the time of the grant of administration determines his competency. In re Pingree's Estate, 100 Cal. 78, 34 Pac. 521. The appel-

lant had no vested right to letters, and the court properly exercised its discretion in granting the letters to the respondent. The order is affirmed.

103 Cal. 438

WILLIAMS v. NAFTZGER et al. (No. 19,-338.)

(Supreme Court of California. July 26, 1894.) FORECLOSURE OF MORTGAGE - ASSUMPTION BY GRANTEE-DEFICIENCY JUDGMENT - REVIEW ON APPEAL.

1. A grantee of mortgaged premises, who has assumed the mortgage, is liable, in an action of foreclosure, for a deficiency judgment.

2. Findings of fact by the trial court upon conflicting evidence will not be reviewed on ap-

peal.

Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by one Williams against Naftzger and others to foreclose a mortgage. There was a judgment for plaintiff, from which, and from an order denying a new trial, defendants appeal. Affirmed.

Collier & Evans, for appellants. Curtis, Otis & Curtis, for respondent.

HARRISON, J. The defendants King and La Baron executed a mortgage to the plaintiff in 1887, upon certain lands in the county of San Bernardino, to secure the payment of their note for \$2,000. In October, 1888, these defendants conveyed the mortgaged premises to their codefendants, Naftzger, Merrill, and Kanavel, subject to the lien of said mortgage; and the said grantees, as a part of the consideration for said conveyance, promised to pay said promissory note, and to secure the discharge and release of the mortgage. In July, 1891, each of these grantees signed and acknowledged a deed of conveyance, purporting to reconvey the premises to King and La Baron, subject to the said note and mortgage, and containing a clause by which King and La Baron assumed to pay and release the same. These instruments were placed in the hands of the defendant Naftzger, and he afterwards delivered them to the defendant La Baron, who caused them to be recorded in the office of the county recorder. Naftzger also paid to La Baron \$500 to induce him to accept the The deeds were delivered by Naftzger to La Baron without the knowledge of King, nor did King ever accept the deeds, or in any way ratify their delivery to or acceptance by La Baron; nor did he agree to a reconveyance of the mortgaged property, or to release his grantees from the liability they had assumed by virtue of the terms of the conveyance to them. soon as he learned that the deeds had been delivered to La Baron, he repudiated the transaction, and notified his grantees thereof. The plaintiff brings this action to foreclose his mortgage, and to recover judgment

against each of the above defendants for any deficiency there may be after a sale of the mortgaged lands. King and La Baron made default, and at the trial upon the issues made by the answers of the other defendants the court found the above facts, and rendered judgment in favor of the plaintiff. The defendants Naftzger, Merrill, and Kanavel have appealed.

An agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises, for which his grantor is liable, renders the grantee liable therefor to the mortgagee; and in an action for the foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be rendered against him, as well as against the mortgagor, for the amount of such deficiency. This liability results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises, and the assumption of the mortgage debt by the grantee, the latter, as between him and his grantor, becomes primarily liable to the mortgagee, and his vendor becomes his surety. Halsey v. Reed, 9 Paige, 452; Crowell v. Currier, 27 N. J. Eq. 154; Crawford v. Edwards, 33 Mich. 354; Keller v. Ashford, 133 U. S. 622, 10 Sup. Ct. 494; Biddel v. Brizzolara, 64 Cal. 354, 30 Pac. 609; Jones, Mortg. §§ 741, 752.

The appellants do not controvert this proposition, but urge in support of their appeal that the evidence was insufficient to justify the court in finding that King did not accept the deed. Upon this proposition, however, there was a sharp conflict in the evidence, and the finding of the court is not here open to review. See, also, Cordts v. Hargrave, 29 N. J. Eq. 446; Stuart v. Hervey, 36 Neb. 1, 53 N. W. 1032. If the deed was never delivered to or accepted by King, the appellants were not released from their obligation to him to discharge the mortgage debt, and the plaintiff is entitled to avail himself of this obligation for the purpose of obtaining a satisfaction of the debt created by King. The judgment and order are affirmed.

We concur: GAROUTTE, J., McFAR-LAND, J.

4 Cal. Unrep. 730 KELLER v. FINK. (No. 19,356.) (Supreme Court of California. July 26, 1894.)

WATER RIGHTS.

Where plaintiff had the right to the water of a ditch and to a dam on defendant's land, which the latter used for the purpose of pas-turing stock, defendant was not liable for injuries to the dam by the cattle tramping and treading the same, where plaintiff had the right to enter and protect the dam against such injuries.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Frederick Keller against Charles Fink for damages to a dam. Judgment for defendant, and plaintiff appeals. Affirmed.

Graves & Graves, for appellant. W. H. Spencer, for respondent.

HAYNES, C. Plaintiff is the lessee of the Branch Flouring Mill, operated by the waters of Arroyo Grande creek. The dam and a portion of the ditch which conveys the water from the dam to the mill are upon defendant's land. It is claimed that defendant's horses, cattle, and hogs so injure the dam and ditch that plaintiff is deprived of water to run his mill for a considerable portion of the time, and prays judgment for the sum of \$5,000. The answer denies all the allegations of the complaint, and, for a second defense, alleges that he uses his land for stock purposes in the usual manner, and that he has never, in any manner, intentionally injured, or permitted to be injured, said dam or ditch. The cause was tried before a jury, and a general verdict was returned for defendant, upon which judgment was entered, and this appeal is from the judgment and an order denying plaintiff's motion for a new trial.

Respondent makes the point that the appeal from the order cannot be considered, because not taken in time. This objection must be sustained. A bill of exceptions was taken by plaintiff, and used on the hearing of the motion for a new trial. The only errors of law noticed in appellant's brief are that the court erred in refusing to give the third and the fourth instructions requested by plaintiff. There was no controversy as to the right of the plaintiff to maintain and use the dam and ditch. The question was as to the defendant's liability for casual injury thereto upon his lands, occasioned by his stock, which was kept upon his land in the manner in which such stock is usually kept, and which rightfully had access to the water. The third instruction, if it had been given, would have required the jury to find against the defendant if they found that he permitted his stock to injure the dam and ditch "by tramping and treading and cutting the same, whereby the water was prevented from flowing to plaintiff's mill. It was not contended that defendant had not the right to the water for his stock, nor, on the other hand, was there any denial of plaintiff's right to enter to make repairs, nor does it appear that plaintiff could not, without interfering with defendant's rights, have protected his dam and ditch, or that the dam might not have been so constructed and of such material that the stock could not injure it, instead of the temporary structure composed of brush and sand which existed. The fourth instruction requested was to the effect that, under the condition of things stated in the third request,

the plaintiff was entitled to damages. These instructions were properly refused, and the instructions given fairly stated the law applicable to the facts developed by the evidence.

The plaintiff was not prejudiced by not being permitted to answer the question, "You say the profits have been \$8 per day?" inasmuch as he did not make a case entitling him to any damages. An objection was properly sustained to the following question: "State whether or not it was worth while to repair the ditch so long as the defendant's stock are permitted to roam and go over the same?" Unless it was shown that it was the defendant's duty to protect the dam and ditch, or in some manner prevent his stock from injuring them, the question was immaterial, and we see nothing in the evidence imposing such duty upon the defendant. Plaintiff's objection to the question put to defendant, "Have you used this land of yours, which includes the creek, any different from the way you have used your other land?" was properly overruled. No one has the right to purposely or so negligently use his property as to imply a willingness to injure the property of another, or which creates an injury which would not result from its ordinary and lawful use, but each is bound to protect his property from such injury as may arise from the ordinary and lawful use by another of his own property. We see no ground upon which the judgment should be reversed, and advise that it be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the order denying a new trial is dismissed, and the judgment affirmed.

Tog Cal. 415 SHERER v. PARK NURSERY CO. (No. 19,355.)

(Supreme Court of California. July 28, 1894.)

Sale—Warbanty of Fruit Trees—Measure of Damages—Statute Construed.

1. Under Civ. Code, § 3313, the damages for breach of warranty of the quality of fruit trees is the difference in the value between the kind of trees warranted and the trees actually delivered at the time those delivered first hore fruit.

ered, at the time those delivered first bore fruit.

2. The damages for breach of warranty of the quality of fruit trees may be shown by the difference between the value of the land occupied by the trees at the time the breach is discovered, and the value such land would have had if the trees had been of the kind warranted.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by J. C. Sherer against the Park Nursery Company to recover damages for breach of warranty of certain fruit trees. There was a judgment for plaintiff, from which, and from an order denying a new trial, defendant appeals. Affirmed.

W. E. Arthur and A. D. Yocum, for appellant. Spencer G. Millard, for respondent.

VANCLIEF, C. The defendant being a corporation engaged in the business of raising and selling nursery fruit trees, the plaintiff, on March 7, 1891, ordered from it 500 nursery peach trees, of specified varieties,namely, 200 Susquehanna, 200 Muir, and 100 Salway; and thereupon defendant sold and delivered to plaintiff 500 young trees, at the price of 20 cents apiece, representing them to be of the varieties and in the proportions ordered, and so labeled them. The plaintiff did not know and had no means of ascertaining whether or not the trees were such as ordered until after he had planted them and had cultivated them about two years, when they first bore fruit, and therefore relied solely upon the representations of the defendant as to the varieties of the trees. When the trees first bore fruit, it appeared that 268 of them were of a different and inferior variety from either of those ordered, and were of a kind that plaintiff did not desire, and which, when planted, occupied about 21/2 acres of plaintiff's land. The object of this action was to recover damages alleged to have been suffered by plaintiff in consequence of a breach of the warranty that the trees were of the kinds ordered. The judgment was in favor of plaintiff for \$350, from which. and from an order denying his motion for a new trial, the defendant appeals.

The principal point contended for by appellant is that the court did not measure the damages by the proper rule, which they say is that expressed by section 3313 of the Civil Code, as follows: "The detriment caused by the breach of the warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time." To what time, in the sense of this section, does a warranty of the quality of personal property refer? Does it refer to the time of completion of the sale by delivery of the property, or to the time of the breach of the warranty, or to the time when the breach is discovered, or with ordinary care and attention might be discovered, by the purchaser? When the quality of the property is apparent, or with ordinary care may be ascertained at the time of delivery, all three of those conditions coexist at that time, as they did in the case of Hughes v. Bray, 60 Cal. 284, in which it was held that a warranty of barley referred to the time of delivery, and that the measure of damages was the difference between the market value of the (inferior) barley delivered and an equal quantity of the quality warranted at the time of delivery; and this, the court said, was in accordance with section 3313 of the Civil

Code. And doubtless this was correct on the facts of that case, since the delivery, the breach of warranty, and presumable notice of such breach concurred in point of time; and it would have been equally correct to have said in that case that the measure of damages was the difference in values, etc.. at the time of the breach of the warranty, or at the time the breach was discovered. But the court did not say, and surely did not intend to be understood as meaning, that all warranties of the class specified in section 3313 of Civil Code refer to the time of delivery of the property; since such a construction would not only be contrary to the common law as administered in the United States and England, but would effect rank injustice in a large class of cases, of which the case at bar is an example. Suth. Dam. §§ 673-676; Sedg. Dam. §§ 191, 768, and cases cited. Under such construction, the measure of plaintiff's damages in this action would be merely the difference between the value of the trees delivered and the same number of trees of the kinds ordered at the time of delivery, and before they were replanted by plaintiff; and so it would be in all cases of warranty of seeds. As to whether a warranty of this class refers to the time of the breach thereof, it is enough to say that if cases ever occur in which the purchaser suffers damage after the breach and before the time when he discovers, or with ordinary care and attention might discover, the defect in the property warranted, the warranty does not in such cases refer to the time of the breach, but to the time when the defect was or might have been discovered. The time of the breach depends upon the nature and meaning of the warranty. What was warranted? In this case I am inclined to the opinion that the defendant warranted that the trees would bear the kinds of fruit known by the names Susquehanna, Muir, and Salway peaches. If so, the breach occurred when they first bore a different kind of fruit; so that here, again, the breach and the discovery thereof were concurrent events. But, if such is not the meaning of this warranty, the breach must have occurred at the time the trees were delivered. But since it seems probable that cases of the class specified in section 3313, Civ. Code, may occur in which the breach and the discovery thereof are widely separate in point of time, the only reasonable construction of that section which may have a uniformly just effect is that the time to which the warranty refers is the time when the breach thereof is, or with due diligence might be, discovered by the purchaser.

The action of the trial court in admitting evidence against the objections of defendant was consistent with this construction. The sole effect of such evidence was to prove the difference between the value of trees of the kinds ordered by plaintiff and the trees actually delivered by defendant, at the time when those delivered first bore fruit; that be-

ing the earliest date at which plaintiff discovered, or could have discovered, the breach of the warranty. It was, however, to the mode of proving this difference of values that defendant more specially objected, which was (1) to prove the value of the land occupied by the trees at the time the breach of warranty was discovered; and (2) the value the land would have had, at the same time, if trees of the kinds and proportions ordered by plaintiff had been planted and cultivated, instead of the 268 trees of a kind not ordered by plaintiff.

It is strenuously contended that the allowance of any evidence of the value of the land was material error, for which the judgment should be reversed. But since growing fruit trees are a part of the land, and probably of no value when severed from it (Montgomery v. Locke, 72 Cal. 75, 13 Pac. 401), it was proper to prove how much the different kinds of trees added to the value of the land; and the difference between the value thus added by the trees delivered and the value that would have been added if the trees ordered had been planted instead of those seems to be the measure of plaintiff's damage, according to section 3313 of the Civil Code. "It is settled in New York," says Mr. Sutherland (section 1019), "that where fruit trees are destroyed or injured, and their owner asserts his right to go beyond their value after severance from the land, so as to obtain compensation for the damage done the latter, his recovery is measured by the difference between the value of the land before and after the injury;" citing Dwight v. Railroad Co., 132 N. Y. 199, 30 N. E. 398. On the assumption that the mode of proof was not materially erroneous, the findings of fact are justified by the evidence. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

(103 Cal. 447)

PEOPLE ex rel. SCHWARTZ v. TEMPLE et al. (No. 19,346.)

(Supreme Court of California. July 27, 1894.)
VACATING JUDGMENT—TIME FOR MAKING MOTION.

1. A judgment void on its face may be set aside on motion. An inspection of the judgment roll only is permitted.

2. A judgment void for want of jurisdiction

2. A judgment void for want of jurisdiction of the person of defendant, where the invalidity does not appear from the judgment roll, may be set aside on motion within a year, under Code Civ. Proc. § 473, providing that when the summons is not personally served the court may allow a defendant to answer to the merits within one year after judgment.

one year after judgment.

3. Where a party fails to move within such time to set aside the judgment, his remedy is by action making all persons interested parties

thereto.

4. Where a judgment is rendered on publication of the summons the affidavit and order of publication are no part of the judgment roll, and

the judgment is not void on its face, even where no affidavit or order is found among the papers, and there is no entry in the records that either was ever made.

was ever made.

5. In an action to vacate a land patent it appeared that the state in 1876 obtained by default a judgment annulling the interest of the relator in land for which he held a certificate of purchase; that the summons was served by publication; that a patent for the land was in 1888 issued to defendant; that in 1889 relator, on notice to the district attorney, defendant having no notice, obtained an order vacating the judgment on the ground that the court never acquired jurisdiction of his person as no affidavit or order of publication appeared in the case. Held, that the order vacating it was void.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the people on the relation of Henry Schwartz against Frank Temple and others. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Hunsaker, Britt & Goodrich and H. S. Foote, for appellant. E. W. Hendrick and Chapman & Hendrick, for respondent Temple. Harris & Gregg and J. P. Hight, for other respondents. Parrish, Mossholder & Lewis, for interveners.

BELCHER, C. This action was instituted for the purpose of having two state patents, one for the east half and the other for the west half of a certain sixteenth section of land in San Diego county, vacated and set aside, so far as they affect the south half of the section, upon the ground that they were issued without authority of law and were vold. The court below found the facts very fully, and gave judgment for the defendants, from which the plaintiffs appeal on the judgment roll, without any statement or bill of exceptions.

The facts found, so far as they need be noticed, are in substance as follows: Prior to July 28, 1865, the said section was surveyed by authority of the United States, and on that day the township plat, including the same, was on file in the proper United States land office. The whole section was then vacant and unoccupied, and it remained so until some time in the year 1883. On May 10, 1869, Henry Schwartz, the relator, who was then qualified to purchase school lands from the state, made application to purchase the south half of the section, and his application was approved by the surveyor general on July 14, 1869. Within 50 days thereafter he paid to the treasurer of San Bernardino county 20 per cent. of the purchase money, and the first year's interest on the balance, and also the sum of \$3 for the issuance of the certificate of purchase, and on September 11th following a certificate of purchase in the usual form was issued to him, which he never assigned or transferred. In the application made by Schwartz and in the order approving the same the said section was described as being in San Bernardino county, and it was then and thereafter by the land department of the state and by the public au-

thorities generally believed to be and treated as being in that county, until a survey of the county line was made in 1880 or 1881, when it was found to be in San Diego county. Schwartz paid the interest on the balance of the purchase money up to January 1, 1874, but never afterwards paid any interest, or any part of the principal. On July 8, 1876, an action in the name of the people of the state of California was commenced against him in the district court of the eighteenth judicial district in and for the county of San Bernardino to foreclose his interest in the said land, and to annul the said certificate of purchase. The action resulted in a judgment by default, entered on December 12, 1876, which recited "that the defendant has been regularly served with summons in said action according to law," and granted the relief prayed for. The judgment roll made up in the case consisted of the complaint, with a memorandum of the defendants' default indorsed thereon; the summons, and a copy thereof, with an affidavit annexed thereto stating that the affiant was one of the publishers and the principal clerk in the office of a certain daily newspaper published in the said county, and that the summons "was published in said newspaper for four weeks consecutively, to wit, daily from the 21st day of July, 1876, to the 11th day of September, 1876;" and a copy of the judgment. Twenty days after the entry of the said judgment a certified copy thereof was filed in the office of the register of the state land office. May 5, 1883, the defendant Frank Temple made application to purchase the west half of the said section, and at that time he possessed the qualifications necessary to enable him to make the purchase. His application was in proper form, and was approved October 2, 1883. Within 50 days after the approval he made the first payment, as required by law, and subsequently made full payment, and on December 8, 1888, received a patent for the land applied for. On May 5, 1883, W. W. Averill made application to purchase the east half of said section, and he was then qualified to make the purchase. His application was in proper form, and was approved October 2, 1883. Within 50 days after the approval he made the first payment, and thereafter a certificate of purchase was issued to him, which he assigned to the defendant Thomas W. Carter, who made full payment, and on May 14, 1886, received a patent for the land so applied for. On February 4, 1889, on motion of Schwartz, an order was made by the superior court of San Bernardino county vacating and setting aside the said judgment entered against him in the district court of that county on December 12, 1876, upon the ground that the said court never acquired or had any jurisdiction of the person of the defendant, for the reason that no affidavit or order of the court was ever made for the publication of summons in the action, and no service of

summons was made on the defendant, and the defendant never appeared in the action. Notice that a motion would be made to vacate the said judgment of foreclosure against Schwartz was given to the district attorney of the county, but not to any one else, and no one of the defendants in this action had any notice or knowledge of the motion, or was present at the hearing thereof in person or by counsel. On June 26, 1889, Schwartz tendered to the treasurer of San Diego county the balance due for principal and interest on his said certificate of purchase, if the same was still valid and in force; and thereafter, on July 9, 1889, this action was commenced. Other facts are found, and several questions based upon them are elaborately discussed by counsel, but the principal and controlling question in the case, and the only one which need be decided, relates to the validity and effect of the order of May 4, 1889, vacating the judgment of foreclosure; for, if that order was void, then the judgment here appealed from must be affirmed.

It is well settled that a judgment which is void upon its face, and which requires only an inspection of the judgment roll to show its invalidity, may be set aside on motion by the court rendering it at any time after its entry (People v. Greene, 74 Cal. 400, 16 Pac. 197); and also that a judgment which is in fact void for want of jurisdiction over the person of the defendant, but where its invalidity does not appear from the judgment roll, may be set aside upon motion within a reasonable time after its entry (Norton v. Railroad Co., 97 Cal. 388, 30 Pac. 585, and 32 Pac. 452). Whether a judgment is void upon its face or not can only be determined by an inspection of the judgment roll, and when the service is by publication the affidavit and order for publication are no part of the roll, and cannot be considered. Estate of Newman, 75 Cal. 213, 16 Pac. 887; Sichler v. Look, 93 Cal. 600, 29 Pac. 220. And what is a reasonable time within which a motion may be made to set aside a judgment not void upon its face must depend somewhat upon the circumstances of each particular case, and is not definitely determined further than that it will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure.1 When a judgment is not void upon its face the court has no power to set it aside on motion, unless the motion is made within a reasonable time, but resort should be had to an action, and all the parties interested should be notified, and have an opportunity to be heard. People v. Goodhue, 80 Cal. 190, 22 Pac. 66; People v. Harrison, 84 Cal. 607, 24 Pac. 311; Moore v. Superior Court, 86 Cal. 495, 25 Pac. 22; Jacks v. Baldez, 97 Cal. 91, 31 Pac. 899. The case in which the order

¹ Provides that where the summons in an action is not personally served the court may allow a defendant to answer to the merits of the action at any time within one year after the rendition of the judgment. Digitized by Google

now under review was made was one in ; which service by publication was authorized by statute (Pol. Code, \$ 3549), and in which, under all the decisions, state and federal, a valid judgment could be rendered upon such service. The judgment roll in the case contained all the papers constituting the judgment roll when service is by publication (section 670, Code Civ. Proc.), and they were all in proper form and sufficient. It was therefore immaterial, in the proceeding referred to, that no affidavit or order for the publication of the summons was found among the papers in the case, and that there was no entry in the records that any such affidavit or order was ever made, inasmuch as, if found, they could not have been considered. The judgment was not void upon its face, and could not upon that ground be set aside on motion. The motion was made more than 12 years after the judgment was entered, and was not within a reasonable time. The court had no power, therefore, to grant the motion, and its action in doing so must be held void and of no effect. It results that the judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

(103 Cal. xviii)

PEOPLE ex rel. SCHWARTZ v. TEMPLE et al. (No. 19,347.)

(Supreme Court of California. July 27, 1894.) Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by the people on the relation of Henry Schwartz against Frank Temple and others. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Hunsaker, Britt & Goodrich and H. S. Foote, for appellant. E. W. Hendrick and Chapman & Hendrick, for respondent Temple. Harris & Gregg and J. P. Hight, for other respondents. Parrish, Mossholder & Lewis, for interveners.

PER CURIAM. This case is in all respects the same as that of People v. Temple (No. 19, 346, just decided) 37 Pac. 414, except that here the land affected is the north half instead of the south half of the section, and the application to purchase the same was made by and the certificate of purchase issued to Louis Schwartz, now deceased, of whose estate Henry Schwartz, the relator, is administrator. Upon the authority of the decision in that case the judgment here appealed from is affirmed.

(9 Wash. 390)

PETERSON v. WOOLERY, Sheriff, et al. (Supreme Court of Washington. July 11, 1894.) ATTACHMENT-CLAIM BY THIRD PERSON-VALUE-GOOD FAITH-CONDITIONAL SALE.

1. Where a third person claims attached goods, and files an affidavit of value, there is no issue as to value on the trial of the right of property, the defense giving no evidence of a greater value.

2. On a trial of a claimant's rights to attach property, it need not be shown that the

attaching creditor was a creditor in good faith, that fact not being questioned.

3. A contract whereby P. agrees to deliver to M., at his shingle mill, shingle bolts, the title to the bolts to remain in P. till paid for, and M. agrees to pay a certain amount per thousand for the shingles manufactured therefrom, payment to be made, for all the shingles manufactured up of a raft of the holts as some as the entire raft is manufactured, is not a contract for the conditional sale of the bolts, within Act March 10, 1893, providing that a conditional sale of personalty, followed by possession of the purchaser, shall be absolute as to creditors, unless a memorandum be filed; such contract being merely for the sale of the manufactured shimples; so that the holts though in ufactured shingles; so that the bolts, though in the possession of M., cannot be held by his creditors. Hoyt, J., dissenting.

Appeal from superior court, King county; Richard Osborn, Judge.

Trial of right to attached property between Nels Peterson, claimant, and James H. Woolery, sheriff of King county, and others. Judgment for claimant, and defendants appeal. Affirmed.

Allen & Powell, for appellants. William Martin, for respondent.

STILES, J. The act of March 10, 1893 (Laws, p. 253), provides that a conditional sale of personal property, followed by the possession of the vendee, shall be absolute as to creditors, unless the vendor and vendee join in a memorandum stating the terms and conditions of the sale, to be filed in the auditor's office. The sheriff of King county, having in his hands a writ of attachment issued at the suit of a creditor of one McMaster, levied it upon certain shingle bolts, which the respondent claimed as his property. Respondent filed an affidavit alleging the value of the bolts to be \$500, and took them into his own possession, under a proper bond. At the trial, no evidence was given upon either side as to the value, and the court submitted the question of value to the jury. This was unnecessary. The claimant must state the value in his affidavit, which will bind him; and, unless the defense gives some evidence showing a greater value, there is no issue to submit to the jury. Neither was it necessary that the defense show that the attaching creditor was a creditor in good faith until that fact was in some way attacked by the other side. The other allegations of error can be better disposed of upon a consideration of the contract between respondent and McMaster, the essential parts of which were as follows: "The said party of the second part [respondent] * * * agrees to deliver to the party of the first part, at the shingle mill, * * * in the city of Seattle, 2,000 cords of shingle bolts; * * * and the said party of the second part agrees to deliver said shingle bolts on rafts or floats at the rate of 100 cords a week, each raft to contain from 100 to 150 cords of shingle bolts. The title to said shingle bolts is to remain in the said party of the second part until paid for. The said party of the first part [McMaster]

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* * will pay to the said party of the second part, in the manner and in the sums and at the times as herein provided for the delivery of said shingle bolts, the prices following, to wit: 521/2 cents per M for each and every M shingles manufactured, said shingles to be made to measure 6 shingles to 2 inches at the thick end; and the sum of 621/2 cents per M for each and every M shingles manufactured, said shingles to be made to measure 5 shingles to 2 inches at the thick end; and each and every M shingles manufactured of what is known as 'rejected shingles' the sum of 521/2 and 621/2 cents per M, respectively. Said party of the first part agrees to keep a correct account of all shingles manufactured at his mill of the shingle bolts delivered by the said party of the second part; and, whenever a raft load of shingle bolts is all manufactured into shingles, then the said party of the first part agrees to pay in full (at the rate specified in this contract) for all the shingles manufactured out of said raft load of shingle bolts. And it is further agreed by and between the party of the first part and the party of the second part that the standard price of shingles 6 to 2 inches is now, at the date of this contract, \$1.35 per M, and that the price of 521/2 cents per M mentioned in this contract is based on this price; and the standard price of shingles 5 to 2 inches is now, at the date of this contract, \$1.60 per M; and the price of 621/2 cents per M, as mentioned in this contract, is based on this price. And if, at any time during the existence of this contract, the prices of shingles shall advance, then the said party of the first part shall at once notify the said party of the second part of that fact, and the party of the second part shall, according to this contract, be entitled to one-half of such advance: that is, if shingles advance 5, 10, or 40 cents per M over and above the standard price mentioned in this contract, then the said party of the first part agrees to pay to said party of the second part one-half of such advance in addition to the 521/2 and 621/2 cents per M shingles, as specified in this contract. But at no time shall the price paid for shingle bolts be any less than 521/2 and 621/2 cents per M for shingles manufactured out of bolts delivered by the said second party." About 200 cords of bolts had been floated conveniently near the shingle mill, and from these Mc-Master had made about 175,000 shingles. The remainder were those seized under the attachment. Appellants' position is that the contract was an agreement for the conditional sale of shingle bolts, which became effective as a sale upon a condition subsequent (the payment of the price per thousand shingles) as soon as the bolts were delivered at the mill; that is, as the facts showed, moored on floats near the mill, and surrendered to the will of McMaster, so that he could proceed with the manufacture of shingles from them. If this construction of the contract is a correct one, it was for the

jury to determine the facts as to delivery, and their verdict might have been for the appellants, inasmuch as neither the contract nor any memorandum of it was recorded: but, if the contract itself did not provide for a conditional sale of shingle bolts, the fact of delivery to McMaster was immaterial, as the case would turn upon the construction of the instrument given by the court, leaving nothing for the jury to pass upon. It seems to us that this contract is not one for the sale of shingle bolts in any event, although there is more or less mention of bolts in it. The respondent agrees to deliver bolts at the rate of 100 cords a week, and, although there is no express provision that McMaster shall convert them into shingles, the clear implication must be to that effect. Respondent nowhere undertakes to sell bolts, and McMaster is not bound to accept and pay for bolts. The one agrees to furnish the materials, while the other undertakes to manufacture them into shingles. If these bolts were to be considered fully delivered, what would be Peterson's measure of damage in case McMaster refused to convert them into shingles? Certainly not the value of the bolts by the cord, as upon a sale; for the contract does not provide for the ascertainment of the price in that way, and it would be impossible to say how many shingles could have been produced from the bolts. On the other hand, McMaster could not compel Peterson to accept the cord value of the bolts in payment of his obligation. In fact, until shingles had been produced, the law would not, as between the parties to the contract, enforce it as a sale of bolts against either; and if not against the parties to it, as between themselves, it certainly should not do so at the instance of mere creditors of one or the other.

Rightly considered, McMaster was the bailee of the bolts for Peterson until they were made into shingles, when the sale provisions of the contract took effect, and no title, conditional or otherwise, passed until then. The agreement was to sell shingle bolts in the form of shingles, when they should be reduced to that form by the labor of McMaster, the price to be per thousand of shingles, but the absolute title of the shingles, even, not to pass until they were paid for. Possession of the materials given for the purpose of manufacture in no wise changed the nature of the transaction from that provided for in the contract. Indeed, the contract must have implied that such a possession be taken. Respondent could safely intrust such a possession to McMaster, without fear that any creditor of the latter would be able to interfere, because, until shingles were made, there was nothing in existence which was intended to be the subject of a sale. This construction of the contract makes the judgment necessarily a correct one, and it is therefore affirmed.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT, J. (dissenting). I am unable to agree with the majority of the court. In my opinion, it was a conditional sale of the bolts by the respondent, and came directly within the provisions of the statute; so that the conditions of the contract could have no effect as against creditors of the one to whom they were sold, unless the same had been recorded, as required by law. Respondent was not dealing in shingles, and it was not within the contemplation of the parties to the contract that it was to be a sale of shingles. It was intended that it should be a sale of the shingle bolts, and there was simply a reservation of the title until such time as the value should be determined under the provisions of the contract. If the statute can be avoided by putting the conditions in any particular form, the evil which it was intended to meet will exist the same as before. The object of the statute was to prevent one placing another in absolute and open possession of personal property, and at the same time retaining such an interest therein by virtue of some condition in the contract of sale that creditors who might act upon the fact of such possession could be deprived of the proceeds of such property. I think the judgment should be reversed.

GOFF v. PACIFIC COAST STEAMSHIP CO.

(Supreme Court of Washington. July 11, 1894.)
CONSTRUCTION OF CONTRACT—BREACH.

Where defendant agreed to charter a ship to plaintiff, and plaintiff agreed to pay therefor \$500 on the "morning" of August 15th, and \$500 August 18th, and made no tender of the \$500 on the forenoon of August 15th, and made no showing to excuse a tender, he was not entitled to recover for failure to furnish the ship.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Alexander C. Goff against the Pacific Coast Steamship Company for damage for breach of contract. Judgment for plaintiff, and defendant appeals. Reversed.

Andrew F. Burleigh, for appellant. F. B. Tipton, for respondent.

HOYT, J. This action was brought to recover damages for the violation of an oral contract, by which it was claimed that the appellant had agreed to furnish one of its steamships to the respondent for the purpose of allowing him to conduct an excursion to Flattery Rocks and return. The testimony of both the appellant and the respondent agreed as to the fact that, while the negotiations were pending between them, a memorandum in writing was made, setting forth the conditions of the agreement. This memorandum was not signed, but was identified and introduced in evidence by the appellant without objection on the part of the respondent. It was in the following language: "Seattle, August 3, 1892. In consideration of the construction of the contract, unaided by

payments, as hereinafter stated, the Pacific Coast Steamship Company hereby agrees to charter steamship City of Puebla to Mr. A. C. Goff for an excursion from Seattle to Flattery Rocks and return on August 18, 1892. In case of fog or heavy weather, steamer shall not be required to go further than Captain Debney deems expedient and safe. A. C. Goff shall pay to the Pacific Coast Steamship Company the sum of five hundred dollars (\$500.00) on the morning of August 15, 1892, and \$500.00 (five hundred dollars) on August 18, 1892, before sailing of steamer. This rate shall cover use of ship and berths only, and does not include meal or liquor privileges. A. C. Goff shall charge for round-trip excursion two dollars per ticket, and for cabin berths one dollar each." The testimony on the part of appellant went fully to the extent of showing that this memorandum entirely covered the agreement which was to be entered into between the steamship company and the respondent; and the testimony on the part of the respondent, while in form in some instances tending to establish that such was not the fact, was, in our opinion, in full confirmation of that upon the part of the appellant. It further appeared from uncontradicted testimony that at the time the negotiations were had and this memorandum made it was understood between the parties that, if the steamship was to be made use of for the purposes of the excursion, it would be necessary that the company should have knowledge of that fact, and such assurances of the fulfillment of the contract on the part of the respondent as would authorize it to incur large expense by way of making preparations for ! having the steamer so used, as soon as the steamer should reach Seattle on the morning of August 15, 1892. The company was not willing to incur this expense until it had satisfactory assurance on the part of the respondent of his ability and intention to carry out the stipulations of the contract on his behalf; that it was for these reasons that the agreement was made that the \$500 should be paid on the morning of the 15th. These facts aid us in the interpretation of the memorandum above referred to, and especially of the provision therein that the first \$500 should be paid on the morning of August 15th. It is unusual in the making of a contract to fix more definitely the time at which either of the parties is to do any act required than that it shall be done on a certain day named; and the fact that the parties to this contract saw fit to stipulate that this payment should be made on the morning of the 15th, instead of on the 15th generally, is in itself significant, and would perhaps, even if unaided by surrounding circumstances, have required that it should be construed as having made time of the essence of the contract, and that that time should be confined to the morning of the 15th. But whether or not this would be

surrounding circumstances, it is clear to our minds that such should be its construction when so aided. As above suggested, there was an attempt on the part of the respondent to denythat this memorandum expressed the terms of the agreement, but he nowhere in direct terms testifies to a different one, and substantially admits that this writing was made for the purpose of expressing the agreement, and that it was satisfactory to him; and nowhere does he state any fact which tends in any manner to show that there was any conversation after the making of said memorandum which in any manner changed the relations of the parties in regard to the subject-matter of the contract. Such being the fact, and the testimony of the appellant being direct and positive that the memorandum expressed fully the terms of the agreement to be entered into between the parties, there was, in our opinion, no evidence to justify the jury in finding to the contrary. It was their plain duty to have found from the testimony that the terms of the contract were expressed in the memorandum, and that the clause in relation to the time of payment of the first \$500 required that it should be made on the morning of the 15th of August as a condition precedent to the boat's being prepared and furnished by the appellant for the use of the respondent. The undisputed facts show that there was no tender, or any act of the appellant which would excuse its having been made, any time during the forenoon of said 15th of August; from which it must follow that there should have been a verdict for the appellant instead of for the respond-The judgment will be reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and SCOTT, STILES, and ANDERS, JJ., concur.

STATE v. OLESON.

(Supreme Court of Washington. June 15, 1894.)

CRIMINAL LAW-BRIEF ON APPEAL.

Where the appellant files a typewritten brief, it will be stricken out, as it is contrary to Sup. Ct. Rule 8 (28 Pac. v.), and the judgment affirmed.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

John Oleson was convicted of burglary, and appeals. Affirmed.

F. W. Cushman, for appellant. W. H. Snell, Co. Atty. (E. E. Cushman, of counsel), for the State.

STILES, J. Appellant, without leave of this court, has seen fit to rest his presentation of his appeal upon a typewritten brief. This is contrary to rule 8 (28 Pac. v.), and counsel for the state moves to strike the brief, and the motion must be granted. It

follows that there is no assignment of error, and the judgment must be affirmed. So ordered. This being a criminal case, however, in order that no substantial injustice may be done, we have examined the brief and the record, and find no evidence that any legal right of the appellant has been infringed.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

PETERSON et al. v. WRIGHT et al. (Supreme Court of Washington. June 19, 1894.)

Attachment—Bond of Claimant—Failure to Return—Verdict.

- 1. The laches of the sheriff in failing to return to the proper court the bond given by a claimant to goods attached by the sheriff does not deprive the court of jurisdiction when the bond is returned, nor bar the right of the attaching creditors, but the bond will be considered as having been on file as of the date when it should have been returned by the sheriff.
- 2. Where the bond given by a claimant requires him to establish his title, a general verdict for defendant for a certain sum in the action by the claimant, though irregular, is sufficient, where the value of the property was admitted, to support a judgment against the claimant for the attaching creditors' claims, provided they are less than the admitted value.

Appeal from superior court, Mason county; Mason Irwin, Judge.

Action by J. S. Peterson and others against W. F. Wright and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Fred H. Peterson (M. Gilliam, of counsel), for appellants. W. W. Likens, for respondents.

HOYT, J. On June 1, 1890, one W. F. Wright commenced an attachment suit against one Thomas Johnson in the superior court of Pierce county, and levied upon property in Mason county. Said property was claimed by one J. S. Peterson, who filed his affidavit, alleging absolute ownership and title to all of said property, stating its value to be \$4,000, and gave his bond with sureties in twice the value alleged, as required by the statute, to the sheriff of Mason county, who approved the same, and released the property to said Peterson. By mistake on the part of the sheriff, this bond was filed in Pierce, instead of Mason, county, and proceedings in that county were had thereon until prohibited by this court. After the delays incident to the suit in Pierce county, in April, 1893, the bond and affidavit were filed in the superior court of Mason county. Said Peterson and some of his sureties objected to the jurisdiction of the superior court of Mason county, on the ground that, owing to the laches of the sheriff in returning the bond and affidavit, such court

had lost jurisdiction. The court overruled the objection, and its action in so doing is the principal error relied on upon this appeal.

In our opinion, the action of the court was right. The sheriff was an officer of the law, and we know of no reason why his mistake or laches should have the effect of discharging said Peterson or his sureties from the obligation into which they had entered, and by means of which they had obtained possession of the property. It was the duty of the sheriff to have returned the affidavit and bond, as required by statute, and he could have been compelled by any one interested to have discharged this duty; and we think that, so far as the jurisdiction of the court over the subject-matter is concerned, the affidavit and bond should be considered as having been on file in the proper court as of the date when it should have been returned by the sheriff.

The jury returned a verdict against the plaintiff and his sureties, and in favor of said Wright and the sheriff, for a certain sum of money, and upon such verdict the court rendered a money judgment, and this action on the part of the court and jury is the other error relied upon by the appellants. The plaintiff was required by the terms of his bond to appear and establish his title to the property; and, if he did not do so, the jury should have so found, and should have further found the value of the property as to which he had failed to establish his claim; but, in view of the fact that there was no contention as to the value of the property, plaintiff was not injured by the form of the verdict. The jury must have found that the claimant was not the owner of the property. The judgment rendered was for the amount of the claim of the attaching creditor, and within the admitted value of the property, and was such as the statute required. We find no error which could have affected adversely the rights of the appellants. Judgment affirmed.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

(9 Wash. 204)

STATE V. MURPHY.

(Supreme Court of Washington. June 20, 1894.) CRIMINAL LAW-CONTINUANCE-COMPETENCY OF JUNOR.

1. An affidavit for continuance stated that

1. An affidavit for continuance stated that M. was a material witness, and would testify that deceased made threats against defendant, but did not state that this could not be proved by other witnesses. Held, that denying the motion was not such an abuse of discretion as would warrant a reversal.

2. A juror stated that he had formed and expressed an opinion as to the guilt or innocence of the defendant; that he still entertained that opinion; that it would require evidence to remove it; that he could not disregard that opinion until it was removed by evidence; that he could determine the facts with the same impurtiality that he could had he heard nothing

about it; that he was unbiased, except by the newspaper reports. *Held*, that a challenge for cause should have been sustained.

3. Where it is sought to impeach a witness by proving that he made statements out of court by proving that he made statements out of court contrary to those in court it is not proper to al-low a witness, in rebuttal, to state that the statements out of court were the same as his testimony in court, without calling for the state-ments made out of court; the proper method being to prove the statements made out of court, and allow the jury to decide whether they are the same so the testimony given in court are the same as the testimony given in court.

Appeal from superior court, King county; T. J. Humes, Judge.

James Murphy was convicted of murder, and appeals. Reversed.

Ronald & Piles, for appellant. John F. Miller, Pros. Atty., and A. G. McBride, for the State.

DUNBAR, C. J. The defendant was prosecuted for murder in the first degree. A verdict of guilty of murder in the second degree was rendered, motion for a new trial was made and overruled, and defendant sentenced to a term of 15 years in the penitentiary. The first assignment of error is that the court erred in denying defendant's motion for a continuance. The affidavit for continuance shows that one Daniel McMillan was a material and necessary witness on behalf of the defense, in that the defendant could prove by said Daniel McMillan certain threats that had been made by the deceased against the defendant, and a continuance was asked for six days to procure the attendance of the said McMillan. Inasmuch as it does not appear from the affidavit that this evidence could not have been obtained from other witnesses, and inasmuch as under the statute a large discretion is vested in the trial court in relation to the continuance of a cause, we are not prepared to say that there was such an abuse of discretion by the court in refusing to grant a continuance on the showing made that this court would reverse the judgment on that ground.

The second assignment, however, viz. that the court erred in denying defendant's challenge for cause to Juror Kile, is, in our minds, a more serious one, as it seems to us that a substantial right was denied to the defendant, namely, the right to be tried by an impartial jury. In order that there may be no misconception of what the ruling of the court is on this question, we think it important to set out fully the examination of the juror Kile. After stating that he had read an account of the murder in the papers, and answering some preliminary questions, the following questions and answers appear: "Question. Then such opinions as would be formed by reading the papers there were formed and expressed? Answer. Yes, sir. Q. And those papers all seemed to give it one way, didn't they? A. Yes, sir; as near as I could tell, the papers were very much one way. Q. And the papers expressed opinions, did they not? A. Yes, sir. Q. And the opinions

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which you and your neighbors expressed were in accordance with the opinions expressed in the newspapers? A. Yes, sir. Q. And you have not had any occasion since that to change your opinion? A. No, because I have not heard anything more about it. Q. And you still, of course, entertain now the opinion which you formed at that time? A. I do. Q. That opinion is such an opinion as would require evidence to remove, would it? A. It would. Q. You could not diregard that opinion in this case unless there should be evidence introduced to overcome that opinion, could you? A. I could not. Q. That opinion will stay with you in this case, will it, unless evidence is introduced to the contrary to remove it? A. Yes, sir. Q. If there should be no evidence introduced to the contrary, then that opinion which you have formed, and which you now entertain, will simply add weight to whatever opinion you form on this testimony? A. I think it would. Q. Will you consider that opinion as a circumstance, or as giving weight to the testimony here which is given in accordance with that opinion? A. Yes, I think I would. Q. Will you diregard that opinion until it is overcome and wiped out of your mind by evidence to the contrary? A. I don't see as I could. Q. Would you require evidence to the contrary before you would disregard that opinion? A. I would. Q. Your mind at this time, then, is not perfectly free from any opinion as to the merits of this case? A. It is not, any more than what I have read. I have an opinion, of course. Q. So that that opinion is still in your mind at the entrance upon this trial? A. It is. Mr. Ronald: I think, if your honor please, we will interpose a challenge for cause to this juror. The Court: Is the challenge denied? Mr. Miller (prosecuting attorney): We deny the challenge. The Court: You say you have some opinion of the defendant's guilt or innocence on this charge? A. I have, from what I read in the paper. Q. Is that opinion founded wholly upon what you read in the paper? A. That is what it is founded on; yes, sir. Q. Founded wholly upon what you read in the paper? No one has undertaken to tell you what the facts were in this case? A. No. because them that I talked with didn't know any more than I did about what they read in the paper. Q. You all formed your impression from what you read in the newspaper? A. Yes, sir. Q. Do you think that you can hear and determine the facts in this case from the evidence given by the witnesses here upon the witness stand with the same impartiality and with the same fairness that you could if you had heard nothing about this thing? A. I think I could. Q. Well, will you hear and determine this cause with that same degree of impartiality and fairness that you would if you had heard nothing about it? A. Well, I think it would take a little more evidence than it would if I had never heard anything about it. Q. You think what you read in the newspapers would be liable to influence you here as a juror in this case? A. It would, unless I had something that was strong on the other side. Q. You would allow what you read in the newspapers to influence your judgment? A. To a certain extent I should, unless I knew something to the contrary. Q. Do you feel as though you were perfectly free and unbiased in this case? A. I do, so far as that is concerned. Q. You don't think, then, that you would be able to hear the case with the same impartiality that you would if you had heard nothing about it? A. I suppose there would be, to a certain extent, a little in my mind. Q. Do you think you would be able to lay aside what impressions you have formed from reading the newspapers, and try the case here upon the evidence? A. I would if I could get stronger evidence. Q. Do you think you would be able to wholly lay aside the impressions you have received from reading this account in the newspaper, and try the case wholly upon the evidence here introduced? A. Yes, I think I could. Q. You think you can do that? A. Yes, sir." This is all the examination that was made of the juror. At its close the defendant's counsel urged upon the court that it was defendant's right to have a fair jury; that there were a great many jurymen in the county; that it was no trouble to get a fair jury; and that, therefore, there was no necessity for having this man sit on the jury, with his mind entertaining in the least any impressions upon the merits of the case. But the court decided that the juror was competent, and he was accepted. The record shows that defendant's peremptory challenges were all exhausted.

In these days of general and rapid dissemination of news and of events, where rumors of crimes are spread by means of newspapers and other agencies rapidly throughout the country, and are brought to the attention of every intelligent citizen, the rule in relation to information possessed by jurors has necessarily become somewhat changed, and the strict enforcement of a lack of knowledge on the subject to be adjudicated necessarily somewhat relaxed; and it would work a miscarriage of justice if the simple reading of newspaper reports of crimes that had been committed, or the listening to rumors concerning the commission of such crimes, should be held to exclude jurors from the trial of criminal cases; and no court in this age, we think, would go to the extent of holding a juror incompetent simply because he had read newspaper reports of the perpetration of a crime, or had heard rumors concerning its perpetration. But, while regarding the changed conditions of society in this respect, and giving to them due consideration, it will not do to go to the other extreme, and relax the rule to the extent of depriving a defendant of his constitutional right to be tried by an impartial

jury. It must be conceded that, if a juror has an opinion as to the guilt or innocence of a defendant, and that opinion is so material and tangible and fixed as to require evidence to remove it, he does not enter the jury box as an impartial juror; and it makes no difference whether that opinion has been obtained through the medium of newspapers which professed to recite the facts, and which recitation the juror believed, or whether it was obtained by listening to the rehearsal of the facts by some individual. The material thing to be ascertained is whether the mind of the juror is impartial, and whether he has an opinion, which must always be distinguished from a mere floating impression, as to the guilt or innocence of the defendant. How he came by that opinion is entirely immaterial. If a juror testifies that he has read a newspaper account, and that, if such account be true, he believes the defendant to be either guilty or innocent, as the case may be, he manifestly would be a competent juror, for he has no fixed opinion as to whether the facts which have been related to him are true or not. Hence he approaches the examination of the case with a mind perfectly susceptible to receive the truth as it appears from the testimony presented. But where he states that he has heard a recital of the facts, whether by a newspaper or by an individual statement, and that he believes the facts stated, and from such statements that he is in a condition of mind that it would take evidence to remove the belief that he already entertains, then it seems equally manifest that he comes to the investigation of the case with a bias either for or against the defendant, and is therefore not, in the meaning of the law, an impartial juror. Now, it is true that the juror in this case finally said, after being questioned by the court, that he thought he could wholly lay aside the impressions he had received from reading the newspapers, and try the case wholly upon the evidence introduced; but this statement gains no strength from its having been the last statement made, for, when the preceding question was put to him, his answer was that he could, "if he could get stronger evidence." Stronger evidence of what? The same evidence that would be required to convict in the mind of one juror ought to be sufficient to convict in the mind of another juror; and, if the presumption is that the defendant must prove his innocence by affirmative defense, it would seem that the evidence which he offered in defense, if it was strong enough to carry conviction to the mind of a person who was absolutely without any knowledge on the subject, ought to be strong enough to carry conviction to the minds of all the jurors; while, on the other hand, if the true presumption is to prevail, viz., that he is to be held innocent until proven guilty, no less amount of proof ought to suffice to convict him in the mind of this juror than would warrant his conviction in the minds

of the other jurors. In other words, there ought not to be a man on the jury who is influenced by testimony or information obtained outside of the trial of the case. This condition, it seems to us, appears plainly from the examination of this juror by the court, laying aside the examination by the counsel for the defense, which might possibly have a tendency to mislead the juror, and cause him to answer unwittingly with regard to his impressions; for when the court asked him if he could hear and determine this cause with the same degree of impartiality and fairness that he could if he had heard nothing about it, his answer was that he thought it would take a little more evidence than it would if he had never heard anything about it; and, when asked if what he read in the newspapers would be liable to influence him while acting as a juror, he frankly stated that it would, unless he had something that was strong on the other side. The whole testimony shows that the witness' mind had been made up as to the guilt or innocence of this defendant; and, when that conclusively appears from the examination, it will not be left to the final announcement of the juror to decide whether or not he thinks he can wholly lay aside those convictions, and try the case upon the testimony presented. Nor do we think that a case can be found which would sustain the court in refusing to grant a challenge to a juror who shows by his examination that he is as incompetent as the juror in this case.

The first case cited by the respondent to sustain his contention that the juror was competent is Holt v. People, 13 Mich. 228. There the answer of the juror was, "I have formed a partial opinion as to the guilt or innocence of the defendant from rumors heard in the street, but not a positive opin-Upon this statement respondent's counsel challenged the juror for cause, and without further examination the challenge was overruled; and the court, after commenting on the fact that under the present conditions of society it was frequently impossible for jurors to come to the investigation of criminal charges with minds entirely unimpressed with what they may have heard in regard to them, or entirely without information concerning them, sustained the lower court on the ground that his mere statement did not disqualify him, but stated that further inquiries might possibly have shown that it was of a nature to constitute disqualification; but, as the defendant did not see fit to make them, and as the prosecution was not called upon to enter on the investigation if the defendant left it imperfect, and before he had a prima facie cause for exclusion, that they would not interfere with the discretion of the judge. Stephens v. People, 38 Mich. 739, also cited by the respondent, a case which refers to Holt v. People, supra, and indorses it, notwithstanding lays down the rule that a juror's opinion as to the guilt or inno-

cence of the accused must not be such as will prevent his giving due weight to the presumption of innocence, and that a juror who is so impressed with the guilt of the accused as to need evidence to overcome his impressions (which it will be seen is exactly the condition of mind testified to by the juror in this case) is not impartial; and the court says that it is useless, under such circumstances, to ask him whether he can return a just and impartial verdict. In that case the plaintiff in error was convicted of keeping a house of pros-Six of the persons who were then titution. summoned as jurors, on being challenged, stated under oath that they had formed an opinion from what they had heard or from reputation that the house kept by the defendant was a house of prostitution, and some of them stated that their opinions or impressions were of that character that it would require evidence to remove them. In each instance, when the defense had gone through with the examination of the juror, the judge took him in hand, and the following is his examination of the first: "Q. Will you state whether the information you have received or the impression you have formed in regard to the house there is of such a positive character that it would be impossible for you to sit here and hear the testimony and decide impartially between the people of this state and the prisoner at the bar as to whether she was guilty of the crime charged within the date mentioned in this information? A. I think not, sir. Q. You think you could sit? A. Yes, sir." The court thereupon overruled the challenge. In that case there was a statute in the state of Michigan providing that: "The previous formation or expression of opinion or impression, not positive in its character, in reference to the circumstances upon which any criminal prosecution is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, such opinion or impression not being positive in its character, or not being based on personal knowledge of the facts in the case, shall not be a sufficient ground of challenge for principal cause, to any person who is otherwise legally qualified to serve as a juror upon the trial of such action: provided, the person proposed as a juror, who may have formed or expressed, or has such opinion or impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial: provided further, the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror." But, notwithstanding this statute, and the large discretion which vested thereby in the trial court, the supreme court of Michigan held that it was error in the court to refuse to allow the challenge upon the question and answer above recited. They say that "the constitution of Michigan provides that in every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury,' and that no legislation can take this right away." "The question on this record," says the court, "is whether that jury can be an impartial one whose members are already so impressed with the guilt of the accused that evidence would be required to overcome such impressions. It seems to us that this question needs only to be stated; it calls for no discussion. This woman, instead of entering upon her trial supported by a presumption of innocence, was, in the minds of the jury when they were impaneled, condemned already; and by their own statements under oath it is manifest that this condemnation would stand against her until removed by evidence. Under such circumstances it is idle to inquire of jurors whether or not they can return just and impartial verdicts. The more clear and positive were their previous impressions of guilt, the more certain may they be that they can act impartially in condemning the guilty party. They go into the jury box in a state of mind that is well calculated to give a color of guilt to all the evidence; and, if the accused escapes conviction, it will not be because the evidence has [not] established guilt beyond a reasonable doubt, but because an accused party, condemned in advance, and called upon to exculpate himself before a prejudiced tribunal, has succeeded in doing so."

Section 22 of article 1 of the constitution of this state guaranties to every person defendant in a criminal prosecution the right to a trial by an impartial jury of the county in which the offense is alleged to have been committed, and it seems evident to us from the statements made by the juror Kile in this case that he was not an impartial juror. If all the jurors who tried the cause were concededly in the same condition of mind that Kile was, viz.—presuming that his convictions were against the defendant-were in a state of mind to consider the defendant guilty of the crime charged until there was strong evidence to support the theory of innocence, the trial would have been little less than a farce, and our boasted constitutional privilege of a trial by an impartial jury would be a privilege existing more in theory than practice. Cases might possibly arise where, by reason of the heinousness of the crime and the great publicity that would naturally be given to it, it would be difficult to obtain jurors that had not more or less information, and possibly some impression as to the guilt or innocence of the defendant; but no such state of facts is shown in this cause. It was urged upon the court at the time that an absolutely impartial jury could be obtained, and there was no good reason why the court should have arbitrarily imposed this juror, entertaining the convictions which he had expressed, upon this defendant.

It is generally contended that a different

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rule should obtain in discharging a juror where his competency is called in question than the rule which should govern in retaining him. No possible harm, at least no harm that rises above a little temporary inconvenience, or additional costs, which ought not to be seriously considered where a citizen is on trial for his life or liberty, can be done by discharging the juror; but very grave harm may come from retaining him. This doctrine is very clearly and concisely announced in State v. Miller, 29 Kan. 43. The court there says: "We can hardly see how the court could commit substantial error by discharging any person from the jury when twelve other good, lawful, and competent men could easily be had to serve on the jury. There is an immense difference between discharging a juror and retaining him. To discharge can seldom, if ever, do any harm; while to retain him, if his competency is doubtful, may do an immense injury to one party or the other." And in passing upon the amount of credit that should be given to the statement of a juror that he could impartially try the case the court says: "Men are seldom conscious of being biased or prejudiced, or of being in such a condition that they could not try any case impartially and be governed entirely by the evidence introduced on the trial of the case." We think, under all the circumstances of this case, that the challenge to the juror should have been sustained; that his examination showed that he was not a competent juror; and the presumption is that the rights of the defendant were jeopardized by the action of the court in compelling him to accept him as a juror.

We have examined the other errors alleged, but think the appellant has no substantial ground for complaint. The instructions, as a whole, were favorable to the defendant, and the instructions which were asked by the defendant, which properly stated the law, had already been substantially given by the court. There is, however, one method of proceeding which, in view of another trial, might well be spoken of here. Upon attempting to sustain the testimony of witness Gordon by showing that he had made statements out of court similar to the affidavit which he had filed in the case, the witnesses were allowed to testify that they had read the affidavit or had heard the testimony of the witness Gordon, and that the statements that he had made prior to that time were the same as those made in the affidavit. For instance, Mr. Winstock, called by the prosecution in rebuttal, was handed Exhibit B (being the affidavit made by Gordon in the prosecuting attorney's office), and the following question was asked: "You may state, Mr. Winstock, how the statement that he made to you as to his being present and witnessing the shooting of Phil Dawe corresponds with the statement made in that affidavit as to his being present and witnessing the shooting of Phil Dawe. Answer. Absolutely the same." The following question was then put to Chief Jackson by the prosecuting attorney: "How did the statement made by Mr. Gordon to you a few minutes after the shooting correspond with the statement that he (Gordon) made in the trial of this case to this jury? Answer. In substance it is the same." We think this is not a fair method or way of introducing this testimony. The witness ought to have been required to have stated what the statement was that was made to him by Gordon shortly after the shooting occurred, and let the jury determine whether it was substantially the same statement that was testified to by Gordon in court, or was sworn to by him in his affidavit. It is true, as was argued by the attorney for respondent, that the truth of the statements of these corroborating witnesses might have been elicited by crossexamination, but the testimony that the statements were the same had already gone to the jury, and had doubtless made their impression upon the minds of the jury, and we do not think that the burden ought to be imposed upon the defense of eradicating from the minds of the jury impressions which had been made by incompetent testimony. Certainly a more truth-eliciting method would have been the one above suggested, viz. for the witness to have stated what the statements were, and for the jury to have made the comparisons and drawn the conclusions. We do not now say that we would reverse the case were this the only error found in the record, but would recommend upon the retrial of the case the method suggested. But for the error in refusing to sustain the challenge to the juror Kile the judgment must be reversed, and the cause remanded, with instructions to grant a new trial.

ANDERS, SCOTT, STILES, and HOYT, JJ., concur.

STATE v. WILSON.

(Supreme Court of Washington. June 21, 1894.) BURGLARY-INFORMATION - CONSTITUTIONAL LAW -CONTINUANCE.

1. Under Code, § 828, which, in a prosecu-tion for burglary, casts the burden of proving innocence of entry on defendant, it is not nec-

innocence of entry on defendant, it is not necessary for the information to state the particular misdemeanor or felony which defendant intended to commit. Linbeck v. State, 25 Pac. 452, 1 Wash. St. 336, followed.

2. Code, § 828, which, on a prosecution for burglary, casts the burden of proving the innocence of the entry on defendant, is not unconstitutional in raising a prima facie presumption of guilt from proof of the entry. State v. Anderson, 31 Pac. 969, 5 Wash. St. 350, followed.

3. Laws 1887–88, p. 14. amending Code, 827, defining the crime of burglary by enlarging its scope, does not by implication repeal section 828, which casts the burden of proving innocence of entry on defendant.

4. An allegation, in an affidavit for continuance, that defendant expects to prove an alibit by certain absent witnesses, is a conclusion of law, and is insufficient.

law, and is insufficient.

5. Statements in an affidavit for continuance that absent witnesses are somewhere within the state, and that their whereabouts could not be ascertained by defendant, are manifestly contradictory and insufficient.

6. A statement in an affidavit by defendant confined in jail that his counsel had made increasing efforts to ascertain the whereabouts of absent witnesses is hearsay, and should be supplemented by the counsel's affidavit.

Appeal from superior court, King county; T. J. Humes, Judge.

Frank Wilson was convicted of burglary, and appeals. Affirmed.

G. D. Farwell, for appellant. John F. Miller, Pros. Atty., and A. G. McBride, for the State.

DUNBAR, C. J. The prosecution in this action was commenced by information. Upon the trial of the case, the appellant was found guilty, and sentenced to eight years' imprisonment in the state penitentiary. The sufficiency of the information was objected to by motion to quash, by demurrer, and by motion in arrest of judgment. The charging part of the information is as follows: "He, the said Frank Wilson, in the county of King, state of Washington, on the 7th day of December, 1892, in the nighttime of the said day, the dwelling house of one Christian Everson, in said county situate, unlawfully, willfully, feloniously, and burglariously did enter, with intent then and there to commit a felony therein." The sufficiency of this information was directly passed upon by this court in Linbeck v. State, 1 Wash. St. 336, 25 Pac. 452. After reciting the law describing burglary, the court said: "And, by virtue of its provisions, the prosecution is no longer compelled to prove with what intent the defendant enters, but, on the contrary, the unlawful entering having been proved, the intent to commit a crime or misdemeanor is presumed; and, this being so, we are unable to see how the accuracy required before such section was enacted can now aid the defendant. The burden of showing the intent with which he entered is by said section cast upon him, and he can show such an intent to have been an innocent one, as well without the details as to his specific intent as with it. Aided by the section above quoted, the information was sufficient." In view of this decision, direct and positive as it was, it would seem that this court should not be again called upon to pass upon the sufficiency of the indictment in this particular. Any argument as to the propriety of the law should be addressed to the legislative department of the government, and not to this court; and the constitutionality of this same statute was as directly passed upon by this court in State v. Anderson, 5 Wash. 350, 31 Pac. 969, where the court said: "We see no reason, however, for holding that the legislature exceeded its power in providing that the presumption of criminal intent should follow the proof of unlawful entry, as provided in

said section. The presumption provided for is not a conclusive one, and, even without the aid of such legislation, the jury would be justified in finding a criminal intent from the fact of the unlawful entry, if, under all the circumstances surrounding the case, such a presumption would be a reasonable one. It is the constitutional right of defendant to demand proof of his guilt before he shall be convicted of a crime, but it does not follow from such fact that it is beyond the power of the legislature to provide that a certain presumption may follow from the establishment of a fact, from which such presumption may follow as a reasonable conclusion."

But it is also urged by the appellant in this case that section 828 of the Code, which casts the burden of proving the innocence of the entry upon the defendant, has been repealed by the amendment of section 827, Laws Wash, 1887-88. The argument is that section 828 of the Code is but a proviso of section 827, and that, by the amendment of section 827 by the legislature in 1888,1 the proviso was repealed with the original section so amended. But an inspection of the respective sections 827 and 828 of the Code shows that 828 is in no sense a proviso to 827. A proviso, as we understand it, is either a limitation or an addition to the provisions of a section; and here section 827 defines the crime of burglary, and section 828 simply provides a rule of evidence, by stating that, where a person shall have unlawfully entered as described in the preceding section, he shall be deemed to have made such entry or breaking with intent to commit a misdemeanor or felony, unless such entry or breaking shall be explained. It can in no sense be considered a proviso to the preceding section. Neither do we think there is merit in the contention of the appellant that section 827 was repealed by the amendatory act of 1887-88, by reason of the latter act being a revisory act concerning the offense of burglary. There was no attempt by the legislature in 1888 to revise the act concerning the offense of burglary, but it was simply an enlargement of the statute concerning burglary, and made the entry into certain buildings and structures burglary, which was not burglary before. Its only effect was to amend what it purported to amend, viz. section 827 of the Code, and had no effect whatever on the balance of the chapter or upon the succeeding sections.

The next contention of the appellant is that the court abused its discretion in not granting a continuance upon the showing made. An examination of the affidavit in support of defendant's motion for a continuance convinces us that it was not sufficient to warrant the court in granting a continuance; or, at all events, it is not sufficient to satisfy us that the court, which was familiar with all the circumstances concerning the case, abused

¹ Laws 1887-88, p. 14.

its discretion in refusing to grant the con-The allegation that defendant would prove an alibi by said witnesses is not a sufficient statement, it seems to us, of what he intended to prove by the witnesses. It is not a statement of a fact, but a conclusion of law. To have put the state into complete possession of the facts which he expected to prove by the absent witnesses, he should have stated the place where he could have proven the defendant to be at the time of the execution of the crime. And, again, the statement that the witnesses were somewhere within the state of Washington and the jurisdiction of the court, and that their whereabouts could not be ascertained by the defendant, is so manifestly contradictory that it amounts to nothing; for, if the whereabouts of the witnesses was not known to, or could not be ascertained by, the defendant, it must clearly appear that the defendant would not be in a position to state that they were within the state of Washington and the jurisdiction of the court. Again, the statement that defendant's counsel had, since the cause was set for trial, made unceasing efforts to ascertain the whereabouts of said witnesses, is purely hearsay. The application shows that the defendant was confined in jail, and whether or not his counsel had made unceasing efforts or any efforts to ascertain the whereabouts of the witnesses defendant would have no means of knowing. If such was the case, the affidavit of counsel should have been brought to bear to sustain defendant's application, for the assertions of the defendant in that respect can amount to nothing. We have examined the other errors alleged by the appellant, but find that there was no substantial error committed on the trial by the court. The judgment will therefore be affirmed.

ANDERS, HOYT, SCOTT, and STILES, JJ., concur.

TACOMA NAT. BANK v. PEET et al. (No. 1,240.)

(Supreme Court of Washington. June 21, 1894.)
CONTINUANCE—IMPOSING CONDITIONS.

Code Proc. \$ 832, empowers the court to enforce as a condition for granting a continuance the payment of \$10 to the adverse party, besides witness fees. Held that, when the court requires the payment of \$25 as such condition, no presumption obtains that the excess over \$10 was made up of witnesses' fees, in the face of a request of the applicant to the adversary to show the costs incurred, but in the entire absence of any showing in the record as to what the costs were.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by the Tacoma National Bank against Mary M. Barnett and Ettie L. Peet for the foreclosure of a mortgage. From a judgment for plaintiff, defendants appeal. Reversed.

Parsons, Corell & Parsons, for appellants. Campbell & Powell and J. H. Parker, for respondent.

SCOTT, J. When this cause was called for trial, the defendants made a showing upon which they applied for a continuance. The court ruled that the continuance might be had upon the following terms: "That said defendants pay to the attorney for the plaintiff in said action the sum of \$25, the same to be applied upon the costs and attorney's fee for the preparation of said action for trial at said time, and that the defendants pay the same as a condition for further appearing for defense in said action, and. also, that they pay the cost of entering the order of postponement; and the court then and there, before entering said order, advised the said counsel for said defendants to consult his partners, and to determine whether they would have a postponement of said cause on said terms, or arrange their affairs to proceed with the trial at that time; and said counsel then and there announced to the court that they would prefer the postponement of said cause on said motion of said defendants and on the terms aforesaid, but objected to the terms, and denied the power of the court to make same. That the said order was then and there made and entered, to which said order the said defendants, by their counsel, duly excepted, and particularly to the portion thereof making the payment of said sum a condition for further appearance and defense in the action." On the 21st day of March, 1893, the defendants served upon the plaintiff the following notice: "To James H. Parker and Campbell & Powell, Plaintiff's Attorneys: Please furnish us a copy of any costs incurred by you in preparation for the trial of this cause for the 16th day of March inst., and a statement of witnesses' fees claimed by you for that day's attendance. Dated March 21st, 1893. Parsons, Corell & Parsons, Attorneys for the Defendants, Barnett and Peet." This demand was not complied with, and on the 27th day of March, when the cause was called for trial, an affidavit was made upon the part of defendants showing the service of such notice, and failure to comply therewith, and that the defendants did not know the amount of costs which had been incurred, if any, for witnesses' fees, and an offer to pay the same, whatever they were, together with the other costs, and an attorney's fee not exceeding \$10 as terms for such continuance and the privilege of being allowed to appear and defend in said cause. No action appears to have been taken thereon other than the attorneys for the plaintiff objected to the defendants being allowed to appear and defend, in consequence of their not having paid the said sum of \$25, which objection was sustained, and an exception allowed, whereupon the case proceeded ex parte upon the part of the plaintiff; and defendants

were not allowed to cross-examine the plaintiff's witnesses, nor participate therein in any manner. Judgment was rendered for plaintiff, and defendants appealed. A number of questions are argued in appellants' brief, but, owing to the condition of the record, and the certification by the lower court that the defendants should not be allowed to raise any other question upon the appeal than their right to appear and defend in said action, we shall confine our attention to that one question.

It is contended by appellants that said sum of \$25 was in reality an attorney's fee which the court adjudged the defendants should pay to plaintiff as terms for said continuance, and that the court had no authority to impose the same; that the only term which the court could impose therefor was a sum not exceeding \$10 under section 832 of the Code of Procedure, which is as follows: "When an application shall be made to a court or referees to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed as the condition of granting the postponement." The respondent, while not disputing the force or application of the statute, contends, we should presume, that not to exceed \$10 of said sum was imposed as an attorney's fee, and that the balance was made up for witnesses' fees, and invokes the aid of the well-known rule that the proceedings of courts are presumed to be regular. But we do not think that such a presumption should obtain in this instance, in the face of the request made by the defendants upon the plaintiff to show the costs incurred, and in the entire absence of any showing in the record as to what such other costs were or any claim that there were any. The court had no power to impose more than \$10 in addition to the other costs as a condition of such continuance, and could not make the right of the defendants to appear and defend dependent on the payment thereof. Immediate payment could have been required as a condition for the continuance. This not having been done, the sum stood as any other claim. It was not a fine in any sense, nor were the defendants in contempt of court, and they had a right to appear and defend at the trial. Judgment should be reversed.

DUNBAR, C. J., and HOYT, STILES, and ANDERS, JJ., concur.

TACOMA NAT. BANK v. PEET et al. (No. 1,241.)

(Supreme Court of Washington. June 21, 1894.)

Appeal from superior court, Pierce county;
W. H. Pritchard, Judge.

W. H. Pritchard, Judge.
Action by the Tacoma National Bank against
Ettie L. Peet and Mary M. Barnett for the
foreclosure of a mortgage. From a judgment
for plaintiff, defendants appeal. Reversed.

Parsons, Corell & Parsons, for appellants. Campbell & Powell and J. H. Parker, for respondent.

PER CURIAM. This case is identical with No. 1,240, between the same parties (37 Pac. 426), and is reversed and remanded for the same reasons.

STATE ex rel. AMES v. GASCH et al., County Commissioners.

(Supreme Court of Washington. June 21, 1894.)
COUNTY SURVEYOR—COMPENSATION—ROAD—VIEW.
A county surveyor appointed under Laws
1893, c. 98, § 3, as one of the viewers to view
a proposed road, stands on the same footing as
any other viewer, and is not entitled to compensation for his services in advance of its establishment by order of the superior court.

Appeal from superior court, King county; J. W. Langley, Judge.

Petition by the state of Washington, on the relation of F. F. Ames, against Fred Gasch and others, county commissioners of King county, for a writ of mandanus to compel respondents to consider a bill for services rendered by relator as a road viewer. From a judgment for respondents, relator appeals. Affirmed.

Andrew & Ames, for appellant. John F. Miller, Pros. Atty., and A. G. McBride (Saml. H. Piles, of counsel), for respondents.

SCOTT, J. During all the times hereinafter mentioned, the relator was the dulyelected, qualified, and acting county surveyor of King county, and the defendants composed the board of county commissioners of said county. On or about the 4th day of November, 1893, an order was duly made and entered in one of the departments of the superior court of said county, in pursuance of the provisions of section 3, c. 98, Laws 1893, p. 237 et seq., generally known as "the Road Law," appointing the relator, as county surveyor, and two other viewers, to view a certain proposed road which had been petitioned for, and to report their doings in writing to said court within 10 days after making such view and survey, together with a map or plat of the county surveyor. This order was fully complied with by the viewers named, and the relator, who wrote out their report and filed the same, together with the map required by the order and by subdivision 4 of section 5 of said chapter, in the office of the clerk of the court. In complying with the provisions of said order, the relator claims that he earned and expended \$67.50. Thereafter, and on the 4th of December, 1893, he filed an itemized claim for such services with the clerk of the board of county commissioners, and the same was brought before the board for its consideration. The claim, when filed and presented, was certified by him to be correct, and that he had furnished the labor and expense amounting to the sum for which the said bill was rendered, and that he

had not received payment of the same, or any part thereof, and that the same was justly due from King county. The commissioners refused to consider the bill, on the grounds-First, that no record evidence was presented to them of the performance of the work; and, second, that they had no right to pass upon the bill until the road, in the viewing of which the services were rendered, had been ordered established by the superior court, which at that time had not been done. Thereupon, the relator petitioned for a writ of mandamus to compel the respondents to consider said claim. An answer was filed, and upon the trial, the relator having rested, the court ordered a nonsuit.

Appellant claims that, as such roads are public highways, the service rendered by him thereon was a public service, for which he is entitled to compensation from the county; and he cites section 241, Gen. St., and section 4, c. 98, Laws 1893, p. 238. It will be noticed, however, that section 3 of said chapter provides for the appointment of three viewers, one of whom may be the county surveyor. It is not requisite that the county surveyor should be appointed as one of the viewers. Section 241, Gen. St., therefore, has no application, for, if appointed, the surveyor would be required to act in person, and could not act therein by a deputy, because the act requires the appointment of three disinterested persons, and the court, in appointing them, determines the qualifications of the persons appointed as individuals, and, while the surveyor might be competent to act as a viewer, a deputy might not be. At the time the writ was petitioned for, there was nothing before the county commissioners from the superior court to show that the road had been established, or that the petition therefor had been denied, or that the costs therein had been taxed, and, as a matter of fact, the road had not been established. The law requires that, upon the filing of the petition, a bond shall be given, payable to the state, for the use of the county, in the sum of \$200, conditioned that the persons making application for the proposed road will pay into the county treasury the amount of all costs and expenses incurred in the view and survey of said proposed road, in case the petition therefor is not granted. Of course, it would be the duty of the county surveyor, if appointed as one of the viewers, to perform the duty imposed upon him, but he would stand upon the same footing as any other viewer, so far as the time and manner of his compensation are concerned. The first notice that the county commissioners have of such proceedings is, under the provisions of section 7 of said act, in case the road is established. If the petition for the proposed road is not granted, no public service has been rendered, for it has been found that the road petitioned for would not be a public benefit. In such case, the law expressly provides that the costs of the survey shall be taxed to the principal and sure-

ties upon the bond. The court only has authority to tax costs in such proceedings, and the commissioners are not authorized to pay anything until the court has taxed the costs, and they know by the order of the court what they are required to pay. Affirmed.

DUNBAR, C. J., and STILES, J., concur. HOYT and ANDERS, JJ., concur in result.

SPOKANE COUNTY v. ALLEN et al. (Supreme Court of Washington. June 21, 1894.)
PROSECUTING ATTORNEY — COLLECTION OF DELIXQUENT TAXES—LIABILITY OF SURETIES.

1. The office of prosecuting attorney, created by Act Feb. 3, 1891, is identical with that of county attorney, existing before the passage of that act.

2. A prosecuting attorney who has collected delinquent taxes as required by Act March 9, 1891, is estopped from asserting that such act has no application to his office, in so far as it requires the payment into the county treasury of the attorney's fees therein provided for.

3. The provision in Act March 9, 1891, requiring the payment of attorney's fees by delinquent taxpayers on collection of the taxes at the suit of the prosecuting attorney, was intended to reimburse the county for extra expenses, and not as additional compensation to the county attorney for the performance of extrinsic services.

4. Act March 9, 1891, requiring prosecuting attorneys to collect delinquent real-estate taxes by action, imposes duties on them not in any way germane to those theretofore required of them; and hence the sureties in the bond of such an attorney, executed before the passage of that act, are not responsible for any delinquencies of the attorney in the performance of the new duties imposed. Hoyt, J., dissenting.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by the county of Spokane against S. G. Allen and others on the official bond of said Allen as prosecuting attorney of said county. From a judgment for plaintiff, defendants appeal. Reversed.

Turner, Graves & McKinstry, for appellants. R. B. Blake and F. T. Post, for respondent.

DUNBAR, C. J. This is an action upon the alleged official bond of appellant 8. G. Allen, as prosecuting attorney of Spokane county, joining the sureties in said bond with their principal, as parties defendant. At the general election held in Spokane county or November 4, 1890, Allen was voted for and declared elected to the office of prosecuting attorney for the county of Spokane. On January 10, 1891, he qualified, and gave the bond sued upon, and entered upon the discharge of his official duties. The pertinent condition of the bond was as follows: "If said & G. Allen shall well and truly perform all the duties required of him by law as prosecuting attorney aforesaid, and shall pay over any and all moneys that may come into his hands as such, then this obligation shall be void; otherwise, of full force and effect." On Feb-

ruary 3, 1891, the legislature passed an act | providing that all officers elected as county attorneys at the last general election should be declared to be prosecuting attorneys. Subsequently to the time when appellant executed the bond in question, to wit, on the 9th day of March, 1891, the legislature imposed upon the prosecuting attorneys of the state the duty of collecting delinquent taxes upon real estate, providing the manner in which they should prosecute by suit, and providing for attorney's fees in such cases. Allen, in the capacity of prosecuting attorney, during the year 1892, brought many of these actions for the collection of delinquent taxes, and retained the attorney's fees provided for by the statutes in such cases, and, upon settlement with the county, refused to account for them. claiming that under the law he was entitled to the same. The agreed statement of facts is much more elaborate, and contains other statements, but the foregoing is sufficient for the purposes of this opinion.

The disposition we are compelled to make of this case renders it unnecessary to discuss the first technical objection made by the appellants, viz. that the complaint does not state a cause of action, for the reason that it does not appear affirmatively that the delinguent taxes described were taxes collected on real estate, instead of personal property. We do not think there is any merit in the contention of appellants that there was no such officer, at the time the bond was given, as prosecuting attorney of the county. Outside of the facts in this case, which show that Allen was elected as prosecuting attorney for Spokane county, and gave his bond as prosecuting attorney for said county, we think, considering the provisions of the statute with relation to the provisions of the constitution, that the office of county attorney is identical with that of prosecuting attorney.

We have examined with attention and pleasure the many cases cited by both appellants and respondent on the question of de jure officers and de facto officers; but in this case the appellant Allen has assumed that the law applied to him, or to the office which he held. He performed the duties of the office, and, if we understand his position, seeks to retain the benefits of the application of the law to the office which he assumed. If he is not entitled to the fees and emoluments by reason of the applicability of the law to the office which he held, he is not entitled to them at all. These considerations, of course, as we shall hereafter see, do not apply to the sureties, but Allen is estopped from asserting them as a reason for not returning this money to the county.

Nor can we sustain the contention that it was the intention of the legislature that the attorney's fees provided for in the collection of delinquent taxes should be appropriated by the county attorney as compensation for duties extrinsic to the office. Section 25 of article 2 of the constitution provides that the

compensation of any public officer shall not be increased or diminished during his term of office; and section 8 of article 11 provides that the legislature shall fix the compensation by salary of all county officers, except certain officers, which exceptions do not embrace the office in question, and provides again that the salary of any county, city, town, or municipal officer shall not be increased or diminished after his election; and the legislature, at its next session after the adoption of the constitution, proceeded to carry these provisions of the constitution into effect by fixing the salaries of the county officers, including that of the county attorney. It would seem that giving a plain interpretation to the language of the constitution, twice expressed, would be conclusive of this proposition; but appellant cites this court to one of its own decisions, viz. State v. Carson, 6 Wash. 250, 33 Pac. 428, in support of his contention that the provisions of the constitution above cited do not preclude the legislature from increasing the compensation of public officers, where the performance of extrinsic services is imposed upon such officer. We do not think that the doctrine enunciated in that case should in any event be extended, though it is plainly distinguishable from the case at bar. In that case the court held that a legislative act which provided that the county treasurer should be charged with the duty of assessing and collecting city taxes, and that the city should pay him therefor the sum of \$500 per year, did not violate the constitutional inhibition against increasing the compensation of any public officer during his term of office. It will be seen that the new duty there imposed was absolutely extrinsic, and in no way connected with the performance of his duties as a county officer. business was for another municipality, and the additional compensation came from the other municipality; and, so far as construing the intention of the legislature is concerned, that body especially provided (Laws 1893, p. 170), in plain terms, that the city should pay the treasurer that amount. But the legislature has made no such provisions in relation to the county attorney, either in direct terms or by implication. It is true that the laws of 1891 provide for the payment of attorney's fees by the delinquent taxpayer, but they do not provide, as in the case of the treasurer, above cited, that they shall be paid to the attorney who is authorized to bring the action; and we have no doubt that the intention of the legislature was that such fees were intended to reimburse the county for extra expenses incurred by the county in furnishing additional assistance to the county attorney in the performance of the additional duties imposed upon him.

But the responsibility of the bondsmen, as we have before intimated, rests upon entirely different grounds. It was the privilege of the attorney, in case he thought the new

duties could not be legally imposed upon him, to refuse to perform them, or, if he was not willing to rely upon that position, to resign the office. But the responsibility of the sureties could not be made to depend upon his decision or choice in either of these contingencies. They contracted with the courty with reference to the law in force at the time the contract was executed, and the law that was then in force was the law which was incorporated into and became a part of their contract, and not some law which the legislature might pass at some subsequent time, which would greatly increase their risk. Of course, sureties on an official bond are presumed to take notice of the fact that changes will be made concerning the duties of their principal, and where these changes are made in matters of minor importance, which, as a whole, do not substantially increase their responsibilities, the sureties will not be exonerated. But wherever an entirely new and distinct class of duties, not germane to the office, is imposed upon a public officer, the sureties are not bound to answer for the added responsibilities. The general rule is thus stated by Mechem on Public Officers (section 305): "The contract entered into by the sureties is ordinarily to be construed by reference to that law, and that only, which was in effect at the time their contract was made, and which they then had in contemplation. As a rule the sureties upon an official bond can be held liable for the faithful performance of those duties only which adhered or were germane to the office at the time their undertaking was entered into, and not for other and different duties added to the office after the execution of the bond. Where the bond is given to secure the faithful execution of a given office, and after the execution of the bond the whole nature of the office is changed, the bond ceases to be obligatory, because the office is no longer the same, within the meaning of the bond." In this action it seems to us that the new duties imposed were not in any way germane to the office at the time their undertaking was entered into. At that time the bond which the county attorney was required to furnish was more or less a simply formal requirement; but the legislature afterwards imposed upon him duties and responsibilities which before that time had attached to the offices of treasurer and sheriff, viz. to assume the responsibility of collecting, and being responsible for, large amounts of money. Many persons would be willing to go upon the bond of an attorney who would not be willing to make themselves responsible upon the bond of a treasurer, whose principal duty it is to collect, care for, and account for, money. It is well understood that a bond of this nature would carry with it more risk and responsibility than a bond given by an officer for the performance of mere clerical or professional duties, and it is not right to assume that this new and absolutely distinct duty and respon-

sibility which is imposed upon the county attorney, and through him upon his sureties, should have been taken into consideration or contemplated by the sureties when they executed the bond in question. Certainly, if the office of county treasurer had been abolished by the legislature, and all the duties of that officer imposed upon the county attorney, it will not be contended that the sureties on the bond of the attorney, given prior to such change, would be held responsible for any delinquencies of their principal in the performance of the new duties imposed; and where a portion of those responsibilities, which are distinct from the ordinary responsibility of the county attorney, are imposed, the principle is the same. The only difference is in degree. In King Co. v. Ferry, 5 Wash. 537, 32 Pac. 538, this court held that, where the legislature had extended the term of office of an officer beyond the limit fixed by law at the time of his election and qualification, the sureties upon his bond could not be held liable for his official acts during such extended term, for the reason that the sureties had a right to take into consideration the requirements of the law, so far as their principal was concerned, which was in existence at the time that the contract was made; and it seems to us that it would be just as inequitable to hold here that the sureties had in contemplation a requirement imposing an entirely different character of responsibility upon their principal, which was afterwards imposed by the legislature. There, this court said, no doubt the central idea was that the term of office was for two years; and here, no doubt, the central idea was that the sureties were to become responsible for the faithful performance of the duties which were then imposed by law upon the principal, and not for the duties which might afterwards be imposed. It is not the fault of the sureties that the legislature did not provide an additional bond to be given by the county attorney, as tax collector, when these additional burdens and responsibilities were imposed upon him. This is in harmony with the rule also laid down by Brandt on Suretyship and Guaranty (section 548) that: "As a general rule the sureties on an official bond are liable for the faithful performance of all duties imposed upon such officers, whether by laws enacted previous or subsequent to the execution of the bond, which properly belonged to and came within the scope of the particular office. They are not, however, liable for after-imposed duties, which cannot be presumed to have entered into the contemplation of the parties at the time the bond was executed." Assuming the correctness of the law thus announced, it seems to us unreasonable to presume that the sureties could have contemplated the imposing of these absolutely distinct duties upon the prosecuting attorney, which not only did not properly belong to, and come within the scope of, his office, but which had, by the settled policy of the law.

for many years, been invested in other officers. The judgment will be reversed, and the cause remanded, with instructions to dismiss the action.

ANDERS, SCOTT, and STILES, JJ., concur.

HOYT, J. (dissenting). One of the duties of the prosecuting attorney, under the law in force at the time the bond in question was executed, was to prosecute suits in favor of the county, and, as incident to that power, to receive payment before suit, and pay over the moneys so received to the county. ing so, I think that the legislation by which it was made his duty to collect taxes due the county by suit, and, as incident thereto, to receive them for the county before suit, if offered, was germane to his duties under the law at the time the bond was executed. For this reason such legislation did not confer such new duties as would relieve his bondsmen of responsibility in regard thereto. The judgment should be affirmed.

FERRY v. FERRY.

(Supreme Court of Washington. June 26, 1894.)
DIVORCE—SETTING ASIDE DECREE—DIVISION OF
PROPERTY.

1. A decree of divorce granted on the cross complaint of the wife will not be set aside at her suit on the ground of her nonresidence, since Code 1881, § 2004, in terms provides for cross complaint, without mentioning residence as a prerequisite.

2. When a complaint for divorce by a husband alleges his residence within the state, the wife, who appears and procures a decree in her favor, cannot afterwards attack such decree on the ground that the husband was a nonresident.

3. A division of property in a decree for divorce cannot be attacked by the wife, for the husband's misrepresentation as to the value of his real estate, where she knew the specific parcels owned by him before the decree was entered, and permitted three years to elapse before attempting to set the division aside.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Evelyn P. Ferry against Clinton P. Ferry to set aside a decree of divorce and a division of property. From a judgment for defendant, plaintiff appeals. Affirmed.

Stevens, Seymour & Sharpstein, for appellant. Elisha P. Ferry, H. K. Moore, and Fishback, Sapp & Ferry, for respondent.

STILES, J. The parties to this action were husband and wife. In September, 1889, respondent commenced an action against appellant, in the district court for Pierce county, for a divorce, alleging his residence in Washington for more than one year prior to the filing of the complaint. Appellant had previously commenced a like action against her husband in California, but, upon being served with process in the Washington suit.

she saw fit to appear therein. There was considerable negotiation between the counsel for the parties before her appearance was made, relating both to the form in which the action should proceed and to the division of the property, of which there was a large amount, nearly all realty, in Washington and Oregon. These negotiations culminated in an agreement, which was expressed by a stipulation filed in the cause, and dated October 5, 1889, under the terms of which the complaint was to be withdrawn, and an amended complaint of a modified form substituted; an answer in the nature of a general denial, and a cross complaint was then to be filed by the defendant, alleging a cause of action for a divorce upon "mild grounds to be agreed upon by counsel for both parties;" and the stipulation further provided a complete scheme of settlement of the property questions, whereby the defendant and cross complainant was to take specified property of the estimated value of \$34,000, \$10,000 in money, and \$6,000 in installments for the support of a minor child. and the husband was to take the residue of the estate. In addition to the provisions of the anticipated decree, it was agreed that the parties should execute and deliver mutual deeds for the further assurance of title. The terms of the stipulation were carried out literally, the court granted a decree of divorce to appellant, and the deeds were executed, and payments made. The deeds were executed and placed in escrow October 15, and the decree was granted October 21, immediately after which the deeds were exchanged. This action was commenced March -, 1893, and seeks to annul the decree, and cancel the deeds executed by appellant to respondent. on two grounds: (1) Because neither of the parties to the divorce suit was a resident of Washington, the plaintiff's allegations in that respect having been false; (2) because the appellant was deceived, by respondent's intentional false statements concerning the amount and value of the estate cognizable under the divorce proceeding, into believing that the entire estate was worth no more than \$150,000, when, in truth, it was worth \$750,000. The objection that no cause of action was stated, and the bar of the statute of limitations, were urged by demurrer, which the court sustained.

1. It will be observed that the decree complained of was obtained at the suit of appellant, upon her cross complaint, so that that numerous class of cases wherein innocent parties, against whom courts without jurisdiction, for want of residence, have rendered decrees of divorce, were granted relief in both direct and collateral proceedings, are not in point. Coulthurst v. Coulthurst, 58 Cal. 239, is cited in support of the proposition that, in this state, the cross complainant in a divorce suit must plead residence. But that was an appeal from a decree, and it is by no means certain that the same court would have annulled a decree under the

circumstances we have here. There was no express authorization of a cross complaint in the California practice, and the case cited was based upon the general provisions of the Code concerning the pleading of a defendant seeking affirmative relief; whereas our statute (Code 1881, § 2004) in terms provides for cross complaints, without mentioning residence as a prerequisite. Sterl v. Sterl, 2 Ill. App. 223, is a case directly to the contrary, under a statute reading: "No person shall be entitled to a divorce in pursuance of the provisions of this act, who has not resided in the state one whole year, next before filing his or her bill or petition." Rev. St. 1877, c. 40, \$ 2. And it was there held that where the husband was a resident, and filed his bill, the wife, who lived in another state, was entitled to have the entire case between her and her husband disposed of. The reasoning of that case seems to be sound, and to be especially applicable here. The appellant must rest, therefore, upon the nonresidence of her husband, and in that she encounters a difficulty. The plaintiff alleged residence, and no one, except the plaintiff, knew better than the defendant whether that allegation was true or not. She was in California, and, although served personally, she was not obliged to appear, but could safely stand upon the ground that at all times, and in all courts, she could successfully combat the effect of any decree which might be entered in the case commenced here. She had actually there commenced a suit of like character against her husband; but she forbore to prosecute it, and, after coming into the case here, she stipulated to dismiss it. She did not make it known to the Pierce county court that she claimed her husband's residence to be elsewhere. She procured the modification of the complaint, and obtained, at the hands of the court, a decree in her favor. She says no evidence was taken as to the residence of either party, and that there was no finding upon that subject; and it is not to be wondered at, since the atmosphere of the case is that of one facilitated by both parties, with the object of getting a decree on proof of as slight facts as possible. No one was deceived or defrauded in this, unless it be the court; and now the same court is asked to set aside the decree thus rendered, at the suit of one who is responsible for the imposition effected, after more than three years of acquiescence and enjoyment of the fruits of the action. It is enough to say that the authorities are decidedly against the proposition, and that courts cannot be used in that way. 2 Bish. Mar., Div. & Sep. § 1548; Kinnier v. Kinnier, 45 N. Y. 535; Nichols v. Nichols, 25 N. J. Eq. 65; Greene v. Greene, 2 Gray, 361. So far as these parties are concerned, within this state, they are no longer husband and wife.

2. But the real relief sought by this action is a readjustment of the property arrangement. A great deal of matter is stated in

the complaint tending to show that the respondent had, in France, commenced a series of acts of cruelty towards appellant, which were intended to place her at such a disadvantage that she would be practically compelled to accept a divorce on the terms which he might dictate. But, be those things as they may, when the scene of the trouble was transferred to Tacoma, we are unable to see wherein there was much difference in the position of the parties, relative to their property. Appellant had counsel, and property of her own, besides the resource she had in orders of the court to compel respondent to furnish her means both for her maintenance and her defense. She alleges that, for the purpose of defrauding her out of her due portion of the property, respondent, who alone had knowledge of the extent and value of the estate, refused to make known of what the property consisted, and falsely represented it to be of only one-fifth its actual vaiue. But, again, the court was at her service to compel her husband to make full disclosure of the property, and to have it valued by impartial appraisers. Respondent could not have been called upon for a valuation, nor did appellant have any right to rely upon any estimate which he might offer; on the contrary, she would naturally be suspicious of it. But, although the state of ignorance alleged might have been in some degree excusable when the stipulation was entered into, that condition of things did not exist when the decree was entered, for, six days before that time (October 15th), appellant had affixed her signature to deeds which minutely described every parcel of real estate now sought to be affected, so that she then knew from respondent all that she could have expected to learn from him, viz. the particular description of the estate. There was nothing in the stipulation, or in the fact of her having executed the deeds, and placed them in escrow, which would have prevented the court, upon a showing, from going into the whole matter of the property, and making a just division. The entry of the decree could have been postponed until a valuation could have been made, if necessary, since it was her decree, and she controlled the entry of it. We know of no rule, prevailing in cases where husband or wife alleges fraud of this kind, different from that which controls cases between other classes of parties. When the opportunity for discovering the fraud is presented, it must be made use of promptly. Appellant says that she did not discover the falsity of respondent's representations until December 10, 1892; but the fraud, if any, was consummated, and the action accrued, October 21, 1889, when the decree was entered. The misrepresentation of value was mere opinion (Parker v. Moulton, 114 Mass. 99; 2 Kent, Comm. 485); all reliance upon which was in appellant's own wrong when she became aware of the property items. A few letters of inquiry addressed to assessors

would, within a few days, have furnished a fair basis for estimating the whole estate, and the alleged fraud would have been discovered. Three years and more were allowed to elapse, and then, after the whole of the property decreed to her had been sold or mortgaged, and the proceeds spent, this proceeding is commenced; but we think the statute, as well as equity, does not sanction the disturbance of the decree, and the consequent conveyances, after so long a delay. Judgment affirmed.

DUNBAR, C. J., and SCOTT, ANDERS, and HOYT, JJ., concur.

CITY OF SEATTLE v. LIBERMAN et al. (Supreme Court of Washington. June 27, 1894.) APPEAL-NOTICE-STIPULATION -ABANDONMENT-ASSIGNMENT-PRIORITIES.

1. Where an oral motion of appeal is regu-

larly given in open court after rendition of a judgment, a written notice is unnecessary.

2. An appeal from a judgment distributing among various claimants a fund due from a city to a contractor is not affected by a stipulation, entered into pending an appeal, authorizing payment by the city of a portion of the fund as directed by the judgment, when the parties did not intend to abandon their appeal as to the

not intend to abandon their appeal as to the residue. Hoyt, J., dissenting.

3. A contract for a street improvement fixed the compensation for the construction of sidewalks, drains, etc., at \$10.25 per 1,000 feet of lumber therein; 70 per cent. being payable as the work progressed, and 30 per cent. on its completion. A subcontractor agreed to furnish as the work progressed, and 30 per cent. on its completion. A subcontractor agreed to furnish the lumber at \$7 per 1,000 feet, and the contractor ordered the city comptroller to make payments for the lumber, according to partial and final estimates of the city engineer, as the work progressed. Held, that on the completion of the work, and on the distribution of the reserved fund, the subcontractor was entitled to priority over a subsequent assignee, claiming under an assignment of all funds due the contract der an assignment of all funds due the contract-

4. The fact that the city comptroller may have had no authority to accept the order directing payment to the subcontractor for the lumber is immaterial, since the order operated as a valid equitable assignment. Hoyt, J., dis-

5. The fact that the subcontractor and his without protest, during the agent accepted, without profest, during the progress of the work, 70 per cent. of the value of the lumber, does not estop them from claiming the other 30 per cent., as against the subsequent assignee, where they supposed they were being paid the full amount called for by the contractor's order.

Appeal from superior court, King county; J. W. Langley, Judge.

Bill of interpleader by the city of Seattle against I. Liberman and others to determine the proper distribution of a fund due from the city to Liberman, among various claimants thereto. From the judgment, D. Keeler and J. L. Taylor appeal. Reversed.

Richard Saxe Jones, for appellants. W. T. Scott and F. A. Steele, for respondent city of Seattle. Allen & Powell, for respondents Ed. Van de Ven and others. Ira Bronson, for respondents Fischer & Macdonald.

SCOTT, J. A. motion was made to dismiss this appeal on the ground that all of the parties to the action had not been served with notice thereof, which is based upon the fact that a written notice was given, which had not been served upon all of the parties entitled to service under the statute. It appears, however, that an oral notice of appeal was regularly given in open court after the rendition of judgment, and an appeal bond was given within the time required thereafter. Consequently the written notice was superfluous, and the motion is denied.

This action was begun October 5, 1803, by the city of Seattle against I. Liberman and others, to determine the conflicting claims of 50 or more claimants to funds in the hands of the city devoted to a street improvement. On September 12, 1892, the respondent the city of Seattle, through its board of public works, entered into a contract in writing with the defendant I. Liberman, whereby said Liberman agreed to grade, to the established grade, Broadway and De Forrest streets, in said city, from Yesler avenue to the south line of Oak street, and construct sidewalks on both sides thereof between said points, as ordered by an ordinance of said city approved August 23, 1892. The city agreed, in the language of the contract, "to pay said Liberman for said improvement at the following rates, to wit: Earthwork, per cubic yard, fourteen and one-half cents (141/2); rock, per cubic yard, seventy-five cents (.75); sidewalks, box drains, and crosswalks, including nails and spikes, ten and 25-100 dollars (\$10.25) for each thousand feet, board measure, of lumber therein; clearing and grubbing, per acre, sixty-five dollars (\$65)." In said contract it was further provided as follows: "All said payments shall be made by warrants payable only from the local improvement fund, district No. 34 of Seattle, provided for by said ordinance No. 2309, and not otherwise; and said party of the second part agrees to look solely to said fund for the payment for said improvement, except that so much of said contract price as is the cost of improvement of street crossings shall be paid by said city from its general road fund, to wit, the street fund. Warrants shall be issued as follows: On or before the fifteenth day of each month, during the progress of the work, warrants shall be issued for seventy (70) per cent. of the contract price of the estimated amount of said work returned by the city engineer as having been done during the preceding calendar month, and the balance of said contract price, being thirty (30) per cent. thereof, shall be retained to secure the payment of laborers who shall have performed work thereon, and material men who shall have furnished materials therefor; and all such laborers and material men shall, for thirty days after the work has been completed, have a lien

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upon said thirty (30) per cent. so reserved for labor done and materials furnished, which lien shall be senior to all other liens, whether by judgment, attachment, or contract; and said improvement shall not be deemed completed until the board of public works shall have filed with the city clerk a statement signed by a majority of them, declaring the same has been completed. But neither said statement, nor any acceptance of said work by said board, shall prevent said city from thereafter making any claim for uncompleted or defective work, when the same is discovered. In case no lien is claimed against said thirty (30) per cent. so reserved during said thirty days, and no uncompleted or defective work shall have been discovered and reported by the city engineer during said time, then warrants for said unpaid balance shall be issued at the expiration of said period; but in case notice of any such lien is given the city during this period, by or on behalf of any person claiming such lien, or in case the city engineer shall report any claim of the city by reason of uncompleted or defective work. then the amount of all liens so claimed shall be reserved by said city until final determination of such lien claims, and the cost of perfecting such uncompleted or defective work shall be retained until such uncompleted or defective work shall have been been perfected or arranged to the satisfaction of the board of public works, unless otherwise ordained by the city council. No warrants shall be issued in any event for any part of said thirty (30) per cent. so reserved until said party of the second part shall have filed with the city comptroller a certificate, signed by the city engineer, stating that said period of thirty days has elapsed, and that no uncompleted or defective work has been discovered for which said city makes claim. This contract is made and entered into with reference to the charter of said city, as amended and now in force, and the ordinances of said city now in force; and the provisions of said charter and ordinances relating to the subject-matter of this contract are hereby made a part hereof, with the same effect as if said provisions were herein incorporated and expressly set forth."

Liberman entered upon the work in accordance with the contract, and after some delay completed it, and it was accepted by the board of public works on August 22, 1893. The contractor's compensation for the construction of sidewalks, box drains, and crosswalks was to be measured by the quantity of lumber used; the cost of the nails, spikes, and other material, and all labor of preparing, laying down, and completing the structures, being included in the \$10.25 per 1,000 feet of lumber used. In order to purchase the lumber needed to carry out his contract, Liberman gave to J. L. Taylor, one of appellants, the following order:

"Seattle, Wash., February 25, 1893. J. M. Carson, Esquire: Please pay J. L. Taylor for lumber used in the improvement of Broadway, for sidewalks, box drains, culverts, or retaining walls, at the rate of seven dollars (\$7.00) per thousand feet. Said lumber is estimated to amount to about 570,000 feet, which, at \$7.00 per M., would be \$3,990.00; and for this sum, more or less, according to the city engineer's estimate, this order is given in favor of J. L. Taylor; payments to be made according to the partial and final estimates of the city engineer, as the work progresses. Order for three thousand nine hundred and ninety-nine dollars, more or less. I. Liberman.

"I hereby release the above amount only from order given me by I. Liberman for the full amt. due and to become due on Broadway. J. T. Nelson."

This order was indorsed at the comptroller's office as follows: "I. Liberman to J. L. Taylor, and release of amount of lumber at \$7.00 per tho. by J. T. Nelson. Release by Nelson to Fischer & Macdonald. Filed March 11th, 1893." There had been a previous order to J. T. Nelson, but on March 15, 1893, Nelson released all claims on the fund. On the 20th day of March, A. D. 1893, Fischer & Macdonald caused to be filed with the city comptroller an order as follows: "Seattle, Washington, March 20, 1893. J. M. Carson, City Comptroller, City of Seattle: Please pay to Fischer & Macdonald all money now due, or which may become due, on Broadway and De Forrest street contract. I. Liberman. [Indorsed] Filed March 20, 1893. J. M. Carson, Compt." Fischer & Macdonald were a wholesale grocery firm in Seattle, and this order was given them as security for groceries and money furnished Liberman by them. The rights of appellant Taylor and respondents Fischer & Macdonald were fixed by these orders. Later on, Taylor assigned his claim to appellant Keeler. On September 1, 1893, Fischer & Macdonald filed the following instrument: "J. M. Carson, City Comptroller: For and in consideration of the sum of four thousand (\$4,000) dollars to me in hand paid by Fischer & Macdonald. I hereby sell, assign, transfer, and set over to said Fischer & Macdonald all of that certain claim against the city of Scattle, a municipal corporation in King county, Washington, amounting to about fifty-six hundred (\$5,600) dollars, being a balance due me upon a contract for the grading and sidewalking of Broadway and De Forrest streets, in the said city of Seattle, together with all sums of money due me from said city, and authorize said Fischer & Macdonald to receive from said city said sum, and receipt therefor. Witness my hand and seal this 1st day of September, 1893. I. Liberman."

During the progress of the work, monthly estimates were returned by the city engineer, allowing the contractor for 70 per cent. of the work completed in each month.

In making payments to Keeler under said order, it seems, some question was raised as to whether he was entitled to the full rate of \$7 per 1,000 for lumber furnished each month, out of the money coming to the contractor for that month, or whether he was to get but 70 per cent. of the \$7 per 1,000 out of the partial payments as the work progressed. The first construction put upon this order by the comptroller was to the effect that Keeler was entitled to only 70 per cent. of the \$7 per 1,000 on the partial estimates; the remaining 30 per cent. of the price of the lumber, as called for by the order, to await the final estimate. Payment was made to Keeler in the month of March for the February estimate, and in the month of April for the March estimate, in accordance with this construction. In the month of May the comptroller departed from this construction of the order, and assumed that Keeler was entitled to the full \$7 per 1,000 for lumber delivered, so long as there was sufficient money due the contractor to make the full payment, and consequently the payment made in May for the April estimate gave him full payment for the lumber delivered during the preceding month; and he also applied this new construction to former payments, and paid the amount that had been held back on the lumber furnished in February and March. The result was that the May payment paid in full for all lumber furnished up to May 1st. In making pay-ment in the month of June on the May estimate, the comptroller returned to his original construction of the order, and again made his new construction retroactive, paying only such sum as would make the total amount of money then and theretofore paid equal to 70 per cent. of the lumber bill up to that time. The reason given for returning to the first construction is that Fischer & Macdonald, who held the second order, insisted that the first construction was the correct one, and they claimed the balance under their order and assignment. This construction was thereafter adhered to, and, in pursuance thereof, payments were made in July for the June estimate, and in August for the July estimate. The August estimate was combined with the final estimate, as the work was completed and accepted on August 22d. No payment was made upon this estimate prior to the decision of this case in the superior court. During the progress of the work, it seems, there was paid, either to Liberman or holders of orders from him, the full 70 per cent. of the contract price of work then completed, up to August; sums not paid to Keeler being paid to Fischer & Macdonald or to such persons as Liberman and Fischer & Macdonald directed. The full cost of the improvement, under the contract, including earthwork, rockwork, clearing, grubbing, sidewalks, and other structures, was \$14.619.07. Under the contract and charter, 30 per cent. of this sum was

reserved "to secure the payment of laborers who shall have performed work thereon, and material men who shall have furnished materials therefor." At the time of the commencement of this action the city had on hand the whole of this "thirty per cent. reserve," viz. \$4,385.72, and also 70 per cent. of the work done in August (no partial estimate for said month having been separately rendered), which last amounted to \$1,213.15. During the 30 days following the completion and acceptance of the work a large number of time checks and other claims were filed with the comptroller by various holders claiming liens for labor performed and material furnished on the work. There was also a contest between Fischer & Macdonald and appellants Taylor and Keeler, regarding their priorities in the fund. amount of the various claims exceeded the amount of the fund remaining in the hands of the city, and the validity of the time checks and so-called liens was in doubt. About 60 persons were claiming an interest in the fund, and the rights of all were contested by one or more of the others. Under these circumstances the city brought this action in the nature of interpleader against all persons claiming an interest. The city claimed to be a party without interest, and only asked that the fund be properly distributed. Taylor and Keeler claimed that under their order they were entitled, all along, to \$7 per 1,000 feet for all lumber furnished; that there was furnished 520,092 feet, amounting to \$3,640.64; that there became due to the contractor, Liberman, for such lumber, \$5,330.94; that the city had a right to retain therefrom only 30 per cent. of the amount due the contractor, leaving \$3,731.66 due in money as the work progressed, which was more than sufficient to pay their claim; that by accepting and filing the order from Liberman to Taylor, and the assignment thereof from Taylor to Keeler, and paying money thereunder, the city had accepted said order and assignment, and was bound by the terms thereof,-and they demanded judgment against the city for \$1,550.67, and interest thereon. The various lien claimants contended that they were each entitled to share pro rata in the 30 per cent. reserve as lienors under the contract and charter. Fischer & Macdonald denied that any of their codefendants had a lien on the 30 per cent. reserve, and set up affirmatively that they had also filed certain labor claims; that they had an assignment of all moneys due Liberman on his contract, and should be allowed the entire fund in the hands of the city until their claims against Liberman, to the extent of \$3,800, were satisfied. The city, by a reply, put in issue the contention of appellants, Taylor and Keeler, and further pleaded an estoppel against them in consequence of Keeler's having accepted the payments as made, without protest, during the pendency of the work. Both the city and

appellants, Taylor and Keeler, replied to the answer of Fischer & Macdonald, putting in issue the matters asserted by them. The cause was tried on these issues, and the lower court adjudged that the city should pay the various lien claimants the amount of their claims, and also pay to Keeler the 70 per cent. of the \$7 per 1,000 feet for lumber furnished in August, and distributed the balance of the fund between Keeler and Fischer & Macdonald, giving to Keeler 27.73 per cent., and to Fischer & Macdonald 72.27 per cent.; said payments being in proportion to their respective claims. Taylor and Keeler appealed therefrom.

The first question to be disposed of is the claim on the part of the respondents that the appellants should be held to have abandoned their appeal in consequence of a stipulation entered into after the appeal was taken. Such stipulation is as follows: "It is hereby stipulated and agreed by and between all parties in the above-entitled action, through their respective attorneys, that said city, the plaintiff, pay forthwith to each person to whom any money is payable under the final judgment and decree rendered herein by the superior court seventy-two per cent. of the full amount payable to such persons, respectively, by the terms of said judgment and decree; said payment to be made either to said parties or to their attorneys; said sum, to be paid as agreed by this stipulation, amounting to \$4,031.18, which sum is to be paid ratably from the street fund of said city, and the local improvement fund, district No. 34, as stated in the complaint. And it is further agreed that payment of said sum of \$4,031.18 to the several persons aforesaid shall be deemed and held, for all purposes, to have been properly paid and disbursed by the plaintiff, so far as any liability of the plaintiff is concerned, and no further, and shall extinguish to that extent the liability of the plaintiff on the contract in the complaint mentioned. It is further stipulated and agreed that the appeal bond given by said defendants Taylor and Keeler shall serve also as the appeal bond for such other defendants as may join in said appeal in the manner provided by law, and that no other bond shall be required by the other defendants so joining in said appeal. This stipulation shall be filed in duplicate in the superior court and in the supreme court, and the judgment of the supreme court, if any appeal be completed and decided, shall not, in any event, hold the plaintiff liable for moneys paid out under this stipulation." It appears that the amount stipulated was paid by the city to the various claimants, appellants and Fischer & Macdonald being included. We do not think this stipulation should be given the effect of depriving appellants of the benefit of their appeal. It clearly was not intended to have such an effect. It is apparent therefrom that the appellants at least understood their appeal should not be prejudiced thereby, and there was nothing upon the face of the stipulation to indicate that the respondents had any other intention. In fact, the stipulation provided for the maintenance of the appeal in stipulating as to the bond, etc. We know of no reason why it should be given any different effect than the parties intended it should have.

The city contends that it should not be held liable, in any event, beyond the amount of the fund devoted to the improvement in question, and that the controversy is really between appellants and Fischer & Macdonald, and, if appellants are entitled to any more money, they should recover the same from Fischer & Macdonald, and not from the city, on the ground that, if the city had not paid to Keeler the full amount he was entitled to under the order given to Taylor, it had paid the same to Fischer & Macdonald: that Fischer & Macdonald are parties to the suit, and are not shown to be insolvent: and that the court is in a position to do justice between all the parties. This last claim is here referred to as it is in a measure connected with the claim that the appellants have waived their appeal by entering into the stipulation, in consequence of having consented thereunder that certain moneys should be paid to Fischer & Macdonald. The relief sought by appellants, however, was against the city only. It is not clearly apparent what the additional sum paid to Fischer & Macdonald under the stipulation was for, as it seems the amount demanded by them was based upon several different claims. If the particular amounts to which Keeler was entitled, however, were paid to Fischer & Macdonald, such payments were made prior to this time, during the pendency of the work. The city was a party to this stipulation, and at the time it entered into it was fully advised of appellants' claim in the premises, and is bound as much as any of the other parties thereby. To hold that the stipulation would deprive appellants of the benefits of their appeal would be to hold that parties, pending a suit, cannot stipulate as to the disposition of a part of the subjectmatter over which there may be no controversy,-and it is not certain that there was any controversy, in this instance, directly between appellants and Fischer & Macdonald as to the sum paid,—and expressly preserve their right of appeal. We are of the opinion that a stipulation of the kind may be entered into, and the right of appeal maintained; and we do not think that the further claim upon the part of the city, hinged upon this,—that appellants should be compelled to look to Fischer & Macdonald,-is well founded. There is no more reason why appellants should be compelled to look to Fischer & Macdonald than there is that the city should look to them, nor as much, for there were no contractual relations between appellants and Fischer & Macdonald, and there

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were between each of said parties and the city. It appears that certain moneys are yet in the hands of the court, and it may be that the court will be in a position to protect the city in the premises—at least, in a measure—by retaining any further moneys, if any, which might be due to Fischer & Macdonald; and, were it not for the stipulation, it might be that the city could recover the excess of moneys, if any, paid to them. We are of the opinion, however, that the city, having stipulated to pay Fischer & Macdonald the additional sum after the decree was rendered, cannot hereafter ask to recover the sum paid, nor any part thereof.

The laborers' liens, and the amounts adjudged to them under the decree, are not contested here, and consequently will remain as fixed by the lower court.

It is further contended by the city and Fischer & Macdonald that Taylor and Keeler were only entitled to 70 per cent. of the \$7 per 1,000 feet for lumber called for by the order, and that this is apparent in consequence of the following language used in said order: "Payments to be made according to partial and final estimates of the city engineer, as the work progresses." But we do not so construe it. Liberman was entitled, under his contract, to more than that amount of money per 1,000 feet for lumber furnished, as the work progressed, and the effect of the order to Taylor was to entitle him to the full amount called for. This was the evident intention of the parties, as we construe the order, and there is nothing, either upon the face of the order or aside from it, to show any different intention. But, conceding that the clause referred to should have the effect of postponing payment for 30 per cent. thereof, Keeler was entitled to this balance upon the completion of the work, as this additional 80 per cent. was no part of the original 30 per cent. reserved under the contract, and did not pass to Fischer & Macdonald.

It is further contended by the city that the comptroller had no authority to bind the city by an acceptance of this order, but, conceding this, we do not think it alters the situation: "An order to pay out of a specified fund has always been held to be a valid assignment in equity, and to fulfill all the requirements of the law." Christmas v. Russell, 14 Wall. 69, 84. And this holds good, although the fund is not actually in being, if it will in due course of time arise from a contract or arrangement already entered into when the order was given. Pom. Eq. Jur. \$ 1283. Consequently, this order to Taylor operated as an assignment of Liberman's claim, to the extent of \$7 per 1,000 feet for the lumber furnished, due from the first payments, as the work progressed; and the city had notice of it and was bound thereby, regardless of any acceptance by the comptroller.

It is also contended by the city that appellants are estopped from making a further claim against the city in consequence of having accepted the payments, as made, without protest at the time they were made. It is contended that Keeler understood that he was being paid but 70 per cent. of the \$7 called for finally, and that he consented thereto. We have examined the proof in relation to this claim, and we do not think that it is established. It should be borne in mind that this order was given to Taylor as security only, and it does not appear how Keeler obtained it, unless it may be inferred from the fact that he was engaged in the brokerage business, and was dealing in such claims; and, if so, it is fair to presume that he only paid therefor in proportion to the amount he received, and therefore was not greatly interested. He testified that he had no knowledge that he was being paid but 70 per cent. of the \$7 called for by the order when the payments were made; that he supposed he was being paid the full amount called for by the order, according to the quantity of lumber which had been used at the time the payments were made, as estimated by the city engineer; that he had confidence in the city's officer who made the payments, and who informed him from time to time what he was entitled to, and made the payments. The only fact upon which an estoppel could be based is that Keeler did not determine for himself the amounts to which he was entitled, but accepted the payments, as made, without protest, taking it for granted that he was getting all that he was entitled to. This is not sufficient. He had no knowledge that he was being paid any less, and he had a right to rely upon the plain import of his order, and should not be prejudiced because he accepted the payments as estimated by the city's officer, under the circumstances, and we think that there was no estoppel in the premises.

The judgment is reversed and the cause remanded, with instructions to the lower court to enter a judgment in favor of appellant Keeler against the city for the balance of the moneys called for by the order in question, in accordance with this opinion, and for any further proceedings deemed allowable or called for, not inconsistent herewith. The costs of this appeal will be recovered of the city and of Fischer & Macdonald. No costs will be allowed against the other respondents, but they will be required to bear the costs of their own brief, as the same was unnecessarily filed.

DUNBAR, C. J., and ANDERS, J., concur.

STILES, J. I concur, with the reservation that the ground of recovery against the city is that the contract with Liberman segregated the cost of the lumber, and made it payable independently, as though it alone were the subject of the agreement.

HOYT, J. (dissenting). I am unable to agree with the conclusion to which the majority of the court have arrived, for the reason, first, that by joining in the stipulation for the distribution of the money the appellants waived their right to further prosecute the appeal. I understand the rule to be that a party cannot accept any of the benefits of a judgment, and at the same time prosecute his appeal therefrom. This rule is so well settled that I deem it unnecessary to cite any authorities in support thereof. That the appellants derived certain benefits from the judgment of the court, by virtue of the stipulation referred to, there can be no doubt, and I think that after signing the same they could not further prosecute their appeal.

Secondly. I am unable to agree with what is said by the majority as to the relations which were established between the city and appellants, Keeler and Taylor, and the respondents Fischer & Macdonald, by reason of the orders given by the contractor. These orders were upon the comptroller of the city, and were in no manner acted upon by its common council. The comptroller is the agent of the city, so far as his duties are provided by law or its ordinances, but no further; and there has not been called to the attention of this court any provision of such law or ordinances giving him any authority to accept such orders, or in any manner to contract in behalf of the city. It may well be doubted whether or not the city would be bound to recognize any order given by a contractor, even if it was accepted by its common council, for the reason that to make such acceptance was not within its powers; and it seems clear that the comptroller, who is a purely ministerial officer, could not, by his action in that behalf, in any manner bind the city. That the city was not bound to recognize the orders of the contractor is so clear that I do not understand appellants to contend to the contrary. It follows that, if the city was bound at all, it was by reason of the acceptance of such orders by the comptroller. But, since he was given no authority to do this, it is impossible to see how the city could be affected by his action in that regard. So far as he acted upon the orders, and made payment to the payees named therein, the contractor would doubtless be bound, by reason of the doctrine of estoppel, but such action on his part could not establish any liability on the part of the city. The opinion of the majority seems to concede that, unless the city had assumed some contractual relation with appellants and said Fischer & Macdonald, it would not be liable to them. If this is so, before they could recover they would have to show a binding contract upon the part of the city; and, since the common council is the only body clothed with power to authorize such a contract, authority from it should have been shown before it could be assumed that any

contract had been entered into. Under the provisions of the charter of the city of Seattle, the comptroller certainly had no power to enter into contracts of this kind, so as to bind the city, unless authorized by the common council; and, no such authority having been shown, his acts, even if sufficient to show an intent to make a contract on the part of the city, could in no manner bind it.

There is another reason why the appellants should not have the relief which is awarded them by the opinion of the majority. The city practically proceeded in rem against a certain definite sum of money which was in its possession, and asked the court to make distribution thereof. This being so, the subject-matter of the suit was only such sum of money, and the court was without jurisdiction to award any other judgment than one disposing of such fund. In my opinion the judgment should be affirmed.

COONEY v. GREAT NORTHERN RY. CO. (Supreme Court of Washington. June 27, 1894.)
INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

The mere fact that a crew of section men are ordered, in the night, to proceed to a crossing to unload a car load of rails, does not impose on the company a personal obligation to provide an unobstructed track for their hand car until it reaches its destination; and, when the headlight of a locomotive a mile and a half away is in plain view during the entire journey, there can be no recovery for an injury in a collision between the hand car and the locomotive, which was moving at the rate of only three or four miles per hour, and which could easily have been avoided by a removal of the car from the track.

Appeal from superior court, Spokane county; Norman Buck, Judge.

Action by Michael Cooney against the Great Northern Railway Company for personal injuries. There was a judgment for plaintiff, and defendant appeals. Reversed.

C. Wellington and Jay H. Adams, for appellant. Hyde & Reagan and W. S. Glass, for respondent.

ANDERS, J. This action was brought by the respondent to recover damages for personal injuries alleged to have been occasioned by the negligence of the appellant. It appears that on the 14th and 15th days of October, 1892, the respondent was in the employ of the railroad company in the capacity of a section hand, and was working on the line of railway which the company was then constructing in this state, west of the city of Spokane, under the direction of John Daly, his section foreman. The section house used by Daly and his men, and also by another section foreman, by the name of Charles Mann, and his crew, was situated a mile and a half east of the Seattle crossing, on the line of appellant's road. Between 2 and 3 o'clock in the morning of October 15, 1892, the said foreman received a telegram from one Burke, appellant's assistant road master, dated the day previous, stating: "Be at Seattle crossing at three o'clock to-morrow morning to unload steel." Another telegram was also received the same night from the road master, in reference to unloading ties, but it is not material in this case, as it does not appear that anything was done in response thereto. Some time before 3 o'clock, in obedience to the first-mentioned dispatch, Daly and Mann, together with five section hands, among whom was the respondent, got upon a hand car at the section house, and started for the crossing indicated in the telegram. The train carrying the steel came from the west, and arrived at the crossing before the time at which the men from the section house were requested to be there. The steel was immediately unloaded, and about 3 o'clock the train started east, and had proceeded 500 or 600 feet when a collision occurred between it and the hand car, whereby the respondent was thrown against the pilot of the engine with such force that the ulna of his left arm was fractured. This injury, the respondent claims, was the result of the negligence of the appellant in thus running its train of cars against and upon him, and in causing the said train and hand car to run into each other. No other act of negligence is alleged in the complaint. The case was tried by a jury, and there was a verdict and judgment for the plaintiff, and the defendant brings the cause here for review by appeal. At the close of the plaintiff's testimony, the defendant moved for a nonsuit, for the reasons (1) that "the testimony introduced shows that the negligence complained of was not the act of the defendant;" (2) that "the evidence shows that the plaintiff, by his contract of employment, assumed the risk incident to the same, and that the accident complained of was one of the incidents thereto;" (3) that "the evidence shows that the act of the plaintiff himself contributed to the cause of the injury complained of." The court denied the motion, and the appellant insists that in so doing it committed error.

We are firmly convinced that the motion should have been sustained. The testimony introduced by the plaintiff shows that, when the men got upon the hand car at the section house, the train, consisting of a locomotive and several freight cars, was standing at the crossing, with the headlight of the locomotive burning so brightly that it was constantly seen by the men on the hand car from the place of their departure until the collision occurred. Upon this point there is no conflict whatever in the testimony. The witnesses for the respondent also testified, substantially, that, notwithstanding they were looking at the headlight during all the

time the hand car was in motion, they could not discover the approach of the train until it was too late to avoid the casualty; that the train was moving slowly, on a down grade, and making no noise, and that they heard no whistle or ringing of the bell when it started. It also appears from the evidence that the hand car was running at a "lively" rate of speed, and made a good deal of noise, which may have been the reason why the train was not heard. It further appears that the men on the hand car, seeing that they were near the train. were about to stop the car, and remove it from the track, and had already begun to apply the brakes, when it collided with the engine. There were two white lights on the front end of the hand car, but neither the lights nor the car were seen by the engineer on the locomotive before the collision. The night was dark and foggy, and the train of the appellant, which was an ordinary construction train, was moving at the rate of only three or four miles an hour. hand car was not thrown from the track by the collision, and it does not appear that any one thereon, but the respondent, received any considerable injury. Upon this state of facts we are aware of no rule of law, applicable to this case, which will justify the denial of the motion for a nonsuit. It was not claimed that the respondent was injured by reason of any negligent act on the part of any person with him on the hand car; but it was claimed that, inasmuch as he was requested to proceed to the crossing at a specified time, and assist in unloading steel, it was the personal duty of the railroad company to provide a clear and unobstructed track for his hand car until it reached its destination, and that he had a right to assume that that duty would be performed by the company, and that its train would not leave the crossing before his arrival. But it will be seen that there is nothing in the telegram stating that the train would wait for the section men at the crossing, or upon which any such assumption could reasonably be predicted. The train was engaged in hauling rails and ties for distribution along the line of the road wherever required, and there was just as much reason to conclude, for aught that appears in the telegraphic order, that the cars to be unloaded at the crossing would be left there, and the train proceed on its journey, as there was to assume that the train would not move until the arrival of the section men. In our judgment, it was wholly unreasonable to presume that the operation of the train would be suspended until the section men arrived at the crossing. The men on the hand car had no more reason to rely upon having a clear track for their journey than they would have had if they had traveled on foot. A hand car can be quickly and easily removed from the track,

and we believe it is universally considered to be the duty of those who are required to use them to so remove them, whenever it may be necessary to do so, in order to permit the passage of ordinary trains of cars.

But if we were to concede that it was negligence on the part of the appellant to permit its train to leave the crossing before the arrival of the respondent, the motion for a nonsuit should nevertheless have been granted, for the reason that it is manifest, from the evidence, that the respondent's own want of care contributed to produce the injury of which he complains. If the respondent had been in the exercise of that degree of prudence and caution which it was his duty to use, under the circumstances, it is hardly possible to believe that he would have been injured. The train with which he came in contact was in plain view for a distance of a mile and a half, and was seen, or could have been seen, by him; and if he failed to discover that it had left the station, and thereby exposed himself to danger, surely the railroad company ought not to be required to respond in damages for the injuries resulting from his own misjudgment, especially in the absence of proof that the train was negligently operated. We think that the very nature of the respondent's employment imposed upon him the duty to look out for trains passing over the road. and to avoid obstructing their passage by the hand car which was furnished for his use and convenience, in the prosecution of his work. Again, the testimony of the respondent himself shows that he had had several years' experience in the construction of railroads, and, therefore, must have been familiar with the risks and dangers incident to such business. These risks he assumed when he engaged in the employment, including the negligence of fellow servants.

As what we have already said disposes of this case, it is not necessary to enter into a discussion of the question as to whether the assistant road master and the conductor of the train were the representatives of the railway company. The appellant called the two brakemen who were on the train at the time of the accident, as witnesses in its behalf, both of whom testified positively that the engineer blew the whistle before starting the train, in the ordinary way, and that Burke, the assistant road master, was on the train, and that the conductor was there also. And that was substantially all of the evidence adduced on behalf of the appellant, except that which related to the character of the injury received by the respondent. At the close of the proofs, the evidence, together with every legitimate inference that might have been drawn therefrom, was so manifestly insufficient to authorize a verdict for the plaintiff that the case should have been taken from the jury, in accordance with the request of the defendant.

The judgment is reversed, and the cause remanded, with directions to sustain the defendant's motion for nonsuit.

HOYT and STILES, JJ., concur.

RICE v. STEVENS et al. (REESE et al., Interveners).

(Supreme Court of Washington. June 27, 1894.)

APPEAL-REVIEW-FINDINGS OF FACT.

Under Laws 1893, c. 60, §§ 2, 3, which provide for exceptions to findings of fact and conclusions of law, the supreme court will not review the evidence unless exceptions thereto have been taken.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Stuart Rice against Calvin Stevens and otners, defendants, and Reese, Crandall & Redman, interveners, to quiet title to land. From a judgment for the interveners, plaintiff appeals. Affirmed.

Wickersham & Reid and Geo. Herriott, for appellant. Sharpstein & Blattner and Remington & Reynolds, for respondents.

SCOTT, J. Appellant commenced this action to remove an alleged cloud upon his title to premises conveyed to him by the Sumner Lumber Company. Respondents herein (defendants and interveners below) are judgment creditors of said lumber company. They filed cross-complaints asking, as affirmative relief against appellant, that the deed to said premises from the lumber company to appellant be set aside as fraudulent and void. A trial was had on November 7, 1893, and the cause was taken under advisement by the court until December 5th following, when findings of fact and conclusions of law were duly made and filed, and judgment entered thereon that same day. Notice thereof was served on appellant's attorney on the next day, and, on the 30th of said month, appellant served notice of appeal "from each and every part of said decision, and the whole thereof."

The appeal involves the court's findings upon the evidence. The respondents contend that the evidence is not before this court for review, because the findings of fact and conclusions of law made by the lower court were not excepted to by appellant. Under the former statutes of the state and territory, when a cause had been tried by the court or referee, and the decision was not made immediately after the close of the testimony, the decision of the court was deemed excepted to. This continued to be the law, except as supplemented by the act of February 25, 1891 (section 398, vol. 2, of the Code), which provided that no exception need be taken with respect to any decision or ruling upon a matter of law, when the same was entered in the jour-

nal, or made wholly on matters in writing and on file in the cause, until chapter 60 of the Laws of 1893 was enacted. Section 2, at page 112, of said act, provides that it shall not be necessary to take exceptions in certain cases, with this proviso: "But this section shall not apply to the report of a referee or commissioner or to findings of fact or conclusions of law, in a report or decision of a referee or commissioner, or in a decision of a court or judge upon a cause or part of a cause, either legal or equitable, tried without a jury." The next section provides how exceptions to such findings may be taken: "Either by stating to the judge, referee or commissioner when the report or decision is signed, that such party excepts to the same, specifying the part or parts excepted to (whereupon the judge, referee or commissioner, shall note the exceptions in the margin or at the foot of the report or decision); or by filing like written exceptions within five days after the filing of the report or decision, or, where the report or decision is signed subsequently to the hearing and in the absence of the party excepting, within five days after the service on such party of a copy of such report or decision or of written notice of the filing thereof." Section 7 of the same act provides that alleged error in any order or decision to which no exception need be taken may be reviewed by the supreme court, and also that the supreme court may review "alleged error in any * * * finding of fact, conclusion of law * * * or decision which shall have been excepted to by any party as prescribed in this act, * * * provided, the ruling or decision * * * together with the exceptions thereto, if any, was a matter of record in the cause. • • But no exception to any appealable order or to any final judgment shall be necessary or proper in order to secure a review of such order or judgment." Section 18 repeals all prior inconsistent laws. In the next chapter of the Laws of 1893 (page 130, § 21), it is provided as follows: "Upon an appeal from a judgment, the supreme court may review any intermediate order or determination of the court below which involves the merits and materially affects the judgment, appearing upon the record sent up from the superior court. Any questions of fact or of law, decided upon trials by the court or by referees, in either legal or equitable causes, may be reviewed, when exceptions to the findings of fact or to the conclusions of law, or both, have been duly taken, by either party, and sent up in the record on appeal; and in actions legal or equitable, tried by the court below without a jury, wherein a statement of facts or bill of exceptions shall have been certified, the evidence of facts shown by such bill of exceptions or statement of facts shall be examined by the supreme court de novo, so far as the findings of fact or a refusal to make findings based thereon shall have been excepted to, and the cause shall be determined by the record on appeal, including such exceptions or statement."

The record shows no exception to the findings. The appellant had five days after the service of notice upon him to file written exceptions to the findings of fact, and, failing to have done so, we think he is precluded from raising any question in relation to the evidence. Under the old practice no exceptions were necessary in such a case, and the result was that the lower court, convinced by one line of evidence, might decide a case on one theory, and the trial de novo here might proceed upon a different theory; involving, to a large extent, an examination of questions not presented, or positions not taken or insisted upon, below. A general rule observed by all courts, unless expressly provided otherwise by legislation, is that unless objections are seasonably made on specific grounds, the ruling of the trial court will not be reviewed in appellate tribunals. This is a salutary rule, relieving appellate courts of much unnecessary labor, and tends to avoid much delay and expense, in affording an opportunity to the lower courts to correct errors and omissions there made in the trial of causes. The new practice act was evidently intended to cure the defects in this respect in the former practice, and is in line with the practice adopted in most of the states. Appellant contends that a different ruling was made by this court in Wintermute v. Carner, 8 Wash. 585, 36 Pac. 490: but an examination of that case shows that what the court there said as to findings of fact was with reference to the former law and practice, as that cause was tried in the lower court before the present law went into effect. Affirmed.

DUNBAR, C. J., and HOYT, ANDERS, and STILES, JJ., concur.

BUCKLEY v. CITY OF TACOMA et al. (No. 1,233.)

WINGATE et al. v. SAME et al. (No. 1,234.)

(Supreme Court of Washington. June 27, 1894.)

MUNICIPAL IMPROVEMENTS—VALIDITY OF ORDINANCE.

1. The charter of the city of Tacoma (section 52) provides that the city shall have powers "by ordinance, and not otherwise," to do certain things. Subdivision 10 gives it power to provide for city improvements, and collecting assessments. Subdivision 13 provides that it shall have power to determine what work shall be done at the expense of the owners of property benefited thereby, "provided the manner of making and collecting assessments therefor shall be as prescribed in this charter." Article 12 provides that a "resolution" is required, instead of an "ordinance," in ordering the improvement of a street. Held, that the specific provision of article 12 governs the general one of the former section.

2. Under a city charter, which provides, in regard to the making of street improvements the expense of which is to be assessed against

the property benefited, that "before any improvement shall be commenced the city council * * shall pass a resolution ordering said improvement to be done," a resolution "that said city council hereby declares its intention to improve N street, in B. addition, from S. street to P. street, at the expense of the abutting owners. Grading and sidewalking. To be done by day labor,"—is not sufficient to render the property owners liable for the expense, as the property owners liable for the expense, as it not only does not order the work to be done, but it also fails to describe the kind of sidewalk to be laid.

3. Where a charter provides that, after the adoption of the resolution by the city council, the board of public works shall cause to be made a survey, diagram, and estimate of the entire cost, which shall be filed in their office, an estimate in the case of grading the street, which merely gives the number of yards of "fill" and "cut" in each block, and the total cost of the work, and the number of feet of property fronting on the street, is insufficient, as a property owner cannot tell thereby whether his property will be left above or below grade.

4. Where the charter provides that the clerk

shall publish a no'ice containing a copy of the resolution specifying the kind of improvement to be made, and stating the street to be improved, and containing a general description sufficient for the identification of the property to be charged, the notice should set out a literal copy of the resolution, and not only give the portion of the street to be improved, but also give the numbers of the lots to be charged with

the improvement.

5. Where the charter requires that, before any improvement shall be commenced, the city council shall pass a resolution ordering the same to be done, the council cannot, after the im-provement has been completed, pass an ordi-nance ordering the same to be done, so as to render an assessment therefor against the prop-

erty owners valid.
6. Where a city neglects to take the necessary steps to render valid assessments against property benefited by local improvements, it cannot enforce such assessments on the ground of benefits received by the landowners.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by J. M. Buckley and by Robert Wingate and others against the city of Tacoma and others to set aside assessments for local improvements. From judgments for defendants, plaintiffs appeal. Reversed.

Doolittle & Fogg, for appellant Buckley. S. C. Milligan, for appellants Wingate et al. F. H. Murray and S. A. Crandall, for respondents.

STILES, J. The enabling act for cities of the first class (Gen. St. § 520) provides that any such city framing a charter for its own government shall have power (subdivision 10) "to provide for making local improvements, and to levy and collect special assessments on property benefited thereby, and for paying for the same or any portion thereof;" (subdivision 13) "to determine what work shall be done or improvements made at the expense, in whole or in part, of the owners of the adjoining, contiguous, or proximate property, or others specially benefited thereby, and to provide for the manner of making and collecting assessments therefor." Section 52 of the charter of Tacoma begins thus: "The city government of Tacoma shall have powers, by ordinance and not otherwise," repeating the language of the statute, with the exception of the last clause of subdivision 13, for which there is substituted: "Provided the manner of making and collecting assessments therefor shall be as prescribed in this charter." But when the reader of the charter gets to article 12, which is a complete code of street improvement and assessment law, he finds that not an ordinance, but a resolution, is required. Appellants make a strong point of this, and insist that anything less than an ordinance renders the whole proceedings leading up to a street assessment void. But the learned judge who heard the case below held that the specific provisions of the article mentioned must govern the general ones of section 52, and we quite agree with his conclusion. Although the enabling act conferred the power, it did not undertake to say how it should be exercised. Very often such powers are made effective through general ordinances, but here the charter framers, and thereby the city en masse, have seen fit to prescribe even a more solemn and formal law on the subject by providing for a charter system which is rigidly binding upon both the legislative and executive powers of the corporation. We do not see how any substantial injury can be done, either, through this construction, and it remains merely to examine the record, to see how the mandates of the charter have been carried out.

The charter provides for the establishment of a board of public works, with a clerk, and specifically delegates to it many executive duties, and the appointment of sundry officers, among whom is a city engineer, who is required to make all necessary surveys of public work under the direction of the board. Article 12, so far as is necessary for the consideration of this case, reads as follows:

"Sec. 135. All applications for establishing or changing the grade of any street or streets, the improvement of public grounds or buildings, the laying out, establishing, vacating, closing, straightening, widening or improvement of any street, road or highway, or the laying out or opening of any new street through public or private property, and for all public improvements which involve the necessity of taking private property for public use, or where any part of the cost or expense thereof is to be assessed upon private property, shall be made to said board, and such work or improvement, shall not be ordered or authorized until after said board shall have reported to the city council upon said application. But before any work or improvements as above contemplated shall be commenced, the city council, when recommended by the board of public works shall pass a resolution ordering that said work be done; provided that all applications for the purpose of changing the grade. or of making any improvements upon any street, avenue or alley, within the city shall be signed by at least three resident freeholders, owners of property abutting upon said street, avenue or alley; provided, however, that the city council may without petition or recommendation have power to order the improvement of any street, avenue or alley, or any part thereof by a two-third vote of all members of the city council.

"Sec. 136. Upon the adoption or passage of any resolution by the city council for the improvement of any street, avenue or alley, the board of public works shall cause a survey, diagram and estimate of the entire cost thereof, to be made by the city engineer; said diagram and estimate shall be filed in the office of the board of public works for the inspection of all parties interested therein. The clerk of said board shall forthwith cause a notice of such filing to be published daily for ten days in the official newspaper; such notice shall contain a copy of the said resolution passed by the city council, and must specify the street, highway, avenue or alley, or part thereof, proposed to be improved, and the kind of improvement proposed to be made, together with the estimated cost and expense thereof, and also a general description sufficient for indentification of the property to be charged with the expenses of making such improvements, and that if sufficient remonstrance be not made before the expiration of ten days after the date of the last publication, said improvement will be made at the expense of the owners of the lots and parcels of land described in said notice as hereinafter provided: but if within ten days after the final publication of said notice the persons owning one-half or more of the lots or parcels of land to be taxed for said improvements shall file with the clerk of the board of public works a remonstrance against said improvement, grade or alteration, the same shall not be made at the expense of the owners of the lots so described, unless the city council, by a two-thirds vote of all the members thereof, order said improvement made notwithstanding such remonstrance.

"Sec. 137. If no remonstrance be made and filed as provided in the last preceding section, then owners of the lots and parcels of land described in said notice shall be deemed to have consented to such improvement; or if such remonstrance has been made and filed, and the city council has ordered such work to be done or improvement to be made, the expense thereof shall be charged to the property described in said notice in the manner as hereinafter provided, and the board of public works, shall, at its earliest convenience, and within six months thereafter, establish the proposed grade or make the proposed improvement; provided, that no improvement shall be made when the estimated cost thereof shall exceed 50 per cent. of the assessed value of the property to be assessed.

"Sec. 138. Such cost and expenses of making said improvement shall be assessed upon

the adjoining, contiguous or proximate lots or parcels of land described in said notice."

Without petition, the council passed this resolution, by unanimous vote: "Resolved by the city council of the city of Tacoma, that said city council hereby declares its intention to improve N street, in Buckley's addition, from Steele street to Pine street, at the expense of the abutting owners. Grading and sidewalking. To be done by day labor." The board of public works, in due course, published a notice as follows: "Notice is hereby given that the following is a true copy of a resolution of intention passed by the city council February 27, 1892, to wit: 'Resolved, by the city council of the city of Tacoma, that said city council hereby declares its intention to improve N street. in Buckley's addition, from Steele street to Pine street, at the expense of the owners of the lots and parcels of land affected by said improvement, according to the city charter; said improvement to consist of grading to an established grade, and building sidewalks on both sides thereof. And the city engineer is hereby ordered to make a survey, diagram, and estimate of the said improvement, and file the same in the office of the board of public works.' That the survey, diagram, and estimate of the cost of said improvement were filed in the office of the board of public works March 7, 1892, by the city engineer, and the estimated cost thereof is \$1,850."

The filing of a diagram and estimate consisted in the engineer's writing in an estimate book kept in the office of the board the following:

N Street in Buckley's Addition.

```
Steele to Prospect cut
                           78 fill 1,055
                                          curb
                                                 810
Prospect to White
                          539
                                     157
White to Oak
                        1,453
                    66
                                            "
Oak to Race
                          575
                                      46
                                                  20
Race to B'd'y
                           92
                                     317
                                                 200
                         2,737
     Totals
                                   1,575
                                               1,309
            2,136 lineal feet of 7
                                  walk.
              80
                                         aprons.
                   "
                          "
                                     ..
                                в
                                         Xings,
                   "
                          66
            2,136
                                gutters.
                          "
                                drain box.
```

1,800 feet frontage. Estimate March 7, 1892, \$1,850.

No remonstrance of the owners of half or more of the lots to be assessed for the improvement was filed, and the board, without further order from the council, proceeded to make the improvement, completing it June 4, 1892, at a cost of \$1,885.94. August 6th, following, the council passed an ordinance (No. 688) entitled: "An ordinance providing for the improvement of N street from Steele street to Pine street, creating a fund, and providing for payment by assessment upon the adjoining, contiguous, and proximate lots or parcels of land, under the provisions of the city charter now in force,"-the body of this ordinance being as follows: "Be it ordained by the city of Tacoma: Section 1. That N street in the city of Tacoma be improved from Steele street to Pine street, according to the plans and specifications of the city engineer on file in the office of the board of public works. Sec. 2. That a fund be, and is hereby, created, and an assessment be levied and collected upon the adjoining, contiguous, or proximate lots and parcels of land, as provided by the city charter now in force, to defray the cost and expense of said improvement, according to the provisions of the city charter, which assessment shall be a lien upon the property liable therefor. Sec. 3. The board of public works is hereby authorized and directed forthwith to enter upon and complete said improvement by day labor, and to proceed in the premises as provided in the city charter. * * *." In these cases the appellants sought to enjoin the collection of the assessments levied upon lots owned by them, but the relief was refused.

Four things plainly appear from the record thus set out, viz.: (1) No resolution was passed ordering any improvement made on N street. (2) The engineer did not file a diagram in the office of the board. (3) Neither the board nor its clerk published a notice containing a copy of the resolution that was passed. (4) The notice contained no description of the property to be charged. But the respondents' position is that this does not matter, as something was done which was, in each particular, intended to comply with the mandatory provisions of the charter. The question is, when did the city obtain jurisdiction to make this improvement and charge abutting property with the expense? Obviously, so far as these cases go, it was when such proceedings had been taken by the city as that the owners of the property to be charged had had the notice prescribed by the charter, and were bound to remonstrate or be estopped. To bring matters to such a point in a case where the proceeding is without petition, the council must have ordered the improvement, the engineer must have filed a diagram and estimate, and the clerk of the board must have published the notice.

1. The Resolution. The initiative step is the resolution which orders the improvement to be made. No such order can be intelligible which does not reasonably describe the kind of improvement intended, not, as counsel for respondents suggests would follow, with such particularity as would be necessary in the making of a contract for the work, but with such fullness of description as would enable an engineer who had no previous familiarity with the matter to make his diagram and estimate after survey of the street. Allowing that the verbless phrase used in the resolution before us means that it is the intention of the council to improve the street by grading it and constructing sidewalking, the query at once suggests itself, what is to be the extent of the grade, and what kind of sidewalk is proposed? There may or may not have been an established grade on N street, and, if there were such a grade, it may or may not have been the intention to conform to it in making this improvement. There is an infinite variety of sidewalks, - wood, iron, stone, brick, concrete,-of more forms than there are materials, some cheap and some expensive, but all sidewalks. How could the engineer make an estimate of the cost, or the board construct the work, without substantial directions in these particulars? The answer comes promptly with the suggestion: either they could not proceed at all, or they must proceed according to their own ideas. In this instance they took the latter course, but without any authority, since it lies with the council alone to prescribe the method of making all such improvements. Something is suggested in argument as to there being general ordinances of the city governing the improvement of streets, which served as a guide to the engineer and board of public works. There is nothing of this in the record, and, if there were such ordinances, they should have been referred to in the resolution in such a way as that parties interested would know where to look for a description of the kind of improvement intended. Streets are not, and usually cannot be, made after one pattern, like the interchangeable parts of a machine. One way of making an improvement may be substantially as good as another, and may serve the purpose just as well, although the difference in cost may mean an easy payment by the owner in one case and substantial ruin in another. It is not to be supposed that the council would overlook such considerations. but that it would endeavor, while prosecuting a reasonable improvement, to lighten the burden of expense as much as possible in each particular case, without regard to any fixed, inflexible rule of procedure. To accomplish this it must know the circumstances surrounding the proposed work, and with this knowledge it can easily prescribe the general features of the improvement. To do otherwise is to cut off from property owners all knowledge of what they will be expected to answer for, and to deprive them of the opportunity to remonstrate in sufficient numbers if they see fit. But the worst of such a loose system is that it leaves to mere executive officers the exercise of a large discretion which the charter does not confer upon them. In other cases, which are also before us, the evil of such a system appears clearly exemplified. But perhaps the greatest defect of this resolution is that, while it declares the intention of the council to improve N street, it does not order anything, and furnishes no basis for any action on the part of the engineer and board of public works. Counsel for the respondents endeavor to excuse the method of procedure by resolution of intention by saying that the council had merely followed a habit acquired under the charter of 1886 (section 144). But under that charter the council itself controlled the work. The determination of the

character of the work was equally necessary, and no such work could be done at all at the expense of the property except upon petition of the resident owners of more than one-half of it. But, be that as it may, the present charter had been in operation a year and a half when these proceedings commenced, and the "habit," under the old charter, cannot be accepted as an amendment to the new one. The resolution of intention should have defined the improvement intended, and directed the board of public works to proceed with its execution as defined, after notice, and upon the failure of property owners to present a sufficient remonstrance.

2. The Diagram and Estimate. The charter prescribes that a diagram and estimate shall be filed after a survey by the engineer. So far as the property owner is concerned with the estimate, the gross estimate of the cost and the total amount of frontage would seem to be about all he is interested in, since the charter method of payment is according to the front foot, and he can be charged for nothing in excess of the estimate. These two items, therefore, would enable him to calculate his probable expense. But the diagram, if it serves any purpose at all to the owner, must be intended to show him how the improvement, when completed, will probably affect his property, so that he can intelligently determine whether he will remonstrate or not. It may be of the very highest importance to him to know whether he is to be left on the brink of a cliff or at the foot of a trestle; whether the assessment he will be called upon to pay will be his total expense, or whether this will be but the beginning of a large outlay necessary to protect his front or restore it to a safe, convenient, and decent condition. Perhaps, in the case of a new and uninhabited street, these would not be very important matters practically, but it is to be remembered that this charter prescribes a universal rule for all cases of street changes and improvements, and that the precedent laid down as a rule for a lot-booming street out in the woods makes the same rule that will be applied should the grade of the most important street in the city be raised or lowered. There was no attempt to comply with the charter in the matter of a diagram in this instance, and therefore one of the purposes of giving a notice was rendered futile.

3. The Notice. By the notice published the owners of property abutting upon N street from Steele to Pine were given to suppose that the council had passed a resolution which was never before that body. The framer of the notice appears to have been apprehensive that the resolution as passed was defective in some particulars, and therefore he changed it, and added to it matter enough to more than double its actual length. The publication of a copy of the resolution in the notice is intended to bring home to the property owner information that the council

has acted in a matter of interest to him, and to let him know precisely what it has done and proposes to do. This copy to be published means a literal copy, according to the usual way in which the word is used, and not the construction which the clerk of the board of public works may put upon the meaning of the resolution. However, in justice to the clerk in this instance, it ought, perhaps, to be said that he had nothing whatever to do with the publication, which was made by the individual members of the board, thus adding one more item to the list of charter infractions. The notice is by the charter required to specify the kind of improvement proposed to be made, and to contain a general description sufficient for identification of the property to be charged. The first of these requirements would be met by the copy of the resolution if that document contained any sufficient specification; the second gives rise to further consideration. The resolution in this case declares the intention to be to improve "at the expense of the abutting owners." The notice improves upon the original by the phrase, "at the expense of the owners of the lots and parcels of land atfected by said improvement, according to the city charter." Neither is a correct statement, critically considered, for the expense is not charged upon the owners, but is assessed to land without regard to ownership. But this is a matter of small consequence. The respondents' reply is that section 138 of the charter makes it obligatory upon the city to levy the assessment in a certain way, each lineal foot of frontage along the line of the improvement paying its proportion of the total cost; so that every person owning property along a street, knowing the law, must know that, when that street is to be improved, his property will necessarily be included in the assessment. The argument is well enough as far as it goes. But what is it worth in the face of the charter direction? According to this theory, when the charter required the notice to specify the street, or part thereof, proposed to be improved, it should have stopped, because the owner could well enough reason out the necessary conclusion as to the liability of his property. It went on, however, and specifically required the property to be charged to be described in a way sufficient for identification; and, more than this, the very first clause of section 138 is in these words: "Such cost and expenses of making said improvement shall be assessed upon the adjoining, contiguous or proximate lots or parcels of land described in said notice, in the following manner;" thus emphasizing what seems to us to have been the clear intention, viz. that each owner should have laid under his eyes specific information that his property was to be assessed, without any resort on his part to argument or conclusion. And this case furnishes an excellent illustration of the value wise to a street they are to be assessed their full share of the cost according to frontage, but where they lie lengthwise half of the cost is to be assessed to the first lot, and the other half to other lots in the rear to the center of the block. Now, it happens that N street runs through blocks in all of which the lots lie lengthwise along it, and there are sixteen lots in each tier, so that one lot must pay half the expense assessed on a hundred feet frontage, and seven lots pay the other half. Could the holder of a deed to lot 27 in block 7, which is the sixth lot from the street, without a familiarity with the lot and block system of Buckley's addition, which is not to be presumed, know whether his lot would be within the assessment district, unless he hunted up a plat? Had he not, under the express language of the charter, a right to expect to see, in a notice of the improvement of N street, his lot specifically named, or at least "lots 25 to 32, inclusive, in block 7," which would have been a sufficient description in this instance, even for a deed? If he did not, then of what use is the minute particularity of this charter in the matter of street improvements? If the city's officials can override these plain, mandatory provisions in the many particulars already pointed out, and improve streets ad libitum, and the property owner be bound on theories of substantial compliance, estoppel, waiver, benefits, or failure to tender fair value, we fail to see any sensible reason for such provisions in a charter. But the people who pay for streets made the charter, and, while they granted to the public authorities most liberal powers, by permitting the arbitrary improvement of streets at local expense, they emphatically reserved to themselves the right to have three things distinctly brought to their knowledge, viz.: (1) What improvement it is proposed to make; (2) what the cost is to be; (3) what property is to be charged with the expense. This knowledge they declared must be afforded in a certain way, and after that they reserved the right to remonstrate, and to have a two-thirds vote of the council to overcome their objections. It is unnecessary to cite authorities on these points. The A, B, C of the laws of municipal corporations, that the power to levy special assessments is to be construed strictly, that the mode prescribed is the measure of power, and that material requirements must be complied with before there is any liability, is all that need be quoted. Spokane Falls v. Browne, 3 Wash. St. 84, 27 Pac. 1077. An assessment made contrary to these principles is void, and injunction lies to restrain its collection. Dill. Mun. Corp. §§ 803, 804; Hill, Inj. § 539.

4. It only remains to determine whether Ordinance No. 688 had any effect to validate the assessment. That it did not must be apparent at a glance. The work had been done beyond recall, and no remonstrance of property owners could have any possible effect. That it gravely ordered the board of public

works to proceed with an improvement which had been completed two months before only made its weakness the more apparent. Why it should have been passed, unless through a consciousness on the ret of the council that what had been done in the matter was wholly without force to render an assessment valid, it is hard to guess. "Before any work or improvement * * * shall be commenced, the city council * * * shall pass a resolution ordering said work to be done," is the language of the charter, and, if anything, its most mandatory provision. That any such proceeding is unavailing as a ratification, see Newman v. City of Emporia, 32 Kan. 456, 4 Pac. 815.

We regret to disagree with the learned judge who passed upon these cases in the superior court, and who prepared a careful and extended opinion, which has been presented to us by counsel. But, either the point was not pressed, or the opinion fails to observe. that the objections raised by the appellants go to the jurisdiction of the city to make the improvement at all at the expense of abutting property, by reason of a complete failure to carry out the plain provisions of the charter, which were conditions precedent to the exercise of the power. Under these circumstances there is no greater legal or equitable right in the city to be reimbursed its outlay than there is in a trespasser upon land who makes valuable improvements and is dispossessed by an ejectment suit. It has done what it did in its own wrong, without previously qualifying itself to have reimbursement; and to now declare that, because the law upholds local assessments on the theory of benefits, a city which omits the steps necessary to bring it under the operation of that law shall have the same right to enforce its assessments as one which takes those steps, would be to deprive the property owner of that which the charter in distinct terms gives him, viz. a right to be heard upon the question of the advisability of the improvement before it is undertaken. There may be cases in which such circumstances exist as should estop an owner from objecting to an assessment in any event, but we do not find them in these cases. The judgments are reversed. and the causes remanded for the entry of judgments in accordance with the prayer of the complaints.

DUNBAR, C. J., and ANDERS and SCOTT, JJ., concur.

BUCKLEY v. CITY OF TACOMA et al. (No. 1,184.)

WINGATE v. SAME. (No. 1,188.) (Supreme Court of Washington, June 27, 18.4.) STREET IMPROVEMENTS—ORDINANCE—VIVA VOCE VOTE.

1. Under a city charter, which requires an order for public improvements to be passed by a two-thirds vote of the council if a remon-

strance of property owners has been made against it, an order adopted by a viva voce vote is void.

2. An order of the city council directing the board of public works to proceed with a public improvement, notwithstanding a remonstrance against it by property owners, should be in the form of a resolution directing the board to proceed; and a mere viva voce vote of the council, adopting the report of a committee advising a denial of the remonstrance, is insufficient.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by J. M. Buckley against the city of Tacoma and others, and by Robert Wingate against the same defendants, to set aside a special assessment levied by the city for the improvement of Oak street from Ross avenue to I street in said city. From a judgment for defendants, plaintiffs appeal. Reversed.

Doolittle & Fogg, for appellants. F. H. Murray and S. A. Crandall, for respondents.

STILES, J. These cases rest upon substantially the same points as those made in Buckley v. City of Tacoma (No. 1,233) and Wingate v. Same (No. 1,234) 37 Pac. 441, the improvement being that of Oak street from Ross avenue to I street. There was a petition from the owners of lots representing 368 feet of frontage, and a remonstrance from owners of 4,325 feet, the total frontage being 6,422 feet. A diagram was filed, though it is not in the record, and there was, perhaps, a nearer approach to compliance with the charter here than in the case of N street. A fatal defect exists, however, in the treatment of the remonstrance by the council. The board of public works formally recommended the granting of the remonstrance. This recommendation was referred to the street committee of the council, which reported advising that the remonstrance be denied. This report the council adopted, as the journal shows, but it does not show by what vote. The clerk testifies that it was probably by a viva voce vote. No other action was taken by the council in the matter. Counsel for respondents asks us to presume that the vote by which the report of the street committee was adopted was a twothirds vote of all the members of the council, and to hold that such adoption was equivalent to the passage of a resolution ordering the improvement, notwithstanding the re-monstrance. Now, the council consisted of 16 members, and it required the affirmative vote of 11 members to overcome the remonstrance. It could not be ascertained whether the requisite number voted in any other way than by roll call or count. The viva voce vote which the clerk recorded may have been merely the ayes of half a dozen members, the remainder keeping silent. Nothing is more common in legislative bodies than the passage of orders in this way, for, so long as a quorum is maintained, a majority of viva voce votes according to the judgment of the presiding officer will prevail. But in no case where a fixed proportion of members must vote to carry a measure is it possible to ascertain the result by the viva voce plan. The record being thus bare of facts to sustain the proposition that the committee report was adopted by the vote of 11 or more members. the burden was upon the respondents to establish it. But they failed therein, as the testimony of the clerk showed still more conclusively that nobody knew what the real vote We have treated this question thus far as though the adoption of the report by vote of 11 members would have been equivalent to an order that the improvement be made notwithstanding the remonstrance. But such a procedure would not do. What would the city clerk certify to the board of public works,-his conclusion, from the journal, that the remonstrance had been denied? Plainly not. On the contrary, the "order" which the charter requires should be in the form of another resolution, reciting the fact that a remonstrance had been filed, and ordering the board to proceed notwithstanding. In no other way is it possible to keep such business from falling into confusion, and entailing misunderstanding of authority and consequent loss. This was an important matter. More than 10 times the representation of property petitioning for the improvement of Oak street remonstrated against it, and the board of public works, presumably after examining into the matter, recommended that it be not made; yet it was proposed to go on. Grave public reasons alone could justify the exercise of the authority vested in the council to disregard the objection made, and it was a case where, if ever, the strict letter of the charter should be followed. Judgments reversed, and causes remanded for entry of judgments in accordance with the prayer of the complaints.

DUNBAR, C. J., and ANDERS and SCOTT, JJ., concur.

McALLISTER et al. v. CITY OF TACOMA et al.

(Supreme Court of Washington, June 27, 1894.) CITY IMPROVEMENTS - RESOLUTION OF INTENTION.

1. Where the council, by resolution of intention, decides to "pave" a street, the board of public works has no authority to add thereto curbing and sidewalks.

2. Neither has the board of public works au-

thority to exact from the contractor a bond that the pavement will last for five years, where it is not required by the resolution of intention.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by J. D. McAllister and others against the city of Tacoma and others to set aside an assessment and levy of taxes for street improvements. Judgment for defendants, and plaintiffs appeal. Reversed.

Doolittle & Fogg, for appellants. F. H. Murray, S. A. Crandall, and James Wickersham, City Atty. (Alfred E. Buell, of counsel), for respondents.

STILES, J. This case is like Buckley v. City of Tacoma (No. 1,233) and Wingate v. Same (No. 1,234), 9 Wash. ---, 37 Pac. 441, in some of the principal features,-enough, perhaps, to decide it. There was a petition to improve Tacoma avenue, between North Fourth and North Fifth streets, by paving the roadway, 54 feet wide, with bituminous rock upon a 6-inch concrete foundation. resolution of intention contained this specification: "Said improvement to consist of paving the roadway 54 feet wide with bituminous rock upon a six-inch concrete foundation." The notice contained a copy of the resolution, with the usual variations, but it only mentioned the paving 54 feet wide. The estimate was declared to be \$5,800. engineer, however, included in his estimate 640 lineal feet of 8-foot walk (kind not mentioned), and 667 lineal feet of concrete curb, in addition to the paving. Minute specifications were prepared by the engineer, which covered these two items, and some others, not provided for in the resolution, and bids for the work were advertised for according to the plans and specifications on file. board also made it a condition of bids that a bond be given guarantying the pavement for five years. The successful bidder entered into a contract to do the work according to the drawings and specifications for \$5,795, and an assessment was levied to pay that amount. Two objections are made in this case that do not apply to the others noted above: (1) That the board of public works had no authority to go beyond the resolution of the council which declared it to be the intention to pave the street; and (2) that it had no authority to exact a bond guarantying the pavement for five years.

The first proposition appears too clear for argument, and the case illustrates the view taken in the former cases that the resolution should describe the work to be done. The board of public works has no independent originating power in the matter of street improvements whatever may be its functions in other departments; for the charter makes it simply the executive hand of the council in all such work. Inasmuch as petitions for improvements come first into its possession, and are to be recommended pro or con by it, it may well be that it should in every case recommend in what way an improvement should be made, if made at all; but beyond that it cannot go, and it must take the order passed by the council, and carry it out without substantial changes or additions. If, in the case before us, it could take an order to pave, and add curbing and sidewalks, in another case it can take one for sidewalking and add paving. The only

answer made to this point is that it does not appear affirmatively that the appellants were charged with the cost of the curb and sidewalks. Let us see. The estimate included both items, and the specifications covered them minutely. The advertisement called for bids according to the specifications, and the contract was made in exact compliance with them. What room for doubt can there be that the expense of curbs and sidewalks was included in the contract price of \$5,795? And when we find that there were 24 lots of 25 feet frontage each, and that each lot was assessed \$241.67, or \$5,800.08 in all, the demonstration that everything called for in the specifications is assessed is too complete for cavil. As to the effect of such excess contracting in rendering an assessment void, see Partridge v. Lucas (Cal.) 33 Pac. 1082.

The second proposition is a twin brother of the first. There is nothing in the charter on the subject of repairs to streets, and the presumption is that ordinary repairs will be taken care of by the city. But the action of the board of public works had the effect of making the abutting property owners pay for all repairs, and not only that. but pay for them five years in advance. No such thing was contemplated in the resolution. The parties interested had no notice that any such thing would be done, and the board had no jurisdiction whatever to make a tender for the work depend upon such a condition. Brown v. Jenks (Cal.) 32 Pac. 701; Paving Co. v. Leach (Cal.) 34 Pac. 116. Judgment reversed, and cause remanded, with instructions to grant the relief prayed for in the complaint.

DUNBAR, C. J., and ANDERS and SCOTT, JJ., concur.

STATE ex rel. GARDINER v. SUPERIOR COURT OF YAKIMA COUNTY et al.

(Supreme Court of Washington, June 28, 1894.)
Appeal—Justice Court—Filing of Transcript

While 2 Hill's Code, § 1634, requires ar appellant from justice's court to furnish the superior court with a transcript of the entries in the justice's docket within 10 days after an appeal has been taken, the failure to do so will not deprive the superior court of jurisdiction, and a motion to dismiss on this ground is addressed to the discretion of the district court.

Original petition by the state of Washington ex rel. George J. Gardiner for a writ of prohibition against the superior court of Yakima county and Carroll B. Graves, judge. Denied.

Jones & Newman and M. A. Root, for petitioner. J. B. Reavis, for respondents.

SCOTT, J. On March 2, 1894, in an action pending before one J. O. Clarke, a justice of the peace in and for Yakima county, where-



in one Rozell was plaintiff and the relator ; herein was defendant, a judgment was rendered in favor of the defendant, dismissing the action. On March 6th the plaintiff duly filed and served a notice of appeal to the superior court, and gave a bond as required by section 1631, 2 Hill's Code. On March 21st, the transcript not having been filed, the relator appeared specially in the superior court, and moved to dismiss the appeal on that ground. On the 26th day of March the transcript was filed. On the 2d day of April the motion came on for hearing in the superior court, and was denied, whereupon the relator makes this application for a writ of prohibition to prevent said court from further proceeding with said cause, on the ground that it has no jurisdiction thereof.

While the statute (section 1634), provides that the appellant shall furnish the superior court with a transcript of the entries in the justice's docket, etc., within 10 days after an appeal has been taken, we are of the opinion that the failure to do this will not deprive the superior court of jurisdiction. Circumstances over which the party appealing has no control may prevent his obtaining a transcript within the 10 days, and, where a party desiring to appeal does all in his power to enforce and preserve his rights in the premises, he should not be defeated by reason of such a failure. According to the ex parte showing made here, the failure to furnish the transcript in this instance was due to the delay and negligence of the plaintiff in said action. But this affords no ground for the granting of the writ. In State v. Campbell, 5 Wash. 517, 32 Pac. 97, we held that a motion of this kind is addressed to the discretion of the superior court, and such court, in the exercise of a matter intrusted to its discretion, will not be interfered with by a writ of prohibition. Writ denied.

HOYT, STILES, and ANDERS, JJ., concur.

ANDERSON v. GUINEAN.

(Supreme Court of Washington. June 28, 1894.)
FELLOW SERVANTS—SUBSTITUTE HIRED BY EMPLOYE.

A substitute hired by an employe stands in the employe's place, with all of its responsibilities and liabilities, so far as the master is concerned; and a fellow servant with the employe is a fellow servant with the substitute, though no contractual relation exists between the substitute and the master, and though the employe alone is responsible for the substitute's wares.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Syvert Anderson against Thomas Guinean for personal injuries. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Ronald & Piles, for appellant. Semple & Hale, for respondent.

SCOTT, J. The defendant was proprietor of a hotel. On May 3, 1893, one Dillon was in his employ as an engineer in charge of the steam-heating apparatus, and it was part of his duties to fill with oil, once a week or oftener, the cups on the shafts connected with the pulleys, used in the operation of the passenger elevator in the hotel. Dillon, desiring to take a vacation, employed the plaintiff to take his place and perform his duties until his return, for which Dillon was to pay The defendant consented to this arrangement. During the time of his employment the plaintiff was injured while oiling the cups aforesaid on the elevator, and it is alleged that said injury was caused by the carelessness of the defendant's servant, the elevator boy who was running the elevator. Plaintiff sued for \$5,000 damages. A demurrer to the complaint was sustained, and from the judgment of dismissal thereon this appeal was taken.

Two questions are raised in appellant's brief, although but one was pressed at the oral argument of the cause. That one is as to whether the plaintiff and the elevator boy were fellow servants. We are of the opinion that Dillon and the elevator boy were fellow servants, and this was not strenuously disputed by appellant; but he contends that he stood upon a different footing in consequence of the fact that the hotel proprietor was not his employer, he having been hired by Dillon, and Dillon only being responsible to him for his pay. There is no claim in the complaint that the defendant had not used due care in the employment of the elevator boy, nor that he had retained him in his service after having received notice of any negligence in the performance of his duties. Appellant's contention is based upon the ground that there was no contractual relation between himself and the defendant, and for that reason he could not be held to have been his servant; but we do not think his position is well taken. The plaintiff was hired by Dillon as his substitute, and he must be held to have taken Dillon's place, with all of its responsibilities and liabilities, so far as the defendant is concerned, although the defendant consented to the change.

The further question raised in the brief is based upon a claim that the defendant is liable in consequence of having provided insufficient and defective machinery. There is no allegation, however, that appellant did not know the machinery was defective; and the particular defect complained of (if it was a defect) is that there was no platform provided to stand upon in filling the oil cups, and of course appellant must have known this, at least when he undertook to perform the particular service. We think the demurrer to the complaint was properly sustained, and the judgment is affirmed.

HOYT, ANDERS, and STILES, JJ., concer.

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WALES et al. v. DENNIS et al. (Supreme Court of Washington. June 29, 1894.)
PARTNERSHIP—RECEIVERS—PRACTICE.

In an action between partners for a dissolution and an accounting, where the complaint contains no allegations of the insolvency of defendants, who are actively carrying on the business, and the answer alleges that they are solvent, and able to respond in damages, and denies the equities of the complaint, a receiver should not be appointed before the final hearing

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Albert N. Wales and Ollie Wales against J. H. Dennis and M. E. Dennis for the dissolution of a partnership, an accounting, and the appointment of a receiver. From an order appointing a receiver, defendants appeal. Reversed.

Hays & Humphrey, for appellants.

HOYT, J. Plaintiffs filed their complaint, setting up the fact that they and the defendants had entered into a partnership for the conducting of a restaurant business in the city of Seattle; that the defendants had so misbehaved themselves in the prosecution of such business as to damage it; that they had failed to do their duty in regard thereto, and that they had denied to plaintiffs any participation in its affairs, or in the profits; and asking that the partnership be dissolved. that an accounting be had, that a receiver be appointed, and that they have their costs. It appeared from said complaint that the plaintiffs had been enjoined from conducting the partnership business in a suit by a person not interested in such partnership. This being so, it is doubtful whether or not the complaint stated a cause of action; but it is not necessary to decide that question. The defendants answered, denying the material allegations of the complaint. It appeared from the answer that the defendants were solvent, and that they were ready to put up a bond to indemnify the plaintiffs. In the light of these facts, should a receiver have been appointed to conduct the business pending the litigation? To do so was to indirectly nullify the injunction against the plaintiffs, as members of such partnership, from continuing its business. If the plaintiffs could not legally be engaged in the business. it is difficult to see how it was competent for it to be conducted in the joint interest of themselves and partners by a receiver. But, regardless of this question, there was enough in the answer to show that there was no necessity for the appointment of a receiver. There was no allegation in the complaint that the defendants were insolvent, and there was a direct allegation in the answer that they were solvent, and able to respond in damages. This being so, and the equities of the bill having been denied, a receiver should not have been appointed until final hearing of the cause. The order appealed from will be reversed, and the cause remanded for further proceedings in accordance with this opinion.

DUNBAR, C. J., and SCOTT, STILES, and ANDERS, JJ., concur.

THOMPSON et al. v. CITY OR TOWN OF SUMNER et al.

(Supreme Court of Washington. June 29, 1894.)

MUNICIPAL CORPORATIONS—CONSTRUCTION OF

WATERWORKS—ORDINANCE.

1. An ordinance for the construction of waterworks in a city of the fourth class, which postpones its taking effect until its adoption by the qualified voters of the town, is void, though Laws 1893, p. 12, § 2, requires an approval by popular vote of the plan proposed by the council, since the ordinance itself must be a law in force independently of the popular vote.

2. An ordinance authorizing the construction of waterworks, which does not direct the giving of notice of election for the submission of the plan to a popular vote, as required by Laws 1893, p. 12, § 2, is void; and the construction of the waterworks is unauthorized, though the city clerk caused the notice to be given, and the election was actually held.

Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by W. L. Thompson and others against the city or town of Sumner and others to restrain defendants from issuing and negotiating bonds for the construction of waterworks. From a judgment for defendants, plaintiffs appeal. Reversed.

A. R. Titlow, for appellants. Thos. Carroll and Hagerman & Carroll, for respondents.

STILES, J. The respondent town, a municipal corporation of the fourth class, had taken steps towards the construction of waterworks, under the act of February 10, 1893 (Laws 1893, p. 12), when this action was brought to restrain a proposed sale of bonds. The court below, after trial, refused the relief asked, and plaintiffs appeal. Many points of objection to the validity of the town's action are made in the brief, but only two of those which apply to the ordinance by which jurisdiction of the subject was acquired need be referred to.

1. Section 7 of the ordinance reads as follows: "This ordinance shall take effect and be in force from and after its passage, publication and adoption by the qualified electors of the town of Sumner." An ordinance of this kind cannot be made to depend upon the result of the election. It is true that by the provisions of the law the town could not proceed with the execution of the plan proposed by the council until it had been approved by the affirmative vote of the electors; but the ordinance itself must be a law in force, with the exception mentioned, independently of the popular vote. The election could be called only by virtue of the order contained in the ordinance therefor; so that the post-

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ponement of the power to hold an election until the ordinance should be adopted by the qualified electors was to postpone it indefinitely.

2. The ordinance contained no provision for notice of an election. The statute requires a waterworks proposition to be submitted at a special election, notice of which must be given to the newspaper doing the city printing, but nothing is said as to who shall give the notice. Gen. St. § 669, however, prescribes that the council shall give notice of each election. The ordinance should have directed that notice be given, and named the executive officer who should prepare and furnish to the publisher a notice in the name of the council. In the absence of an ordinance providing for an official newspaper, this ordinance should have specified the paper in which publication should be made. The act of the clerk, in printing a notice in a paper of his own selection, was without authority, and did not amount to notice. Force v. Batavia, 61 Ill. 103; Gaddis v. Richland Co., 92 Ill. 119; Dill. Mun. Corp. § 197; McCrary, Elect. § 161. Judgment reversed, and cause remanded for entry of judgment in accordance with the prayer of the complaint.

DUNBAR, C. J., and SCOTT, ANDERS, and HOYT, JJ., concur.

DEBENTURE CORPORATION, LIMITED, OF LONDON et al. v. WARREN et al.

(Supreme Court of Washington. June 29, 1894.)

MORTGAGE FORECLOSURES—PURCHASER'S RIGHT TO
POSSESSION.

1. Code Proc. § 519, which authorizes the purchaser at a judicial sale to take possession on the day of sale until a resale or redemption, applies to mortgage foreclosure sales.

applies to mortgage foreclosure sales.

2. Code Proc. § 513. which gives a mortgagor one year within which to redeem from a foreclosure sale, does not by implication repeal section 519, authorizing the purchaser to take possession on the day of sale.

Appeal from superior court, King county; J. W. Langley, Judge.

The Debenture Corporation, Limited, of London, England, foreclosed a mortgage executed by Susan F. Warren and others. At the sale James F. Gifford became the purchaser. His demand for possession was refused, and he petitioned for a writ of assistance. From an order sustaining a demurrer to this petition, complainants appeal. Reversed.

Allen & Powell, for appellants. Hart & Hart, for respondent Susan F. Warren.

HOYT, J. This appeal is from an order sustaining a demurrer to the petition of the appellants, and denying the relief therein prayed for. Respondents moved to dismiss the appeal upon the ground: First, that it was not taken in time; and, second, that the bond was approved before the date of the

taking of the appeal. The record fails to show that the respondents ever served notice, in writing, of the entry of the order upon the appellants; and, under the provisions of the statute of 1893,1 the appeal was in time. The action of the appellants in giving the bond on appeal was in substantial compliance with such statute. The motion will be denied.

Upon the merits the only substantial question to be decided is as to when the purchaser at a foreclosure sale is entitled to the possession of the property purchased. There are other questions discussed in the brief of the respondents. They relate to the procedure adopted by the appellants, and to the parties who are entitled to inaugurate the same. In regard to these matters it is only necessary to say that, if the purchaser was entitled to possession at the time demand therefor was made on the mortgagor, the petition was sufficient to put in motion the powers of the court in aid of its process, to the end that the possession to which the purchaser was entitled thereunder should be secured to him. Upon the main question numerous authorities have been cited by the respective parties, but they furnish little aid in its determination, for the reason that its decision so largely depends upon our statute. It is contended upon the part of the respondent that the title does not pass until the expiration of the time for redemption, and that, under the general rule, the right to possession would not accrue until such title had That such is the law, in the absence passed. of any express statute upon the subject, is conceded. But we have an express statutory provision. It is found in section 519 of the Code of Procedure, which is in the followinglanguage: "The purchaser from the day of sale until a resale or redemption, and the redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period." And under it we must hold that the purchaser is entitled to possession from the day of sale, if that section applies at all to sales made upon the foreclosure of a mortgage. Its language is too explicit to allow of any construction whatever. Does it apply to foreclosure sales? It is general in its language, and the chapter as a part of which it was enacted in the Code of 1881 clearly refers to sales under mortgage foreclosure as well as other sales. And there is nothing in the nature of such sales which makes such a provision inapplicable thereto any more than to other sales on execution. There is no reason why one who has his property sold upon an execution should be at once deprived of its possession, and one

'Act March 8, 1893, § 3.

who has like property sold in a foreclosure proceeding should be allowed to retain possession until the right of redemption has expired. We are unable to agree with the contention of the respondents that the effect of the passage of the act of February 3, 1886, the substance of which is now contained in section 513 of the Code of Procedure," was to repeal the provisions of said section 519. Before the enactment of that statute there was little need of the aid of section 519, so far as foreclosure sales were concerned; but that fact is not sufficient to authorize us to hold that a statute general in its terms, and clearly covering one class of cases, is repealed by another statute, which brings another class within its purview. In our opinion, the purchaser was entitled to possession upon demand any time after confirmation of the sale upon presentation of a certificate from the sheriff; and that, such being his right. and it being derived solely from the process of the court, it had jurisdiction to entertain a proceeding in the original action by which such rights could be secured. The order will be reversed, and the cause remanded, with directions to overrule the demurrer to the petition.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

STATE v. REIS et al.

(Supreme Court of Washington. June 30, 1894.)

LARCENT—EVIDENCE.

Under an indictment for grand larceny, proof that defendants conspired to cheat a person while pretending to play at cards, and that, while so pretending, defendants snatched from such person a sum of money, is sufficient to sustain a conviction, as it is not necessary to set forth in the indictment the conspiracy or the manner in which the money was taken.

Appeal from superior court, King county; T. J. Humes, Judge.

Matt Reis and Tom Rauschman were convicted of grand larceny, and appeal. Judgment affirmed.

Jas. Hamilton Lewis and G. D. Farwell, for appellants. John F. Miller, Pros. Atty., and A. G. McBride, Dep. Pros. Atty., for the State.

STILES, J. Appellants were accused by information of the crime of grand larceny. The information was in the usual form, and we find no valid objection to it; nor do we conceive that counsel for appellants, although much of their argument in the brief is devoted to the insufficiency of the information, really expect relief on that ground. The actual objection is that the case against appellants, as proven, is at variance with

the one pleaded against them in the information. But this, again, arises out of the failure of the defense to appreciate that it was upon the testimony of the prosecuting witness, Bunce, that the appellants were convicted, and not upon that of the defendants, or of those witnesses who heard him say that his loss occurred because defendants did not play fairly at cards. Upon Bunce's testimony as clear a case of larceny was made out as the books report, and the after-conduct of the defendants strongly tended to corroborate his version of the story. But it was not necessary to write into the information the probative facts of this larceny, viz. the conspiracy of defendants to cheat and swindle Bunce while pretending to play at a game of cards, the snatching of Bunce's money out of his hand by Reis, and the latter's instantly handing it over to Rauschman, on the pretense that it had been won on a bet. No common-law offense need be charged in that way, nor need it be charged in any other way than as required by statute. The ultimate fact was that appellants took, stole, and carried away Bunce's money. The evidence over-flowed with sufficiency. There seem to be no further objections which are sustained by exceptions in the record, and the judgment is affirmed.

DUNBAR, C. J., and HOYT, SCOTT, and ANDERS, JJ., concur.

NOYES v. LOUGHEAD et al.

(Supreme Court of Washington. June 30, 1894.)

Pleading—Striking from Files—Landlord

AND TENANT—LEASE.

1. While a motion to strike an answer from the files, and for judgment for want of an answer, is not directly recognized by statute, still, where a party, after a ruling that certain facts constitute no defense, serves an amended answer, setting up the same facts, such answer should be stricken out.

2. In an action on a bond to secure rent, it appeared that plaintiff rented a building to defendant L., the lease stating that the building was in course of construction, to be completed March 15, 1890; that the lease was for five years, to commence on a blank date, and end on a blank date; that defendants N. and K. executed a bond for payment of the rent, the terms of the lease being referred to in the bond; that it was stated in the bond that the lease should commence at the completion of the building. Held, that the lease commenced to run from the completion of the building, as the statement in the lease that the building was to be completed on a certain date was not a covenant that it would be completed on that date. Dunbar, C. J., dissenting.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by John Noyes against J. H. Loughead, J. N. Kahaley, and J. C. Nixon to recover on a bond given as security for rent. Plaintiff moved to have defendants' answer stricken from the files, and for judgment for

^a This section provides that the mortragor may redeem the property sold at any time within one year.

want of an answer. The motion was granted, and defendants appeal. Judgment affirmed.

Stratton, Lewis & Gilman and Smith & Littell (Junius Rochester, of counsel), for appellants. Strudwick & Peters, for respondent.

HOYT, J. In the cause in which this appeal was prosecuted, the defendants filed an amended answer, which was challenged by demurrer, and held insufficient. After this they filed their second amended answer, setting up substantially the same defense as in the first one. Thereupon, respondent moved the court to strike it from the files, and for judgment on the pleadings for want of an answer. Motions of this kind, under the circumstances of this case, are not directly recognized by our statute, and the practice of interposing them should not be encouraged, as there is usually a more orderly way to reach defects in pleadings, and one which will better preserve the right of amendment so liberally provided for in our Code. But where a party, having just had a ruling that certain facts constituted no defense, comes again into court, relying upon an answer setting up only the same facts, he cannot complain if the court strikes it from the files, and proceeds to judgment as though no answer had been filed. And since that is substantially what was done in this case, we are not disposed to disturb the action of the court in that regard.

The other question presented by the appeal is as to the sufficiency of the answer as to which the court sustained the demurrer, and this must depend entirely upon the construction to be given the bond upon which the action was brought, and the lease referred to therein. If, construing these two instruments together, it appears that it was in the contemplation of the parties, at the time the bond in question was given, that the lease was for five years, commencing on the 15th day of March, the facts alleged in the answer constituted a defense to the action. If, however, the construction of these instruments establishes the fact that it was intended that the lease was to be for a period of five years from the time the building was completed, the facts set out were not sufficient. The bond refers to the lease, and to the rent to grow due thereunder. The provisions of the lease, so far as this question is concerned, provide, substantially, that the party of the first part leases to the party of the second part the building in question for the period of five years, said building being now under course of construction upon certain lots, by the said plaintiff, under contract with Heatherington, Clements & Co., architects, and to be completed on or about the 15th day of March, 1890. It is contended, on the part of the appellants, that the statement that it was to be completed on or about the 15th day of March, 1890, was the fixing of

a definite day when the lease should commence, and that, if the building was not finished at that time, the lease would be ineffectual. It is doubtful whether this would be taken to have been the intention of the parties if there was nothing else in the lease, or in the bond which was executed in connection therewith, which could aid in determining such intention. It might well be held that this clause was inserted by way of description of the building, and to show that, under the contract for its construction, it was to be completed on a certain day. This would be more reasonable than to hold it to have been a covenant on the part of the lessor that the building would be ready for occupancy on that date, and that, if it was not, he would respond in damages. There are, however, other expressions in the lease and bond which furnish material aid in arriving at the intention of the parties. The lease is for the definite term of five years, but is, by its terms, to commence on a blank date, and end on a blank date. Though the terms of the lease are referred to in the bond quite fully, it is nowhere referred to as commencing on a certain date, but is always spoken of as commencing upon the completion of the building, and ending five years from that time. In our opinion, the lower court rightly construed the lease as being one to commence upon the completion of the building, rather than upon any certain day, and, this being so, the facts set up in the amended answer constituted no defense. The judgment will be affirmed.

STILES, SCOTT, and ANDERS, JJ., concur.

DUNBAR, C. J. (dissenting). I think the answer shows that there was such a variation of the terms of the contract that the sureties were released, and the motion for judgment should have been denied. I am, therefore, compelled to dissent.

BERGMAN v. SHOUDY et al.

(Supreme Court of Washington. July 3, 1894.) Examination of Witness—Use of Memoranda.

A memorandum of the contents of a trunk, made from an inspection seven months after the same was deposited for storage, and after the sale thereof for storage charges, cannot be used by a witness to refresh his memory as to the contents of the trunk and the value thereof at the time they were deposited for storage.

Appeal from superior court, King county; R. Osborn, Judge.

Action by Mary Bergman against John A. Shoudy, James H. Stevens, and Fred S. Sylvester, partners as Shoudy Bros. & Co., for conversion. Judgment was rendered for plaintiff, and defendants appeal. Judgment reversed.

Allen & Powell, for appellants. Turner & McCutcheon, for respondent.

DUNBAR, C. J. This was an action instituted by respondent against the appellants to recover the value of a certain trunk and its contents, which was stored with appellants, who were warehousemen. The trunk remaining in storage for such a time as was regarded by the appellants as unreasonable, it was sold for storage charges. It appeared upon the trial that, at the time of receiving the trunk, the appellants gave to the respondent the following receipt: "No. 421. Shoudy Bros. & Co. Storage Receipt. Seattle, Wash., Apr. 23, 1891. Received in store from M. Bergman the following described property, subject to his order upon surrender of this receipt and payment of charges, on the condition that Shoudy Bros. & Co. shall not be liable for loss by fire or any extraordinary act of the elements, nor for damage by rats, mice, moths, or any other vermin, nor from frost, riot, insurrection, or war. Rates of storage: .50 per month. 1 trunk, [marked] original." In testifying to the contents of the trunk and the value of such contents, the plaintiff was permitted, over the defendants' objection, to use and testify from a certain memorandum which purported to contain a list of the several articles contained in the trunk, with their respective values, which memorandum was made on the 29th day of November, 1891, after she had inspected the contents of the trunk, subsequent to the sale. We think there is no substantial merit in the first and second assignments of error by appellants, but are satisfied that the third assignment is meritorious, and that the court should not have permitted the plaintiff to use the memorandum in testifying. statement of facts shows that the trunk was deposited on April 23, 1891, and the memorandum was not made out until November 29th, following; hence it will be seen that it was over seven months from the time the trunk was deposited, and was in the possession of the respondent before the memorandum was made, and was in no sense a memorandum from which the witness could refresh her mind concerning what the contents of the trunk were, or the value of the contents, at the time it was deposited. A memorandum of this kind appeals to the mind of the jury as being something reliable; and if a witness, after so great a length of time, is allowed to introduce this character of testimony, it is very liable to prejudice the minds of the jurors. The general rule is that a witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that it will reasonably appear that the transaction was fresh in his memory. Reyn. Steph. Ev. p. 189. The circumstances, as testified to by the respondent, show that the memorandum in this case did not fall within this rule. Such being the case, the memorandum

should not have been brought to bear upon the jury. For the error committed in this respect, the cause must be reversed, and a new trial granted.

ANDERS, HOYT, STILES, and SCOTT, JJ., concur.

STATE ex rel. McLEOD v. SUPERIOR COURT OF THURSTON COUNTY et al. (Supreme Court of Washington. July 9, 1894.)

Amendment of Pleading.

Allowing defendant to file an answer on the merits, after the issue in an answer setting up the pendency of another action has been decided against him, is within the jurisdiction of the court.

Petition for certiorari by the state of Washington, on the relation of Alexander McLeod, against the superior court of Thurston county and J. C. Horr. Denied.

Robinson & Linn, for relator.

HOYT, J. Relator brought an action against J. C. Horr, in the superior court of Thurston county. Said Horr, by way of answer to the complaint, set up the fact of the pendency of another suit in relation to the same subject-matter. To this answer a reply was filed, and, upon the issue thus made, a trial was had. Thereupon the court made an order finding that there was no cause pending, at the time of the commencement of the action, in which the parties and the issues were the same, and therefore found for the plaintiff. Immediately upon the entering of said finding, plaintiff moved the court for judgment according to the prayer of his complaint, and the defendant asked leave of the court to file a further answer going to the merits of the action. Upon the hearing of said motions, the court entered an order denying that of the plaintiff, and permitting the defendant to further plead. These are substantially the facts set up in the petition of the relator as the foundation for his application for a writ of certiorari to said superior court and said J. C. Horr.

It was conceded, upon the argument, that, if the proceedings of the court above set forth were within its jurisdiction, the application must be denied, however erroneous the making of the order may have been. But it is contended, on the part of the relator, that the making of such order was in excess of the jurisdiction of the court, and that, for that reason, he is entitled to have the proceedings certified here for review. It is claimed by him that by the filing of his answer, setting up alone the fact of the pendency of another suit, the defendant waived the right to make any other defense, and that it was beyond the power of the court to allow him thereafter to file another answer. That a judgment in favor of the plaintiff, rendered upon the determination of

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the issue raised by the pleadings, would have been final, there can be no doubt, and it is upon this fact the relator founds his argument; and most of the authorities cited by him only hold that a judgment rendered under these circumstances would as finally determine the rights of the parties as one rendered after the issues made by an answer on the merits had been determined in favor of the plaintiff. But it does not follow from the fact that, if a judgment had been rendered, and allowed to stand unreversed, it would be final as to the rights of the parties, the trial court has no power to relieve a party from inadvertence or mistake before or after the entry of such judgment. The court may do this after the issues made by an answer upon the merits have been fully decided. Our statutes clearly contemplate such action. The courts are every day proceeding upon the theory that, upon a proper showing, they may afford such relief. And there is no reason why the power of the courts should be more restricted after the dedetermination of such an issue as the one raised by the pleadings in this case than upon the determination of other material issues. Our statute as to amendments is very liberal, and, by force thereof, the court, upon a proper showing, and upon such terms as may be just, can furnish relief at almost any stage of the proceedings. If it sets aside a finding or judgment in favor of the plaintiff. without proper cause having been shown therefor, it may constitute such error as will authorize this court to reverse its determination in that regard upon appeal; but no relief could be furnished by way of a writ of certiorari, for the reason that the lower court, having the right to investigate and determine whether or not good cause had been shown for its action, was clothed with jurisdiction to act in the matter. Nothing is made to appear, from the petition in this cause, which satisfies us that the court has even committed error, much less has the fact of its exceeding its jurisdiction been established. The writ must be denied.

ANDERS, SCOTT, and STILES, JJ., concur.

DUNBAR, C. J. I concur in the result.

HOWARD v. McNAUGHT et al. (Supreme Court of Washington. July 9, 1894.) Res Judicata—Foreclosure of Mortgage—Action on Bond.

1. The foreclosure of a mortgage on lands situated in another state to secure a bond is no bar to an action on the bond where the defendants in the foreclosure action were nonresident of the state where the action was brought, and were not served with notice, since no personal judgment was rendered against them.

sonal judgment was rendered against them.
2. In a subsequent action on the bond, evidence of the value of the mortgaged premises is inadmissible unless fraud is pleaded in the sale of the same.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by Charles H. Howard, guardian, against M. S. McNaught and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

D. M. Woodbury and Wells & Joiner, for appellants. Million & Houser, for respondent,

HOYT, J. This action was brought to recover an amount alleged to be due upon a certain bond. The appellants claimed there was nothing due thereon, for the reason that the debt evidenced by it had been reduced to judgment in the district court of Harper county, Kan. It appeared that there had been a foreclosure of a real-estate mortgage, which had been given to secure the payment of the bond in question, and that certain moneys had been realized upon a sale of the mortgaged property, and applied upon the amount due upon the bond, leaving a balance of \$756, for which this action was brought. It further appeared that in such foreclosure suit there was no personal service upon the appellants, that they were nonresidents of the state, and never appeared therein. The alleged errors of the trial court are argued under several heads, but the material question involved in the entire discussion is as to whether or not, under the circumstances above stated, there was such a merger of the original cause of action that no suit could be maintained thereon here. If there was such a merger, then the rulings of the trial court were clearly erroneous, and the judgment should be reversed. If there was no such merger, then the judgment should be affirmed. That a cause of action is merged in a judgment rendered thereon may be stated as a general rule, and it is because of this rule, and of the fact that it is applied as well in the case of foreign as domestic judgments, that the appellants contend that this action could not be maintained. But to this general rule there are well-recognized exceptions or limitations, and one of these is that it is a merger only so far as the judgment determined, or might have determined, the rights of the parties; from which it will follow that the judgment in the state of Kansas was only a merger of the cause of action upon the bond so far as the enforcement thereof against the real estate was concerned. The judgment was only binding to that extent, and had no force against the appellants personally, or their property not covered by said mortgage. The rights of the appellants to make any defense that they might have to said bond were in no manner concluded by such judgment. Hence, under the exception or limitation above stated, there was no merger of the right to maintain a personal action against these defendants upon the original undertaking. See 15 Am. & Eng. Enc. Law, p. 340, § C.; McVicker v. Beedy, 31 Me. 314; Bank v. Butman, 29 Me. 19. Of

course the amount of the bond could be collected but once, and to the extent that money was realized in the proceeding in Kansas it would constitute a payment of the undertaking, and only the balance could be recovered here, and that is all that was sought in this action. The appellants attempted to prove the value of the land against which the foreclosure proceedings were had, and alleged error because they were not allowed to do so, but, in the absence of an allegation of fraud by reason of which the land had been sold for less than its value, it was immaterial whether it was worth more or less than the amount obtained for it. The judgment will be affirmed.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

TUCKER v. BROWN et al. SAME v. MASTICK.

(Supreme Court of Washington. July 9, 1894.)

EJECTMENT—PLEADING.

In ejectment by an heir at law, a complaint which alleges that plaintiffs ancestor had never been a resident of the United States, had never done any business therein, that all debts owing by him at the date of his death had been fully paid, and that there was no necessity for administration, is not demurrable on the ground that the action should have been brought in the name of the ancestor's administrator, as the facts alleged show that no administration of the estate was pending, and that there was no possibility of any administration thereof being required in this state. Hill v. Young, 34 Pac. 144, 7 Wash. 33, followed.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Action in ejectment by Benjamin James Tucker against S. H. Brown and the Hastings Estate Company.

Action in ejectment by Benjamin James Tucker against E. B. Mastick, Jr.

The defendants demurred to the complaints, and judgment in each action was rendered in favor of defendants, and plaintiff appeals. The court on appeal heard the cases together. Judgments reversed.

Arthur, Lindsay & King and H. H. Eaton, for appellant.

HOYT, J. The judgments from which these appeals were taken were rendered upon the sustaining of demurrers to the complaints. In the brief of the appellant it is stated that the ground upon which the complaints were held insufficient was that it appeared therefrom that the plaintiff was suing as heir, when there had been no administration or distribution of the estate of his ancestor. The respondents have made no appearance in this court, and we shall assume that the only fault found with the complaints by the lower court was as above stated. It is alleged in the complaint that the ancestor under whom the plaintiff claimed had never

been a resident of the United States, had never done any business therein, that all the debts owing by him at the date of his death had been fully paid, and that there was no necessity for administration. These statements are relied upon to take the cases out of the rule announced by this court in Balch v. Smith, 4 Wash. 497, 30 Pac. 648, and Hill v. Young, 7 Wash. 33, 34 Pac. 144, or, rather, to bring the plaintiff within the exceptions suggested in the opinions in those cases. The facts alleged show that no administration of the estate of the ancestor was pending, and that there was no possibility of any administration thereof being required in this state. Under these circumstances we can see no reason why the heir should not be allowed to maintain his action as such. To so hold in no manner contravenes what was said in the cases above cited. On the contrary, those cases, when fairly interpreted, tend strongly to show that a complaint setting out such facts would state a cause of action. The judgments will be reversed, and the causes remanded, with instructions to overrule the demurrers.

DUNBAR, C. J., and STILES and ANDERS, JJ., concur.

OSBORN v. LOGUS.

(Supreme Court of Oregon. July 30, 1894.)

APPEAL—FORECLOSURE OF MECHANIO'S LIEN—NoTICE.

Notice of appeal from a judgment dismissing plaintiff's complaint in an action to foreclose a mechanic's lien, wherein like liens of other claimants on the same property were foreclosed, must be served on such claimants, and payment of their claims after service of such notice on defendant will not obviate the necessity of notice to them.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by T. F. Osborn against Charles Logus to foreclose a mechanic's lien. From a judgment dismissing his complaint, plaintiff appeals. Dismissed.

Wallace McCamant, for appellant. J. H. Hall, for respondent.

PER CURIAM. This is a motion to dismiss an appeal. A decree having been rendered, dismissing plaintiff's complaint, in a suit to foreclose a mechanic's lien, wherein like liens of other claimants upon the same property were foreclosed, the plaintiff attempted to appeal by serving the notice thereof upon the owner of such property only. Appeals are taken by causing a notice to be served upon the adverse party, and filing the original, with proof of service indorsed thereon, with the clerk. Hill's Code, § 537. An adverse party is one whose interests in relation to the judgment or decree appealed from are in conflict with the modification or reversal sought by the appeal. To Digitized by The Victorian (Or.) 32 Pac. 1040. If the decree should | be reversed, and one entered here foreclosing plaintiff's alleged lien, the interests of the other lien claimants would necessarily be in conflict with such decree, in case the property sought to be charged with the lien was upon a sale thereof insufficient to pay the whole amount decreed against it. Hill's Code, § 3677. In such case they would be compelled to share pro rata with the plaintiff, and hence the other lien claimants were or might thus become adverse parties. But, in order to show that the other claimants would not in fact be affected by such a decree, the appellant filed affidavits, and a copy of the decree, with marginal indorsements thereon, from which it appears that the amounts awarded to the several lien claimants have been paid. The proofs, however, are silent as to when these payments were made, except as to one of them, the acknowledgment of which was entered on the margin of the decree after the notice of appeal was served. Jurisdiction must be determined from the conditions existing when the appeal was taken, and could be acquired in this case only by service of the notice of appeal upon all the adverse parties. Hamilton v. Blair, 23 Or. 64, 31 Pac. 197; Moody v. Miller (Or.) 33 Pac. 402. And, plaintiff having failed to serve the other lien claimants with such notice, the appeal must be dismissed.

FINNEGAN v. PACIFIC VINEGAR CO. (Supreme Court of Oregon. July 30, 1894.)

CORPORATIONS—CONTRACT OF DIRECTORS—RATIFICATION.

Where two of three directors of a corporation, without authority from the board, make a contract of employment, and the third director, after hearing of its terms, allows the employé, without objection, to continue work for four months, it will be presumed that the directors ratified the contract.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by Thomas S. Finnegan against the Pacific Vinegar Company for damages for breach of contract of employment. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

F. R. Strong, for appellant. A. L. Frazer, for respondent.

BEAN, C. J. This is an action to recover damages for the breach of an alleged contract of employment. The complaint sets forth, in substance, that on November 1, 1892, the plaintiff was employed by the defendant corporation to act as its salesman and solicitor until October 14, 1893, under an agreement by which he was to receive for his services \$100 a month in cash during the time stipulated, and \$700 in the capital stock of the defendant; that the services were rendered according to the contract until June 7,

1893, when he was discharged without cause; that defendant has failed to pay him for such services since May 1, 1893, and has refused to deliver the promised stock, although demanded, to his damage in the sum of \$960. The answer denies the contract as alleged, but admits that plaintiff worked for defendant as its salesman and solicitor from about November 1, 1892, and that he was paid at the rate of \$100 per month while so employed, and alleges that such employment was during the pleasure of the defendant, and subject to be terminated by it at any time. The jury returned a verdict in favor of plaintiff, thus finding the contract as alleged by him; and, judgment being rendered accordingly, defendant appeals.

It appeared upon the trial that at the time the contract was made the officers of the defendant corporation were Gideon Stolz, president; John Sealy, vice president and general manager; and Frank Sealy, secretary,-and that these three persons composed the board of directors. The contract was entered into on behalf of the corporation by John Sealy, its vice president and manager, and Frank Sealy, its secretary, but without formal authority from the board of directors, or knowledge of the president. In pursuance of the contract, plaintiff worked for the defendant until June, 1893, without objection from any one, although the president, Mr. Stolz, as the evidence tended to show, knew of the terms of the contract at least as early as the preceding February. An objection was made to the admission of this testimony, which being overruled, it is now contended that it was incompetent because the contract was not authorized by the board of directors, nor any authority shown in the vice president to bind the company thereby. It is not necessary to decide whether the vice president, as general manager, had authority to bind the company by the contract as claimed by plaintiff. If he had no such authority the company is liable, if the contract was acquiesced in and ratified by its directors. It is well settled that a principal, who, after knowledge of the facts, neglects to promptly disavow the act of an agent who has exceeded his authority, makes such act his own, and such acquiescence is equivalent to a previous authority. This rule is as applicable to a corporation as an individual. Mechem, Ag. §§ 158, 167, 178. It was formerly the rule that a corporation could only appoint an agent by a formal resolution of its board of directors, and under its corporate seal; but this doctrine has long since been abandoned, and the authority of an agent to make the contract may now be shown, as in the case of individuals. It may be by showing an express appointment, or implied from the adoption or recognition of his acts by the corporation. Calvert v. Stage Co. (Or.) 36 Pac. 24. And such ratification need not be by a formal vote or resolution of the board of directors. Campbell v. Pope, 96 Mo. 468, 10 S. W. 187. "If this were not so,"

as said by Mr. Justice Redfield, "It would lead to very great injustice, for it is notorious that the transaction of the ordinary business of railways, banks, and similar corporations, in this country, is without any formal meetings or votes of the board. Hence, there follows a necessity of giving effect to the acts of such corporations according to the mode in which they choose to allow them to be transacted." Bank of Middlebury v. Rutland & W. R. Co., 30 Vt. 159. Now, in this case the defendant having suffered the plaintiff to work for it, under a contract made with its vice president, for the period of eight months, without protest or objection, and without in any way signifying its dissent, the jury was justified in finding that it had ratified the act of its agent, and therefore could not be heard to impeach the validity of the contract on the pretense that it was made without authority. If it desired to disavow the contract, it was its duty to have been active in doing so as soon as the fact came to its knowledge. Two of the directors had notice of, and knew the terms of, the contract, at the time it was made, and the other, as the jury could properly have found, more than four months before any attempt was made to disavow it; and, having remained silent during this time, their assent and ratification will be presumed. Kelsey v. Bank, 69 Pa. St. 426; St. James Parish v. Newburyport & A. H. R. Co., 141 Mass. 500, 6 N. E. 749; Jourdan v. Railroad Co., 115 N. Y. 380, 22 N. E. 153. We are of the opinion, therefore, that the evidence was competent, and the judgment must be affirmed.

(26 Or. 145)

FRIESE v. HUMMEL et al. (Supreme Court of Oregon. July 30, 1894.) JUDGMENT—ACTION TO SET ASIDE — WHEN LIES.

A decree of the supreme court will not be set aside for perjury and fraud unless the perjury and fraud are collateral to the questions examined and determined in the action.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by Louise Friese against W. F. Hummel and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Frank B. Jolly, for appellant. F. A. E. Starr, for respondents.

PER CURIAM. This is a suit to set aside a former decree of this court, rendered March 29, 1892, in the case of Hummel v. Friese, 29 Pac. 438, and for a new trial, on account of the alleged perjury of a witness. The plaintiff, for cause of suit, alleges, inter alia: "That by perjury and fraud the plaintiff in the suit above named in this answer [referring to the answer in the former decree] had sufficient testimony to warrant the court in ordering and entering the decree above set forth. That C. G. Hummel, by whose testimony alone it was established that the con-

veyance named in said answer described all the property purchased by plaintiff from him in said block, perjured himself in the oath he took, in this: In 1879, by writing made and signed by him, and delivered to one -, he agreed, for \$1,200, to be paid within one year, to deed all the land within said inclosure to said W. Beutelspacher. That, in order to enable himself to convey all such land to plaintiff, said Hummel, by agreement with said W. Beutelspacher, and payment to him of \$25, canceled such agreement, and it was returned to him, with said understanding, in the presence of another party. That after testifying, and before said decree, said Hummel died. That, since said decree was given, plaintiff discovered said testimony, not knowing of it before. That, on a new trial of said suit, plaintiff will introduce such testimony, and prove said facts by said witnesses." The court having sustained a demurrer to the complaint for the reason that it did not state facts sufficient to constitute a cause of suit, and the plaintiff refusing to further plead, a decree was rendered dismissing the suit, from which decree the plaintiff appeals.

Did the complaint state sufficient facts to entitle the plaintiff to the equitable relief demanded? is the question involved in this suit. A court of equity may, by an original bill in the nature of a bill of review, set aside a decree obtained by the fraud of the prevailing party, where the acts or conduct constituting such fraud were not involved in the consideration of the merits. 2 Freem. Judgm. (4th Ed.) § 485. A judgment or decree procured by perjury is doubtless a fraud, and such as would induce equity to grant relief. were it not for the fact that its existence can rarely or never be ascertained otherwise than by trying anew an issue tried in a former proceeding. Id. § 489. Frauds for which a court of equity will set aside a judgment or decree must consist of extrinsic, collateral acts, not involved in the consideration of the merits. The credibility of testimony given on the trial of a cause, bearing upon the issue, is intrinsic, and has been considered in reaching the conclusion sought to be impeached; and the case is not the less tried on its merits, and the judgment is none the less conclusive, by reason of the false testimony produced. U. S. v. Flint, 4 Sawy. 42, Fed. Cas. No. 15,121. "Relief," says Allen, J., in Ross v. Wood, 70 N. Y. 8, "can only be granted upon some new matter of equity, not arising in the former case. Equity will not take cognizance, on the same grounds, of the very point which another court of competent authority in the case has considered and decided." In Tebbets v. Tilton, 31 N. H. 273, it was held that fraud in a judgment might be shown by a party when it may be done without showing any participation in the fraud, and where it does not involve a re-examination of the merits of the case. In Folsom v. Folsom, 55 N. H. 78, it was held,

in a suit to impeach a decree for fraud, that evidence, discovered after the trial, which showed that the decree had been obtained by perjury, was not newly discovered, but cumulative upon the same issues tried before. In Pico v. Cohn, 91 Cal. 129, 25 Pac. 970, and 27 Pac. 537, the facts showed that the plaintiff was over 80 years old, unused to business, and could not speak or understand the English language; that he owned real property of the value of \$200,000, upon which there was an incumbrance of \$63,000; that, being pressed for payment, he applied to one B. Cohn for, and obtained, a loan of that amount, to secure the payment of which he executed and delivered an absolute conveyance of all his property; that within two months from the time he received the loan he tendered to Cohn \$65,000, and demanded a reconveyance, but upon Cohn's refusal to convey he commenced an action to recover said property; that, during plaintiff's negotiations with Cohn, one Pico Johnson was present, and knew that the transaction was a loan and security, and not a purchase and conveyance absolute, and shortly after the execution of the deed so stated to others; that, relying on Johnson's knowledge of the transaction, and his statements concerning it, plaintiff called him as a witness, when, instead of testifying that the transaction was a loan and mortgage, he testified that it was a sale and absolute conveyance, and upon the strength of his evidence a decree was rendered in favor of the defendant. In a suit brought to set aside this decree, it wa, alleged, in addition to the foregoing facts, that plaintiff had made the discovery that Cohn had paid Johnson \$2,000 to testify falsely, which sum was placed in the hands of one Forbes, with directions, given in Johnson's presence, to pay it to him if he testified to an absolute sale, and that immediately after he had so testified he demanded and received the money. A demurrer to the complaint having been sustained by the lower court, the judgment was, upon appeal, affirmed, the court saying: "That a former judgment or decree may be set aside and annulled for some frauds, there can be no question: but it must be a fraud extrinsic or collateral to the questions examined and determined in the action. And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged " See notes documents or perjured testimony. to this case in 13 L. R. A. 336. The reason assigned in support of this rule is that causes once tried by a court having jurisdiction of the subject-matter and the parties should forever be at rest; that the unsuccessful party ought reasonably to expect, if he had an unscrupulous adversary, that perjured testimony would be offered at the trial, and should be prepared to meet it; and that, having gone into a consideration of the merits, he is estopped by the conclusion of the court. U. S. v. Flint, supra. The plaintiff not having alleged sufficient facts to entitle her to the equitable relief demanded, there was no error in sustaining the demurrer (Cotzhausen v. Kerting, 29 Fed. 821), and the decree is therefore affirmed.

ELLIOT v. WHITMORE et al. (No. 416.)
(Supreme Court of Utah. June 19, 1894.)
STAY OF INJUNCTION — BOND PENDING APPEAL—
DECISION AS TO WATER RIGHTS.

2 (comp. Laws. § 3641, provides that, when a judgment directs the delivery of possession of real property, its execution cannot be stayed on appeal without giving a bond therefor. Section 3642 provides that, when an appeal is taken and a bond given, all proceedings in the lower court shall be stayed. Held, that where defendant, by means of a ditch, appropriated to his own use the water in a stream, and plaintiff obtained a judgment entitling him to the use of a part of the water, and secured an injunction restraining defendant from taking more than a certain amount, the court erred in refusing to allow a supersedens bond to stay the injunction pending appeal. Miner, J., dissenting.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Action by Lewis A. Scott Elliot against George C. Whitmore and another for an injunction and for damages. From an order refusing to fix the amount of a supersedeas bond, defendants appeal. Reversed.

Brown & Henderson and E. D. Hoge, for appellants. C. S. Varien and Zane & Putnam, for respondent.

MERRITT, C. J. This is an appeal from an order of the third district court refusing the application of the defendants to fix the amount of the supersedeas bond to be given to stay the judgment on appeal from the final decree, and denying a stay of proceedings upon the injunctional order contained in The complaint in this action said decree. was filed in the first district court at Provo, September 8, 1887, and averred that defendants were entitled to a primary right to the waters of Grassy Trail creek, to a certain amount; that the plaintiff, in 1885, appropriated to his own use certain amounts of water from said creek, in excess of the amount conceded to defendants, and that he was the owner of such excess by prior appropriation; that defendants had, in violation of plaintiff's rights, taken possession of all the waters of said stream, and, "by means of dams, flumes, and ditches theretofore dug and made, unlawfully diverted all of the waters of said creek from the channel thereof. and from plaintiff, and refuses to allow the same, or any part thereof, to flow down to or on his said land;" and that defendants threaten to continue such diversion and appropriation unless restrained,-and prays for an injunction, and that the same may be made perpetual enjoining such diversion by defendants. The answer admits the taking of the water, but denies any appropriation by

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plaintiff, and asserts title to the entire stream in the defendants. The case has been once before this court (Elliot v. Whitmore, 8 Utah, 253, 30 Pac. 984); and, upon being remanded to the district court, was sent to a referee for trial, who filed his report, in which he finds that the defendants are entitled to a first right in the stream to the amount of 67-150 of a cubic foot per second, and the plaintiff to a right thereafter to 5 cubic feet per second at his head gate, some distance below the premises of defendants; and that the defendants have been and are taking the whole of the waters of the stream; and that a certain device or box presented by plaintiff should be put into defendants' ditch, which would prevent any greater amount of water from flowing therein than the amount awarded to them; and that a competent engineer should be appointed to put the said device into defendants' ditch; and that defendants should be enjoined from disturbing said device, and from taking more water than the amount awarded to them. On the 8th of May, 1893, an order was made confirming said report, and a final judgment was entered pursuant thereto, appointing W. P. Hardesty a commissioner to put in said device, and directing him to proceed and put in said device, and enjoining defendants from interfering therewith when put in, or from taking from the stream more water than the amount awarded them by the decree, and awarded costs against the defendants, taxed at the sum of \$1,762.65. Thereupon the defendants, desiring to appeal from said judgment to this court, made application to the court, under 2 Comp. Laws, § 3641, to fix the amount of a supersedeas bond to stay the execution of the judgment pending the appeal; and upon such application the court entered an order "that the amount of the bond in this action be fixed at the sum of \$3,243.20, double the amount of judgment in this action; and that any stay of proceedings upon the injunctional order contained in the decree in this action, or any suspension of said injunctional order, be, and the same is hereby, refused and denied, and the said injunctional orders in the said decree contained are continued in full force and effect." From this order this appeal is taken.

The subject-matter of the controversy in the original action is real property. Fritts v. Camp, 94 Cal. 893, 29 Pac. 867; Pacific Yacht Club v. Sausalito Bay Water Co., 98 Cal. 487, 33 Pac. 322. The statute under which defendants made the application to fix amount of supersedeas bond provides that, if the judgment or order appealed from directs the sale or delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sufficient sureties, in an amount not exceeding a sum to be fixed by the judge of the court by which the judgment was rendered, which must be specified in the undertaking, etc. Section 3642 provides that, "whenever an appeal is perfected as provided in the preceding sections of this chapter, it stays all further proceedings in the court below, upon the judgment or order appealed from, or upon the matter embraced therein." If the judgment or decree from which defendants were seeking to appeal was, in effect, for the delivery of possession of real property, then they were entitled to have the judgment stayed pending the appeal; and it was the duty of the court to fix the amount of the bond for that purpose. The defendants were in possession of the stream, and the provision in the judgment that the defendants should refrain and desist from taking it was, in effect, a judgment that they deliver it to the plaintiff; the judgment directed a commissioner to go and turn it over, and deliver it to the plaintiff. An appeal does not ordinarily supersede or suspend an injunction, but this rule is only to preserve the status quo of the property at the time the decree is entered. Hovey v. McDonald, 109 U. S. 150, 8 Sup. Ct. 136; People v. Simonson, 10 Mich. 835; Calvert v. State. 34 Neb. 681, 52 N. W. 687; Buillon, Beck & Champion Min. Co. v. Eureka Hill Min. Co., 5 Utah, 182, 12 Pac. 660. If the injunetion is mandatory, its effect is to take the subject-matter of the controversy from the possession of one party, and give it to the other; the rule has no application. Bliss v. Superior Court, 62 Cal. 543; Mining Co. ▼. Fremont, 7 Cal. 130. In the case of Bliss v. Superior Court, McKee, J., speaking for the court, says: "It is only of orders or judgments which command or permit some act to be done that a stay of proceedings can be had." And in the case of Mining Co. v. Fremont the court points out the distinction between mandatory and prohibitory judgments and orders. In the case at bar the defendants were in possession at the time the decree was entered. The effect of the decree was to take the property in dispute from them, and deliver it to plaintiff. In fact, a commissioner was directed to make the delivery. The order appealed from should be reversed and set aside; and as the defendants have perfected their appeal, so far as they could, which is now pending in this court, the cause should be remanded to the court below, with instructions to fix the amount of supersedeas bond on appeal from the judgment.

SMITH, J. I concur in the judgment reversing the order of the court below in refusing to fix a supersedeas bond. In addition to the reasons pointed out in the opinion of the chief justice, I desire to state the following: Six appeals are before us, all arising from practically one judgment. This is one of them. It is perfectly apparent to me that, when the late chief justice refused to fix a supersedeas bond, he was acting under the erroneous impression that the merits of

the controversy could never be brought before this court for review. We have just decided that he was in error in this conclusion. and that the statement on motion for a new trial must be settled and the cause determined on its merits. Such being the case, I am fully persuaded that, if the matter could again be submitted to Judge Zane, he would reverse his former order, and allow a supersedeas bond. In other words, the arbitrary refusal to fix a supersedeas, it seems to me, can only be defended upon the assumption that there was nought but delay in the appeal from the judgment. We have seen that the error in this case is in this assumption. The case is one where, if the evidence is to be reviewed, either in this or the trial court. the judgment should be superseded. I am also of the opinion that in a case of this character, which, in effect, transfers the possession of real property from one party to the other, the trial court, in case of appeal, has no discretion except to fix the amount of the bond: but, granting that the court has the discretion claimed for it, I am still of the opinion the order should be reversed.

MINER, J. (dissenting). I cannot concur with my brethren in this case. The injunctional order granted by the court below perpetually restrained and enjoined the defendants from in any manner altering or changing the flow of water from the measuring box, and from changing or altering the measuring box or the measurements of water thereof, and from taking from said stream any larger quantity of water than 67-150 of a cubic foot per second. This was a preventive injunction, and not a mandatory injunc-It was a perpetual injunction upon a final decree granted by the court, after hearing the testimony of the witnesses on both sides of the case. Upon a full hearing, and having all the testimony before it, the court below denied the motion of the appellants to fix a supersedeas bond, and thereupon continued such order in full force during the pendency of the appeal. Upon an appeal from such order, in refusing to fix a supersedeas, and without having the testimony before us, this court is asked in this collateral way to pass upon and reverse the order, based upon a final decree in the court below. The order was within the discretionary power of the lower court to make or refuse; and, having been refused, after a full hearing, this court should not reverse the order until the hearing of the appeal upon the main case. In doing so, this court is making an order and deciding the case without having the proofs or knowing what injury may follow to the party in whose favor the order was When the lower court has exercised a discretionary power in refusing to suspend the injunction, or allow the supersedeas, such order should not be disturbed during the pendency of the appeal, nor until the final hearing thereon in this court. Swift v. Shepard, 64 Cal. 423, 1 Pac. 493; Cochrane v. Bussche, 7 Utah, 233, 26 Pac. 294; U. S. Sup. Ct. Rule No. 93; Bliss v. Superior Court, 62 Cal. 542; Heinlen v. Cross, 63 Cal. 44; Hovey v. McDonald, 109 U. S. 150, 3 Sup. Ct. 136; Mining Co. v. Fremont, 7 Cal. 130; Leonard v. Land Co., 115 U. S. 465, 6 Sup. Ct. 127. The appeal should be dismissed, with costs.

ELLIOT v. WHITMORE et al. (No. 412.) (Supreme Court of Utah. June 19, 1894.)

Change of Venue — Presumption on Appeal— Irrigation — Decree as to Distribution of Water—Breach of Injunction—Contempt.

1. 2 Comp. Laws 1888, § 3199, authorizes the court to change the place of trial to the nearest court when the parties do not agree on the court to which the change shall be made. *Held*, that where the court so transfers a cause, and the record does not show the contrary, it will be presumed that the parties did not agree as to a court.

2. The right of either party to a trial in a

certain district may be waived.

3. An order changing the place of trial is an appealable order, and an appeal is the proper

remedy to correct such an order.

4. Where the court has jurisdiction of the parties and the subject-matter of the suit, it has power to locate on unsurveyed government land a measuring box in a ditch for the distribution of water.

5. A court has power to imprison a person for breach of an injunction until he complies therewith, when it is within his power to do so, and he refuses to do so.

and he refuses to do so.
6. No appeal lies from a conviction for contempt in the breach of an injunction by destroying a measuring box, and diverting the water.

Smith, J., dissenting.

Appeal from district court, Salt Lake county; before Justice G. W. Bartch.

Application by Lewis A. Scott Elliot for the arrest of George C. Whitmore for contempt of court. Defendant was found guilty. From an order denying a new trial, he appeals. Affirmed.

Brown & Henderson, for appellant. C. I. Varian and Zane & Putnam, for respondent.

MINER, J. A decree was entered in the third district court on the 9th of May, 1893, distributing and dividing the water of Grassy Trail creek between the plaintiff and defendants. By said decree, one W. P. Hardesty was appointed a commissioner of said court to construct a measuring box upon defendants' ditch at some convenient place near the defendants' head gate, so as to definitely measure out the water to each party. The defendants were perpetually restrained and enjoined from taking from said stream more water than was allowed them by said decree, and were also perpetually restrained and enjoined from in any way altering or changing the flow of water from said measuring box, and from in any manner changing or altering said measuring box, or the meas-

¹ Rehearing denied July 27, 1894.

urements thereof. In defiance of this decree and injunctional order, with full knowledge and in direct violation thereof, the defendant George C. Whitmore, on the 11th and 15th days of June, 1893, willfully, unlawfully, and maliciously tore out both ends of said measuring box, which was located on unsurveyed public lands of the United States, so that it would not measure the water, and diverted and took from said stream water in greater quantity than was allowed by said decree. For this alleged violation of the injunction, the plaintiff presented a complaint, on oath, to the third district court, and obtained a warrant in attachment in the name of the people of the territory directing the arrest of the defendant, and ordering him to show cause why he should not be punished for contempt of the decree of the court, etc. The defendant filed his answer, and a hearing was had before the court, and thereupon the court found, among other things, that the defendant was guilty of the acts complained of, which acts were contempts of the authority of the court. The court thereupon ordered and adjudged that said George C. Whitmore be confined and imprisoned until he cease diverting from the waters of said stream any quantity larger than 67-150 of a cubic foot of water per second, and until he restore the said measuring box to the same condition in which it was immediately before the doing of the acts of contempt mentioned above, on the 11th day of June, 1893; and that said George C. Whitmore be remanded to the custody of the United States marshal, to be by him imprisoned and confined until the further order of this court. From this order Whitmore appealed to this court, assigning many errors, and no supersedeas bond was given.

The first error assigned is that the court had no jurisdiction to render the decree, to make the order above referred to, or to punish for contempt, because the said cause was first pending in the first district court (the district where the water was located), and that said court, upon its own motion, transferred said cause to the third district court, without any authority therefor. The order of the first district court reads as follows: "In this case, the court, on its own motion, ordered that this case be transferred to the third district court, at Salt Lake City, for further proceedings." After this order was made, the case was transferred to the third district court, that being the nearest district court. After this, and on the 13th day of February, 1893, and after said cause was transferred in accordance with said order to the third district court, the attorneys for the respective parties appeared in the third district court; and on motion of the attorneys for both parties, and by consent and at the request of all, the court ordered that the cause be referred to J. H. Harris, as sole referee, to try all the issues in said cause, and the defendant's ditch carried the water in

report findings of fact and conclusions of law. In pursuance of said order and stipulation, the parties appeared before said referee, who, without objection, took the testimony offered by the respective parties, and a decree was entered upon such testimony, and report so taken and filed. A motion for a new trial was subsequently made by the respondent, Whitmore, and at no time was any objection made to the jurisdiction of the court, or to any of said proceedings growing out of said order changing the place of trial. The objection is made for the first time in this court. Our statute (section 3199, 2 Comp. Laws 1888) authorizes the court to change the place of trial upon its own motion if the parties do not agree, but in that case the cause must be transferred to the nearest This question was fully covered and decided in the case of In re Whitmore, 9 Utah, 441, 35 Pac. 524. This court held in that case, and under the same state of facts and upon the same order, that "the presumption follows that the parties did not agree, and that there was good cause known to the judge for transferring the cause to the third district court. 2 Comp. Laws 1888, \$ 3199; Emery v. Hardee, 94 N. C. 787; Cartright v. Town of Belmont, 58 Wis. 370, 17 N. W. 237; Table Mountain, G. & S. Min. Co. v. Waller's Defeat S. Min. Co., 4 Nev. 222; Solomon v. Norton (Ariz.) 11 Pac. 108; Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982. It does not appear that any motion was made in the third district court to transfer the That court was not bound of its own motion to change the place of trial, and the right of either party to try the case in the first district court was a right that they could waive. Table Mountain, G. & S. Min. Co. v. Waller's Defeat S. Min. Co., 4 Nev. 222; Watts v. White, 18 Cal. 321, 324; 2 Comp. Laws 1888, § 3197; Vaughn v. Hixon (Kan.) 32 Pac. 358; Solomon v. Norton (Ariz.) 11 Pac. 108; Railway Co. v. McBride, 141 U. S. 127, 11 Sup. Ct. 982. The order changing the place of trial from the first district court was an appealable order, and, if erroneous, an appeal was the proper remedy to correct it. 2 Comp. Laws 1888, §§ 3635, 3652; Clarke v. Lyon Co., 8 Nev. 181; Machine Co. v. Cole, 62 Cal. 311; Gage v. Downey, 79 Cal. 140, 21 Pac. 527, 855. We think the third district court had jurisdiction over the subject-matter of the suit, and over the parties thereto." We think the decision in Re Whitmore, above referred to, and cases there cited, are decisive of this question, and that the court had jurisdiction over the subject-matter of the suit and over the parties thereto. Having such jurisdiction, the court had the power to specify and regulate the location of the measuring box upon the defendant's ditch, in question. so that it could effectually carry out and distribute the water in accordance with the decree and order of the court. The fact that



dispute across unsurveyed government land would not abridge the right of the court to locate the measuring box in such convenient and necessary locality on the government land as would effectually control the water for the convenient use of the parties entitled thereto, at the least reasonable expense to the parties. 2 Comp. Laws 1888, §§ 2785, 2779.

In this case the defendant Whitmore was convicted of willfully and contemptuously violating the decree and injunctional order of the court which restrained him from interfering with or removing the measuring box in the ditch, and from diverting the water of the stream. The contempt consists in the doing of a forbidden act that was not only injurious to the opposite party, but was a flagrant and contemptuous violation of the express command of the court. The order that he be confined and imprisoned until he should cease diverting the water of the stream in excess of the amount allowed by the order, and until he restore the measuring box, and until the further order of the court, was within the power of the court to impose. The record shows that it was within the power of Whitmore to cease disobeying the order of the court, and to restore the measuring box. He refused to do either. The contempt first committed was contempmously continued in the face of the positive order of the court. It nowhere appears from the record that defendant has performed what he could perform in obedience to the order. If the defendant had complied with the order of the court, and that fact had been made to appear, then it was within the discretionary power of the court to impose a further sentence for the violation of the injunctional order. The imprisonment imposed would continue until defendant had complied with such order, or made a satisfactory showing to the court that he could not comply with it. The court was not called upon to make any further order until this showing was made. In re Swan, 150 U.S. 637, 14 Sup. Ct. 225. Many of the questions involved in this case were fully discussed in Re Whitmore, 35 Pac. 524, 9 Utah, 441, and for this reason we omit further discussion. We hold now, as we held in that case, that an appeal does not lie to this court from the judgment and conviction for the contempt appealed from. Id.; People v. Owens, 8 Utah, 20, 28 Pac. 871. The appeal in this case is dismissed; the order and decree of the district court are affirmed; and the appellant is remanded to the custody of the United States marshal, in compliance with the order, judgment, and commitment of the third district court, there to abide the further order of that court

MERRITT, C. J., concurs.

. SMITH, J. I dissent, especially upon the molding that the judgment is not appealable.

ELLIOT v. WHITMORE et al. (No. 425.) (Supreme Court of Utah. June 19, 1894.) New Texal—Time for Serving Statement.

2 Comp. I aws, § 3402, subd. 3, provides: that, where a motion for a new trial is made on a statement, a copy of the statement shall be served within 10 days after the service of notice, or such further time as the court will allow. Held, that an order extending the time for serving the statement, which is granted within the 10 days, but not filed until the 10 days have expired, is valid, the statute being silent as to filing.

Appeal from district court, Salt Lake county; C. S. Zane, Justice.

Action by Lewis A. Scott Elliot against George C. Whitmore and another for damages and an injunction. From an order dismissing and denying defendants' motion for a new trial, they appeal. Reversed.

C. D. Hoge and Brown & Henderson, for appellants. C. S. Varian and Zane & Putnam, for respondent.

MERRITT, C. J. This is an appeal from an order made by the third district court dismissing and denying defendants' motion for a new trial. From the bill of exceptions in the record it appears that the cause was tried before J. H. Harris, as referee, to whom it had been referred by order of the court. The referee made and filed his report in favor of plaintiff, on the 9th of May, 1593, and on the same day judgment was entered in pursuance thereof, and notice of the judgment and decision was served on defendants: attorneys. On the 18th of May, 1893, and within 10 days after judgment, defendants served and filed their notice of intention to move for a new trial, upon a statement to be prepared. The 28th of May, when the 10 days allowed by statute for settling statement would expire, fell on: Sunday. On Sate urday, the 27th of May, the defendants obtained from Judge Bartch, judge of the third district court, an order in writing, dated on that day, and duly signed by him; extending the time in which to prepare and serve states ment on motion for new trial for 10 days from May 27, 1893. This order was filed with the clerk in the cause on May 30, 1893. It will be seen from this statement that the statutory time for preparing and serving proposed statement on motion for new trial expired on Monday, May 29th; that the order made by Judge Bartch, made on Saturday. the 27th of May, was within this time, but it was not filed in the cause until next day, after the time would have expired; and upon this order the question in this case arises. Other orders were made afterwards, further extending the time, and defendants preparedand served upon plaintiff a proposed statement; and, no amendments being offered after the expiration of 10 days, the proposed statement was presented to the referee, and he refused to sign it, and thereupon the plaintiff moved the court to dismiss the motion for new trial, on the ground "that the statement on motion for new trial in this action was not

served within the time allowed therefor by law, or within any time in addition thereto allowed by said court or judge thereof." On the hearing of this motion, the order was made from which this appeal is taken.

No question is made but that all the proceedings subsequent to the filing of the order of Judge Bartch on May 30th are regular and in time, if that order is valid and operative. The plaintiff claims, and the court below held, that this order of Judge Bartch is invalid, and has no force or effect whatever, because it was not filed within the time limited by statute. The statute relating to the matter in controversy (2 Comp. Laws, § 3402, subd. 3) reads as follows: "If the motion is to be made on a statement of the case, the moving party must within ten days after service of the notice, or such further time as the court, in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party," etc. The statute does not in terms require the order to be filed, but it is claimed that the order is not in any way connected with the case until it is filed, and, if this is not done before the time expires, it has no force whatever; and the cases of Campbell v. Jones, 41 Cal. 515, and Clark v. Strouse, 11 Nev. 76, are cited and relied upon to support that contention. The case of Campbell v. Jones arose under section 195 of the old practice act of California, which is in many respects different from the present statute of California, from which our statate above quoted is taken. The point here in issue was not raised in that case. The only point there in controversy was whether an oral promise of the judge, made out of court, to extend the time, was in effect an extension. The court held that it was not. In passing upon the case, the opinion says that the order should be in writing, signed by the judge, and filed in the case before the time expires, or entered in the minutes of the court. The case of Clark v. Strouse arose under the practice act of Nevada, which was taken from the former practice act of California, and is identical with the statute considered in the case of Campbell v. Jones, before referred to. In the case of Clark v. Strouse the court held that the statement must not only be in writing, and signed by the judge, but must also be filed with the clerk in the case before the time expires; and the case of Campbell v. Jones is referred to. In neither of these cases is there any argument or reasoning on the question. The statute under which these cases were decided required that the statement, when prepared, should be filed with the clerk, and that amendments proposed thereto should be filed with the clerk, and further provided that, "if no affidavit or statement be filed within five days after the notice for a new trial, the right to move for a new trial shall be waived." Under these provisions, there may have been some reason for requiring an order which extended the time to be filed, but we are not satisfied with the rule, as applied to our statute. The statute expressly authorizes the judge to make the order out of court. He might be absent from the clerk's office when it is made, but, if the order is actually made by him before the time expires, the statute is complied with. In the case of Swift v. Canovan, 47 Cal. 86, which arose under a code of civil procedure from which our code is substantially taken, the court held that an order made by a judge, out of court, extending the time for filing an answer, was not invalid because it was not filed, and, in deciding the case, said: "The more correct practice certainly is to file or serve the order extending the time to answer, but we are not aware of any provisions of law requiring it to be filed or served." We think this is the correct rule in relation to an order extending the time to prepare and serve statement on motion for a new trial. Any other construction would be too narrow, and, in many cases, work great injustice. The provisions of the code relative to orders extending the time for filing answers, taken together, are substantially like the statute under consideration. Hayne, New Trials & App. p. 413, § 147, states the rule that the order should be in writing and signed, but says nothing about it being filed. We think the court erred in dismissing and denying the motion for a new trial; and the order appealed from is reversed and set aside, with costs to the appellants, and the cause remanded, with instructions to the court below to proceed and hear the motion for a new trial when the statement is settled.

MINER and SMITH, JJ., concur.

WHITMORE v. HARRIS.1

(Supreme Court of Utah. June 19, 1894.)

WRIT OF MANDATE — TO REFEREE — REFUSAL TO SIGN STATEMENT ON MOTION FOR NEW TRIAL — COSTS.

1. Where the time for serving amendments to a proposed statement on motion for a new trial has expired, and no amendments have been proposed, on refusal of the referee to sign the statement a writ of mandate will issue.

the statement a writ of mandate will issue.

2. Where the party who obtained judgment in such action appears by counsel, and resists the application for the writ of mandate, costs will be awarded against him, and not against the referee.

Appeal from district court, Salt Lake county; before Justice C. S. Zane.

Application for writ of mandate by George C. Whitmore against J. H. Harris. From a judgment denying the writ, petitioner appeals. Reversed.

Brown & Henderson, for appellant. C. S. Varian and Zane & Putnam, for respondent.

MERRITT, C. J. This is an appeal from an order or judgment of the third district court refusing and denying a petition for a ¹ Rehearing denied.

writ of mandate. The facts are fully stated in an opinion of this court, just handed down, on appeal from an order dismissing and denying a motion for a new trial, in the case of Elliot v. Whitmore, 37 Pac. 463, and the questions determined in that case are decisive of this.

The time for serving amendments to the proposed statement on motion for a new trial having expired, and no amendments proposed, it was the duty of the referee to sign the statement; and, having refused to do this, the writ asked for should have been granted. Lewis A. Scott Elliot, the plaintiff in the action to which this application for the writ of mandate relates, having appeared by counsel and resisted the application for the writ, costs should be awarded against him, instead of the referee. 2 Spell. Extr. Rel. § 1708; People v. Bacon, 18 Mich. 247. The judgment or order appealed from should be reversed, with costs against Lewis A. Scott Elliot, and the cause remanded, with directions to grant the writ as prayed.

MINER and SMITH, JJ., concur.

4 Cal. Unrep. 784 ONTARIO LAND & IMP. CO. ▼. HOWARD. (No. 19,336.)

(Supreme Court of California. Aug. 15, 1894.)
REVIEW ON APPEAL—CONFLICTING EVIDENCE.

A judgment for plaintiff will not be disturbed where there is a substantial confict in the evidence, with a clear preponderance in plaintiff's favor.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; John L. Campbell, Judge.

Action by the Ontario Land & Improvement Company against J. S. Howard to compel defendant to pay a balance due on a contract for the sale of land, or, in default thereof, to foreclose his interest in the land. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Goodcell & Leonard and E. H. Jolliffe, for appellant. Sheldon & Borden and E. M. Hanna, for respondent.

SEARLS, C. On the 9th day of June, 1887, H. L. Macneil and others, as trustees, entered into an agreement in writing with H. C. Parker, by which they agreed to sell to him, and he agreed to buy, a certain piece or parcel of land situate in Ontario, county of San Bernardino, state of California, designated as "Lot number one (1) in Canyon Ridge Tract of Ontario Colony," together with 10 shares of the capital stock of the San Antonio Water Company, for the sum of \$2,500, payable in four annual installments of \$625 each,one on the execution of the agreement, and the residue in like annual installments,-with interest, etc.; said Parker to have possession, and deed to be executed, on completion

of payments. Plaintiff is assignee of Macneil and others, and defendant, Howard, is assignee of Parker, and agreed to pay purchase money to plaintiff. This action was brought to obtain a decree requiring the defendant to pay a residue of such purchase money within a specified time, or, in default thereof, that his interest in the land be foreclosed. Defendant pleaded want of title in plaintiff. At the trial it was stipulated, in substance, that a patent from the government of the United States had issued for the rancho Cucamonga, and that plaintiff held under the grantee in said patent. The only question under the stipulation, was whether or not the land agreed to be conveyed was within the exterior boundaries of the rancho Cucamonga, as defined in said patent. It was conceded that, if the tract was within the patent, plaintiff had title thereto in fee simple, and was able to convey, and had tendered a good and sufficient deed of conveyance, properly executed, to defendant, which he had refused to accept, or to pay any portion of the money due as the purchase price of the land. The cause was tried by the court, a jury having been waived, written findings filed in favor of plaintiff, upon which a judgment was entered in its favor. The appeal is by defendant, J. S. Howard, from the judgment, and from an order denying a motion on his behalf for a new trial.

The case is plain and simple. Plaintiff, by its testimony, made what may be termed a perfect case; showing, beyond a peradventure, the land to be within the exterior boundaries of the rancho Cucamonga. Defendant introduced testimony tending to show that said land was without the boundaries of the rancho. Taken together, there is a substantial conflict in the evidence, with, as I think, a clear preponderance in favor of plaintiff. Under such circumstances, there being no other question involved, it can subserve no useful purpose to analyze and discuss the testimony. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 516 PELLISSIER ▼. CORKER. (No. 19,384.)

(Supreme Court of California. Aug. 13, 1894.)

GRANT OF EASEMENT.

A deed to R., "his heirs and assigns, for the sole purpose of an alleyway, to be used in common with the owners of other property adjoining said alleyway," conveys only an easement, and dedicates the land for use as an alleyway.

Department 1. Appeal from superior court, Los Angeles county; William P. Wade, Judge. Action by Germain Pellissier against Aurella J. Corker for an injunction restraining defendant from obstructing an alleyway. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Westerman & Broughton and Edwin Baxter, for appellant. Moye Wicks, for respondent.

GAROUTTE, J. This action is brought for a perpetual injunction to restrain the defendant from obstructing an alleged alleyway situated between the respective lots of land of the parties. The relief prayed for was granted, and this appeal is prosecuted from such judgment and an order denying a motion for a new trial. Defendant claims title in fee to the land covered by the alleged alley or way, and bases her right to obstruct the same as grantee of one Rhinehart under a certain deed made to him by one Winbigler, the original owner of the entire tract. At the date of this deed he held the title in fee to the strip in dispute, unless it had been previously dedicated. Appellant insists that the deed from Winbigler passed the title in fee to Rhinehart, and she now relies upon the Rhinehart title; and the determination as to the character of title that passed under that deed is determinative of the case. It recites: "I, David Winbigler, for value received, do hereby grant to W. V. Rhinehart, his heirs and assigns, for the sole purpose of an alleyway, to be used in common with the owners of other property adjoining said alleyway, all that tract of land," etc. We think this deed is an express grant of an easement; a right to the use, and nothing more. Section 1066 of the Civil Code declares that grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in that article; and upon the face of this writing the intention, and the whole intention, of the parties is apparent from every line, and that intention was to dedicate the strip of land for use as an alleyway by the owners of the adjacent lots, and that the legal title should be held by Rhinehart, his heirs and assigns, in trust for that purpose, and subject to the easement created by the dedication. If we consider the situation of the parties, and the surrounding circumstances accompanying the making of the deed, this conclusion is impregnably fortified. Section 1105 of the Civil Code declares that a fee-simple title is presumed to be intended to pass upon a grant of real property. unless it appears from the grant that a lesser estate was intended; and in this case it clearly appears from the grant that a lesser estate was intended. Appellant invokes a principle laid down in section 1070-that, if several parts of a grant are irreconcilable, the former part prevails; and she now declares that this grant was to Rhinehart and his heirs and assigns; that these words conveyed an estate in fee, and that the subsequent language of

the deed attempted to create limitations and reservations inconsistent and irreconcilable with the title already created. We think the principle here invoked has no application to the present case. There are no irreconcilable parts to this grant. Indeed, there is but one part to it, and that is essentially the grant for a use. Many of the cases cited by appellant hold that a prohibition of the use of property granted, inconsistent with the title conveyed, is void. A notable case to this effect is Eldridge v. See Yup Co., 17 Cal. 44. It is there held that if land be conveyed in fee simple, and the habendum clause of the deed attempts to limit the use, such attempted limitation is of no effect, as being inconsistent with the fee title. But the present case is not analogous, and presents no such conditions, for no estate in fee ever passed to the grantee. For the foregoing reasons the judgment and order are affirmed.

We concur: VAN FLEET, J.; HARRISON, J.

108 Cal. 454

GAY v. DARE et al. (No. 19,322.)

preme Court of California. July 30. 1894

(Supreme Court of California. July 30, 1894.)
Contract—Action for Breach—Damages.

Plaintiff bought stock of a national bank under an agreement with defendant that, at the end of a year, he would take it back, and repay plaintiff the price and interest. Plaintiff gave notice, and, at the end of the year, tendered the stock. Between the notice and the tender the bank became insolvent. After the tender the comptroller of currency levied an assessment on the stock which plaintiff had to pay. Held, in an action for breach of contract, that plaintiff could recover, not only the purchase price and interest, but also the amount of the assessment.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by John H. Gay, Jr., against D. D. Dare and S. G. Havermale, to recover damages for breach of contract. A demurrer to the supplemental complaint was interposed by defendant S. G. Havermale. The same was sustained, and plaintiff appeals. Reversed.

Hunsaker, Britt & Goodrich, for appellant. C. L. Barber and Wellborn, Stevens & Wellborn, for respondents.

SEARLS, C. The California National Bank of San Diego was a national banking corporation, organized under the laws of the United States, and having its place of business at San Diego, Cal. On the 20th day of January, 1891, plaintiff subscribed for 100 shares of the capital stock of said corporation, and paid therefor the sum of \$12,500: In consideration of plaintiff's subscribing for and payment of said sum of money for said stock, the defendants herein jointly and severally agreed with him, in writing, that, in the event of said plaintiff "wishing to sell

the said stock at the end of one year from the date of issue, we [the defendants] will take said stock at the price paid for it, and allow the said John H. Gay, Jr. [plaintiff], ten per cent. on the investment of \$12,500 for the time said money was invested. Interest payable from the time the money is paid in. Said John H. Gay, Jr., agrees to give the undersigned four months' notice of his desire to dispose of said stock. [Signed] D. D. Dare. S. G. Havermale. J. W. Collins." On the 15th day of September, 1891, plaintiff, wishing to sell said stock in pursuance of the terms of said agreement, gave to the defendants notice of his desire to dispose of said stock to them, pursuant to the terms of said agreement; and four months thereafter, on, to wit, January 20, 1892, plaintiff offered to return said stock to defendants, and demanded of them performance of said agreement, and that they take and pay him for said stock said sum of \$12,500, and interest from January 20, 1891, at 10 per cent. per annum, which defendants refused to do. After plaintiff gave the defendants the four months' notice of his desire to sell the stock to them, but before the tender thereof and demand, as above stated, viz. on the 12th day of November. 1891, the California National Bank of San Diego, aforesaid, became and was and ever since has been insolvent. Plaintiff thereafter brought this action to recover the \$12,500 and interest, tendered and deposited in court the stock, etc. Defendant Dare was absent from the United States, and was not served with process. Defendant Collins was served with summons, made default, and thereafter died. Defendant Havermale answered. Subsequent thereto, the comptroller of the currency of the United States, on the 15th day of May, 1892, levied an assessment upon the stock of the insolvent bank to pay its debts, which amounted to \$10,000 upon the 100 shares held by plaintiff, which sum he was compelled to pay, and did pay, to the receiver of the bank. Thereafter plaintiff filed a supplemental complaint, setting out the levy of said assessment and the payment thereof by him, and sought to recover the same from defendants, in addition to the sum of \$12,500 and interest. Defendant Havermale demurred to the supplemental complaint, which demurrer was sustained by the court; and at the trial plaintiff had judgment for \$12,500 and interest, but it was adjudged that the plaintiff take nothing in the cause of action set out in his supplemental complaint. Plaintiff appeals from so much of the judgment as adjudged that he take nothing by reason of the facts set forth in his supplemental complaint on file in said action. The case comes up on the judgment roll, without a statement or bill of exceptions.

It is quite apparent from the agreement that the true intent of the parties to it was that if the plaintiff, at the end of one year from the date of the purchase, desired it, the defendants would repurchase the stock,

and repay his money, with interest at 10 per cent. The practical effect of this was to treat the sum paid by plaintiff as an investment, upon which he was to have interest, if he so desired, and gave the four months' notice prescribed in the agreement. This he did, as he had a right under the agreement to do. four months before the expiration of the year. The contention of respondents that plaintiff's notice was premature cannot be maintained. The agreement of defendants was to take the stock at the end of one year, if plaintiff desired to sell it. This he could do four months before the expiration of the year. The duty of defendants under their agreement was to take and pay for the stock when, after the four months' notice, it was, on the 20th day of January, 1892, tendered to them, and payment demanded. Not having done so, the question is, can plaintiff recover as damages the assessment which was thereafter, and on the 5th day of May, 1892, levied upon said stock, and which he was compelled under the statutes of the United States to pay and did pay? "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this Code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Civ. Code, § 8300. The vendor of personal property, in a suit against the vendee for not taking and paying for the property, has the choice ordinarily of either one of three methods to indemnify himself: "(1) He may store or retain the property for the vendee, and sue him for the entire purchase price. (2) He may sell the property, acting as the agent for this purpose of the vendee, and recover the difference between the contract price and the price obtained on such re-sale. (3) He may keep the property as his own, and recover the difference between the market price at the time and place of delivery and the contract price." Dustan v. McAndrew, 44 N. Y. 72; Dwiggins v. Clark, 94 Ind. 49; Sedg. Dam. (8th Ed.) § 753. The plaintiff here adopted the first of the methods above set forth, and retained the property for the vendees until suit was brought, when he deposited it in court for their benefit. This he had a right to do. Indeed, in all that class of cases where a purchaser of chattels pays the price, but stipulates that, after a trial of the property purchased, or at some future time, he may, if he so desires, return the property, and receive back the price paid, it is usually held that it does not amount in law to a contract to repurchase, but is, upon the exercise of the option, a rescission of the contract, and the title at once vests in the original vendor. Laubach v. Laubach, 73 Pa. St. 387; Thorndike v. Locke, 98 Mass. 340. Be this as it may, it was the duty of the defendants on the 20th day of January, 1892, to receive the stock and repay plaintiff his money, with interest, which they refused to do. One of the results of such refusal was that plaintiff was compelled to pay an assessment of \$10,-00b, subsequently levied upon the stock. Upon a tender by plaintiff and refusal to accept and pay by the defendants, the former held the stock as the trustee for defendants; and, as such trustee, he was entitled to all necessary expenses for which he became liable and paid by virtue of his position. The assessment was a consequential damage, it is true, which arose from the stock standing in the name of plaintiff; but it was a consequence of the refusal of the defendants to take the stock at the time they had agreed to do, and it was a proximate result of their The vendor of chattels, in cases refusal. where the vendee refuses to accept and pay for them pursuant to agreement, and who thereafter holds them as the agent or trustee of the vendee, not only may, but must, at his peril, take care of and protect the property for his principal or beneficiary, and is entitled to compensation therefor as damages consequential of the breach of the contract. This doctrine has been applied to the storage of grain and other personal property, to the feed and care of animals, and to various other expenses incident to the nature, character, and condition of the property. McCracken v. Webb, 86 Iowa, 551. In such cases the loss is the natural result of the breach of the contract, and is so near in its casual sequence to the injury or wrong that the law takes it in the account in its estimate of what is just compensation. Spelling on Private Corporations, at section 501, says: "After a call has been made, the corporation has a cause of action against the shareholder at the time of making it: and this cause of action cannot be extinguished except by its consent. But between the immediate parties the transferrer has recourse against his immediate transferee for such calls and assessments as be has been compelled to pay pending registration,"-citing Castellan v. Hobson, L. R. 10 Eq. Cas. 47. The case cited fully sustains the doctrine enunciated in the text. the rule otherwise, one who contracts for the purchase of stock in a corporation to be delivered in the future, upon which he is certain assessments will be levied, may, by violating his contract to receive the stock, devolve upon the vendor the necessity of paying the assessment, and then, if the stock has not been sold, tender payment and demand his stock; or where payment has been made; and the stock delivered, he may, by neglecting his manifest duty to have a transfer made upon the books of the corporation, compel the transferrer to pay future assessments. Such is not the law. One who contracts to purchase stock on a given date must take it at the time indicated in his contract cum onere; and, if he fails to do so, he is liable, not only for the purchase price and interest, but for all assessments levied

upon the stock after his breach of the contract which his vendor is compelled to pay thereon. It follows that the court below erred in sustaining the demurrer to the supplemental complaint, and that portion of the judgment appealed from should be reversed, and the cause remanded, with directions to the court below to overrule the demurrer of defendant Havermale to the supplemental complaint, with leave to answer, and that the issues tendered by such supplemental complaint be tried on the merits.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, so much of the judgment of the court below as is appealed from is reversed, and the cause remanded, with directions to the court below to overrule the demurrer of defendant Havermale to the supplemental complaint, with leave to said Havermale to answer, and that the issues tendered by such supplemental complaint be tried on the merits.

(4 Cal. Unrep. 733)

Ex parte MURPHY. (No. 21,14%) (Supreme Court of California. Aug. 4, 1894.) Habbas Corfus—Return—Expiration of Sentence—Escapes.

When in habeas corpus the sheriff returns that he holds the prisoner by virtue of a commitment to the house of correction for three years, and the commitment bears a date more than three years old, the court cannot consider an unauthenticated statement of dates when the prisoner escaped and was recaptured, and of the date when his term will end, the same being pinned to the sheriff's return, as proof that the prisoner has not in fact served his term.

In bank.

Habeas corpus ex parte Thomas Murphy. Petitioner discharged.

G. E. Colwell, for petitioner.

PER CURIAM. The petitioner was convicted of grand larceny, in the superior court of the city and county of San Francisco, March 1, 1889, and on March 9, 1889, was sentenced to be confined in the house of correction of said city and county for the term of three years. Upon his petition and averment that he is illegally restrained of his liberty by the sheriff of said city and county, a writ of habeas corpus was issued out of this court, directed to said sheriff, and to the said writ the sheriff made return that he holds the petitioner by virtue of a commitment is sued under the aforesaid judgment, said commitment consisting of a certified copy of the judgment. As the commitment bears date March 9, 1689, it appears upon its face that the period of confinement for which the petitioner was sentenced has expired, and, as the sheriff presents no other authority for restraining him of his liberty, it follows that he is entitled to be discharged. It was suggested at the first hearing of the matter that the

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petitioner had in the meantime escaped from the house of correction, and that he had not in fact been confined for the full period of his sentence. Thereupon leave was given to the sheriff to amend his return, for the purpose of showing these facts, but he has failed to make such showing, and again returns that he holds him by virtue of the original com-There is attached, by a pin, to the amended return filed by the sheriff, what purports to be a list of dates at which the petitioner escaped, and was recaptured, and the statement of the time when his term of confinement will expire. This list or statement is signed "Chas. Gildea, Supt.," but is not authenticated in any other mode, nor is it in any way referred to by the sheriff, and cannot be considered as giving to that officer any authority to retain the petitioner in his custody. The petitioner is discharged.

103 Cal. 441 CLUGSTON v. GARRETSON. (No. 19,313.)

(Supreme Court of California, July 27, 1894.)
SLANDER — WORDS ACTIONABLE PER SE — CHARGING ARSON.

It is actionable per se to charge one with setting fire to a wood yard in which is located a warehouse, as such act is arson, under Pen. Code, § 447, 448.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by B. D. Clugston against G. G. Garretson to recover damages for slander. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Conklin & Hughes and V. E. Shaw, for appellant. Works & Works and D. L. Withington, for respondent.

VANCLIEF, C. Action for damages alleged to have been suffered by plaintiff in consequence of defamatory words spoken by defendant of and concerning the plaintiff. The following is a copy of the complaint: "(1) That on the 7th day of March, 1893, a warehouse in a yard owned by the Pacific Wood and Coal Company was set on fire, and it was suspected that it had been feloniously set on fire. (2) That on the 7th day of March, 1893, at San Diego, the defendant, in the hearing of C. K. Stewart and sundry other persons, spoke of and concerning the plaintiff the false and scandalous words following, to wit: 'Clugston set fire to the yard; set fire all along here.' And that upon the 8th day of March, 1893, in the presence of Thomas Croghan and sundry other persons, the said defendant spoke of and concerning the plaintiff the false and scandalous words following: 'Clugston made a good job of it. Clugston set the yard afire. He was seen going out of the yard ten or fifteen minutes before the fire broke out.' And upon the 8th day of March, 1893, in the presence of Herman Mosher and sundry other persons,

the said defendant spoke of and concerning the plaintiff the false and scandalous words following, to wit, 'Clugston set the fire.' (3) That the defendant meant thereby, and was so understood by those hearing him, that the plaintiff had feloniously set fire to said yard. (4) That the said words were false and defamatory. That the plaintiff has sustained damage by reason of said false and scandalous words in the sum of twenty thousand dollars. Wherefore the plaintiff prays judgment against the defendant in the sum of twenty thousand dollars." Defendant demurred to the complaint on the ground "that it does not state a cause of action." The demurrer was overruled, and defendant answered as follows: "Comes now the defendant, and by leave of court files this, his amended answer, and admits the allegations of paragraphs 1 and 3 of said complaint; admits that he spoke concerning the plaintiff the words alleged in paragraph 2 of said complaint to have been spoken by him. But denies that said words, or any of them, were either false, scandalous or defamatory; on the contrary, this defendant, upon information and belief, alleges that each and all of said words charged to have been spoken by him are true. Defendant denies that plaintiff has sustained damage by reason of said words used by defendant, or any of them, in the sum of twenty thousand dollars, or any other sum. And, further answering, defendant avers: That at the time at which said words were spoken by him certain litigation was pending between plaintiff and this defendant, with others, over an election of a board of directors of the Pacific Wood and Coal Company, and involving the right to possession and control of the said yard, and this defendant, with his associates, had acquired possession and control of said yard, and was in possession at the time of said fire, to wit, March 7, 1893; that by reason of this, defendant and his associates being in control and possession of said yard, and by reason of defendant and others then in possession of said yard preventing said Clugston from gaining control and possession thereof, and carrying on the wood and coal business in the name of said Pacific Wood and Coal Company, he, the said Clugston, became greatly angered and exasperated, and made numerous threats of doing bodily harm to this defendant and others in control of said yard as well as the management of the business of said company, and at divers times expressed himself, in substance, 'that he would rather see the property destroyed than be in the possession and control of defendant and his associates.' all of which was known to this defendant at the time he spoke the words set forth in paragraph 2 of said complaint." The jury returned a general verdict for plaintiff, assessing the damage at \$800; and also a special verdict on issues submitted by the court to the effect: (1) That at the times the words were spoken, and at the time the answer was

filed, the defendant believed the words spoken were true, and that facts known to defendant and information given to him warranted such belief; (2) that defendant was not guilty of actual or express malice, and that nothing was found or allowed as exemplary damages; (3) that before filing his amended answer the defendant endeavored in good faith to ascertain whether the charge made by him against the plaintiff was true; (4) but that the words spoken were false. Judgment was rendered for plaintiff in accordance with the general verdict, and defendant brings this appeal from the judgment on the judgment roll containing a bill of exceptions to instructions given to the jury at request of the plain-

1. It is contended that the court erred in overruling defendant's demurrer for the reason that the words alleged to have been spoken by defendant are not per se actionable. It is claimed that the words spoken charge plaintiff with having set on fire only the yard in which the warehouse stood, and that setting fire to a yard is not arson nor any other crime. This, I think, is erroneous in two respects: In the first place, the yard in which the warehouse is alleged to have been set on fire should be regarded prima facie as "appurtenant to or connected with" the warehouse, and therefore within the definition of the word "building" given in section 448 of the Penal Code; and the yard being so appurtenant to or connected with the warehouse, the setting of it on fire was arson. Pen. Code, §§ 447, 448. In the second place, it is alleged that "a warehouse in a yard * * * was set on fire," and that on March 8th, in the presence of Mosher and others, defendant said, "Clugston set the fire." Under the circumstances alleged, these words obviously meant that Clugston set fire to the warehouse, and must have been so understood by Mosher and others to whom they were spoken; and no innuendo was necessary to show the meaning. That he had said to others on March 7th that "Clugston set fire to the yard all along here," and "made a good job of it," is not inconsistent with what he said to Mosher and others on the next day. It was not necessary to allege that the warehouse was consumed or destroyed by the fire. Pen. Code, § 451. If distinct causes of action are not separately stated, or not stated with sufficient certainty, these defects were waived. Code Civ. Proc. § 434. As having a general bearing on the question of sufficiency of the complaint, the following cases are referred to: Chamberlain v. Vance, 51 Cal. 75; Fleming v. Albeck, 67 Cal. 226, 7 Pac. 659; Thompson v. Barkley, 27 Pa. St. 263. I think the complaint is sufficient to stand the test of a general demurrer.

2. The only ground of objection to instructions given to the jury is that they assume that the words admitted to have been spoken under the circumstances alleged in the com-

plaint and answer imputed to plaintiff the crime of arson. As above shown, the words alleged to have been spoken are actionable per se. The answer expressly admits the speaking of the words under the circumstances alleged in the complaint, and alleges no circumstance tending to show that they were spoken, or intended to be understood, in any other than their proper and ordinary sense; but does allege circumstances in mitigation, tending to show that defendant had reason to believe that plaintiff did set fire to the property, and a motive for imputing the crime to him. The first two instructions given embody and sufficiently exemplify the only ground of objection to instructions. They are as follows: "This is an action for slander for words alleged to have been spoken by the defendant, charging the plaintiff with the crime of arson. The defendant admits the speaking of the words, but alleges that the words spoken were true, and sets up certain mitigating circumstances." "Under these pleadings no proof was necessary on the part of plaintiff to make out his case. The defendant having admitted the speaking of the words, the law presumes that the words were both false and malicious. Therefore the burden of proving the truth of the words or any facts tending to mitigate the damages was on the defendant." At request of defendant the court, among others, gave the following instructions: "If the jury do not find the plea of justification to be true, but do find the defendant guilty, then the jury, in estimating the amount of plaintiff's damages, may take into consideration any facts proven tending to show whether or not the utterance of the words complained of was made by the defendant in the belief that they were true. Though the jury may believe from the evidence that the defendant was guilty of speaking the words charged in the complaint, and that said words are untrue, still, if the jury find from the evidence that the words were spoken without actual malice on the part of defendant, but in good faith believing them to be true, then, and in that case, the verdict of the jury should be confined to the actual damages sustained by plaintiff." I think the jury were properly instructed, and that the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

THOMAS v. LANE et al.

(Supreme Court of Arizona. Jan. 16, 1894.)

APPEAL-ASSIGNMENT OF ERRORS.

Where no assignment of error is filed, a judgment will be affirmed unless fundamental error appears on the face of the record.



Appeal from district court, Pinal county; before Justice Owen T. Rouse.

Action between David S. Thomas and J. M. Lane and others. From the judgment, Thomas appeals. Affirmed.

F. J. Heney, for appellant. W. R. Stone and Kibbey & Israel, for appellees.

HAWKINS, J. Appellees moved to affirm the judgment for several reasons, viz.: (1) That there is no bill of exceptions filed; (2) no statement of facts filed; (3) no assignment of errors was filed. An examination of the record discloses the fact that no assignment of errors was filed. We do not think it necessary to examine as to the other defects. Paragraph 940, Rev. St. 1887, provides that in all cases the appellant or plaintiff in error shall file with the clerk of the court below an assignment of errors distinctly specifying the grounds on which he relies, and all errors not so distinctly specified shall be considered by the supreme court as waived. The statute is conclusive of the question, and has often been construed by this court. Sutherland v. Putnam (Ariz.) 24 Pac. 320; Gila R. I. Co. v. Wolfley, Id. 257; U. S. v. Tidball (Ariz.) 29 Pac. 385. No fundamental error of which this court takes notice without a formal assignment of errors appears on the face of the record. The court appears to have had jurisdiction of the subject-matter and of the parties to the action, and the pleadings warrant the judgment. The judgment is affirmed.

BAKER, C. J., and SLOAN, J., concur.

DOBSON v. OWENS, Sheriff. (Supreme Court of Wyoming. July 25, 1894.) DISMISSAL OF APPEAL.

An appeal will not be dismissed where the transcript shows that a demurrer was overruled, which ruling is assigned as error, because the transcript does not show that time was asked or given to present a bill of exceptions, when it does show that a bill was presented, in vacation, within the time given for settlement, as the statute provides.

Error to district court, Weston county; William S. Metz, Judge.

Action by Ella Dobson against John Owens, sheriff. Demurrer to answer overruled, and plaintiff brings error. Motion to dismiss denied.

Lacey & Van Devanter and M. B. Camplin, for plaintiff in error. E. E. Lonabaugh, for defendant in error.

GROESBECK, C. J. The defendant in error moves to dismiss the proceedings in error for want of jurisdiction in this court, because, in effect, the journal entries of the court, as embodied in the transcript, do not show that time was asked or given to reduce the exceptions of plaintiff in error to writing and present them to the court, al-

though the bill of exceptions shows that the plaintiff in error presented her bill of exceptions to the judge of the court before whom the cause was tried, in vacation, within the time given for settlement and allowance, which is permitted by the express provision of statute. The transcript of the journal entries of the district court does not show that time was asked or given to the plaintiff in error to prepare and present her bill of exceptions for allowance to the court or judge. However, the transcript-which, it is admitted, is defective-shows that the demurrer of the plaintiff in error to the answer of the defendant in error in the trial court was overruled, and an exception was taken to the adverse ruling of the court by the plaintiff in error, and this ruling of the trial court is assigned as error in the petition in error. This is sufficient to confer jurisdiction upon this court, without regard to the matters presented in the bill of exceptions. The pleadings in the trial court are a part of the record, and there is no necessity for incorporating them in the bill of exceptions. The ruling upon a demurrer to a pleading is not cause for granting a new trial, and a motion for a new trial is not necessary to preserve an exception taken to such ruling. Perkins v. ' McDowell, 3 Wyo. 328, 23 Pac. 71. It appears, therefore, that the record of the court below presented by the transcript shows that an exception to the ruling of the trial court overruling the demurrer to the answer of defendant was taken by the plaintiff, and the petition in error contains an assignment of error based on this action of the court. So, notwithstanding any seeming conflict between the bill of exceptions and the record of the court, as shown by its journal entries, sufficient matter is presented to this court, upon alleged errors in settling the pleadings, to give this court jurisdiction of The motion to dismiss is denied.

Counsel for plaintiff in error having suggested a diminution of the record, and having asked leave to file an amended transcript containing all the journal entries of the court in usual form, the request is granted, and the amended transcript is here substituted for the original transcript filed. This presents for review, with the assignment in error of the trial court, the action of the trial court in overruling the demurrer of the plaintiff below to the answer of the defendant.

CONAWAY and CLARK, JJ., concur.

SNOHOMISH COUNTY ABSTRACT CO. v. ANDERSON et al.

(Supreme Court of Washington. July 9, 1894.) Counties—Contracts of Assessor—Liabilities.

The board of commissioners made an order refusing to allow the assessor to use plain-

tiff's abstract books in making the assessment, but, notwithstanding this, the assessor did use the books, and agreed that the county would pay therefor. *Held*, that the county was not liable.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by the Snohomish County Abstract Company against Fred S. Anderson and others, commissioners of Snohomish county, and Snohomish county to recover for the use of abstract books by the county assessor. Judgment for plaintiff, and defendants appeal. Reversed.

A. D. Austin, for appellants. Coleman & Hart, for respondent.

SCOTT, J. This action was brought by the plaintiff to recover for the use of its abstract books by the county assessor in making the county assessment in 1892. The allegations of the complaint were admitted upon the trial, excepting that, "without the information so furnished by the plaintiff, the assessor could not have made the assessment," and that "the information and the use of such books was of the value of five hundred dollars." The cause was tried without a jury, and judgment was rendered for the plaintiff for the sum claimed.

Appellants contend that the charge was an unauthorized one, for which the county is not liable. It is insisted by the respondent that the only question we can consider is whether the county is liable for the reasonable value of the information so furnished. from the standpoint that the use of such books was indispensable to the making of the assessment. The testimony taken at the trial is in the record, and also certain findings of fact, one of which is "that, without the information so furnished by plaintiff, the assessor of Snohomish county could not have made an assessment of said county for the year 1892, either within the time prescribed by law, or at all." We cannot concede the force to this finding which the respondent contends it should have as aforesaid, for we are bound to know, as a matter of law, that these books were not the only source from which the information required could have been obtained. Abstract books, of course, only show the information contained in the county records, although in a more convenient and abbreviated shape; and even if we should presume that the records were lost or destroyed, of which there was no proof, recourse could still have been had to the citizens. Consequently, it is evident that the use of such books was only a matter of convenience, and not of necessity. It is also evident that respondent's attorney so views the matter, for in his brief he says: "The assessor, desiring an abstract of the record title to real estate in Snohomish county, to aid him in making his assessment, made known his desires to the board of county commissioners," etc. The board of county

commissioners made an order refusing tocomply with such request. The assessor, however, entered into an agreement with the respondent for the use of its books, undertaking to bind the county therefor, notwithstanding said action of the commissioners. It may be that the most convenient and economical way of obtaining the information required was by the use of such books, yet, even if the commissioners would have been authorized to procure said books for such purpose, it is clear the assessor had no such authority without any authorization from the commissioners, leaving a direct refusal to permit him to procure the same out of the question. It might have been impossible for the assessor, individually, to have procured the necessary information; if so, it is usual in such cases to employ deputies to assist. But the impossibility of making the assessment otherwise would not have been enough to authorize or empower the assessor to take the course he did take. The use of a horse might have been necessary to enable the assessor to travel around more speedily, or within the time required, and the assessor, unaided, might have been unable to procure one, yet it would scarcely be contended that this would afford ground sufficient to authorize the commissioners to provide one, or to base a charge upon against the county, if the commissioners should refuse to; and yet such a charge could be sustained, if the one involved in this action could be, for they stand upon the same ground. Reversed and dismissed.

DUNBAR, C. J., and ANDERS, HOYT, and STILES, JJ., concur.

TOWN OF HAMILTON v. CHOPARD et al. (Supreme Court of Washington. July 9, 1894.)
MUNICIPAL IMPROVEMENTS — ASSESSMENT—VALIDITY OF CONTRACT.

1. In an action by a town to foreclose a lien growing out of an assessment for the improvement of a street the plaintiff must show that a contract for the work had been actually entered into, and it is not sufficient to show that the common council opened bids and awarded the work.

2. Where the proceedings of the common council in regard to letting the contract simply consist of opening bids and awarding the work, without stating the amount of the bids submitted, or the sum for which the work was awarded, they are insufficient to authorize the contract.

3. An assessment roll which merely gives names of owners, descriptions of property, amount charged against each lot, and the residences of owners, is not prima facie evidence of the regularity of the proceedings prior to the making of such assessment roll. Town of Elma v. Carney, 30 Pac. 732, 4 Wash. 418, distinguished.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by town of Hamilton against L. Chopard and wife and Frank Wilkeson and

wife to foreclose a lien growing out of an assessment. Judgment was rendered for defendants, and plaintiff appeals. Judgment affirmed.

I. E. Shranger, Sinclair & Smith, and N. W. Bolster, for appellant. Kerr & McCord and D. M. Woodbury, for respondents.

HOYT, J. This action was brought by appellant to foreclose an alleged lien growing out of an attempted assessment for the improvement of one of its streets. The formal allegations of the complaint as to the incorporation of appellant, and other matters of this kind, were admitted, but the allegations as to the improvement of the street, and the making of an assessment to pay for the same, were denied. Upon the issues thus made the cause went to trial. The plaintiff put in evidence—First, a general ordinance prescribing the method by which its streets should be improved, and assessments therefor made; second, the minutes of a meeting of its common council, from which it only appeared that certain bids for the improvement of Cumberland street were opened in the presence of the council, and that of W. H. Hakes accepted. These minutes do not contain the amount of any of the bids submitted, so that the acceptance of the bid of W. H. Hakes in no manner informed the court or anybody else of the amount for which he was to do the work specified in the contract. Plaintiff next introduced what is denominated in the statement of facts as the "Street Assessment Roll for Cumberland Street," but which was in the shape of a book, with certain columns marked and ruled upon it, from which it only appeared that such columns were headed respectively with the words, "Name," "Lot," "Feet." "Addition," "Street," "Block," "Amount," "Residence," and thereunder, respectively, "L. Chopard," "20," "16." "Second," "Cumberland," "100," "70.95," "Seattle;" and this was all the information that could be gathered from the so-called "assessment roll." Plaintiff then called Fred E. Pape, who testified only to the fact that he was the auditor of Skagit county, that lot 20 in block 16 fronted on Cumberland street, and that such street had been properly dedicated. These are all the proofs that the statement of facts shows to have been introduced or offered before plaintiff rested its When it had so rested, defendants made a motion for a nonsuit, which was granted, and from the judgment rendered thereon this appeal has been prosecuted.

The facts shown by these proofs were not sufficient to establish a lien. It nowhere appeared therefrom that any contract for the improvement of the street had ever been entered into. The proceedings of the council above referred to were entirely insufficient for that purpose; and, as there was no other proof upon the subject, excepting the street assessment roll, it was not shown that any

facts existed which under the ordinance authorized the making of such roll. We do not understand from appellant's brief that it very strenuously contends that sufficient facts were shown to authorize the court to find that an assessment had been regularly made. Its contention that the judgment should be reversed is founded upon its understanding of the ruling of this court in the case of Town of Elma v. Carney, 4 Wash. 418, 30 Pac. 732. But, even if that case was to receive the interpretation contended for by appellant, not enough appeared in reference to the so-called "street assessment roll" to bring it within the definition of such roll contained in the opinion in that case. When it was said therein that the assessment roll was prima facie evidence of the regularity of the proceedings, an assessment roll which had upon its face such authentication and certification as constituted it a warrant for the collection of taxes was contemplated. The so-called "assessment roll" introduced in evidence in this case, so far as it appears from the statement of facts, had nothing whatever upon it to authenticate it in any manner. It was simply a column of names, descriptions, and figures, and was evidence of nothing. But, even if this so-called "assessment roll" had been such as to bring it within the rule announced in the case above cited, it would not follow that such rule could have force when the affirmative proof offered on the part of the plaintiff showed that the council had never taken the steps necessary to give it jurisdiction to make such a roll. Where the plaintiff seeks, as in this case, to put in all the proceedings, enough must appear to show that the assessment roll was made in pursuance of the authority of the common council, before it can have force in a suit where the fact of the making of the assessment was put in issue by the pleadings. In towns of this class entire regularity in the proceedings cannot be expected, and technical objections should be overlooked by the courts; but matters of substance cannot be so overlooked without a violation of the constitutional provision as to the taking of property without due process of law. The judgment will be affirmed.

DUNBAR, C. J., and SCOTT, ANDERS, and STILES, JJ., concur.

STATE ex rel. McMARTIN v. WHITNEY. (Supreme Court of Washington. July 10, 1894.) DISTRICT ATTORNEY-ELECTION-FILLING VACAN-CIES.

Laws 1885-86, p. 59, provided for the election of prosecuting attorneys by districts, consisting in some cases of one, and in other cases of several, counties. Vacancies were filled by the governor. Section 5, art. 11, of the constitution, afterwards adopted, required the legislature to provide by law for the election of prosecuting attorneys in the several counties. By section 6 the county commissioners filled va-

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cancies. Laws 1889-90, pp. 302, 304, and Laws 1891, p. 6, enumerate the county officers, one being a prosecuting attorney, but do not provide for their election. *Held*, that the law of 1886 was amended by the constitution so as to require the election of a prosecuting attorney in each county, and that the commissioners, and not the governor, had power to fill vacancies.

Appeal from superior court, Snohomish county; Henry McBride, Judge.

Action by the state of Washington, ex rel. William H. R. McMartin, against Lewis C. Whitney, to try title to office. Judgment for defendant, and plaintiff appeals. Affirmed.

Fishback, Sapp & Ferry, for appellant. Whitney & Frame, for respondent.

STILES, J. A vacancy having occurred in the office of prosecuting attorney of Snohomish county, the respondent was on May 9, 1893, appointed by the board of county commissioners to hold the office. On the same day the governor appointed the appellant. Both appointees qualified, but respondent obtained possession of the office, and appellant brought this action to try the title. The case involves the question whether the governor or the county commissioners possess the power of appointment to fill a vacancy in the office in question.

The only law upon our statute books which pretends to provide for the election of prosecuting attorneys, and defines their authority in detail, is that of February 4, 1886 (Laws, p. 59). That act prescribed that there should be elected "in the district comprising * * * county one prosecuting attorney." In some cases there was one county, and in others there were several counties, in a district. King, Kitsap, and Snohomish counties were thus united as a district, in which one attorney only was provided. The governor was by that act authorized to fill vacancies. The act of March 26, 1890, entitled "An act classifying the counties according to population, enumerating the county officers,' etc.. confused matters a little by naming as a county officer "one county attorney," and omitting all mention of prosecuting attorneys. But the general impression was that this was a mere lapsus linguae; and this was confirmed by the act of February 3, 1891, which substantially declared county attorneys and prosecuting attorneys to be the same officers. Section 5, art. 11, of the constitution imposed upon the legislature the duty of providing, by general and uniform laws, for the election in the several counties of prosecuting attorneys and other county, township, and district officers; and section 6 of the same article imposed upon the boards of county commissioners the duty of filling vacancies in all county offices. legislature of 1890 did not provide for the election of any county officers, however; the act of March 26th having for its object only the fixing of salaries, and some provisions in regard to deputies, fees, etc. Nor has there been any legislation on the subject since, the existence of all the county offices in the state depending entirely upon laws passed during the territorial period. The electors in every county in the state. however, at the elections of 1890-92, treated the office of prosecuting attorney as though the constitution had amended the act of 1886 so as to require the election of such an officer in each county, whether it had theretofore been associated with some other county in a district or not; and rightly so, as both parties to this case must concede, since, if the contrary were decided, there would be no prosecuting attorney for Snohomish county, but a prosecuting attorney for the district composed of King, Kitsap, and Snohomish counties. We think the popular interpretation was right, in this, and that the amendment was carried further, so that the prosecuting attorneys became, from the election of 1890, county officers, simply, without any "district" appellation, which had theretofore attached to them wholly because some of them happened to be elected by the joint vote of several counties. It follows that the provision of the constitution in regard to filling vacancies affects this office, and that the respondent is rightfully entitled to it. wherefore the judgment is affirmed.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

VOLLRATH v. CROW et al.

(Supreme Court of Washington. July 10, 1894.) EVIDENCE OF CUSTOM—NEW TRIAL — MISCONDUCT OF JUROR.

1. Where both parties admit an express agreement as to where the logs were to be scaled and delivered, but the evidence as to the place of delivery is conflicting, evidence of a general custom, in case of a sale of logs, to scale and deliver them at the mill, is not admissible.

missible.

2. A new trial may be granted where, during the trial, plaintiff and a juror play cards and drink together at a saloon, though it does not appear that they talked about the case, or that plaintiff paid for the liquor.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by Otto Vollrath against Thomas Crow and another to recover the amount paid on an accommodation note for defendants. Judgment for plaintiff, and defendants appeal. Reversed.

Bell & Austin and W. R. Andrews, for appellants. Fishback, Sapp & Ferry and A. W. Frater, for respondent.

SCOTT, J. The plaintiff brought this action to recover the amount of a promissory note for \$400, which he alleged he had executed to defendants, without any consideration other than for their accommodation, and which they had negotiated, and he had been compelled to pay. The defendants admitted

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the making and negotiation of the note, but denied that it was without any other consideration than their accommodation, and, by way of counterclaim, alleged that, in January previous to the execution of said note, they had sold and delivered to the plaintiff a quantity of cedar logs, and that the plaintiff had not paid any part of the purchase price, otherwise than as said note was a partial payment. The plaintiff replied, denying this affirmative matter. Verdict and judgment for plaintiff.

The controversy was as to whether the title had passed. The plaintiff testified that the logs were to be scaled and delivered at his mill, according to the terms of the contract. The defendants contended that the logs were to be accepted according to a scale made at Priest's point. The logs were taken from this place, and were lost before reaching the mill. The plaintiff was allowed to introduce proof to show a general custom, in case of a sale of logs, to scale and deliver them at the mill. This testimony was objected to by the defendants, and its admission is alleged as error. We think the point is well taken. The contract was not indefinite. There was simply a controversy as to what the contract was. Both parties admitted that there was an express agreement as to where the logs were to be scaled and delivered. In such a case, proof of a custom to scale at the one place or the other was inadmissible. "Where a contract is by word of mouth, and the controversy is not as to the meaning of the terms used by the parties, but as to what precise terms had been in fact used, evidence of custom is not admissible." Lawson, Usages & Cust. § 187. And see Sanford v. Rawlings, 43 Ill. 92.

A great many questions have been raised on this appeal; but as many of them are unimportant, and none of them are likely to arise upon a new trial, and owing to the lengthy discussion it would take to pass upon them, we shall not undertake to do so. There is one, however, which we cannot allow to pass without comment. A motion for a new trial was made by the defendants, and proof was submitted that, during the progress of the trial, the plaintiff and one of the jurymen were playing at cards and drinking together at a saloon; that they were walking together, and conversing with each other. This was not contradicted, although affidavits were submitted to the effect that the plaintiff and the juryman in question did not converse about the case. Nothing was said as to whether the plaintiff or the juryman paid for the liquor which was drunk by them while they were playing cards together. It seems that defendants were unable to obtain any proof in relation thereto, but we think it is fair to assume that it was paid for by the plaintiff. It was a matter within his knowledge, and he had an opportunity to show the fact, if it was otherwise, and, having failed to do so, it should be presumed against him, under the circumstances. While we do not

say what we would do, as an appellate court, if the disposition of the case rested upon this one question, as the granting of a new trial is largely intrusted to the discretion of the lower court, yet we may safely say that, were the proposition before us originally as a trial court, we would grant the motion for a new trial upon this ground, if there were no other reasons to warrant it. Such conduct upon the part of the plaintiff and the juryman was reprehensible in the extreme. Instead of seeking each other's soclety, they should rather have avoided it. Trials of causes should have the appearance of fairness, and it would tend greatly to bring judicial proceedings into disrepute if matters of this kind should be overlooked or tolerated. We fully agree with the contention of appellant that a verdict rendered by a jury, a portion of whom are found to have been promenading the street, conversing, playing at cards, and drinking with the successful litigant, has the appearance of anything but fairness; and let it once be understood that such things are permissible, and we will be treated to the spectacle of litigants vieing with each other, in both private and public places, in attempts to win the good will and favor of the jury, and the administration of the law greatly scandalized thereby. Reversed.

DUNBAR, C. J., and ANDERS, HOYT, and STILES, JJ., concur.

HARTSON v. DALE et al.

(Supreme Court of Washington. July 10, 1894.) COUNTY COMMISSIONERS—COMPENSATION—INJUNC-TION.

1. Under Sess. Laws 1893, c. 75, § 3, providing that, when a county commissioner shall claim any compensation except the per diem and mileage for the regular sessions of the board, he shall file a petition, to be passed upon by the superior court, the commissioners have no authority to draw a warrant for services rendered by a commissioner in attempting to prevent the state board of equalization from raising the tax assessment of the county.

2. Nor could pay for such services be made a demand upon the county salary fund.

3. The fact that a county treasurer has paid a warrant drawn without authority on the treasurer has a county treasurer. ury pending an appeal from a judgment sustaining a demurrer to a complaint seeking to restrain his doing so, is not ground for dismissing the appeal and thereby depriving appellant of his costs.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by D. H. Hartson against John L. Dale and others. From a judgment for defendants, plaintiff appeals. Reversed.

Million & Houser, for appellant. Wells & Joiner, for respondents.

DUNBAR, C. J. This is an action brought by appellant as a resident and taxpayer of Skagit county against respondents to cancel and enjoin the payment of a certain warrant,

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issued by the auditor to respondent Dale, an interest in the warrant being claimed by respondent Moody, and Dunlap being made a party that he may be enjoined from paying the warrant as treasurer. The complaint alleges that the respondent Dale is chairman of the board of county commissioners of Skagit county, and that on the 2d day of September, 1893, while acting as such chairman, together with only one other member of the board, and while the board was in session, made an order authorizing respondent Dale to attend the state board of equalization at Olympia, claiming to represent the county of Skagit, for the purpose of inducing said state board of equalization not to interfere with the assessment roll of said Skagit county by raising the amount of assessed property of said Skagit county as assessed by the county assessor thereof; that such services rendered by said Dale were not for attendance upon any regular session of the board of county commissioners, but that such services were rendered in fact without any authority of said board of county commissioners; that the said defendant Dale afterwards presented a bill to the board of county commissioners of Skagit county for \$75 for his services in so attending the meeting of the said board of equalization, and that the board of county commissioners unlawfully and without warrant or authority of law allowed and ordered paid to the said Dale the sum of \$75, and directed that said sum be paid said Dale by warrant drawn upon the salary fund of Skagit county; and alleges that the auditor of Skagit county, in pursuance of said order, did, on the 28th day of September, 1893, draw his warrant upon said Dunlap, as treasurer of said county, payable out of the salary fund, for the sum of \$75; that the warrant was duly presented. and indorsed by the treasurer, "Presented, and not paid for want of funds." The complaint alleges that the plaintiff is a taxpayer of the county of Skagit, and has been for three years last past, and alleges all other necessary qualifications, and asks that the treasurer be restrained from paying the warrant. Respondents interposed a demurrer to the complaint, which, upon a hearing by the court, was sustained. The plaintiff electing to stand upon his complaint, a judgment of dismissal was duly entered, and from the judgment the appellant appeals.

Section 3, c. 75, of the Session Laws of 1893 provides that: "Whenever a county commissioner of any of the classes of counties mentioned in section 2 hereof [which embraces the commissioners in this case] shall claim or demand pay or compensation for attendance upon extra sessions of the board of county commissioners, or shall claim or demand pay or compensation for any extra services or expenses, or for any services except the per diem and mileage allowed for attendance upon regular sessions of said board, he shall make out and file with

the clerk of the superior court aforesaid a petition showing in detail the amount claimed, together with a statement of the facts which he claims made such extra services and expenses necessary; which petition shall be verified by the oath of the commissioner claiming thereunder." And the statute proceeds at length to point out the manner in which said claim shall be examined and passed upon by the court. It seems to us that the mere citation of this law is sufficient to establish the correctness of appellant's claim that this warrant was issued without authority of law by the commissioners. It is against the policy of the law to allow commissioners to pass upon their own bills where the services rendered are not especially provided for and settled by the law. It is no part of the duty of a commissioner, which is imposed by the law, to visit the state board of equalization in the capacity of a lobbyist in the interests of the county, or in any other capacity; and the law very wisely provides that in the incurring of all such expenses as those incurred in this case by the commissioner, if it could be legally incurred at all,-a question upon which it is not now necessary to pass,-a disinterested tribunal should pass upon the amount which such services were worth. That these services were not any part of the services required of the commissioner as a commissioner is admitted and asserted by respondent on page 8 of his brief, where he says: "These services rendered by respondent Dale not being any of the duties imposed by law upon such an official, his position was the same and no more official than would have been the service of an attorney or other representative appointed for this purpose by the board of county commissioners." If, then, the services rendered were not official, or the demand for compensation, in the language of the law, "was for any services except the per diem and mileage allowed for attendance upon regular sessions of said board," it plainly falls under the provisions of section 3, above cited, and the claim should have been presented to the tribunal in the manner required in said section. Again, the order making this demand a claim against the salary fund is entirely wrong, and the commissioners had no more authority to order it paid out of said fund than any other bill which had been created against the county outside of the salaries of officers provided for in the law creating a salary fund.

There is a supplemental record in this case, and a motion to dismiss, based upon affidavits showing that since the appeal was taken in this case the warrant in controversy has been paid by the treasurer; but this court refuses to consider this showing, for it seems to us it would be extremely inequitable to allow any subsequent action of the respondent to have the effect of subjecting the appellant to the costs of his appeal, which we think was meritorious. Therefore



the judgment of the court in sustaining the demurrer will be reversed, and the cause remanded, with instructions to the lower court to overrule the demurrer to plaintiff's complaint.

HOYT, J. I concur in the result.

SCOTT, ANDERS, and STILES, JJ., concur.

(26 Or. 174)

WALLACE V. CITY & SUBURBAN RY. CO. (Supreme Court of Oregon. July 80, 1894.)

ELECTRIC STREET RAILROAD —ACTION FOR DEATH OF CHILD — NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE - QUESTION FOR JURY - INSTRUC-

1. In an action against a street-car company for the death of a child, about six years old, on a street crossing near a school, it appeared that while children were playing near the track that while children were playing near the track the car was run over the crossing at a rate of 10 miles an hour. The evidence left it uncertain as to whether the child suddenly appeared on the track in front of the car. Held, that a monsuit was properly refused.

2. It was not error to charge that, though the child was negligent in going on the track, yet, if defendant's servants saw its dangerous position, it was their duty to exercise all the diligence then possible to avoid injuring her.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by John E. Wallace, administrator of the estate of Mary Bodiala, deceased, against the City & Suburban Railway Company, to recover for the death of plaintiff's intestate, caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Affirmed.

R. Mallory, for appellant. N. D. Simon, for respondent.

BEAN, C. J. This is an action to recover damages for the death of plaintiff's intestate, caused by the alleged negligence of the defendant corporation in the management and operation of one of its electric street cars on Savier street, in the city of Portland. negligence charged in the complaint is that a car, while being run and operated recklessly, negligently, and carelessly, and without the exercise of any care and attention, and at an excessive and dangerous rate of speed, ran over and killed the plaintiff's intestate, a child about six years of age, while she was lawfully crossing the track at a public street crossing.

At the close of plaintiff's testimony the defendant submitted a motion for a nonsuit, which being overruled, the trial resulted in a verdict and judgment in favor of plaintiff, from which defendant appeals, and now insists that the court erred in overruling its motion for a nonsuit. The refusal to nonsuit was proper, unless the evidence for the plaintiff, taken in its most favorable light, would not authorize the jury to find a verdict in his favor. On a motion for a nonsuit, every intendment and every fair and legitimate inference which can arise from injury, or that it would not have occurred

the evidence must be made in favor of the plaintiff, and the court must assume those facts as true which a jury could properly find under the evidence. "Before a court is authorized to grant a nonsuit for insufficiency of evidence," says Lord, C. J., "it must appear that, admitting the testimony of plaintiff to be true, and giving him the benefit of every inference that is fairly deducible from it, the plaintiff has still failed to support his In fact, it is enough if the evidence action. offered tends to show facts sufficient to sustain the action, though remotely." Herbert v. Dufur, 23 Or. 462, 32 Pac. 302. The only question we have to determine, then, is whether there was any evidence offered by plaintiff, from which the jury could lawfully find that the death of plaintiff's intestate was caused by the negligence of the defendant in operating its cars at an excessive and dangerous rate of speed.

The main facts may be briefly stated as follows: The defendant's cars run east and west on Savier street, and at or near the intersection of that street with Nineteenth street there is a parish school, which at the time of the accident was attended by the deceased and a number of other children, who were accustomed, as was known to the persons in charge of the car, to use the crossing at which plaintiff's intestate was killed, in going to and from school. A few moments after the school had adjourned for lunch, and while the children were on the street,some engaged in playing near the track, and others on their way home,-the defendant's car came down Savier street, running, as the evidence for plaintiff tended to show, at the rate of 10 miles an hour, and, without slowing down, attempted to pass the crossing; and in doing so the plaintiff's intestate was knocked down by the car, and killed. The particular incidents attending the accident are not fully disclosed, the only eyewitnesses being two boys, aged 9 and 18 years, respectively. The elder boy first stated that he was playing marbles in the street, about 10 feet from the track, and saw the car strike the deceased, and two wheels pass over her body, and afterwards testified that she was standing on the crossing, about 3 feet from the track, while the car was coming down from Twentieth street, and he did not see the car strike her, but saw her fall on the track. The other boy, who is a brother of the deceased, says that he and his sister were on their way home from school, and that he had hold of her hand, and while they were crossing the track his sister was struck by the car, and that neither of them saw it, nor did they look to see if a car was coming. and knew nothing of its approach until it struck the girl, when he jumped back.

The contention for the defendant is that this evidence does not in any way tend to show that the excessive or dangerous speed of the car was the proximate cause of the

if the car had been running at a rate of speed perfectly safe and legal. If we assume, as does the argument for the defendant, that the child, without the fault or negligence of the defendant, suddenly and unexpectedly appeared on the track immediately in front of the car, we might conclude that her death was an unavoidable accident, and that the rate of speed would be immaterial, for upon such an appearance on the track no precaution could have prevented the accident. But because these facts are not fixed and certain the case had to go to the jury, and the rate of speed properly became an element in the case. The evidence does not show how far in advance of the car the child attempted to cross the track, but it does tend to show that she was on or within three feet of the track, within plain view of the persons in charge of the car, while it was moving from Twentieth street down to the place of the accident, and, notwithstanding such fact, no attempt was made to avoid a collision. It is a well-settled principle that a wrongdoer is responsible for such consequences as might reasonably have been anticipated as likely to occur as the natural and probable result of his misconduct, and it is ordinarily the province of the jury to ascertain whether the injury in a particular case was such natural and proximate result of the wrong complained of. Hartvig v. Lumber Co., 19 Or. 522, 25 Pac. 358; Ransier v. Railway Co., 32 Minn. 331, 20 N. W. 332. Now, in this case, the accident occurred at a public street crossing, much frequented by children going to and returning from school, at a time when the children might reasonably be expected to be using the crossing, and therefore the law demanded the greater vigilance and care on the part of those in charge of the car. They saw, or could, by the exercise of reasonable care, have seen, the children on or near the track a sufficient length of time before reaching the crossing to have slowed down and had the car under control, but, in place of doing so, were running at a dangerous rate of speed, as we must assume. In view of the rule that what is ordinary care and what negligence are inquiries to be answered, in most cases, by the jury, we think it cannot be declared, as a matter of law, that it is not negligence in those in charge of an electric street car, who see, or can, by the exercise of ordinary care, see, a company of small children on or near the track at a public street crossing, and who they have reason to suppose are crossing the street, to attempt to pass them at the rate of 8 or 10 miles an hour. It was therefore clearly the province of the jury to ascertain the position of the child while the car was coming down the street, and whether a slower rate of speed would not have enabled the persons in charge of the car to have observed the child on the track in time to avert the accident. There was, then, sufficient evidence for the consideration of the jury, tend-

ing to show that the excessive speed of the car was negligence, and the proximate cause of the injury, unless the deceased was guilty of such contributory negligence as would prevent a recovery by her administrator. As a general rule, it is undoubtedly the duty of a pedestrian to look and listen before attempting to cross a street-car track, and a failure to do so will bar a recovery; but this rule is not to be applied inflexibly in all cases, without regard to age or circumstances. If we assume that it can be asserted, as a proposition of law, that a child of the age of the deceased is sui juris, so as to be chargeable with negligence, the law is not so unreasonable or unjust as to require of it the same degree of reason and consideration in avoiding the consequences of the negligence of others that is required of persons of full age and capacity; and it should be left to the jury to determine whether the child, in attempting to pass in front of the car, acted with that degree of care and prudence which might reasonably be expected. under the circumstances, of a child of her age and capacity. She was lawfully in the street, and was as much entitled to use the crossing as the defendant corporation. In attempting to do so, she was run over and killed by the car of defendant, running at an excessive and dangerous rate of speed. The negligence of the defendant must therefore be assumed, and it was for the jury to judge whether the child's conduct, in attempting to cross the track in front of the approaching car without looking or listening, was characterized by any want of that degree of care which could reasonably have been expected of a child of her age. Cassida v. Navigation Co., 14 Or. 551, 13 Pac. 438; Railroad Co. v. Gladmon, 15 Wall. 401; Stone v. Railroad Co., 115 N. Y. 104, 21 N. E. 712; Byrne v. Railroad Co., 83 N. Y. 620; Mattey v. Machine Co., 140 Mass. 337, 4 N. E. 575; Railroad Co. v. Long, 75 Pa. St. 257; Railroad Co. v. Kelly, 31 Pa. St. 372; Barry v. Railroad Co., 92

Viewing, then, the case from the standpoint of plaintiff's testimony alone, the motion for a nonsuit was properly overruled. Nor do we find any error in the instructions complained of. The statement that the case should receive the same consideration as if the child were living, and had brought an action herself for injuries, is in the opening paragraph of the charge, and, in view of what follows, could not have been intended or understood by the jury as asserting that the same rule for the measure of damages should be applied as if the child had lived. and brought an action for her own injuries. By paragraph 6 the court simply asserts the doctrine that, although the child may have been guilty of negligence in going on the track, yet, if the servants of defendant in charge of the car saw the dangerous position in which she had placed herself, it was their duty to have exercised all the diffgence then possible to avoid injuring her. The terms "more than ordinary diligence," and "extraordinary diligence." as used by the court, were intended to define what would constitute ordinary care under the exigencies of the situation. The term "ordinary care" is a relative term, aiways dependent on circumstances. What would be ordinary care in one case would be the grossest neglect in another. Thus, if an adult should be seen on a streetcar track, it might be assumed that he would leave the track before the car reaches him, but no such presumption can be indulged in as to the conduct of an infant of tender years; and hence, when the court said that, if the servants of defendant saw this child on the track, they were required to use more than ordinary diligence to prevent injury, it was only, in effect, saying that the age of the child required the highest degree of care on the part of the servants of the defendant, and nothing short of that would be ordinary care, under the circumstances. We think, therefore, the judgment must be affirmed, and it is so ordered.

FLINT v. NELSON et al.

(Supreme Court of Utah. June 21, 1894.)

Action on Note — Evidence — Instructions —
Presumptions on Appeal — Defense—Duty to
Exhaust Security.

1. In an action on a note signed by two individuals, where defendants claim that it was delivered by mistake, a conversation between defendants at the time one of them signed it, plaintiff not being present, is not admissible as part of the respective.

part of the res gestae.

2. Under Comp. Laws, § 3362, requests for instructions are properly refused where not handed to the court till after he has charged the

jury.
3. The refusal to give a requested charge will not be adjudged error where the record does not contain the instructions given, since it will be presumed that they covered the requested charge

charge.

4. In an action on a note, evidence that plaintiff has collateral security is imadmissible unless the fact of his having said security is pleaded as a defense.

Appeal from district court, Weber county; before Justice James A. Miner.

Action by Richard Flint against A. H. Nelson, Frank J. Cannon, and A. H. Cannon. From a judgment for plaintiff, defendants appeal. Affirmed.

A. R. Heywood, for appellants. Kimball & Gilbert, for respondent.

SMITH, J. This was an action upon a negotiable promissory note made by defendants to the plaintiff. The answer of defendants denied that plaintiff was the owner of the note; alleged that it was made without any consideration; and also alleged that plaintiff obtained possession of it wrongfully; that the delivery of it was by mistake, which the plaintiff well knew. The evidence as to what occurred at the time of the delivery of the note sued on is squarely conflicting.

Plaintiff swears to one state of facts and Frank J. Cannon to another. The jury found for plaintiff, and there is no question made here but that the evidence supports the verdict.

It is admitted that the note sued on was given as a renewal in whole or in part for two other notes given by two of the defendants, the principal of these two old notes being the same as the face of the note in suit. Defendants claim that the new note was to be in full satisfaction of the old notes, both principal and interest; while plaintiff claims it was given as a renewal of the principal only. Plaintiff did not surrender the old notes, but indorsed the amount of the new note as payment in full of the principal on them.

The main question before us arises upon the refusal of the court to permit defendants to show certain representations and conversations which occurred between defendants F. J. Cannon and A. H. Cannon at the time the latter signed the note. The plaintiff and defendants Nelson and F. J. Cannon live in Ogden, while defendant A. H. Cannon lives in Salt Lake City. On the date the note was signed it was presented to A. H. Cannon, in Salt Lake City. The plaintiff was not present. A conversation was held between F. J. Cannon and A. H. Cannon, as a result of which A. H. Cannon signed the note. The defendants offered to prove what was said in this conversation, and it was objected to, and the objection sustained. An exception was taken by defendants. The question is, was this ruling excluding the conversation correct? It is claimed by defendants that this conversation was part of the res gestae of the making of the note, and therefore admissible; and cites the case of Insurance Co. v. Mosely, 8 Wall. 397, as an authority for its admission. That was a case where the deceased told his wife, just after he was hurt, and on returning to his bed, that he had fallen down stairs, and nearly killed himself. This was held to be admissible in an action against the insurance company. We followed this case in the case of Linderberg v. Mining Co. (Utah) 33 Pac. 692, but it is clear that the case at bar does not fall within the rule established by either of these cases, nor of any other case that has been called to our attention. In the case at bar the defendants claim the right to prove a conversation between two of the defendants in the absence of the plaintiff, and of which he had no knowledge, for the purpose of showing that they are not now bound to pay the note they made. Assume the strongest case that can be conceived, to wit, that defendants F. J. and A. H. Cannon agreed that they would make the note, and sign it, but that under no circumstances should it be delivered to the payee, and subsequently one of these makers, for a sufficient consideration, does in fact deliver it, without notice of the

agreement, can it be claimed, in such a case, that the previous agreement not to deliver the note can be given in evidence to defeat a recovery upon it? The fact is that, when several makers of a note place it in the possession of one of their number, and he delivers it to the payee, he acts as the authorized agent of all the makers; and the payee takes it, if for value, charged with no other equity than that brought to his knowledge. In other words, he can be in no wise charged with what has transpired between the makers, in his absence, and of which he has no notice. To admit any other rule would be to permit every surety upon a promissory note or other writing to escape liability by proving self-serving statements, made in the absence of the obligee, and of which he had no knowledge. We think all such statements are inadmissible, and the fact that they were made just at the time some one or more of the makers signed the note does not render them competent to alter or vary the plain import of the written obligation. 1 Greenl. Ev. § 275, and cases cited in note.

Defendants also complain that the court refused an instruction asked, to the effect that, "if plaintiff received the note sued on under representations that he would return it the next day, or cancel the old ones, then you must find a verdict for defendants." This request was not handed to the court until after the jury had been instructed, and the court refused it for this reason. We think it but fair to the trial court that requests for instructions should be presented to the court before the charge to the jury is given. tion 3362 of the Compiled Laws of Utah seems to contemplate this procedure. See, also, Anderson v. Parker, 6 Cal. 201. there is another reason why the judgment cannot be reversed for the refusal to give this instruction as requested. It is this: The bill of exceptions does not contain the charge which the court did give to the jury, and such charge nowhere appears in the record before us. It is, of course, to be presumed that the court correctly charged the jury, in the absence of anything to the contrary. Especially is this so where no exception to the charge as given has been taken. We must assume, therefore, that the court correctly charged the jury on the very point covered by defendant's request. Such being the case, the court was under no obligation to repeat the instruction at the request of defendants. Seattle v. Buzby, 2 Wash, T. 26, 3 Pac. 180; Brewster v. Baxter, 2 Wash. T. 135, 3 Pac. 844; People v. Cochran, 61 Cal. 548.

The remaining question presented in the brief and in the oral argument is this: Defendants claim that plaintiff cannot maintain this action, for the reason that it appeared on the trial that he held some collateral security, to wit, a collateral promissory note; and the contention of defendants is that an action of foreclosure under section 3460. Comp. Laws, is plaintiff's exclusive remedy. We do not feel called upon to decide whether a foreclosure is the plaintiff's appropriate remedy or not, for there is nothing in the pleadings anywhere intimating that plaintiff holds such collateral, or that defendants will rely on such defense. It was new matter, and, if defendants relied on it as a defense, it was their duty to affirmatively set it up in their answer. This they did not do. We do not think they are in a position to complain because the court refused to admit testimony relating to it. The exception argued arose upon such a refusal. This disposes of all questions raised on the appeal. See Hong Sling v. Assurance Co., 7 Utah, 443, 27 Pac. 171. The judgment is affirmed, with costs to respondent.

MERRITT, C. J., and BARTCH, J., concur.

(10 Utah. 206)

HANSON et al. v. FLETCHER et al. (Supreme Court of Utah. June 25, 1894.)

MINES AND MINING-NOTICE OF CLAIM-VALIDITY SUFFICIENCY OF DESCRIPTION - EXCESSIVE CLAIM.

1. Trees blazed and squared, rock monuments, and the prospect hole are permanent objects, within the meaning of Rev. St. U. S. 2324, requiring the notice of the location of a mining claim to describe the same by reference to some natural or permanent monument.

2. The fact that the calls in such a notice call for stakes, when in fact the monuments are trees cut off about three feet from the ground,

trees cut off about three feet from the ground, and blazed and squared, is immaterial.

3. The fact that the location of a mining claim, as marked on the ground, is 300 feet too long and 50 feet too wide—the statute providing that a claim may be located 1,500 feet by 600 feet (Rev. St. U. S. § 2320)—does not render the location void, where the excess was included through mistake, and in good faith, and the notice posted on the claim stated that only 1.500 feet by 600 feet was claimed, and gave the point of beginning, and direction of the boundary lines. boundary lines.

Appeal from district court, Weber county; before Justice James A. Merier.

Action by H. C. Hanson and others against Mark Fletcher and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Lessenger & Becknith and Smith & Smith, for appellants. Evans & Rogers and W. W. Maughan, for respondents.

MERRITT, C. J. This appeal comes to this court upon the judgment roll. It appears from the findings of fact that on the 27th day of October, 1891, the respondents made a mining location known as the "Blue Rock." The location was made by erecting a rock monument at a point upon the ground known as the "prospect hole" or "discovery shaft," by placing in the monument a notice of location, which said notice of location is as follows: "Notice of Location. Notice is hereby given that the undersigned, having

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complied with the requirements of section 2324 of the Revised Statutes of the United States, and the local laws, customs, and regulations of this district, have located fifteen hundred feet in length by six hundred feet in width on this, the Blue Rock mine, lode, vein, or deposit, bearing gold, silver, and other precious metals, situated on the north side of the Bear Lake Road mining district, Cache county, Utah territory, the location being marked and described on the ground as follows, to wit: Beginning from prospect hole and monument, where this notice is posted, (300) three hundred feet, in an easterly direction, to a rock monument; thence six hundred feet, in a southerly direction, to a stake; thence six hundred feet, westerly direction, to a stake and monument; thence fifteen hundred (1,500) feet, in a northerly direction, to a stake and monument; thence six hundred feet, in an easterly direction, to a rock monument; nine hundred feet, southerly direction, to place of beginning. This claim is on the north side of the Bear Lake road, about one mile north of the Republican mine, near Beaver creek, Logan canon, Cache Co., Utah. The mining claim above described shall be known as the 'Blue Rock Mine.' Located on this 27th day of October, 1891. Names of locators: Mark Fletcher. J. P. Coburn. Frank Crookston. W. H. Maughn." The location was made by erecting a stone monument about 31/2 feet high and 21/2 feet in diameter at the base at the prospect hole described in the notice of location, in which said notice of location above given was posted, and by erecting another stone monument, of about the same dimensions, about 340 feet, in an easterly direction, from said prospect hole, and by blazing and squaring up a pine tree about 1 foot in diameter and about 5 feet high, about 900 feet southerly from last-named monument, upon which there was plainly written, "Southeast corner of Blue Rock mine," and by squaring up a pine tree 6 inches in diameter and about 5 feet high, about 300 feet westerly from said last-named stake, and by marking on the same, "Blue Rock, south center end stake," and by erecting a rock monument, and placing a stake therein about 6 feet high, about 350 feet still westerly from said center end stake, on which there was marked, "Southwest corner of Blue Rock mine," and by squaring up and blazing a mahogany tree about 9 inches in diameter and 5 feet high, around which there was piled up, about 3 feet high, a rock monument about 1,700 feet northerly from said southwest corner, and by marking on said tree, plainly, "Northwest corner of Blue Rock mine," and by erecting a monument of rock about 31/2 feet high and about 31/2 feet through at the base about 300 feet easterly from said last-named corner, in which there was placed a paper marked, "North center end line of Blue Rock mine," and by squaring up and blazing a quaking asp tree about 6 inches in diameter, and about 5 feet high, about 290 feet from said north end center monument, and plainly marking thereon, "Northeast corner of Blue Rock mine, fifty feet east;" and by going 50 feet east therefrom a rock monument, about 3 feet high and 2 feet at its base, was situated at the northeast corner of said Blue Rock mine, and thence running about 1,000 feet southerly to said east side monument. At the time of said location the respondents did not intend to include within the stakes and monuments so erected more ground than 1,500 feet long by 600 feet wide. But, by an innocent mistake in pacing off the exterior boundaries, the easterly side line of the claim was in fact 1,900 feet in length, and the westerly side line was in fact 1,700 feet long; the north end line was in fact 640 feet, while the south end line was in fact 650 feet. The above notice of location was filed in the office of the recorder of Cache county, there being no mining district in the locality where said claim was discovered. Subsequently, on the 20th day of June, 1892, appellants went upon the ground described in respondents' notice of location, and saw the location notice placed in the rock monument by respondents, and read the same. It also appears from the findings that the appellants saw the stakes and monuments which marked the location of respondents; but disregarding the same, because they believed the location of respondents was void, owing to the fact that respondents had included within their stakes and monuments more than 1,500 feet in length by 600 feet in width (being a greater amount of ground than that allowed by act of congress), appellants located a mining claim known as the "Amazon," running at right angles across the Blue Rock location, taking in, within the lines located by respondents, all the mineral which had been discovered, together with the prospect hole or discovery shaft, and monument containing the respondents' notice of location. None of the excess so located was claimed or located by appellants. It also appears from the findings that the stakes and monuments of respondents were plainly visible on the ground; that respondents honestly and in good faith, at the time of their location, believed that they were within the limit; and that they did not intend to locate more than the proper area, but through innocent inadvertence and honest mistake, as above stated, respondents did in fact locate ground in excess of the limit of the grant. Upon these findings the court concluded, as matter of law, that the location of respondents was valid, and gave judgment in their favor for the possession of the ground described in respondents' notice of location.

Counsel for appellants contend that the notice of location of the Blue Rock is insufficient, for the reason that it does not contain a sufficient description by reference to some natural object or some permanent monument acr the identification of the claim, and that

the location of the Blue Rock is void because respondents included an excess of ground within the stakes which marked the boundaries of their claim. Section 2324 of the Revised Statutes of the United States provides. in substance, that the location must be distinctly marked upon the ground, so that its boundaries can be readily traced, and that all records of mining claims made shall contain such a description of the claim located, by reference to some natural object or permanent monument, as will identify it. It will be seen by this section that two things are requisite to the valid location and record of a mining claim: First, distinctly marking the location upon the ground, so that its boundaries can be readily traced; and, second, the record of the claim must contain a description of the claim by reference to some natural object or permanent monument. It was found by the court that the Blue Rock location was distinctly marked upon the ground, so that its boundaries could be readily traced. The notice of location recorded makes reference to the prospect hole, rock monuments, and stakes. Such objects are, within the meaning of the law, permanent monuments, and are sufficient to satisfy the requirements of the statute. Hammer v. Milling Co., 130 U. S. 291, 9 Sup. Ct. 548. The idea and purpose of the act of congress. in requiring the records of mining claims to make reference to some natural object or permanent monument, are to prevent the swinging or shifting of the claim of the locator from one point to another; in other words, to fix the location with certainty, so that subsequent locators may determine what ground is included within the location so made. It will be seen that the record of the notice of location in this case describes the ground by metes and bounds with sufficient certainty to identify the claim.

But appellants also contend that the calls in the notice, in some instances, call for stakes, whereas in fact, instead of stakes, trees were blazed, squared up, and marked. Such a variance is immaterial, because it had no tendency to mislead appellants.

The second contention of appellants-that the location is void for the reason that an excess of ground is included within the stakes and monuments of respondents-is also untenable. It will be observed that respondents, through an innocent mistake, included within their claim 400 feet upon the easterly side line, and 200 feet upon the westerly side line, 40 feet upon the northern end line, and 50 feet upon the southerly end line, in excess of the amount allowed. This discrepancy was attributable, however, to an innocent mistake, caused honestly, through an inaccurate method of measurement, and without any intention to include a greater amount than the limits of the grant. This question was directly before the supreme court of the United States in the case of Mining Co. v. Rose, 114 U. S. 576, 5 Sup. Ct. 1055. In that case Mr. Justice Miller, speaking for the court, makes use of the following appropriate language: "We hardly think it needs discussion that the inclusion of a larger number of lineal feet than 200 renders the location, otherwise valid, totally void. This may occur, and often must occur, by accident of the surveyor, or other innocent mistake, when there exists no intention to claim more than 200 feet. Must the whole claim be made void by this mistake, which may injure no one, and was without design to violate the law? We can see no reason, in justice or in the nature of the transaction, why the excess may not be rejected, and the claim held good for the remainder, unless it interferes with rights previously acquired." In the case under discussion no previous rights had been acquired at the time respondents made their location of the Blue Rock claim; neither does any of the excess fall within the limits of the Amazon claim, which was made by appellants. It is true that in the case just cited the court had under consideration the act of 1866, which permitted the location of 200 feet in length for each locator, to the limit of 1,200, except in the case of the discoverer, who was entitled to 200 feet additional as a reward for his discovery. In reason and principle, however, as well as upon authority, that decision should be made applicable to the act of 1872, under which the respondents made their location. Stem-Winder Min. Co. v. Emma & Last Chance Consol. Min. Co. (Idaho) 21 Pac. 1040; Burke v. McDonald (Idaho) 33 Pac. 49; Atkins v. Hendrie, 1 Idaho, 95; Thompson v. Spray, 72 Cal. 528, 14 Pac. 182; Doe v. Tyler, 73 Cal. 21, 14 Pac. 375; Eilers v. Boatman, 3 Utah, 159, 2 Pac. 66. We do not mean to be understood that any length, however great, in excess of the limit of the grant, can be located without rendering the claim void for want of certainty. A mining claim may include so great an excess of ground as to render it absolutely void, depending upon the surroundings and particular circumstances of each case. But what we do mean to say is that, under the particular circumstances of this case, the excess within the boundaries of the Blue Rock does not render the same void. The object of the law requiring the claim to be distinctly marked on the ground, so that its boundaries can be readily traced, was in this case accomplished. Appellants 88.W the stakes and monuments which bounded respondents' location. They read the location notice. They knew that respondents only claimed 1,500 feet in length by 600 feet in width. It does not, therefore, lie in the mouths of appellants to say they were misled by the innocent mistake of respondents. The judgment of the court below is affirmed, with costs.

. FARTCH and SMITH, JJ., concur.

103 Cal. 498

MODOC COUNTY v. SPENCER et al. (No. 18,291.)

(Supreme Court of California. Aug. 6, 1894.)
COUNTIES—EMPLOYING COUNSEL IN CRIMINAL
CASES.

1. Neither under County Government Act, § 25, subd. 17, empowering the board of supervisors to direct the management of suits to which the county is a party, and to employ counsel to assist the district attorney therein, nor under Id. subd. 36, empowering it to authorize the district attorney to appoint an assistant, if need be, nor under any inherent general power undefined by statute, has the board power to employ counsel to assist in the prosecution of criminal cases.

2. In a suit by a county through its district attorney to restrain the treasurer from paying a warrant the payee of the warrant is a proper

party defendant.

Department 1. Appeal from superior court, Modoc county; C. L. Claffin, Judge.

Suit by the county of Modoc against Spencer & Raker and others for injunction. Judgment for plaintiff. Defendants appeal. Affirmed.

Spencer & Raker and Clarence A. Raker, for appellants. G. D. Goodwin, E. E. Copeland, and Atty. Gen. Hart, for respondent.

VAN FLEET, J. The substantive question in this case is as to the power of a board of supervisors to employ counsel on behalf of the county to prosecute or assist in the prosecution of criminal cases. The board of supervisors of Modoc county, on the 7th day of July, 1891, adopted an order or resolution in the following terms: "Upon motion, and with full consent of the board, it is ordered that the firm of Spencer & Raker be, and are hereby, employed and appointed as assistant counsel with the district attorney to aid in the prosecution of all criminal cases now pending before the superior court of Modoc county, at the agreed sum of \$600 as full compensation for all services." And thereafter. on the 9th day of October, 1891, as a sequence of the foregoing, adopted a further order or resolution, of which the following is a copy: "On motion of Supervisor Wylie, seconded by Supervisor Cannon, it is ordered that the auditor be instructed to draw a warrant on the treasurer for three hundred dollars, as part payment for legal services rendered by Spencer & Raker for the county, in conformity with a previous order of the board of supervisors made, employing the said Spencer & Raker to assist the district attorney in the prosecution of criminal cases pending in the superior court of Modoc county, California, against Denis O'Brien and T. B. Reese." pursuance of this last-recited order the auditor drew his warrant in favor of said Spencer & Raker as therein directed, and this action is brought by the county, through its district attorney, to restrain the treasurer from paying it. Judgment went in favor of the county, from which defendants appeal. If the board had no power to employ counsel for the purposes indicated, the judgment is right;

otherwise not. We can find no authority in the law to sustain the action of the supervisors in the premises. Boards of supervisors are creatures of the statute, the constitution (article 22, § 5) providing that the legislature shall provide for their election or appointment, and prescribe their duties. The authority for any act must, therefore, be sought in the statute. The only provisions looking to such power as was here attempted to be exercised which have been called to our attention are found in section 25 of the county government act (St. 1891, pp. 304-307), which takes the place of the provisions of the Political Code on the subject. Subdivision 17 of that section gives the board power "to direct and control the prosecution and defense of all suits to which the county is a party, and to employ counsel to assist the district attorney in conducting the same." Subdivision 36 of the same section gives it power "to authorize the district attorney to appoint an assistant district attorney, if in their judgment it may be necessary, for the proper discharge of the duties of the district attorney, and to allow such assistant district attorney such compensation for his services as they may determine, not to exceed, unless otherwise in this act provided, the sum of fifteen hundred dollars per annum." It cannot be successfully contended that the first of these provisions gives any warrant for the action of the board in this case. That provision is evidently intended to empower the supervisors to protect the rights of the county in any litigation it may have involving its property or other substantial rights. power is in terms restricted to suits "to which the county is a party," and while possibly, in a proper case, it might be construed to include actions or proceedings in which the county, while not nominally a party, nevertheless has a direct, substantial interest or right of property involved, it can have no application to the character of cases referred to in the orders of the board in question. The county was in no sense a party to those cases, nor had it any rights litigated therein. They were criminal cases, prosecuted in the name and on behalf of the people of the state. They involved no interest of the county in any sense other than such interest as the county had in common with every other county and all the people of the state in upholding the administration of the law. The fact that the county, as an instrument of the law, pays the expense of criminal prosecutions, confers no such right or interest as that contemplated by the act. It is equally apparent that subdivision 36 has no application to the facts. That provision contemplates the appointment by the district attorney, under authorization of the supervisors, of an assistant district attorney, who takes an official oath as an officer of the county, and under the authority, direction, and control of his principal assists in the performance of any and all duties pertaining to the office. It does not contemplate

the employment by the supervisors of special counsel, who may or may not be acceptable to the district attorney, to take part in particular cases. There is no sort of analogy between the purpose of subdivision 36 and that aimed at in the proceedings of the board in this instance, and the suggestion that the action of the board may be upheld as a substantial compliance with that provision is without weight. In fact, it does not seem to Le very seriously contended that either of these provisions warranted the act of the board, but it is strongly urged, in effect, that it was within the inherent, general power of the board, in the absence of special provision, to provide for the proper prosecution of these But we know of no such inherent or undefined power in the board of supervisors. Their powers being purely statutory, their every act must find its warrant in the statute, either expressly or by necessary implication. Robinson v. Supervisors, 16 Cal. 208; San Joaquin Co. v. Jones, 18 Cal. 327; Foster v. Coleman, 10 Cal. 279; Linden v. Case, 46 Cal. 171. The legislature having specified certain cases in which such power may be exercised. there is no implication that she intended it to be exercised in others. "Expressio unius est exclusio alterius." In fact an examination of all the provisions of the statutes bearing upon the subject leads to the conclusion that it never was intended that the board of supervisors should be permitted to control or interfere with criminal prosecutions or with the district attorney in their management. The district attorney, in the discharge of the duties of his office, performs two quite distinct functions. He is at once the law officer of the county and the public prosecutor. While, in the former capacity, he represents the county, and is largely subordinate to and under the control of the board of supervisors, he is not so in the latter. In the prosecution of criminal cases he acts by the authority and in the name of the people of the state. Const. 6, 20; County Government Act, 136. If he fails for any reason to appear at the trial in a criminal case for the discharge of his duty, the court is authorized to designate some competent attorney to take his place for the occasion (Pen. Code, § 1130); and if at any time it is deemed essential for the public service that he have assistance in this behalf it is made the duty of the attorney general to go to his aid (Pol. Code, § 470, subd. 7). It is said that what was done here has been frequently done by boards of supervisors in other counties. We are not disposed to question this assertion, nor the perfect good faith of the board in this instance. Many acts done by boards and officers in the supposed discharge of their duty and in the best of faith do not find sanction in the law, and for a time pass current because unchallenged; but that fact cannot weigh in favor of their validity when eventually called into question. The action of the board, being without authority, was void, and created no legal claim against the county. "It is settled in this state that no order made by a board of supervisors is valid or binding unless it is authorized by law. No claim against a county can be allowed, unless it be legally chargeable to the county; and, if claims not legally chargeable to the county are allowed, neither the allowance nor the warrants drawn therefor create any legal liability." Linden v. Case, supra.

The other questions, as we have indicated, do not demand extended notice. The demurrers were properly overruled. The complaint stated a cause of action, and, while Spencer & Raker were perhaps not necessary parties, they were nevertheless proper ones. The answer did not contain any defense to the action, and the court did not err in its disposition of it. Nor was there any substantial error in the manner of entering judgment; it was in effect a judgment on the pleadings. Judgment affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

RIALTO IRRIGATING DIST. v. BRANDON et al. (No. 19,341.)

(Supreme Court of California. July 20, 1894.) Eminent Domain—Rights of Irrigation Com-Pany—Pleading—Evidence.

1. Laws 1887, p. 29, authorized plaintiff to construct waterworks for irrigation, and section 12 gave it power to acquire property "necessary for the construction, use, supply, maintenance, repair, and improvement of said canal or canals and works * * * and all necessary appurtenances." Held to authorize taking land for constructing a pipe line.

structing a pipe line.

2. The complaint alleged that, in order to properly irrigate the lands in the district, it was necessary to construct a pipe line across defendant's land, which adjoins the district. Held sufficient to show the use a public one, and the taking necessary

taking necessary.

3. It was proper to admit the decree of the superior court confirming the proceedings for plaintiff's organization to establish the facts therein stated.

 It was not necessary to show there was no other way than the one designated by which the water could be brought.

Department 1. Appeal from superior court, San Bernardino county; C. W. Rowell, Judge. Action by the Rialto Irrigating District against J. R. Brandon and others to condemn a right of way for a pipe line over defendants' land. Judgment for plaintiff, and defendants appeal. Affirmed.

Joseph R. Brandon, for appellants. Walter Bordwell, for respondent.

VAN FLEET, J. Plaintiff is an irrigation district formed under the law of 1887 (St. 1887, p. 29), commonly known as the "Wright Act," having its location in San Bernardino county. In constructing its works for the purpose of supplying water for irrigation purposes to the inhabitants of the district, it was found necessary, to complete a proper irrigation system, to lay a certain pipe line,

described in the complaint, across lands belonging to the defendants. This action was brought for the purpose of condemning a right of way for such pipe line. Judgment went for plaintiff, condemning the necessary way, and assessing damages for the taking in favor of defendants, with costs. The appeal is from the judgment and an order denying a new trial. The appeal is without merit.

1. The demurrer to the complaint was properly overruled. The objection that power is not given under the act to condemn property for the purposes sought is untenable. The argument is that the act provides only for the construction of ditches and canals, and that this does not include pipe lines. The act provides for the construction of a "system of works" to irrigate the lands within the district, and by section 12 the board is given the right to acquire property "necessary for the construction, use, supply, maintenance, repair, and improvement of said canal or canals and works * * * and all necessary appurtenances." This language is broad enough to include pipe lines, flumes, or other conduits usually employed in works of the kind for conveying water, even if not necessarily included in the terms "ditches and canals." The complaint, after alleging plaintiff's organization into an irrigation district, and the purpose of its organization, shows that the object sought by the use is to provide water for irrigating lands within the district, particularly describing such lands; that the defendants own the land over which the right of way is sought, particularly describing it, and that such land adjoins plaintiff's district, and constitutes its boundaries on two sides,-the north and west: that. in order to properly irrigate the lands in the district, it is necessary to construct the pipe line (which is particularly described) across the defendants' land at the point designated; and that the right of way is sought for the purposes of establishing and maintaining such pipe line. The complaint is also accompanied by proper maps, which are made part of it, showing survey and delineation of the proposed line upon the ground. This was sufficient to show that the use is a public one, and that the taking is necessary to such use. Cummings v. Peters, 56 Cal. 596. There is nothing in the further point urged against the complaint. The rule there contended for is not a rule of pleading, but of evidence.

2. It was not error to admit the decree of the superior court confirming the regularity of the proceedings for plaintiff's organization as an irrigation district to establish the facts therein decreed. The proceeding in which that decree was rendered was a proceeding in rem, had and authorized for the express purpose of fixing the legal status of the corporation, and that decree concluded the whole world upon all the questions involved. Crall v. Irrigation Dist., 87 Cal. 140, 26 Pac. 797.

-6. The evidence was sufficient to sustain the finding that the right of way was a public use, and a necessity. It was not necessary for plaintiff to show that there was absolutely no other way but the one designated in its complaint by which the water could be brought on its land. The fact that it might have been possible, as shown by the evidence, by going a long way around, and condemning other lands, at a much greater expense, to accomplish the purpose sought, is immaterial. We have examined the various other assignments, and do not regard them as requiring special mention. We find no error in the record, and the judgment and order are affirmed.

We concur: GAROUTTE, J.; HARRISON, J.

103 Cal. 508

In re YOAKAM'S ESTATE. (No. 19,383.) (Supreme Court of California. Aug. 6, 1894.)
NEW TRIAL—NOTICE OF MOTION—SPECIFICATIONS.

1. Code Civ. Proc. § 659, subd. 4, providing that when the motion for new trial is to be made on the minutes, for insufficiency of the evidence to justify the verdict, the notice must specify the particulars in which the evidence is alleged to be insufficient, does not require said notice to be more specific than so as clearly to show the court and adversary the points relied on.

2. Where the record does not state the evidence given at the trial, the supreme court may

2. Where the record does not state the evidence given at the trial, the supreme court may presume that it authorised the court to order a new trial, under Code Civ. Proc. § 662, of its own motion, for manifest passion or prejudice.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

In the matter of the estate of Emily R. Yoakam, deceased, on contest as to undue influence used in procuring execution of will. Trial by jury, and verdict for contestant. New trial granted, and contestant appeals. Affirmed.

Clarence A. Miller, for appellant. McLachlan & York, for respondents.

BELCHER, C. Emily R. Yoakam died in the county of Los Angeles, leaving an alleged last will which was dated March 4, 1893. The respondents filed in the court below the said will, and their petition asking that the same be admitted to probate. In due time the appellant appeared and contested the probate thereof, upon the grounds, among others, that its execution was procured by the undue influence of certain persons, none of whom were named therein as legatees or executors. A general denial of all the allegations contained in the written grounds of opposition was filed by respondents. By agreement, the issue as to the alleged undue influence in procuring the execution of the will was submitted to a jury, and by their verdict the jury found in favor of appellant on that issue. Subsequently, on motion of respondents, the court made and entered its order granting a new trial of the contest, and from

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that order this appeal is prosecuted. The notice of the motion for a new trial stated that the motion would be made upon the minutes of the court, and upon the ground that the evidence was insufficient to justify the verdict. Appellant contends-and this is the only point made for a reversal—that the notice did "not properly or at all specify the particulars in which the evidence was alleged to be insufficient, as required by subdivision 4 of section 659 of the Code of Civil Procedure, and that the motion should therefore have been denied." The specifications contained in the notice are as follows: "The evidence was insufficient to justify said verdict, in this: The evidence showed that the said alleged will was signed by the testatrix, in the presence of the subscribing witnesses thereto, on the 4th day of March, 1893, and that she at that time requested said subscribing witnesses to sign the same as witnesses, and that they signed the same on that day, as such witnesses, at her request, and in her presence; that the said decedent, at the time of the signing of the said alleged will, declared the same to be her will, and that she was at that time, and always, of sound mind, and competent to make a will, and that she was not at that time, or ever, under undue influence or influenced by fraud; that there was no undue influence, or any influence, exerted at that time, or ever, over decedent, in the making of said alleged will, or with reference thereto, by Dr. Hodge, Henrietta Davis, Minda Davis, D. W. Davis, or either of them, or by any one, and that the evidence shows that the said alleged will provides for an equitable distribution of the estate of the decedent among the proper subjects of her bounty, and is fair and just in its provisions."

The object of the specifications required by the statute is clearly to direct the attention of the court and adverse party to the particular point on which the evidence is claimed to be insufficient, and when this object is accomplished they will be held sufficient. Mc-Cullough v. Clark, 41 Cal. 298; Eddelbuttel v. Durrell, 55 Cal. 279; Newell v. Desmond, 63 Cal. 242. The specifications complained of are in substance not unlike those approved in Harnett v. Railroad Co., 77 Cal. 32, 20 Pac. 154; and, as said in that case, "it would be difficult to state in more specific terms the particular points of insufficiency on which the moving party proposed to rely in its proceeding for a new trial." In our opinion, therefore, they must be held sufficient to meet the requirements of the statute. Besides, the record contains no statement of any of the evidence given at the trial, and, so far as we can know, it may have been such as would have authorized the court, under the provisions of section 662, Code Civ. Proc.,1 to grant a new trial on its own motion, without any application therefor. But the rule is well settled that all intendments are in favor of the regularity of the action of the court below, and that error will never be presumed, but must affirmatively appear in the record. We advise that the order appealed from be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

DAVIS v. HART. (No. 19,401.) (Supreme Court of California. Aug. 13, 1894.) Appeal—Failure to File Brief—Reversal.

On appeal, where respondent fails to file a brief or make oral argument, and the findings are attacked for insufficiency of evidence to uphold them, the judgment will be reversed.

Department 2. Appeal from superior court, Kern county; R. A. Conklin, Judge.

Action by Alfred A. Davis against Josiah H. Hart. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

A. Rousseau and J. A. Haralson, for appellant. Mahon & Laird, for respondent.

FITZGERALD, J. There is no brief on file by respondent, nor was the case orally argued in his behalf. As the record shows that the findings are attacked by the specifications on the ground of the insufficiency of the evidence to support them, it follows, on the authority of Richter v. Irrigation Co. (Cal.) 36 Pac. 96, that the judgment and order appealed from should be reversed. So ordered.

We concur: McFARLAND, J.; DE HA-VEN, J.

STATE ex rel. COUGHLIN v. BOARD OF COM'RS OF WASHOE COUNTY. (No. 1,411.)

(Supreme Court of Nevada. July 31, 1894.)
SHERIFFS—BOARD OF PRISONER — AUTHORITY TO
CONTRACT FOR MERCHANDISE.

Section 2139. Gen. St., provides that the sheriff "shall furnish all necessary sustenance," etc., to prisoners; that the "commissioners are hereby required to allow him" the "expenses thereof." Page 108, St. 1887, provides that no county officer, except the board of commissioners, "shall contract for the payment or expenditure" of any money for any purpose, or "shall purchase any stores or materials, goods, wares or merchandise, or contract for any labor or services whatever." Held, that the latter law repealed the former.

Application for writ of certiorari by the state of Nevada, ex rel. W. H. Coughlin, against the board of commissioners of Washoe county, to compel them to allow a bill for

¹ Code Civ. Proc. § 662, permits the court, of its own motion, to grant a new trial when the jury has so plainly disregarded the instructions or the evidence as to satisfy the court that they misun-lerstood the instructions, or acted under passion or prejudice,

supplies furnished to prisoners by order of the sheriff. Writ denied.

Torreyson & Summerfield, for relator. B. F. Curier, Dist. Atty., and Benjamin Curler, for respondents.

BIGELOW, J. The question involved is the right of the board of commissioners of Washoe county to contract for the board of the prisoners confined in the jail of said county. It is claimed that the authority to purchase all necessary supplies for the prisoners is vested in the sheriff, and that the commissioners have nothing to do with it, except to allow the bill as contracted by that officer. By St. 1861, p. 41, as amended by St. 1866, p. 189 (Gen. St. § 2139), it was provided that the sheriff "shall furnish all necessary sustenance, bedding, clothing and fuel for the prisoners committed to his custody: and the commissioners are hereby required to allow him, out of the county treasury, all necessary costs, charges, and expenses thereof." It is admitted that this act vested the disputed power in the sheriff, but it is contended that the law in this respect was changed by St. 1887, p. 108, which reads as follows: "No county officer in any county in this state, except the board of county commissioners, shall contract for the payment or expenditure of any county moneys for any purpose whatever, or shall purchase any stores or materials, goods, wares or merchandise, or contract for any labor or service whatever, except the board of county commissioners, or a majority of them, shall order such officer to do the same." Does the latter act vest in the commissioners the authority previously existing in 'the sheriff? Except as limited by the constitution, the legislature undoubtedly has full control over county affairs, and it is not suggested that it did not have the power to make the change indicated; but it is contended that it did not do so, upon the principle that a general statute does not repeal a special one, unless the intention so to do is clearly manifested; that, as the act of 1861 is nowhere mentioned in the act of 1887, the latter, at most, can only constitute a repeal of the former by implication, and, as the two acts can stand together,-the one as constituting an exception to the general rule of the other that no county officer shall be permitted to contract for the county,—no such repeal exists. This principle is illustrated by the case of State v. Beard, 21 Nev. 218, 29 Pac. 531.

The question is one of intention upon the part of the legislature, but of intention to be ascertained under the established rules for the interpretation of statutes. The courts are not permitted to speculate as to whether the legislature had a certain state of facts in view at the time of the enactment of a statute, or as to whether, if it had, the statute would not have been drawn differently; but, where the language is clear, we must

suppose that the lawmakers intended just what they have said, in every aspect of the case that they ought to have had in mind. Where, as in the case of State v. Beard, supra, two affirmative statutes have been enacted,one special and the other general,-and there is ample scope for the latter to operate without repealing the former, it may be presumed that the legislature did not intend to repeal the special act, although in the letter of the two acts there is a conflict. Especially is this the case in view of the rule of interpretation,-which we must presume was known to the legislature,—that one affirmative statute will not repeal another, unless there is an absolute conflict between them, or it can be ascertained in some manner that a repeal was intended. But where the later act is expressed in negative terms, the principle is different. Negative statutes are mandatory, and must be presumed to have been intended as a repeal of all conflicting provisions, un less the contrary can be clearly seen. would not, perhaps, be easy," said Sharwood, J., in Bladen v. Philadelphia, 60 Pa. St. 464. 466, "to lay down any general rule as to wher the provisions of a statute are merely direct ory, or when mandatory or imperative Where the words are affirmative, and relate to the manner in which power or jurisdiction vested in a public officer or body is to be exercised, and not to the limits of the power or jurisdiction itself, they may be, and often have been, construed to be directory; but negative words which go the power or jurisdiction have never, that I am aware of, been brought within the category." A negative statute, being mandatory, and in terms s negation, or denial, of the prior law, repeals it. Bish. Writ. Law, § 153. If a statute contrary to a former one be expressed ir negative words, it operates to repeal the former. Suth. St. Const. § 139. Thus, an act providing that "no corporation" shall interpose the defense of usury repeals the laws against usury as to corporations. Curtis v. Leavitt, 15 N. Y. 135. An act that "no beer" shall be sold without a license repeals a law previously authorizing such sale, under certain circumstances, without a license. Read v. Storey, 6 Hurl. & N. 423. It is certainly the general rule that the negative words in a subsequent statute constitute a repeal of all previously enacted conflicting provisions and we are unable to discover anything indicating a different intention in this case. Under our statutes the commissioners are the only officers authorized generally to purchase supplies, or enter into contracts, on behalf of the county. Gen. St. 1949. At the time of the enactment of the statute of 1887. but two or three instances existed where other officers had the power of so doing. Certainly, without a statute to that effect. no officer could bind the county, and, as we must suppose that the last-mentioned act was intended to make some change in the law, and was not passed for a mere idle purpose

apon what else could it be intended to operate, if not in the instance mentioned? If intended for these few instances, why should it not as well have been intended to apply to the sheriff, in the matter of keeping of prisoners, as to the assessor in the publication of the list of taxpayers, or to the treasurer in the publication of the delinquent tax list?

It is suggested that other officers have been in the habit of purchasing supplies for the counties, and that it was to prevent their already illegal acts that the statute was passed. This is possible; but to construe the statute upon that theory would be to take our feet from the well-trodden path of recognized legal construction, to be relied upon by legislatures and courts in both enacting and construing laws, and resort to the miry bog of speculation, without chart or compass to guide our steps. It is also argued that the difficulty of properly caring for the prisoners, if the sheriff must consult the commissioners every time he orders a meal or purchases a pair of shoes for them, proves that the legislature did not intend such a result. But to this it must be answered that, where the law is plain, this is a consideration with which the courts have nothing to do. Their duty is to ascertain and give effect to what the legislature, within the limits of the constitution, has declared. If the law works badly, it will probably be changed, but this is for the legislature to determine. It may also be added that the act of 1887 permits the commissioners to authorize other officers to purchase all necessary supplies, etc., for the county; and we can no more suppose that they will neglect to either properly attend to county affairs themselves, or to authorize others to do so, than that the legislature would fail to enact laws necessary for that purpose in the first instance, or the sheriff fail to furnish necessary food and clothing for the prisoners in his charge while the duty of so doing rested upon him. At any rate, it seems clear that, by the last-mentioned law, the legislature intended to place all expenditure of county funds under control of the board of commissioners; and this, under the circumstances, is conclusive of the controversy. The application for the writ is denied.

MURPHY, C. J., and BELKNAP, J, concur.

ALLEN v. LEAVENS.

(Supreme Court of Oregon. July 30, 1894.)

ORDER-WHAT CONSTITUTES.

When goods are sold on defendant's written promise to accept an order drawn by the purchaser for their amount, the indorsement of the purchaser's name upon such promise is not an order on which defendant is liable.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by Wiley B. Allen against John M. Leavens. There was judgment for plaintiff. Defendant appeals. Reversed.

W. W. Page, for appellant. W. L. Nutting, for respondent.

MOORE, J. This is an action to recover money. Upon a trial thereof without a jury the court found the facts and conclusions of law thereon as follows: "(1) That on the 28th day of November, 1892, the said James Cusick was in the employ of the defendant and his partners, and that there was at that time wages due him from the defendant and his partners for work and labor. (2) It was at that time verbally mutually agreed by and between the plaintiff and the said James Cusick and the defendant that in consideration of the plaintiff selling to the said Cusick certain goods for the sum of \$20, and extending to him credit for the same, the defendant would pay the plaintiff on the 12th day of December, 1892, the said sum of \$20 for said goods, out of the wages then due or to become due said Cusick for said work, and that it should be deducted from his wages. (3) That in consideration of said mutual understanding and agreement, the plaintiff, on or about the 28th day of November, 1892. sold and delivered to said James Cusick certain goods, wares, and merchandise of the agreed value of \$20, and extended credit to him for the same according to the terms of said agreement. (4) That as evidence of said agreement on the part of the defendant to pay the plaintiff said sum of \$20 in accordance with said verbal agreement mentioned in finding No. 2, the defendant, on the 28th day of November, 1892, made and delivered to the plaintiff a written memorandum in words and figures following: Portland, Or., Nov. 28, 1892. To Wiley B. Allen: I will accept and pay James Cusick's order for (20) twenty dollars on the 12th day of December, 1892. [Signed] J. M. Leavens.' (5) That after said memorandum had been made and delivered by the defendant to the plaintiff, the said James Cusick indorsed his name or the same, and on the 12th day of December the plaintiff presented said memorandum to the defendant for the payment of said \$20 in accordance with said verbal agreement and said memorandum; but the defendant refused to pay the same. (6) That said \$20 is now due and owing from the defendant to plaintiff, together with interest thereon from the 12th day of December, 1892, at eight per cent. per annum."

From the foregling findings of fact, the court found the following conclusions of law: "(1) That there is now due and owing from the defendant to the plaintiff the said sum of \$20, and interest thereon at eight per cent. per annum, from December 12, 1892. (2) That plaintiff is entitled to a judgment for said sum, and interest and costs and disbursements."

A judgment for plaintiff having been given in accordance with such findings, the defendant appeals.

There being no bill of exceptions, the only question presented is whether the findings support the judgment. The defendant contends that the cause of action is founded upon a bill of exchange alleged to have been drawn on him by James Cusick in plaintiff's favor for \$20, while the plaintiff contends that it is founded upon a promise by defendant to pay Cusick's indebtedness to plaintiff, he being Cusick's debtor in an amount equal to such indebtedness when he made the promise; and that, the defendant's undertaking being original, a memorandum of the transaction was unnecessary. Section 785, Hill's Code, provides that an agreement to answer for the debt of another is void, unless the same, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged. If the defendant was indebted to Cusick and he to the plaintiff, and all mutually agreed that Cusick's debt should be canceled, and defendant should pay the debt which he owed to Cusick to the plaintiff, such agreement is not within the statute, and is valid and binding without any written memorandum thereof. In such case the defendant's agreement is not collateral, but an original one to pay his own debt to a substituted creditor; and the fact that by the transaction the debt of another is paid makes no differ-Brandt, Sur. § 66; 3d Pars. Cont. 26. The plaintiff in such case would discharge Cusick's previous liability, and look to the defendant for payment, who, by virtue of the fact of his debt to Cusick, and of the mutual agreement and promise to pay the same to the plaintiff, would become liable therefor. But could this rule have any application to a credit extended by plaintiff to Cusick subsequent to defendant's promise? It may be conceded that if the plaintiff, upon the faith of defendant's promise, delivered goods to Cusick, but charged the same and extended the credit to the defendant, it was a sale to the latter upon his request, and hence not within the statute; but, if the credit were given to Cusick upon the defendant's promise, the latter's undertaking would be collateral, and to render it valid there should be a note or memorandum thereof expressing the consideration. Dixon v. Frazee, 1 E. D. Smith, 32; Briggs v. Evans, Id. 192. If Cusick was at all liable to the plaintiff, the defendant's agreement, though it may have induced the plaintiff to furnish the goods, was collateral, and within the statute. 1 Chit. Cont. (11th Am. Ed.) 750. The court found that the plaintiff furnished goods, wares, and merchandise to Cusick, and extended credit to him, according to the terms of defendant's agreement. The credit having been given to Cusick subsequent to defendant's agreement. Cusick, by the findings of the court, would be liable to the plaintiff, and the defendant's un-

dertaking one of guaranty, collateral to the liability of Cusick. If the cause of action be as contended for by the plaintiff, the findings do not bring it within the rule applicable to the case suggested where an antecedent debt has been discharged in consideration of a mutual agreement of all the parties, and a promise on the part of a third person, who is indebted to the person primarily liable for the original debt, to pay the same; nor can it apply to a credit extended to Cusick subsequent to defendant's promise, because, in that event, it appears from the findings that Cusick was still liable to the plaintiff. If the cause of action be as contended for by the defendant,—that the plaintiff, in consideration of defendant's agreement to accept Cusick's order, sold goods and extended credit to the latter,—the defendant would not become liable until Cusick had drawn on him for the amount, assuming, without deciding, that the defendant would be liable notwithstanding the statute, which provides that "no person within this state shall be charged as an acceptor of a bill of exchange unless his acceptance shall be in writing, signed by him-self or his lawful agent." 2 Hill's Code, § 3194. The court has found that Cusick did not draw the order on the defendant, but merely indorsed his name on the agreement to accept such order when drawn. "A bill of exchange," says Mr. Daniel in his work on Negotiable Instruments (section 27), "is an open letter, addressed by one person to a second, directing him, in effect, to pay absolutely and at all events a certain sum of money therein named to a third person, or to any other to whom that third person may order it to be paid;" and Cusick's name indorsed on the defendant's agreement cannot, under the most liberal construction, be deemed to come within the definition above given. From an examination of the court's findings it would appear that the sale of the goods had been made upon the faith of defendant's written promise to accept an order to be drawn by Cusick for the amount thereof, and, no order having been drawn by him, the defendant has incurred no liability to the plaintiff. For these reasons the judgment is reversed, and a new trial ordered.

STATE ex rel. EGBERT et al. v. SUPERIOR COURT OF KING COUNTY et al.

(Supreme Court of Washington. July 7, 1894.)
Jurisdiction of Justice—Appeal—Dismissal.

1. Where a statute provides that a justice of the peace shall have jurisdiction in actions for the recovery of money where the amount "claimed" does not exceed \$100 (2 Hill's Code, \$23), the interest due and claimed on the principal is part of the amount "claimed," within the meaning of the statute.

2. Where the court from which an appeal is taken had no jurisdiction of the action, the appellate court has jurisdiction only to reverse the judgment or dismiss the appeal.

Dunbar, C. J., dissenting.

Petition for certiorari by the state of Washington, on the relation of Curtis Egbert and others, against the superior court of King county and T. J. Humes, Judge. Granted.

T. A. Gamble, for relator. I. E. Moses, for respondents.

HOYT, J. A complaint was filed in a justice's court against one of the relators to recover, on a contract for the payment of money only, the sum of \$91, and interest thereon from such a date that the principal and interest amounted to the sum of \$109, in which sum judgment was prayed. Upon default of defendant, judgment in that amount was rendered against him. From such judgment he took an appeal to the superior court, and the other relators joined with him, as sureties in the bond given upon such appeal. The superior court, having dismissed the appeal, made an order affirming the judgment of the justice's court, and rendered a judgment in the superior court against the principal and sureties in the appeal bond for the amount thereof, with costs, and is now proceeding to enforce the collection of said judgment against said principal and sureties. Relators have filed their petition in this court setting out these, among other facts, and praying a writ of certiorari to be directed to said superior court, and to Thomas J. Humes, the judge in whose department the proceedings were had, to the end that the record may be certified here, and the action of the court reviewed. Such writ will not be awarded if the superior court was proceeding within its jurisdiction, and the question whether or not these facts show that such court had not jurisdiction is the one which we are called upon to consider upon this application. is claimed on the part of the relators that said court had not jurisdiction, for two principal reasons: First, that the justice's court had no jurisdiction, and for that reason the superior court could get no jurisdiction on appeal; and, second, that, if the superior court did get jurisdiction of the subject-matter upon appeal, it had no jurisdiction to render a judgment upon the bond without having first brought the sureties before it on proper notice.

As to the first contention, the rule is well settled that if the court from which an appeal is taken had no jurisdiction of the subject-matter, and for that reason its judgment was absolutely void, the appellate court, by virtue of the appeal, can get no jurisdiction to do more than to reverse the judgment or dismiss the appeal. This rule is so well established that it is not necessary to cite authorities or make argument in support thereof. Did the justice's court have jurisdiction of the subject-matter upon the complaint filed, which was the foundation of the judgment from which the appeal was taken? This question must be decided upon the con-

struction to be placed upon such complaint. It is claimed upon the part of the relators that the cause of action stated in the complaint arose upon a contract for the recovery of money only, and that the sum claimed was more than \$100. On the other side, it is contended that since the principal sum was less than \$100, and it was brought above that amount only by the claim for interest thereon, for the purposes of the statute giving jurisdiction to justices' courts the sum claimed was less than \$100. 2 Hill's Code, \$ 23. It is not contended but that if the sum claimed was for more than \$100, within the meaning of such statute, the justice's court got no jurisdiction of the subject-matter by reason of the filing of such complaint. In our opinion, the claim for interest due upon the principal sum is as much a part of the sum claimed as is the principal itself. The interest, while not technically a part of the contract, is so connected with it that, when the claim is made therefor in a complaint, it forms a part of the claim arising upon the contract. The claim, interest and all, is upon a contract for the recovery of money. A part of it is upon the contract which gave rise to the principal indebtedness, and the remainder is upon a contract, express or implied. for interest thereon. The statute upon the subject intended that justices of the peace should have jurisdiction in all matters of contract where the entire amount claimed by the plaintiff did not exceed the sum of \$100. and it is nowhere made to appear therefrom that, when a part of such claim is for interest, it could exceed such amount. In our opinion, then, the justice's court had no jurisdiction of the subject-matter.

The other contention made by the relators presents a somewhat more difficult question. In regard thereto, we only now desire to say that no provision of the statute or condition of the bond on appeal from the justice's court has been called to our attention which would warrant the court in summarily rendering judgment against the sureties in the appeal bond without their having had their day in court. The writ prayed for will be awarded.

SCOTT, STILES, and ANDERS, JJ., concur.

DUNBAR, C. J. (dissenting). I concur in the opinion of the court on the propositions therein argued, but there was another question raised in this case, viz. that, the amount involved in the suit being under \$200, this court has no jurisdiction of the cause, on appeal or otherwise. This question, while directly raised, is not referred to in the majority opinion, probably for the reason that it has heretofore been decided by this court adversely to the contention of the respondent; but I am still unable to see how, under any construction of the constitution, the supreme court can assume jurisdiction in this kind of

a case. Section 4, art. 4, of the constitution provides that the appellate jurisdiction of the supreme court shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of \$200, unless the action involves the legality of a tax, etc.; and this case, being a plain action for the recovery of money, does not fall within any of the exceptions. Following this restriction of the appellate power of the supreme court, and in the same section, it is provided that the supreme court shall also have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction. I think that all these provisions must be construed with reference to the provisions concerning the appellate jurisdiction of the court, and that the limit imposed upon the appellate jurisdiction was intended to be absolute. It cannot be contended for a moment that this writ is made by virtue of the appellate jurisdiction of the court, for the appellate jurisdiction does not attach in this kind of a case by reason of the limitation imposed by the constitution above referred to. Neither can it attach by reason of the force of the provision granting revisory jurisdiction, for there is nothing revisory in the action of this court in this kind of a proceeding. Webster defines "revisory" as having the power or purpose of revision, and "revision" as the act of re-examination to correct, review, alter, or amend. The central idea of revision is a work upon something already in hand, and, in a legal sense, to correct or revise where the jurisdiction had already obtained, and the court desired to correct its own rulings, orders, or judgments. If the constitution had granted this jurisdiction for the purpose of carrying into effect the supervisory powers of the supreme court, there could be no question but that this court would assume jurisdiction in such cases, for "supervising" means to oversee or direct, to superintend the work of some one else, having, so far as the person is concerned, exactly the opposite meaning of "revising." This court, then, cannot assume jurisdiction in a case of this kind without, by judicial construction, importing into the constitution the word "supervisory" after the word "revisory." This importation is not at all necessary for the administration of justice, and, in my judgment, is directly opposed to the will of the makers of the fundamental law. The idea of the constitution is that the superior courts can be relied upon to absolutely and finally determine cases involving less than \$200, and the construction given by the majority to the constitution simply allows a litigant, by indirect methods, to obtain a benefit by certiorari he could not obtain by a direct appeal. It seems to me that the assumption of jurisdiction in this kind of cases by this court is a usurpation of the constitu-

tional jurisdiction of the superior courts, which is not only unwarranted, but absolutely forbidden by the fundamental law. The writ should therefore be refused.

STATE v. SMITH.

(Supreme Court of Washington. July 7, 1894.)

MURDER—SUFFICIENCY OF EVIDENCE.

1. Where, in a prosecution for murder, the evidence showed that the body which was supposed to be that of the deceased was very much burned, yet several witnesses testified that they recognized it from certain physical peculiarities, and the surroundings showed that a homicide had been committed, a conviction will not be set aside on the ground that the evidence falled to show the "corpus delicti."

2. Where, in a prosecution for murder, the evidence, though circumstantial, is so cogent and convincing that no fair-minded jury could have found defendant not guilty, a conviction for murder in the first degree will not be set aside.

Appeal from superior court, Spokane county; James Z. Moore, Judge.

H. D. Smith was convicted of murder in the first degree, and appeals. Affirmed.

D. W. Henley, for appellant. S. G. Allen, for the State,

ANDERS, J. The appellant was tried upon an information charging him with the crime of murder in the first degree in the killing of John Wyant, in Spokane county, on June 9, 1892, by shooting him with a gun and cutting him with a knife. The jury returned a verdict of guilty as charged, upon which verdict, after overruling motions in arrest of judgment and for a new trial, the court adjudged him gullty, and sentenced him to be hanged. To reverse this judgment and sentence, the defendant prosecutes this appeal.

The first error relied upon as a ground for reversal of the judgment is the overruling of the defendant's demurrer to the information. This objection is not tenable. The information is substantially in accordance with the precedent of an indictment for murder formulated and recommended by our territorial supreme court in the case of Leonard v. Territory, 2 Wash. T. 381, 7 Pac. 872, and is sufficient both in form and substance. No material allegation is omitted and no superfluous averments are contained therein, and the facts constituting the crime charged are set forth in plain and concise language, in accordance with the requirements of the Code.

Nor did the court, in our opinion, commit error in overruling the motion in arrest of judgment. Nothing appears in the record showing the absence of the conditions which must exist in order to warrant the prosecution of a public offense by information, rather than by indictment. On the contrary, we think it sufficiently appears that the prosecuting attorney was fully justified

in the case in filing the information against the defendant upon which he was tried.

It is contended by the learned counsel for the defendant that the evidence in this case is entirely insufficient to sustain the verdict, and that the court therefore erred in denying the defendant's motion for a peremptory instruction in his favor, and also in overruling his motion for a new trial, based upon the insufficiency of the evidence; and it is especially urged in the brief of appellant that the death of John Wyant is not shown by the testimony adduced at the trial. But a careful consideration of the evidence leads us to a different conclusion. The evidence discloses that Wyant was an unmarried man, and for some years prior to June 9, 1892, had resided alone upon his farm, about 5 miles southwest of the village of Spangle, in Spokane county, and some 18 or 20 miles from the city of Spokane. He was supposed to have considerable means, and, owing to his peculiar custom of always converting his money into coin, it was generally rumored and believed among his acquaintances that he was hoarding his money by burying it. He was seen at work in one of his fields on the afternoon of the day above mentioned. but was never seen or heard of alive afterwards. On the evening of that day, at half past 10 o'clock, his barn, which was situated some distance from his house, was, by Mrs. Morris, discovered to be on fire. She aroused her husband, and he and some of his neighbors went to Wyant's premises. Soon after they arrived at the burning building, they discovered what they supposed to be the form of a human being in the midst of the flames, lying in that portion of the barn where hay was usually kept. Other neighbors were called, and, after satisfying themselves that what they had before believed to be a human body was in fact such, they proceeded to examine the premises. Upon entering the house, they found the dining table with dishes upon it, which had been used, but were unwashed; a chair near it, and a diary, such as Wyant always kept, lying open upon the table, containing a brief account of what he did on the 9th day of June; and eggshells upon the hearth of the stove. Nothing in the house appeared to have been molested, and, judging from appearances, Wyant had eaten his supper, and at once left the room. Further investigation developed the fact that his riding horse was missing from the pasture where he was kept and where the other horses were found. In the morning, the fresh tracks of the missing horse were traced past the house of Mr. Rohweder to the end of the lane. From there, instead of following the usually traveled road to Spokane, which passes through Spangle, the tracks indicated that the horse took a short cut, which was rough, and but little traveled, and which was known to the appellant. On the evening of June 10th, this horse was found on the usually traveled road between Spokane and Spangle, about seven miles south of Spokane, and was going towards home. He was also seen and recognized at Spangle, and appeared to have been ridden hard, having dried sweat and saddle marks upon him. The tracks of this horse were easily identified and followed, on account of the fact that there was a peculiarly shaped notch in one of his hoofs. The coroner, having been sent for, went to the Wyant farm the morning after the fire, accompanied by Dr. Hoxie, and held an inquest on the body, which was still lying untouched in the ruins of the barn. It was found that the legs of the deceased to the knees and the arms to the elbows had been entirely consumed by the fire, and the remaining portion of the body was greatly charred and blackened, and covered with a coating of ashes, which seems, in a measure, to have preserved it from further consumption. The general outlines of the face had not been destroyed, and, owing to the fact that a cloth around the neck had been saturated with blood, it had not burned, and it was discovered that the throat had been cut, as the witnesses expressed it, from ear to ear. In the stomach undigested eggs were found, and it was shown that Wyant was in the constant habit of eating eggs. A bullet had passed through the head from left to right, just above the ears, and another had apparently pierced the abdomen. It was thus made apparent that a heinous crime had been committed. Somebody had evidently been killed by violence inflicted by another. Who was it? Several of the neighbors and intimate friends of John Wyant swore positively that it was he, and the jury so found, and we think rightly. Some of the witnesses recognized the body as that of Wyant by the peculiar shape of the head and face. Others knew him by the absence of a certain tooth and by a certain front tooth which stood alone. A quid of tobacco was found between the lip and the teeth of the corpse, and one of the witnesses. testified that Wyant habitually held his tobacco in that peculiar manner; and they all agreed that the curly hair which was found unburnt on the back of the head resembled that of John Wyant. With all of this evidence before them, the jury could hardly have arrived at the conclusion that the death of John Wyant was not proven beyond any reasonable doubt.

And that appellant killed him, we think, is equally certain. For some weeks prior to the homicide, appellant had been rooming and boarding at the Albion Hotel, in the city of Spokane, and was known by the name of H. C. Jones, which he says he assumed in order to avoid being recognized by certain persons who had been in the penitentiary with him in California. On June 6, 1892, he went out to the farm of Mr. Rohweder, near the Wyant place, saw Wyant, but, Mr. Rohweder not being at home, returned to Spangle, where he spent the night at an hotel.

The next morning, June 7th, this Mr. Rohweder, having gone to Spangle on business, met appellant, with whom he had been acquainted for about 12 years, and for whom he had worked at one time in California, and took him back to his home, where he spent the day, Wyant being there also a portion of the time. Appellant tried to purchase Wyant's farm for his brother, who had been in that vicinity some time previously, but was then in California, but Wyant was not disposed to sell. During the conversation at Rohweder's, Wyant remarked, in the presence of the appellant, that he (Wyant) had money, but not nearly so much as people thought he had. Wyant went home before night, and the appellant remained all night with Rohweder. The next morning, June 8th, Rohweder took appellant to Spangle in a wagon, where he took the train for Spokane; but, before going on board the cars, he was seen to purchase a ticket to Spokane and return to Spangle. On the next afternoon, June 9th, at about half past 1 o'clock, appellant borrowed overalls, a "jumper," and an old coat from the day clerk at the Albion Hotel, saying he wanted them because he was going to work in a well that night. Soon after, he left the hotel, and was not again seen there by any of the employes until 4 or 5 o'clock on the following morning. But he was seen on the train which left Spokane for Spangle at 2:30 o'clock on the afternoon of June 9th, and got off at the latter place on the arrival of the train at about half past 3 o'clock, and was then wearing clothing similar to that he had borrowed at his hotel a short time previously. Appellant was not again noticed until a little after sunset, when he was seen by Rohweder in Wyant's field, going down a place which was a little lower than the ordinary level of the ground in the direction of Wyant's house. He was then 200 or 250 yards distant from Rohweder, but the latter testified positively that he knew him. Both Mr. and Mrs. Morris saw a man whom they did not know at about the same time and place. About 9 o'clock that evening, Mrs. Vila, who lived but a short distance from Wyant's house, heard two shots fired at or in the locality of his barn. Near 10 o'clock, Mrs. Morris heard a horse run down the road past her house, and coming from the direction of Wyant's ranch; and Rohweder, who lived further down, also heard a horse running down the road. He says he looked out of the window, and saw the appellant on John Wyant's horse, going past his house at full speed. The moon was shining brightly, and he watched him until he disappeared in the distance. When opposite the window, appellant was only 40 or 50 feet from Rohweder, and he testified that he recognized him, and also the horse. This was the horse which, as we have stated, was missing from the pasture a few hours later, and whose tracks were followed towards Spokane, and which was found loose in the

highway the next evening. On the morning of June 9th, appellant went to the office of an attorney in Spokane, and had a contract of sale of the Wyant farm and everything thereon, including the live stock, prepared ready for signing, which he paid for and carried away. When on the witness stand in his own behalf, he explained this transaction by saying, in effect, that he expected to meet Wyant at Spokane that afternoon on the arrival of the train from Spangle, and desired to have the contract ready when he arrived, but he did not come. In explanation of his absence from his boarding house from the time he borrowed the clothes until the next morning, appellant testified that he went down the river fishing in the afternoon, and in the evening, as he was walking about somewhere in Browne's addition, he was attacked by two men, who attempted to rob him. One of them, he said, presented a pistol, which he grabbed with his left hand, and it was discharged, the bullet grazing and slightly injuring his hand. He further stated that, just at that moment, the other man struck him in the stomach, and made him sick; and, after they both ran away, he lay down on the ground for an indefinite length of time, and then went to his hotel. He admitted that he gave no alarm, and never mentioned the occurrence to the police. On the following day it was observed that his hand was injured, and, on being asked what the matter was, he replied that he had cut it. He was arrested a day or two afterwards, and on examination it was found that his left hand had been wounded by a gunshot, which had been fired from, and not towards, him, as he testified. Powder was still sticking in the skin on the upper side of his thumb and index finger. His legs were chafed, and showed that he had recently been riding. In his valise, which was in his room at the time of his arrest, were found the borrowed overalls and jumper, a soft hat, which he did not wear about town, and a revolver, perfectly clean, and with every chamber loaded, and a wiper, which bore evidence of very recent use. The coat which he got with the overalls was upon the floor at the foot of his bed. No explanation whatever was given why he did not work in a well on that fatal night. With all the facts and circumstances appearing in the record before us, we are unable to say that the jury were not fully warranted by the evidence in arriving at the conclusion which they did, that the appellant was the person who perpetrated the atrocious crime charged in the information. While the evidence is largely circumstantial, it is to our minds so cogent and convincing that we believe no fair-minded and impartial jury could have found the appellant not guilty.

The appellant also complains of the instructions given by the court to the jury. They are very voluminous, and many of them were given at the request of defend-

ant's counsel. We have carefully examined them, and are of the opinion that, as a whole, they are singularly free from substantial errors, and are as favorable to the appellant as he had any right to demand or expect. We see in them no positive misdirection, nor anything by which the jury could have been misled to the prejudice of the defendant. The defendant had the benefit of able and industrious counsel in the trial and presentation of his case to the jury, and was deprived of no right to which he was entitled under the law. The judgment and sentence are therefore affirmed, and the court below will, in accordance with the statute (section 1354, Code Proc.), proceed to appoint a day for the carrying of the same into effect.

DUNBAR, C. J., and SCOTT, HOYT, and STILES, JJ., concur.

SMITH et al. v. COCHRANE. (Supreme Court of Washington. Aug. 24, 1894.)

For report of majority opinion, see 37 Pac.

Dissenting opinion.

HOYT, J. (dissenting). I am unable to agree with the conclusions of the majority stated in the foregoing opinion. It is conceded therein that the greater number of the decided cases is in favor of the proposition that it is within the power of the legislature to provide for constructive notice in proceedings of this kind, and in my opinion the weight of reason and authority is to the same effect. The reasoning of the majority by which it is attempted to detract from the force of the cases so holding, and to show that under our constitution they are not in point, though ingenious, is unsatisfactory, to my mind. But, even if it were satisfactory. from the premises which are assumed as its foundation I should still be unable to concur therein, as I am unable to interpret the provisions of our constitution, which are referred to and used as a foundation for the argument, as do the majority of the court. It is therein assumed that under the provisions of section 16 of article 1 of our constitution, municipal corporations, as well as all others, must first make compensation in money before they can appropriate a right of way. I am unable thus to construe the section. It is true that in the case of Lewis v. City of Seattle, 5 Wash. 741, 32 Pac. 794, it was held that such was its proper construction, but this question was not necessarily involved in that case, and upon further consideration I think what was said therein upon that question was not warranted by the language of the section of the constitution under consideration. In that case it was held that the provision which required that the damages assessed should be irrespective of any benefit from any proposed improvement did not apply when the condemnation was sought by a municipal corporation, and a like course of reasoning would exempt municipal corporations from the prior payment of the damages in money. In fact, when we apply to the provisions of that section the ordinary rules of interpretation, such construction seems to me a necessary one. One of such rules is that every word must, if possible, be given significance; hence it must follow that the word "first" before "made" in the second clause, relating to the subject. must be given force; and, if it is, the result will be that as to municipal corporations the compensation need not be first made in money, or ascertained, and paid into court for the owner. In the first clause it is provided that no property shall be taken or damaged without just compensation having been first made, and, if the intent had been to make the same rule applicable to the appropriation of rights of way by municipal corporations, there would have been no use whatever in again inserting the word "first." If, as claimed by the majority, the second clause is to be governed by the provisions of the first, the intent would have been made clear if the word "first" had not been repeated. It follows that under the construction given by the majority the use of the word "first" the second time is disregarded, and the rule above referred to violated, while the construction which results in holding that by the language of the second clause municipal corporations were exempted not only from the provision as to the setting off of benefits. but also from the one as to prior payment, every word will be given force, and the general rule of construction followed. This construction will result in no hardship not fully contemplated by the language of the constitution, for the general provision will still apply to municipal corporations that they can take or damage no property without just compensation. The only effect will be to allow such corporations to take possession of property necessary for their use upon providing that there shall be paid therefor just compensation. This construction may at times work some little hardship upon property owners, but it will be insignificant when compared to the benefit to the public flowing therefrom. The method in which municipal corporations do their business is such that public policy demands that an exception be made as to the time of payment, and that they should be allowed to take possession of property condemned whenever, under the law, they have taken such steps that the owner is assured of just compensation; and such, to my mind, was the evident intent of the constitution makers when they made use of the language under consideration.

I see no reason for the suggestions of evil growing out of such a holding, contained in the opinion of the majority. The action of the legislatures of the several states has always been in the line of proper protection

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of property rights. That this has been the tendency is shown by the fact that in many of the states the strongest provisions as to such protection are contained in the acts of their legislatures, and not in their constitutions. The legislative, as a co-ordinate branch of the government, is charged with certain duties, and the courts have no greater right to assume that it will depart from its proper functions than it has to impugn the motives or practices of the judiciary.

There is one other objection to the law under consideration, made by the majority, which I desire to mention. Doubt is therein expressed as to the right of the legislature to provide the method set out in said law by which the damages may be ascertained. It is argued that the requirement that the damages shall be assessed by a jury unless waived is not given force by the course of proceeding marked out by the statute. The owner is given the right to have the damages assessed by a jury if he appears and asks it, and, if he does not do so, he has waived such right in one of the methods provided by the statute. If he does not appear, the court will proceed, as in any other case, to adjudicate against him upon the record, and such proofs as by the statute or the practice of the court are requisite in the case under consideration. Every statute enacted by a legislature should be sustained unless its conflict with the constitution is so plain that there is no foundation for two opinions in regard to the question. Apply this rule to the statute under consideration, and the result will be that it should be held valid. In my opinion, the judgment of the superior court was right, and should be affirmed.

SPARGO v. NELSON et al.
(Supreme Court of Utah. June 28, 1804.)
MECHANIC'S LIEN-WAIVER.

Though a mechanic's lien for materials furnished attaches on the day the person commences to furnish the material, yet, where such person, after having filed a notice of lien therefor, though it was unnecessary, cancels the notice on being told by the owner that he cannot borrow money by mortgage unless the notice is canceled, and another loans money, taking a mortgage as security, and part of the money borrowed is paid to the person claiming the lien for material already furnished, he is estopped to claim that the mechanic's lien is prior to the mortgage, though he did not know who was going to loan the money.

Appeal from district court, Weber county; before Justice James A. Miner.

Action by James H. Spargo against Fritz E. Nelson and others. There was a judgment for plaintiff, and defendants the Eccles Lumber Company and G. R. Belknap appeal. Affirmed.

Evans & Rogers, for appellants. Rhodes & Pash, for respondent.

BARTCH, J. This action was brought to recover a debt of \$1,400, secured by mort-

gage on certain real property, and to have the mortgage declared to be a lien prior and superior to a certain mechanic's lien of the defendant Eccles Lumber Company, filed for record after the mortgage had been filed. It appears from the record that on the 18th day of July, 1891, the defendant Nelson, who was the owner of a certain lot in the city of Ogden, entered into an agreement with the defendant company by the terms of which the company was to furnish him the material necessary to construct a house on his lot; that the company, on the 30th day of July, 1891, after having furnished a portion of the material, the house being in course of construction, filed, in the proper office, a notice of intention to claim a lien on the house and lot for money due and to become due because of the furnishing the material; and that on the 4th day of September, 1891, the defendant Nelson applied to the plaintiff for a loan of \$1,400, and proposed to secure it by executing a mortgage on the same property. The plaintiff, discovering the lien of the Eccles Lumber Company, refused to make the loan unless the notice of intention to claim the lien would be canceled by the company. Nelson then informed the company that he could borrow money on the property if their notice of lien were canceled, but did not inform it of whom he could get it. He also agreed with the company that he would pay it the amount called for in the notice, which was \$459.30. The company then canceled the notice of lien. Thereupon, on the 28th day of September, 1891, the plaintiff loaned Nelson the money, taking his promissory note, which was also signed by the defendant Hansen, therefor. As security for the note, Nelson executed and delivered to the plaintiff a mortgage on the house and lot, which mortgage was duly placed on record. Thereafter, on the 11th day of November, 1801, the defendant company filed another notice of lien, for \$290, on the same property. This lien was afterwards foreclosed, and, at the time this action was instituted by the plaintiff, the property was advertised for sale. The defendant Belknap was the officer who was executing the order of sale. Under this state of facts, the court below held that the mortgage lien of the plaintiff was paramount and superior to the mechanic's lien of the defendant company, and entered judgment accordingly, and restrained the company from selling the property. From this judgment the defendants the Eccles Lumber Company and Belknap appealed, assigning as error the holding the mortgage lien of respondent paramount and superior to the mechanic's lien of the appellant company and the issuing of the restraining order.

Counsel for appellants insist that under the act approved March 12, 1890, relating to mechanics' liens, which was in force at the time of this transaction, the lien of the appellant company was paramount and superior to the mortgage lien of the respondent,

because it attached first in point of time. This contention is correct, and must be sustained, unless the appellant company is estopped, by its own acts or conduct, from insisting on its lien as against the respondent, for it will be noticed from the facts in this case that the company commenced to furnish material for the erection of the house before the mortgage security was given; and this court, in Morrison v. Carey-Lombard Co., 9 Utah, 70, 33 Pac. 238, held that the lien of a person who furnished material for the construction of a house attached on the day when he commenced to furnish the material. In the case at bar the date of commencing to furnish material was prior to the date of the mortgage. Is, then, the appellant company estopped from insisting on its lien, as against the respondent, because of its own acts? When the defendant Nelson informed the company that he could borrow money if it would release its notice of lien, and agreed to pay it the amount the notice called for, the company caused the notice of lien to be canceled of record, as follows: "Cancellation: I, Thomas D. Dee, secretary of the Eccles Lumber Company, do hereby release and discharge the lien herein created. The Eccles Lumber Company, by Thomas D. Dee, Sec'y." This was a deliberate cancellation of the lien, and, from the fact that Nelson had informed the company of his futile efforts to obtain money with the incumbrance on his property, it must be held that the cancellation was made for the purpose of an inducement to the party with whom Nelson was dealing. The mere fact that the company was not informed by Nelson that the plaintiff was the party with whom he was negotiating can make no difference, for it was aware that, whoever the party might be, he was unwilling and had refused to loan the money so long as there was a prior incumbrance on the property, and with this knowledge caused the release to be executed. Nor does the fact that the notice of lien released was not necessary to effect a lien under our statute change the status of the parties to the transaction, for manifestly the intent was to induce the party, whoever he might be. to part with his money by doing an act which would lead him to believe, under a misapprehension of law, that the mortgage would, after the release, be a paramount lien. In consideration for this act, the company were to and did receive a portion of the money so obtained, in payment of the amount due it from Nelson. A court of equity will not lend its aid in furtherance of such a scheme as is presented in this record. Where a party who has a right of lien against property, for the purpose of inducing another person to loan money on the same property as security, releases such right, such party, after such person has so loaned the money on the faith of such security, will not be heard to reassert his right of lien, as against the person who so parted with his money. Bigelow, Estop. p. 502; Copeland v. Copeland, 28 Me. 525; Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657; Markham v. O'Connor, 21 Am. Rep. 249; Faxton v. Faxon, 28 Mich. 159; Truesdail v. Ward, 24 Mich. 117. We are of the opinion that the facts and circumstances of this case, as they appear both from the pleadings and record, are of such a nature as to constitute an estoppel, and that, therefore, the lien of the appellant company is inferior and subordinate to the lien of the respondent. The judgment is affirmed.

MERRITT, C. J., and SMITH, J., concur.

ALLEN v. LOGAN CITY.

(Supreme Court of Utah. June 28, 1894.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK—NEGLIGENCE OF FELLOW SERVANT.

1. In an action against a city for personal injuries, it appeared that plaintiff, in order to work out his poll tax, was put to work by the road supervisor at undermining a gravel bank. The gravel was raked out, which caused the bank to fall so that the material might be hauled away. At times it was necessary to blast. Plaintiff was notified of the danger of the work. On account of the ground being frozen, and cracks in it, caused by the previous blasting, the bank caved, and fell on plaintiff. The road supervisor was unaware of the cracks, but an employé in charge knew of them, and tell him when it started to fall, which he did as soon as he was aware of it. Plaintiff knew of the previous blasting, but did not know of the cracks. Held, that plaintiff had assumed the risk. Bartch, J., dissenting.

the other employé to inform plaintiff or the supervisor of the cracks was that of a fellow servant. Bartch, J., dissenting.

Appeal from district court, Weber county; before Justice James A. Miner.

Action by Edward O. Allen against Logan city. There was a judgment for plaintiff, and defendant appeals. Reversed.

D. A. Reavill, Evans & Rogers, and W. W. Manchan, for appellant. E. M. Allison, Jr., and Rich & Rich, for respondent.

MERRITT, C. J. This is an action wherein respondent sued in the court below to recover damages for an injury which he sustained while working at undermining a gravel bank, which fell upon him, and caused the injury complained of. The jury rendered a verdict in favor of respondent for \$2,200. A motion for a new trial was made and denied in the court below. From the judgment and order denying a new trial this appeal is taken.

The facts, as disclosed by the record, show that on the 28th day of December, 1891,—the date of the injury,—appellant, Logan city, a municipal corporation, was engaged in undermining and throwing down a bank of earth known as the "Temple Hill Gravel Bank," and hauling material therefrom, and using it in the improvement of the streets of Logan city. The bank extended along a distance in

length of about 40 rods, with a perpendicular height of about 61/2 feet. The formation consisted of about a foot or 18 inches of soil and gravel, underneath which was 4% or 5 feet of cement, and still underneath the cement was a seam of loose gravel, which was easily removed. The weather was very cold, and the frost had penetrated the surface a distance of about 16 inches. The usual method of undermining the bank by the workmen employed upon it was to use what was called a "pike pole,"-an instrument with a handle about five or six feet long, containing a steel point at the end, which was thrust into the seam of gravel underneath: and thereby the workmen would cause the bank to be so undermined that in some cases it would fall of its own weight, and at other times giant powder was used in throwing it down. Respondent, on previous occasions, had worked at the same employment in which he was engaged on the day of the injury, and had caused the bank to fall by undermining the same. He also knew of the method by which the bank had been worked and thrown down on previous occasions. On the day of the injury. without any objection on his part, and because he was a careful man, he was set to work by the road supervisor, Eliason, for the purpose of working his poll tax. He was informed that the work was of a very dangerous character; that he ought to be careful, so that the bank when undermined would not fall upon him. He was also told that the safest manner in which he could perform the work was to take this pike pole, and use it in front of him, and dig out the loose gravel underneath the cement, moving backward while so doing, keeping his body adjacent to the bank not undermined. He followed the directions given him, and began to work digging out the gravel underneath and back from the face of the bank, a distance of 4 or 5 feet, moving backward as directed: pursuing his work until he had undermined in that manner about 35 feet easterly from the point where he began. About 5 or 10 minutes before the accident, a Mr. McCullough, whom the road supervisor had instructed to look after the men, warned respondent the bank would be likely to fall, and to be very careful. Mr. McCullough also stated to him that he would stand by him, and watch the bank, so that when it gave evidence of falling he would warn him. Mr. McCullough saw the bank was about to fall, and immediately gave warning to respondent, who began to run away, when the bank split off about 10 feet easterly from where it had been undermined, and opposite to the point where respondent was working. The falling of that portion of the bank not undermined struck the respondent, and partially buried him, and injured him. The breaking of the bank beyond the point where undermined, and by which respondent was working, was caused by its frozen condition, and probably because of cracks and fissures formed in the earth.

caused by the use of giant powder on previous occasions. McCullough and one Crockett knew that the bank opposite where respondent was working contained cracks on the morning prior to the time respondent went to work. Crockett, however, before respondent commenced to work, went upon the top of the bank, and, with a crowbar, pried off all the ragged edges and pieces that could be thrown down by the use of his bar, and ieft the bank in a safe condition with which to work, unless the same was undermined. The evidence does not show that Eliason knew of any cracks that were upon the surace of the bank. The respondent testified that he did not know of any cracks upon the surface opposite to where he was working, nor did he state that he would not have worked there, had he known of such cracks. On previous occasions, however, respondent had worked at the same employment, and knew that on other occasions powder had been used to throw down the bank, and that it had force and power sufficient for that purpose; and, upon a previous occasion when respondent was at work, the bank caved while he was undermining it, but he succeeded in getting away in safety. The only purpose which respondent had in undermining the bank was to cause it to fall. His labor in undermining it was the occasion of the fall. The evidence also shows that respondent was repeatedly warned that the work was dangerous, and to be careful while he undermined the bank, so as to avoid an injury to himself when it would fall.

At the conclusion of the testimony for the respondent in the court below, appellant rested his case, and moved the court for a nonsuit on several grounds, among which were: First, that the evidence was insufficient to show any negligence on the part of appellant: second, that the evidence established the fact that respondent, in entering upon the contract of employment, assumed the risks and dangers incident to it; third, that whatever injury respondent suffered was brought upon himself by his own want of care and diligence; and, fourth, that if any negligence was shown, which caused the injury, the same was occasioned by a fellow servant of respondent. The court overruled appellant's motion for a nonsuit, to which appellant took an exception, and assigns error to this court.

In discussing the case under consideration, we deem it necessary to consider but two points: First, does the evidence show any negligence whatever upon the part of appellant which would entitle respondent to recover? and, second, if any negligence were shown by the evidence, was it the negligence of a fellow servant? These points will be considered in their order.

1. It will be seen that the evidence clearly established the fact that respondent was voluntarily working under a gravel bank, undermining the same for the purpose of caus-

ing it to fall; that he was warned of the dangerous position in which he had placed himself, and repeatedly warned to be careful, in order to prevent an injury. of the dangerous employment in which he had voluntarily engaged himself, and knew the manner in which the work was being carried on, and had actually been employed, carrying on the same work, upon previous occasions. He was engaged in a business, the accomplishment of which was, in its nature, extremely hazardous. The very purpose for which the bank was being undermined was to cause it to fall, so that the material might be used in improving the streets of the city. Without caving the bank, and causing it to fall, nothing of profit could be accomplished. The danger was as open and obvious to the servant as it was to the master. Respondent was a careful workman, and there is nothing in the evidence to show that he was incompetent, or did not understand the hazards incident to the work. He was familiar with all the facts and circumstances surrounding the employment, and is presumed to know that when he caused the bank to be undermined it would fall. In fact, that was the purpose for which he was employed, and the very business in which he was engaged, and the risks and dangers of the employment were assumed by him. Besides, the fall of earth was an unusually large one, splitting off the bank beyond the point where it was undermined, and by which respondent was standing. This, as shown by the evidence, was not only unusual, but unforeseen and unexpected. It was a mere accident which was the cause of the injury, for which the appellant is not liable. Naylor v. Railway Co., 53 Wis. 661, 11 N. W. 24; Bennett v. Iron Co. (Utah) 34 Pac. 61; District of Columbia v. McElligott, 117 U. S. 621, 6 Sup. Ct. 884; Railroad Co. v. Lempe, 11 Am. & Eng. R. Cas. 201; Anderson v. Winston, 31 Fed. 528; Songstad v. Railway Co. (Dak.) 41 N. W. 755; Griffin v. Railway Co. (Ind. Sup.) 24 N. E. 888; Walsh v. Railroad Co., 27 Minn. 367, 8 N. W. 145; Southern Pac. Co. v. Seley, 14 Sup. Ct. 530.

2. It is equally clear that if any negligence was shown, which caused the injury, it was the negligence of a fellow servant. Eliason, the road supervisor, was the vice principal of appellant. He directed respondent where to work, and warned him that it was dangerous, and to be careful, so that he would not receive an injury while working at the bank. The record shows that the supervisor had left the point where the work was being done, and had gone upon the streets of the city, where the gravel was being distributed. He left McCullough and one Worley in charge, and directed the other men what to do, and warned them to be cautious, so that no injury should occur. McCullough and Crockett were the only persons who knew of the existence of cracks on the surface of the bank. McCullough stated to respondent that

he would warn him when the bank gave evidence of falling. If McCullough permitted respondent to remain at the bank too long, and was not as vigilant as he should have been in warning respondent, such negligence would be attributable to him alone. lough had no power to discharge or employ the workmen. He was engaged at the bank. and in the same general department, and working at the same general character of work, with respondent; and Crockett was working at the same place, and in the same manner. It is clear that McCullough and Crockett were fellow servants with respondent, and for their negligence, if any be shown, appellant is not liable. Coal Co., v. Johnson, 6 C. C. A. 148, 56 Fed. 810; Railroad Co. v. Baugh, 13 Sup. Ct. 914; Bennett v. Iron Co., supra.

It is clear, in principle and upon authority, that the unfortunate accident which resulted in the injury of respondent was one of the ordinary risks which he assumed when he entered upon his employment, and for which appellant cannot be held liable. In our opinion the nonsuit should have been granted. The judgment and order appealed from are therefore reversed, and the cause remanded, with costs, and with directions to grant a new trial.

SMITH, J., concurs.

(June 29, 1894.)

BARTCH, J. (dissenting). I do not agree with my brethren in the reversal of this case. The plaintiff was summoned under the laws of this territory to work out his poll tax. He obeyed the summons, and placed himself in the hands of an officer who had charge of the work, willing to obey his directions. He assigned him to a dangerous position, where he had not been accustomed to work. He worked two half days, and on the third he was injured, without negligence on his part. He had never used giant powder, did not know the effects a shot would produce on the bank, and had never been on top of the bank, and it was not his duty to go there. No one had told him about the cracks which were visible on top of the bank, and which had been occasioned by the shots fired on the previous day, when he was absent. Nor did he know that any shots had been fired on the day previous to the accident. The officer who had charge of the blasting knew that cracks were on top of the bank, and that they extended beyond where plaintiff was at work, but said nothing to him about them. He did tell the foreman who had charge of the place that the bank was cracked opposite to where the plaintiff was working, and that it was dangerous to a man working there; but the foreman also failed to notify the plaintiff of the condition of the bank, although he received this information about an hour and a half before the accident happened. It is shown that when the bank fell it broke away, as indicated by the crack on top, to a distance of about 10 feet beyond where the plaintiff was at work, and this rendered his escape impossible. If the plaintiff assumed the risks incident to his employment, can it be contended that he assumed the additional risks of danger occasioned by the blasting on the day previous, in his absence, of which he was in total ignorance? It seems to me that to so hold is to extend the rule too far. The agent of the appellant committed the acts causing the additional risk which the plaintiff unconsciously assumed, and then, in total disregard of his safety, neglected to inform him of his more perilous position. The plaintiff was but an ordinary laborer, unskilled in and unaccustomed to the work which he was performing, and was under the control of the officers and foreman of the appellant. I do not regard this as a case in which the rule applicable to a fellow servant will apply. Armstrong v. Bailway Co., 8 Utah, 420, 32 Pac. 693. . I am of the opinion that the record presents a case which entitles the plaintiff to recover. I therefore dissent.

BANK OF SAN LUIS OBISPO v. PACIFIC COAST STEAMSHIP CO. (No. 19,363.)

(Supreme Court of California. Aug. 22, 1894.)
Corporations—Liability of Stockholders—
Limitation of Actions.

Under Code Civ. Proc. § 359, requiring actions to enforce a liability against stockholders of a corporation to be brought within three years after the liability is created, an action to enforce the liability on a note of a corporation must be brought within three years of its date.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the Bank of San Luis Obispo against the Pacific Coast Steamship Company. There was a judgment for plaintiff, from which defendant appealed. Reversed.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. Graves & Graves, for respondent.

BELCHER, C. This action was commenced on the 3d day of June, 1890, to recover from the defendant, as a stockholder in the San Luis Hotel Company, a corporation, its proportion of an indebtedness alleged to be due from said hotel company to the plaintiff. It is averred in the complaint that at all the times mentioned therein the capital stock of the San Luis Hotel Company was \$75,000, divided into 750 shares of the par value of \$100 each, and that the defendant was the owner of 92.14 shares of the said stock; "that on the 30th day of December, 1886, said corporation, the San Luis Hotel Company, borrowed from the plaintiff, and the plaintiff loaned and advanced to it, said San Luis Hotel Company, the sum of \$29,177.66,

and on said day the said San Luis Hotel Company gave its promissory note to the. plaintiff for said sum of \$29,177.66, which note is in the words and figures following, to wit" (then setting out a copy of the note, dated December 30, 1886, and payable six months after date). It is further averred that on or about the 11th day of April, 1890, an action was commenced against the said hotel company to recover the amount due on said note for principal, interest, attorney's fees, and costs, and that, on or about the 30th day of the same month, judgment was duly made and given in said action against the defendant therein, and in favor of the plaintiff herein, for the sum of \$8,237.93; that afterwards an execution was issued upon the said judgment, and returned wholly unsatisfied, and that the proportion of said indebtedness for which the defendant was individually and personally hable was \$2,105.07, with interest thereon from the date of said judgment; and that no part thereof had been paid. The defendant demurred to the complaint upon the grounds that the cause of action was barred by the provisions of subdivision 1 of section 338, and by the provisions of section 359, of the Code of Civil Procedure. The demurrer was overruled, and the defendant then answered, and, among other defenses set up, pleaded in bar of the action the same provisions of the Code. The case was tried, and the court found, among other things, that the action was not barred, and that the plaintiff was entitled to judgment for the sum of \$1,251.63, with costs. Judgment was accordingly so entered, from which the defendant appeals.

The demurrer should have been sustained. The action was commenced more than three years and five months after the date of the note set out. The cause of action appeared, therefore, on the face of the complaint, to be barred by the statute of limitations. It must now be regarded as settled law in this state that the liability of a stockholder of a corporation to pay his proportion of its corporate debts is one created by statute, and an actionto enforce that liability must be brought within three years after the cause of action accrues. Moore v. Boyd, 74 Cal. 167, 15 Pac. 670; Hyman v. Coleman, 82 Cal. 650, 23 Pac. 62; Hunt v. Ward, 99 Cal. 612, 34 Pac. 335. In the case last named, it was held that the liability of a stockholder of a corporation upon a note given by the corporation is created, within the meaning of section 359 of the Code of Civil Procedure, at least as early as the date of the note; and the statute of limitations commences to run in favor of the stockholder from the date of its execution, and not from its maturity, regardless of how long the liability of the corporation to actions may be postponed by agreement of the creditor. The judgment should be reversed, and the cause remanded.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is reversed, and the cause remanded.

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ULLRICH v. SANTA ROSA NAT. BANK. (No. 15,624.)

(Supreme Court of California. Aug. 20, 1804.)
Parties—Presumptions on Appeal.

1. In an action to recover money deposited by plaintiff with defendant under an agreement that it is to be paid to a third person on condition that the latter deliver a deed to plaintiff within a certain time, such person is not a necessary party.

2. Where, on appeal, the record does not contain the evidence, and findings of fact were waived, it will be presumed that the allegations of the complaint were proven, and that the affirmative allegations in the answer were not.

Department 1. Appeal from superior court, Sonoma county.

Action by one Ullrich against the Santa Rosa National Bank. There was a judgment for plaintiff, and defendant appeals. Affirmed.

R. M. Swain and J. A. Barham, for appellant. Albert G. Burnett and J. M. Thompson, for respondent.

HARRISON, J. It is alleged in the complaint that on the 9th of December, 1892, the plaintiff deposited with the defendant the sum of \$750, and that at the same time it was agreed between him and one Hattle C. Brown that she would, within three weeks from that time, "furnish" the plaintiff with a deed of conveyance of certain land in Sonoma county, and that thereupon the defendant should pay her the money so deposited, and that if she should fail to so furnish the deed the defendant should return the money to the plaintiff; that said money was accepted by the defendant upon and subject to this condition and agreement; that Mrs. Brown has entirely failed to furnish the deed; that on the 26th of September, 1893, the plaintiff demanded of the defendant the return of the money, which was refused; and that the defendant, at the time of such demand, knew that Mrs. Brown had failed to furnish the deed. Judgment was asked against the defendant for the amount so deposited with it. The defendant demurred to the complaint upon the ground that there was a defect of parties defendant, in that Mrs. Brown was a necessary party to the The demurrer was overruled, and the defendant answered the complaint, denying all its allegations, and setting up certain affirmative matters of defense. The cause was tried by the court without a jury. Findings of fact were waived, and judgment was rendered for the plaintiff, as prayed in his complaint. The defendant has appealed from the judgment upon the judgment roll alone, without any bill of exceptions.

1. The demurrer was properly overruled.

The complaint does not show that Mrs. Brown was in any way interested in the matter in litigation, or that her presence was necessary to a determination of the rights of the plaintiff and defendant to the money in controversy. The allegations of the complaint are to the effect that the money had been received by the defendant from the plaintiff upon the condition and agreement that, if Mrs. Brown did not furnish to the plaintiff a certain deed within three weeks from the date of the deposit, the money was to be returned to the plaintiff, and that she had not furnished such deed. This is but the ordinary averment of an agreement for the payment of money upon the happening of an event, and that the event had happened. If these averments are true, the defendant is liable to the plaintiff for the money.

2. If there were any facts, not appearing upon the face of the complaint, which would render Mrs. Brown a necessary party, whose presence was essential to the determination of the controversy, those facts could have been presented by the defendant in its answer; and the court would thereupon, upon its motion, have ordered her to be brought in as a defendant. Code Civ. Proc. \$ 589. So, too, if Mrs. Brown had set up any claim to the money held by the defendant, the defendant could have alleged that fact in its answer; and if it could have shown the facts required by section 386, Code Civ. Proc., it could, under the provisions of that section, have had her substituted as a defendant in its place, and procured a discharge from any liability for the money. Defendant did not, however, pursue either of these courses, but chose to defend its right to retain the money by a mere traverse of the allegations of the complaint.

8. As the record does not contain any of the evidence at the trial, and as findings of fact were waived, we must assume, in support of the judgment, that the allegations of the complaint were sustained by the proofs, and that the affirmative allegations of the answer were not so sustained. The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

ESREY v. SOUTHERN PAC. CO. (No. 15,-440.)

(Supreme Court of California. Aug. 15, 1894.)
RAILROAD COMPANIES — INJURIES TO PERSON ON
TRACK — PROXIMATE CAUSE — FINDING — SUFFICIENCY OF EVIDENCE — WILLFUL NEGLIGENCE —
QUESTION FOR JURY.

1. Plaintiff negligently went between defendant's railroad track and a high platform in front of moving flat cars. The track and platform were about three feet apart, and she stood in the space between them while one or more cars passed her, and was seen by the brakemen. A box car, wider than the flat cars, was

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then attached, and moved in the opposite direction until it struck plaintiff. Held, that the facts justified a finding for plaintiff.

2. It appeared that after plaintiff was struck she threw herself on the ground, to save her life, and the brakeman saw her, and gave the opposite and ditional signal to preced and the engineer an additional signal to proceed, and the train moved on. *Held*, that the question of the wantonness of defendant's employes was

for the jury.

3. In an action against a railroad company
the negligence, an for personal injuries caused by its negligence, an amendment alleging that the acts of defendant were willfully done does not materially after the ause of action, so as to make a plea of limita-

tions available.

Department 1. Appeal from superior court, Tulare county; W. W. Cross, Judge.

Action by Nannie Esrey against the Southern Pacific Company for personal injuries caused by defendant's negligence. judgment for plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

Foshay Walker, for appellant. Justin Jacobs and Bradley & Farnsworth, for respond-

GAROUTTE, J. Plaintiff recovered a judgment for damages against defendant for personal injuries sustained by being struck by a moving car of defendant. Defendant has appealed from the judgment and order denying a motion for a new trial. The case has once been before the court (88 Cal. 899, 26 Pac. 211), and a detailed statement of the facts may there be found. For our present purposes, the following facts, as testified to by plaintiff, are deemed material: Upon attempting to leave the depot grounds of defendant, and with a view of going around the end of the depot platform, plaintiff crossed the railroad track, and thereupon found herself between the outside rail of the track and the platform of the depot, which platform was about five feet in height, and the width of this intervening space was about three feet. At this moment of time a train came backing towards her, composed of flat cars, which prevented her going further; and for her own safety she stood against the side of the platform, with the object of allowing the cars to pass by. The original width of this space being but three feet, and the cars extending some distance outside and beyond the track, it is apparent that plaintiff, at this time, was in such close quarters as to be not only in an unpleasant position, but, it may be said, a dangerous one; and it will be further conceded that she found herself in that position by reason of her own thoughtlessness and want of care. One or more cars passed her at this time, and there is no question but that the two brakemen, and possibly the engineer and fiveman, saw her standing in this position. train was backed a short distance beyond the point where she stood, when it stopped a moment. A box car was attached thereto, and it then started to retrace its course. When the box car came to the point where plaintiff was standing,—it being wider than the flat cars, and leaving a space next to the platform of not more than 14 inches,it inevitably struck her, and the injury resulted.

Upon the foregoing state of facts, we think the jury entirely justified in finding a verdict in favor of plaintiff. By her own negligence she placed herself in a position of danger, but defendant was aware of her danger, and did not exercise ordinary care to protect her from the danger that surrounded her. Under these conditions the law gives the injured person a right of action. This right of action is based upon the principle that a failure to exercise ordinary care by a defendant, under such circumstances, amounts to a degree of reckless conduct that may well be termed willful and wanton; and, when an act is done willfully and wantonly, contributory negligence upon the part of the person injured is not an element which will defeat a recovery. Some text writers and courts declare the same principle, in another form, by holding that under these circumstances the contributory negligence of the party injured is not the proximate cause of the injury, but that the negligence of the defendant, being the later negligence, is the sole proximate cause. As has been said by one of our law reviews, "the party who last has a clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible." As fully sustaining these general principles, see Shear. & R. Neg. § 99; Cooley, Torts, p. 674; Romick v. Railroad Co., 62 Iowa, 167, 17 N. W. 458; Williams v. Railroad Co., 72 Cal. 120, 13 Pac. 219; Needham v. Railroad Co., 37 Cal. 409; Robinson v. Railroad Co., 48 Cal. 423; Holmes v. Railway Co., 97 Cal. 161, 31 Pac. 834.

In addition to the foregoing statement of facts, it further appears that after plaintiff had been struck by the car, and had thrown herself upon the ground to save her life, the brakeman saw her in this most dangerous position, and instead of stopping the train, and removing her from still greater threatened calamities, he gave an additional signal to the engineer to proceed, and the train moved on, plaintiff remaining in this dangerous position. Even though the emp'oyds were not aware at this time that she had been injured by the car, we think, taking this circumstance into consideration, in connection with all the other circumstances which we have stated, the question as to the wantonness and willfulness of the employes' acts in moving the train was a question of fact, which the jury were well justified in finding against the defendant. To commit an act recklessly is to commit it wantonly; and in this case the manner in which this train was moved after the box car was attached, the employes knowing the dangerous position of the plaintiff at the time, indicated such a spirit of reckless

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indifference on their part towards the plaintiff's safety that the jury were justified in saying that their act was willful and wanton; and it was a most fortunate circumstance that plaintiff's life was not the forfeit of defendant's conduct.

In view of the suggestion of the court made at the time the case was previously before as, the plaintiff, prior to the present trial in the court below, an ended her complaint by charging the acts of the defendant to have been willfully and wantonly done. Conceding this form of allegation necessary to support the judgment,-and the law of the case would seem to so declare,—still we do not think the cause of action has been materially altered by the amendment, and consequently the plea of the statute of limitations is not well taken. The amendment pertains wholly to the manner in which the injury was inflicted, and actual damage is all that is sought to be recovered. The gist of the action is a claim of actual damages for personal injuries inflicted by defendant's moving cars, and these are the facts found stated in the original complaint. Appellant, to support its contention, relies upon various cases cited from the later Indiana Reports. The courts of that state, in declaring the law upon this question, have drawn the lines very closely around the injured party, and have declared the law against him in cases where we think the better doctrine, and the one most generally approved, would have declared in his favor. In this state the principle recognized and adopted does not go to the lengths found in the language of those decisions. And the case of Railway Co. v. Bryan, 107 Ind. 51, 7 N. E. 807, seems to state the rule more liberally in favor of a plaintiff seeking to recover for personal injuries upon the present lines than has been done by other Indiana cases preceding it.

The appeal from the order denying the motion for a new trial has been heretofore dismissed, and, as a result, it will not be necessary to consider some of the questions discussed in appellant's original brief. But, regardless of the claim upon the part of the respondent that the evidence cannot be considered upon this appeal, as will be observed, we have carefully considered it. We think the motion for a nonsult was properly denied, and that there is no valid objection to the law given to the jury.

Whatever may have been said by the court in the former appeal as to the character and weight of evidence was said expressly in view of the fact that the willfulness and wantonness of the acts of defendant were not matters before the court; and for these reasons we are not called upon to compare the evidence disclosed by the record in that case with the evidence now before us, for the purpose of showing any existing differences therein, and thus avoiding the binding effect of the principle of the law of the case. It is conclusively shown

that the evidence was considered in the light of the complaint then before the court, and in that light alone, when we look to the language of the opinion. It is there said: "But the defendant's employes saw her intime to have avoided the accident, and hence were bound to use care. The brakemen ought to have stopped the train, and, if necessary, compelled her to get out of harm's way." If such was the duty of the brakemen (and we have no doubt of it), the defendant was liable in damages for a violation of that duty; for the brakemen did not stop the train, and allow or compel the plaintiff to remove from her dangerous situation. And the language used by the learned commissioner indicates that if thecomplaint had been sufficiently broad in its allegations the judgment would not have been reversed. For the foregoing reasonsthe judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

(108 Cal. 528)

WHITE v. HARRIS et al. (No. 19,339.)
(Supreme Court of California. Aug. 13, 1894.)
STREET IMPROVEMENTS—ASSESSMENT OF BENEFITS
—VALIDITY.

1. Failure to form a district on which should be chargeable the expense of constructing a sewer, as provided by Act March 18, 1885, does not render void an assessment for a sewer, as Act March 18, 1885, as amended by Act March 14, 1889, authorizes the construction of sewers without the formation of such district.

2. Under Act March 18, 1885, providing that the superintendent of streets shall fix the

2. Under Act March 18, 1885, providing that the superintendent of streets shall fix the time for the commencement of work to be performed under a contract for the construction of sewers, "which shall not be more than 15 days from the date of the contract," a contract providing that the work shall be commenced within 15 days sufficiently fixes the time.

Department 2. Appeal from superior court, Los Angeles county; William P. Wade, Judge.

Action by S. White against Charles T. Harris and others. From a judgment for defendants, plaintiff appeals. Reversed.

John T. Jones, for appellant. Wells, Monroe & Lee, Allen & Flint, and M. T. Allen, for respondents.

FITZGERALD, J. Action to foreclose a lien alleged to have been created by an assessment upon the defendants' lot for the construction of a sewer in front thereof, and along the streets described in the complaint. A general demurrer to the complaint was sustained by the court, and, upon plaintiff declining to further amend, judgment was given for the defendants, from which judgment plaintiff appeals upon the judgment roll alone.

The only ground urged here, upon which the complaint was held to be insufficient by the court below, is that it failed to allege the formation of a district upon which should

be chargeable the expense and cost of constructing the sewer, as required by section 27 of the act approved March 18, 1885. As this act and the act amendatory thereof, approved March 14, 1889, furnish, independent of the section referred to, ample authority for the construction of sewers by a city without the formation of a district to be assessed for that purpose, and also provide for the payment of the expenses and costs thereof by an assessment upon the lots or land fronting upon the streets along which such sewer is constructed, it follows that the court below erred in sustaining the demurrer on this ground.

The remaining point raised in support of the demurrer, that the contract under which the sewer was constructed did not fix the date for the commencement of the work, as required by section 6 of the said act of 1885, is not well founded. The contract set out in the complaint provides as follows: "Work to be commenced within fifteen days." Section 6, referred to, provides that the superintendent of streets "shall fix the time for the commencement [referring to the work to be performed under the contract], which shall not be more than fifteen days from the date of the contract." The word "time," as here used, was not intended to mean a particular day to be fixed by the superintendent of streets for the commencement of the work, but that the time fixed by him for that purpose should not be more than 15 days from the date of the contract. Let the judgment be reversed, with directions to the court below to overrule the demurrer.

We concur: McFARLAND, J.; DE HAVEN, J.

103 Cal. 548

PEOPLE v. CURRY. (No. 21,110.)
(Supreme Court of California. Aug. 16, 1894.)
CRIMINAL LAW—APPEAL—REVIEW—SUFFICIENCY
OF EVIDENCE—DEFENDANT AS WITNESS—IN-

STRUCTION.

1. The denial of a new trial will not be disturbed where there is evidence to sustain the wordigt.

verdict.

2. It is not reversible error to charge that "the defendant in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness," where the charge defines expressly the relation.

Department 2. Appeal from superior court, Los Angeles county; B. N. Smith, Judge.

Matthew Curry was convicted of robbery, and appeals from the judgment and from an order denying his motion for a new trial. Affirmed.

R. A. King and C. C. McComas, for appellant. Atty. Gen. Hart, for the State.

PER CURIAM. The defendant was convicted of the crime of robbery, and appeals from the judgment and order denying his

motion for a new trial. It is insisted that the evidence is insufficient to support the verdict. The sufficiency of the evidence has been passed upon by the jury, and again by the trial court when considering the motion for a new trial, and under such circumstances we are averse to nullifying their action. The evidence of the prosecuting witness, especially as strengthened by that of the police officer, is ample to sustain the verdict. The venue also is sufficiently shown by the record.

The court instructed the jury that "the defendant in a criminal case, testifying in his own behalf, occupies a relation to the case different from that occupied by any other witness; and in considering the weight and effect to be given to the testimony of this defendant, in addition to noticing his manner," etc. (Then follows the balance of the stereotyped instruction upon this subject.) Appellant specially attacks that part of the instruction wherein the jury is told that the defendant, in testifying, occupied a different relation to the case from that of other witnesses. Inasmuch as that portion of the instruction following declares expressly wherein the defendant occupied a different relation to the case from other witnesses, and to what extent that relation might be considered in weighing defendant's evidence, no harm was done him by the giving of the instruction. Such must necessarily be so, for this portion of the instruction has been repeatedly given by trial courts, assailed by appellants, and approved upon appeal by this court. We have often suggested that the better practice would be to refrain from instructing jurors to the effect as evidenced by the foregoing instruction, but the suggestion appears to fall upon stony places, and brings forth no results. We shall limit the rule strictly as it has been heretofore declared, and new trials will be the result if those limits are overstepped to any extent. We think this case comes fairly within the We find nothing further in the record demanding our attention. For the foregoing reasons the judgment and order are affirmed.

BROWN v. BOARD OF EDUCATION OF CITY OF POMONA. (No. 19,354.)

(Supreme Court of California. Aug. 13, 1894.) Contracts of City—Ultra Vires—Pleading.

As the authority of a municipal corporation to make a contract not void on its face will be presumed, the defense of ultra vires, in an action thereon, must be raised by answer.

Department 2. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by C. H. Brown against the board of education of the city of Pomona to recover for architect's services. A demurrer to the complaint was sustained, and plaintiff appeals. Reversed.

Cal.Rep. 35-37 P.-52

Wells, Monroe & Lee and Wm. Pollard, for appellant. W. A. Bell and C. E. Sumner, for respondent.

McFARLAND, J. The court below sustained a demurrer to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action; and, plaintiff declining to amend, judgment was rendered for defendant. Plaintiff appeals from the judgment.

It is averred in the complaint that at defendant's request the plaintiff made and delivered to defendant certain plans and specifications for two public school buildings, to be built in the city of Pomona, which were duly approved, accepted, and adopted by defendant; that the services of plaintiff, in preparing and furnishing the same to defendant, were reasonably worth a certain stated sum of money; that plaintiff has demanded of defendant payment of said sum of money; and that defendant has not, nor has any one, paid the same or any part thereof, and the whole thereof remains due and unpaid. prayer is for judgment for said sum of money. It is clear that the question here involved, and the only question upon which we can pass, is a pure question of pleading. decisions of this court, cited by counsel for respondent, declaring the general doctrine that a contract which a municipal corporation attempts to make in violation of or beyond its chartered powers is void, are not in point, for they were made upon facts found on issues joined. No one of them, from Zottman v. San Francisco, 20 Cal. 96, to Barry v. Goad, 89 Cal. 215, 26 Pac. 785, dealt with a question of pleading such as is presented in the case at bar. It is contended by respondent that the defendant had no power to make the contract sued on; but surely, when a corporation seeks to avoid its own contract on the ground of its want of power to contract, it must make good its defense of ultra vires by plea and proof. "A contract by a corporation, which is not, upon its face, necessarily beyond the scope of its authority, will, in the absence of proof, be presumed to be valid." Union Water Co. v. Murphy's Flat Fluming Co., 22 Cal. 621; Shaver v. Mining Co., 10 Cal. 400; Evans v. Bailey, 66 Cal. 112, 4 Pac. 1089; Ditch Co. v. Zellerbach, 37 Cal. And with respect to mere ordinary business contracts a municipal or quasi municipal corporation stands on the same footing with other corporations. If a contract for the drawing of plans and specifications in anticipation of proceedings for the building of a schoolhouse was entirely beyond the scope of the powers of the respondent, and could not be legally made by it under any conceivable circumstances, then the point sought to be made by respondent might perhaps be raised on demurrer; but the position that respondent could not under any circumstances make such a contract is not tenable. We do not understand respondent to insist

on that position, his contention being that such a contract can be made only under certain circumstances. As to the form of the complaint, we think it sufficient. "Corporations may be bound by implied contracts within the scope of their authority," and "municipal corporations are liable to actions of implied assumpsit." Dill. Mun. Corp. \$\$ **459**, 938. And in Hunt v. City of San Fran cisco, 11 Cal. 258, the court said: "We have held that the common counts, in the usual form adopted under the old system of pleading, are good in actions against private persons, and we cannot see either the necessity or propriety of holding a different rule in respect to corporations of whatever kind. The rules of pleading are general. They are designed to embrace all persons, natural or artificial, capable of suing or being sued." With the real merits of this case, as they may appear when properly presented, we cannot deal on this appeal. If the contract sued on was invalid or void, or if for any reason it was one which appellant cannot enforce, respondent can defeat the action upon sufficient answer and evidence. But we think that the court erred in sustaining the demurrer. The judgment is reversed, with directions to the superior court to overrule the demurrer to the complaint.

We concur: FITZGERALD, J.; DE HA-VEN, J.

108 Cal. 550

COFFEE v. WILLIAMS. (No. 19,316.) (Supreme Court of California. Aug. 16, 1894.) ACCOUNT STATED - IMPEACEMENT - PLEADING -HARMLESS ERROR.

1. Where the existence of a stated account is denied by defendant, and the only evidence of the same is the testimony of plaintiff and that of a friendly witness, evidence of the falsity of the items in the account, and the circumstances of the transaction, are admissible to show that there never was such an account.

 Error in striking out parts of an answer is not prejudicial, where the remainder is suf-ficient to cover the things sought to be proven in defense.

3. Under Code Civ. Proc. § 454, in account stated, plaintiff, on demand, should furnish defendant with a copy of the stated account, though he need not furnish the original items of the open account.

Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by George W. Coffee against C. S. Williams. There was a judgment for plaintiff, and defendant appeals. Reversed.

E. Rousseau, for appellant. Mahon & Laird and B. Brundage, for respondent,

McFARLAND, J. Defendant appeals from a judgment in favor of plaintiff, and also from an order denying defendant's motion for a new trial. It is averred in the complaint, in brief, that on November 13, 1888, the two parties formed a copartnership in the business of farming and stock raising, which

continued until June 2, 1891, when it was dissolved by mutual consent; that they contributed equal amounts of capital, and were to share equally in profits and losses; that on February 5, 1891, they had an accounting of all their partnership dealings down to that date, and thereupon "an account was stated" between them of all said dealings, and upon such statement a balance of \$1,851.96 was found due from defendant to plaintiff; and "that the said defendant then and there acquiesced in said statement, and agreed to pay said balance," but has refused to pay the same, or any part thereof. It is also averred that after said February 5th, and up to June 2d,-the date of the dissolution,-there were certain other partnership transactions, upon which defendant is further indebted to plaintiff, and that there is certain partnership property remaining to be disposed of. The prayer is-First, for judgment against defendant for said \$1,851.96 alleged to be due on said account stated; and, second, that an account be taken of all partnership dealings subsequent to said February 5th, and that there be a final settlement and distribution of any property left after payment of debts, etc. The alleged stated account is not set forth in the complaint. There is merely a general averment that there was such an account, and that there is due thereupon, from defendant to plaintiff, the said sum of \$1.-851.96. The answer admits the formation and dissolution of the copartnership at the times stated in the complaint, but avers that it included buying and selling and dealing in live stock, as well as stock raising. It denies that the parties put equal amounts of capital in the business, and avers that defendant contributed \$7,310 of capital, and plaintiff unly \$8,110. It denies that on February 5, 1891, or at any other time, there was an accounting of all the partnership dealings. or that any account was stated between the parties, or that a balance was struck of \$1,-851.96, or any other sum, or that defendant acquiesced in any statement, or agreed to pay to plaintiff or to said partnership said sum or any sum of money. There are many other averments in the answer to the effect that defendant was ignorant of business, and intrusted the entire management of the partnership to plaintiff; that plaintiff, intending to defraud defendant, kept no books of accounts, and concealed from defendant the business transactions of the partnership. The following averment in the answer was, on motion of plaintiff, stricken out by the court, viz.: "That on the 5th day of February, 1891, the plaintiff and defendant were in Bakersfield, and went to the store of one Dave Hirshfeld to confer about their partnership affairs, at which time and place plaintiff procured to be written in a book, which the plaintiff then and there had, certain words and figures, an exact copy of which is hereto annexed, marked 'Exhibit A,' and made a part of this answer. That no set-

tlement was made on said 5th day of February, 1891, by or between plaintiff and defendant, of any partnership dealings or transactions, and no balance was figured up as to any indebtedness of plaintiff or defendant, and no promise was made by either to pay the other any sum of money whatever." The answer further avers that plaintiff made large sales of partnership property to several named persons, of which no mention is made in said Exhibit A, and specifies large items in the same which are alleged to be incorrect and false. Numerous general averments of fraud are also made in the answer, against plaintiff, and it contains other averments not necessary to be here mentioned. The court found that there was an account stated, as averred in the complaint, and gave judgment for plaintiff for its amount; and the case having been referred to take an account of the partnership dealings subsequent to said February 5th, and the referee having made his report, a final decree was entered. The main contest on the appeal is about said stated account.

The only document, or copy of a document, purporting to be the account stated, relied on by plaintiff, which we are able to find in the transcript, is the Exhibit A attached to defendant's answer. Plaintiff, so far as we have discovered, did not introduce in evidence any stated account. He offered at one time certain pages of a book, which, as we suppose, were intended to show said account; but an objection to the book was at that time sustained, and we do not find when he again offered the book, or any other writing purporting to be a stated account. Defendant demanded the account of plaintiff, under section 454, Code Civ. Proc., but it was not furnished. Plaintiff's witness, Hirshfeld, testified that he made the stated account in a book of plaintiff, and also copied it in a book of defendant; and, as Exhibit A was a copy from defendant's book, we assume that Exhibit A is the alleged account stated sued on. It is as follows:

Investment of C. S. Williams, 7,310.		
	Drawn.	Credits.
	2,000.00	
	2,700.00	25.00
	301.50	
	109.50	
	50.25	
	100.00	
	39.00	111.00
	352.88	
1891.	5,698.13	875.98
Feb. 5th. Bill D. H.	170.45	
Feb. 5th, Cash	500.00	
· ·		
Investment of Geo.	W. Coffee,	3,110.00
Investment of Geo.	W. Coffee,	3,000.00
		\$6,110.00
	Drawn.	Credits.
	1,000.00	668.63
	100.00	
	604.04	
	684.78	
	0 200 00	668.63
IPob Seb IDSS TO TO	2,388.82	003.03
Feb. 5th, Bill D. H.	117.80	¬ 1
	- (000

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It is doubtful if the foregoing would, under any view, constitute an independent cause of action as an account stated. An account stated is a document-a writingwhich exhibits the state of account between parties, and the balance owing from one to the other; and when assented to, either expressly or impliedly, it becomes a new contract. An action upon it is not founded upon the original items, but upon the balance agreed to by the parties. And the general rule is that, when the stated account is admitted, it can be avoided only by averment and proof of fraud, mistake, etc. 6 Wait, Act. & Def. p. 424 et seq.; 1 Wait, Act. & Def. p. 191 et seq.; Hendy v. March, 75 Cal. 566, 17 Pac. 702, and cases cited. But the account, in order to constitute a contract, should appear to be something more than a mere memorandum. It should show upon its face that it was intended to be a final settlement up to date. And this should be expressed with clearness and certainty. The account sued on in the case at bar as an account stated is certainly very loose and unsatisfactory. But few items of account are given; there are no dates, except one; dollar marks are not even placed before the figures; and there is no balance struck or stated. It looks like a mere memorandum put together hastily for further consideration,-not like so important a writing as an account stated. It is possible, perhaps, for an account stated, which does not state a balance, to be good, if, from a calculation upon the figures given, a balance can be ascertained; but an account sent by a merchant or banker without any balance stated would be a rare document. However, a calculation of the figures written in Exhibit A will not give the balance asserted by plaintiff, viz. \$1,851.96. It would differ from that result to the extent of at least \$500. Plaintiff would explain that by saying that the item of \$500, of the date of February 5th, accrued after the alleged settlement. Nevertheless it is part of the alleged stated account.

Assuming, however, that the paper in question is not so deficient in form that it could not, upon any proof, pass muster as an account stated, still it is clear that defendant, under the positive denials in the answer, should have been allowed great latitude in introducing evidence to disprove it; and we think that the court erred in sustaining objections to evidence which he offered on that The evidence of plaintiff on the point consisted of his own testimony and that of his witness, Hirshfeld, who was very friendly to plaintiff; and it was to the general effect that some time in the month of February, 1891, plaintiff and defendant, together with Hirshfeld, met at the store of the latter to "see how we stood up to date;" that they had squabbles over certain matters, but that finally, on February 5th, they settled; that what is called the account stated was made by Hirshfeld in a book of plaintiff, and afterwards copied in a book of defendant; that a balance was struck, showing that defendant owed plaintiff \$1,851.96; and that defendant acquiesced therein and agreed to pay said sum. Defendant, on his part, testified that he met plaintiff at Hirshfeld's because there was some company debts to be paid,-particularly a debt to one Dinkelspiel,—and to get some idea or knowledge how the company stood; that plaintiff's books "did not show much of anything," that he could not tell anything about the account, and did not have anything he could settle by; that he had defendant charged with different sums of money which he objected to; that they then settled with Dinkelspiel, and paid his bill; that plaintiff said that Hirshfeld's bills had been forgotten, and he would bring them next morning; that he did not bring them next morning, but they settled with Hirshfeld. and then "quit." He further testified that plaintiff had sold stock, of which there was no account on his books; that defendant had trusted the whole business to plaintiff (which plaintiff admits), and that there were no accounts kept, upon which any settlement could be made; that plaintiff had put into the capital stock only \$3,110, as shown by said alleged account stated, and that he had not put in the second item of \$3,000, or any part of it; that the \$2,700 charged to defendant should have been only \$2,100, and was money paid for defendant to one Kraus; that the \$2,000 charged to defendant was wholly incorrect; that various other items in said alleged stated account were incorrect; and that large transactions were not mentioned in said account. In defendant's answer, it is averred that, between the commencement of the partnership and said February 5th, plaintiff sold to certain parties named therein cattle to the amount, in money, of over \$36,000. Now, as to the question whether or not there had been an account stated, as alleged in the complaint, there was the testimony of plaintiff and Hirshfeld on the one side, and the testimony of defendant on the other. Under this condition of the testimony, defendant sought to introduce evidence of circumstances which he claimed would tend to show that it was,-if not impossible,-at least highly improbable, that he ever agreed to such an alleged account stated as that averred in the complaint. This evidence was ruled out by the court upon the theory that, when there is an account stated, parties cannot go back, and attack the original items of the account, unless upon proper averment of fraud, mistake, etc. This is no doubt the rule when the account stated is admitted, but in the case at bar the main issue was the question whether there was such an account. that issue was before the court, of course, no evidence about the original items was admissible for the purpose of surcharging the account; but in determining the existence of the stated account the court was not confined to considering the mere naked "yes"

and "no" of the witnesses. The defendant had the right to show, if he could, the inherent improbability of his agreement to such an account; and, to that end, evidence was admissible of at least the general nature of the circumstances of the business between the parties, and the character of the objections made by defendant to the items of the alleged account stated. If, for instance, it be true that the item of \$2,700 should be only \$2,100; that the item of \$2,000 is false; that plaintiff contributed orly \$3,110, instead of \$6,110, to the capital stock; that plaintiff, who conducted the whole business, had kept no accounts, and had nothing to present as a basis of settlement; that there was over \$30,000 worth of stock sold by plaintiff which formed no part of the alleged statement of account; and that defendant, in the attempts at settlement, had objected to all these things, -then these matters were proper for the court to consider in determining whether defendant acquiesced in an account so radically different from the truth, and from his own contentions. If, after considering these matters, the court should be of the opinion that there was an account stated, as alleged, it would sustain the account, without reference to the original items; and, if after such consideration it should think the preponderance of evidence to be against the stated account, it would so find, and would then order an account to be taken de novo of all the partnership dealings. But, in determining the first question before it, was there an account stated, as averred? the court erred in ruling out a great deal of evidence offered by defendant.

There were about 70 rulings of the court. sustaining objections to questions asked by defendant, each followed by an exception. Some of them were asked in cross-examination of plaintiff's witnesses, and others of them were asked of defendant and his wit-They are too numerous to be each noticed here. Some of them were, perhaps, for special reasons, properly ruled out, but most of them should have been admitted. What we have said will clearly enough show our views on the subject, namely, that evidence touching the nature of the partnership business of plaintiff and defendant, and the character of certain items put in and omitted from the alleged account, is admissible upon the point whether or not there ever was such an account stated as that relied on by plaintiff. A few instances of objections sustained will be sufficient to illustrate our meaning. Upon cross-examination of plaintiff an objection was sustained to this question: put in considerably more property than you did?" Plaintiff, having testified that he did not know if there was any indebtedness due the firm from third persons when the alleged account was taken, but there might have been, was asked by defendant this question: "Then it was taken into the account, if you

tained. Objection was also sustained to this. question asked of plaintiff: "I will ask you if there was not considerable difficulty about a certain transaction, in which Mr. Charley Kraus had received some money from Mr. Williams, and that there was a variance between your accounts and Mr. Williams' of \$600?" Also, to the following question asked "Do you. of plaintiff's witness, Hirshfeld: know how much money has been paid in by either of the firm previous to that settle-"Now, this ment?" Also, to the question: What was that?" \$2,700. Objection was sustained to this question asked of defendant: "Now, that first item, \$2,000. State what you know about that?" Also, to the question: "I will ask you, Mr. Williams, if, on the 5th day of February, 1891, at the store of Dave Hirshfeld, any account was settled or gone into in relation to the number of cattle bought and sold, or the amount of money received from the sales of cattle of the partnership?" Also, to the question whether there was any account or settlement on that day of partnership money. Also, tothe question whether there was any settlement or computation of amounts due to outside parties. Also, to the question, "Was there any settlement as to how much Mr. Coffee or Mr. Williams, or either of them, or both, owed to Mr. Hirshfeld for partnership goods bought previous to that time?" Also, to the question, "I will ask you, Mr. Williams, if you ever made any further efforts in adjusting the matter in regard to that \$2,700?" Hirshfeld, having been recalled by plaintiff, and having stated on cross-examination that he had made the accounting between the parties on February 5th, and found the balance of \$1,851.96, was asked this question: "Have you in your possession the amounts and items from which you struck that balance?" and objection to the question was sustained. Defendant, having testified that he did not acquiesce in the statement copied in his book by Hirshfeld, and that "the items of that statement were discussed by Coffee and me," was asked by his counsel this question: "State what items, and what was said," and an objection to this question was sustained. Objection was also sustained to the following question: "State, Mr. Williams, what was the point of difficulty, and, if it is so that you were eight or ten days laboring on that settlement, what was the difficulty?" (Plaintiff had testified that they were eight or ten days in settling.) The witness Hirshfeld, having testified that his books showed how much money he had paid out on the checks of each party and of both parties, was asked how much had been so paid out on each party's check, and objection was sustained. Objection was also sustained to the question, how much money he had received from each party. The court also refused to allow defendant to prove by the witness Dinkelspiel that he had received intalked it over?" and objection was sus- to his possession over \$17,000 of the funds

of the partnership of plaintiff and defendant, and sustained an objection to this question asked of the witness Briggs: "State, Mr. Briggs, whether or not Mr. Coffee told how much he had made by selling the cattle of the partnership." The foregoing questions, and many others of a similar kind, should have been allowed. It would certainly be difficult to believe that the defendant acquiesced in the alleged account stated, and promised to pay the alleged balance, if the things which he sought to prove are true. The errors committed in excluding said evidence are clearly material, and make necessary a reversal of the judgment and order appealed from.

We do not think that the appellant was prejudiced by the order of the court striking out of his answer the matter hereinbefore shown to have been stricken out, for the answer was left sufficiently full to cover the things sought to be proven in defense.

We do not think that the attempted averments of fraud in the answer were specific enough to warrant a defense upon that ground.

The respondent should have given to appellant a copy of the alleged stated account sued on. He need not have furnished the original items of the open account upon which the alleged stated account was based, but a copy of the stated account itself should have been furnished.

Before another trial each party should be allowed, if he so desire, to make proper amendments to his pleadings. We cannot refrain, however, from expressing the hope that they may be able to arrive at an amicable settlement of their difficulties. Considering the confused state of their accounts, it will be hard for a court to arrive at a just solution of their contentions; and it would be better for each to concede something than to prolong expensive and perhaps ruinous litigation. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: FITZGERALD, J.; DE HA-VEN, J.

103 Cal. 525 HIGH v. BANK OF COMMERCE. (No. 19,-393.)

(Supreme Court of California. Aug. 13, 1894.)

EXECUTION — SUPPLEMENTARY PROCEEDINGS
AGAINST SUPPOSED DEBTOR OF EXECUTION DEBTOR—EVIDENCE.

In supplementary proceedings, evidence that some time prior to the execution there probably was a small balance in a bank, on open account, in favor of one of the execution debtors, will not warrant the supreme court in holding that the bank was indebted to defendant in execution.

Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by John E. High against the Bank of Commerce, a corporation, as a supposed

debtor of Comstock & Trotsche, copartners, against whom plaintiff had obtained a money judgment, on which execution was issued. From a judgment for defendant, plaintiff appeals. Affirmed.

David L. Withington, for appellant. Luce & McDonald, for respondent.

McFARLAND, J. Plaintiff appeals from a judgment in favor of defendant, and from an order denying a motion for a new trial. Plaintiff, having a money judgment against Comstock & Trotsche, copartners, and having procured an execution to be issued, and claiming that the defendant was indebted to Comstock & Trotsche, proceeded under section 720 of the Code of Civil Procedure, and procured an order allowing him to sue the defendant, and thereupon he commenced this action. The court found that, at the time the said proceeding was instituted, defendant was not indebted to said copartners, or either of them, and did not have any money or property belonging to them. Assuming that the transcript shows upon what grounds the motion for a new trial was made or denied, still the only point made by appellant is that the findings are not sustained by the evidence. The evidence is very meager; and we would not be warranted in holding that the court below should have found some indebtedness from respondent to the said copartners, or that there was money of the latter in the hands of the former. There is some evidence tending to show that, at a time prior to the proceedings supplementary to execution, there probably was a small balance in the bank, on open account, in favor of one of the said copartners; but the presumption that "a thing once proven to exist continues as long as is usual with things of that nature" is shown by human experience to be not applicable to a balance in one's favor in a bank. There is nothing in the point that a general denial did not raise the issues passed upon by the court. Neither was the order of the judge on the proceedings supplementary to execution an adjudication of the rights of the parties. "His only power in the premises was to make an order authorizing the judgment creditor to institute an action in the proper court," and, if he chose so to do, to forbid a transfer pending the action. McDowell v. Bell, 86 Cal. 616, 25 Pac. 128. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

BAILIFF v. POWERS et al. (No. 15,552.) (Supreme Cour: of California. Aug. 15, 1894.)

TRIAL—FAILURE TO MAKE FINDINGS.

A judgment will not be reversed because of a refusal to find upon a material issue, unless the record shows that there was evidence to sustain the finding.

Department 1. Appeal from superior court, Sonoma county; R. F. Crawford, Judge.

Action by Bailiff against Powers and oth-Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

James W. Oates, for appellant. Geo. Pearce, for respondents.

PER CURIAM. The appeal is from the judgment alone, upon the judgment roll, without any bill of exceptions. The only point urged by the appellant, for a reversal, is that the court falled to find upon all of the issues in the case. A failure to find upon a material issue will not, however, authorize a reversal of a judgment, unless it appears from the record that there was evidence before the trial court from which it could make a finding upon such issue. Himmelman v. Henry, 84 Cal. 104, 23 Pac. 1098; Winslow v. Gohransen, 88 Cal. 450, 26 Pac. 504; Dolliver v. Dolliver, 94 Cal. 646, 30 Pac. 4; Hulsman v. Todd, 96 Cal. 228, 31 Pac. 39; Rogers v. Duff, 97 Cal. 66, 31 Pac. 836. As the record in the present case fails to show that any evidence was introduced upon these issues, it follows that there was no error in failing to make findings thereon. The findings fully support the judgment, and it is affirmed.

103 Cal. 519 HERMAN v. SANTEE et al. (No. 19,357.) (Supreme Court of California. Aug. 13, 1894.) WRITS — AMENDMENT OF RETURN — NOTICE OF MOTION.

1. Where a summons has been properly served, but the proof of service is defective, the court may, after judgment, allow an amended affidavit of service to be filed nunc pro tunc as of the date of the judgment. Reinhart v. Lugo,

24 Pac. 1089, 86 Cal. 395, disapproved.
2. Where, on the return day of a motion, the adversary of the moving party, without any previous notice, makes another motion, and the motion is without chiarties, around at length same is, without objection, argued at length, and a general exception taken to the granting thereof, notice of such motion will be deemed to have been waived.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by Minnie J. Herman against Milton Santee and others to foreclose a mortgage. A motion by plaintiff for leave to file an affidavit of service nunc pro tunc as of the date of judgment was granted. and defendant Milton Santee appeals. Af-

David L. Worthington and Works & Works, for appellant. Conklin & Hughes, for respondent.

BELCHER, C. This action was brought to foreclose a mortgage given to secure payment of a promissory note made by the appellant, Milton Santee. On September 8, 1892, a decree of foreclosure was entered as

have been duly and regularly summoned to answer unto the plaintiff's complaint herein, and made default in that behalf, and that the default of each defendant for not appearing and answering unto plaintiff's complaint has been duly and regularly entered herein." Subsequently, appellant gave notice of a motion to vacate and set aside the decree, so far as it provided for a deficiency judgment against him, upon the ground that previous to the institution of the action he had been discharged from the indebtedness sought to be enforced, by a discharge in insolvency. The motion came on to be heard on September 1, 1893, both parties being present in court by their attorneys. Before the hearing commenced, the respondent, without any previous notice, presented to the court an amended affidavit of service of the summons and complaint in the case, and asked for an order that the same be filed nunc pro tunc as of September 8, 1892, and made a part of the judgment roll. The attorney for appellant objected to the order asked for, and stated that "as the decision of the motion would, in his judgment, be decisive of the motion made to vacate the judgment by defendant Santee, he would like permission to introduce his authorities upon the motion before the court." Thereupon, the motion was argued "at length," and during the course of the argument the attorney stated that he appeared as amicus curiae. After the argument was concluded, the court granted the motion, and the appellant excepted to the ruling. The appeal is from the judgment, and the order granting respondent's motion.

The summons was served by a person other than the sheriff, and the affidavit of service, as originally made and returned. was defective and insufficient, because it did not state that the affiant was over the age of 18 years at the time of the service. The appellant contends that, because the affidavit of service was insufficient, the clerk had no authority to enter the default, and the court had no jurisdiction to enter the judgment, and that both the default and judgment were void. It is true that the clerk was a mere ministerial officer, and could perform only ministerial duties. Conceding, therefore, that in the absence of due proof of the service of the summons the clerk had no right to enter the default, still that fact is unimportant, and can cut no figure in the decision of the case. A valid judgment by default may be rendered by the court, though no formal default has been "The only purpose of a default is entered. to limit the time during which the defendant may file his answer, and that time never extends beyond a trial and judgment." Drake v. Duvenick, 45 Cal. 463.

The important question, then, is, was the judgment void? Section 416 of the Code of Civil Procedure declares that, "from the prayed for, reciting that the "defendants | time of the service of the summons and of a copy of the complaint in a civil action,

the court is deemed to have acquired jurisdiction of the parties, and to have control of all the subsequent proceedings." In Pico v. Sunol, 6 Cal. 295, it is said: "Jurisdiction of the person of defendant is acquired by the service of process, and dates from such service, and not from the return." And in Drake v. Duvenick, supra, it is said: "The fact of service was material, and from the time service was made the court was deemed to have acquired jurisdiction. The return of service might be formal or informal, perfect or imperfect. Still, if service were in fact made, the court acquired jurisdiction of the person of the defendant." So, in Estate of Newman, 75 Cal. 220, 16 Pac. 887, it is said: "It is the fact of service which gives the court jurisdiction, not the proof of service." The amended affidavit of service, which the court allowed to be filed, was in all respects in proper form, and showed that the appellant was regularly served with a copy of the summons and complaint. None of the facts stated in the affidavit are controverted; and it must be held, therefore, that from the time of the service the court acquired jurisdiction of the parties to the action.

The question then arises, did the court err in allowing the proof of service to be amended and filed nunc pro tunc as of the date of the judgment? Upon this subject, Mr. Freeman, in his work on Judgments (4th Ed., § 89b), states the law as follows: "If the return upon the summons or other writ designed to give the court jurisdiction over the person of the defendant is omitted, or incorrectly made, but the facts really existed which were required to give the court jurisdiction, the weight of authority at the present time permits the officer to correct or supply his return until it states the truth, though by such correction a judgment apparently void is made valid. Though the proof of the service of process does not consist of the return of an officer, the like rule prevails. Thus, if a summons has been published in the manner required by law, but the proof of publication found in the files of the court is defective, the court may, on the fact of due publication being shown, permit an affidavit to be filed showing the facts, and when so filed it will support the judgment, as if filed before its entry." In opposition to this view, and in support of his theory, appellant cites Reinhart v. Lugo, 86 Cal. 395, 24 Pac. 1089, in which, on page 401, 86 Cal., and page 1080, 24 Pac., it is said: "The default and judgment were void, not because there was no service, but because there was, at the time of entering the same, no proof of service." This language is not in harmony with the weight of authority upon the subject, and in our opinion it does not state the law correctly. The case is reported in the American State Reports (volume 21, p. 52), and, in a note commenting upon it, it is said: "The court declares, in effect, that it is not the service of process which gives courts jurisdiction, but the proof of such service; that if the proof is defective it is immaterial that the service was perfect; and, the proof being imperfect, there is no way in which the judgment can be sustained by showing the facts regarding the service of process as they really existed when it was entered. The very reverse of this we apprehend to be the law. It is the fact of service of process which confers jurisdiction, and it is a familiar practice in California, as well as else where, when the proof of such service is absent or defective, to permit it to be amended or supplied." And again: "To support judgments entered upon insufficient proof of service of process, or without the proof of such service appearing in the record, courts have uniformly permitted such proof to be amended or supplied, not for the purpose of authorizing them to enter new judgments based upon such proof, but to show that judgments previously entered were not entered without jurisdiction, and are not, and never were, void;" citing Allison v. Thomas, 72 Cal. 562, 14 Pac. 309, and numerous other cases. We conclude, therefore, in view of the authorities, that the judgment in question was not void, and the court did not err in permitting the amended affidavit of service to be filed.

It is further claimed that the application to file the amended affidavit was without notice, and the order authorizing the filing was therefore erroneous. But, conceding that previous notice of the application should have been given, still we are unable to see that appellant was in any way prejudiced by the failure. He was present in court when the motion was made, and raised no such objection then. On the contrary, he proceeded to argue the question at length, and, when it was decided against him, took a general exception to the ruling. This was in effect a waiver of notice, and appellant cannot now be heard to complain of the action of the court on this ground. We discover no prejudicial error in the record. and therefore advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 508

PEOPLE v. MOORE. (No. 21,087.)
(Supreme Court of California. Aug. 11, 1894.)
SODOMY—INFORMATION—SUFFICIENCY — CONDUCT
OF TRIAL—CHALLENGE OF JURONS—FAILURE TO
INFORM DEFENDANT OF HIS RIGHTS.

1. An information which charges that defendant committed the crime against nature in and upon the "person" of Carl K. sufficiently



states that it was committed with a human be-

ing, as distinguished from an animal.

2. Where defendant has no counsel, it is reversible error for the court to fail to comply with Pen. Code, § 1066, which provides that, before a juror is called, defendant must be informed that if he intends to challenge an individual juror he must do so when the juror appears, and before he is sworn. pears, and before he is sworn.

Appeal from superior Department 2. court, Kern county; A. R. Conklin, Judge.

William H. Moore was convicted of the crime against nature, and appeals. Reversed.

Wm. Fitzgerald, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. Appellant was convicted of the crime against nature, and was sentenced to suffer the very severe penalty of imprisonment in the state prison for the term of 41 years. He appeals from the judgment.

The appellant had no counsel in the court below. Consequently, there is no statement or bill of exceptions before us, and, of course, no evidence. Afterwards counsel took an appeal for appellant, and is compelled to rely upon the judgment roll, or what is called in section 1207 of the Penal Code a "record of the action." This includes only the indictment or information, a copy of the minutes of the plea or demurrer, a copy of the minutes of the trial, the instructions given or refused, and a copy of the judgment. The offense charged in this case is, in its nature, coarse and detestable; but it is an offense easily charged, and difficult to disprove. It affords great facility for a false accusation made for the purpose of revenge and injury, and usually its proof depends mainly upon the testimony of an accomplice. These considerations, and the very severe penalty imposed, induce us to look closely into the only record which appellant's counsel on the appeal could bring here.

We are disposed to think that the objections to the sufficiency of the information are not good. The averment that the alleged crime was committed "in and upon the person of Carl Kohler" sufficiently states that it was committed with a human being, as distinguished from an animal. We think also, that the jurisdiction of the case in Kern county sufficiently appears from the face of the information. The crime is alleged to have been committed on a car; and whether or not the information would be good under section 783, Pen. Code, upon the theory that the jurisdiction was in any county through which the car passed in the course of its trip, we think that it sufficiently avers the offense to have been committed in Kern county. Appellant objects to the instructions of the court upon the subject of reasonable doubt; but, considering them all together, they are not erroneous.

We think, however, that under the circumstances of this particular case the judgment

should be reversed for the failure of the court to inform the appellant of his rights, as provided in section 1066 of the Penal Code. That section is as follows: a juror is called the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so when the juror appears and before he is sworn." In all the decisions of this court, which have been called to our attention, where this section of the Code was under review, it has been held that a failure to comply with it is error. although, in those decisions, the failure was held not to be prejudicial, because in each case the defendant had been represented by counsel competent to protect his rights, and the right of challenge had been exercised. In People v. Mortier, 58 Cal. 266, the court, speaking of the provision of the Code, "The object of this provision of the say: law is to protect the rights of the defendant in the matter of challenging jurors. He should be informed of the fact that if he desires to challenge any particular juror he must exercise that right before the juror is sworn; but it appears from the record in the case that the defendant's rights in this respect were fully understood by him and his counsel, and the privilege of challenging jurors was exercised to a large extent in the case. It is true that the court omitted a duty imposed by law, but it clearly appears that the defendant was not in any manner prejudiced by the error complained of." In People v. O'Brien, 88 Cal. 489, 26 Pac. 362. the above language was quoted approvingly, the court holding, also, that under the facts in that case the error was not prejudicial. See, also, People v. Ellsworth, 92 Cal. 596, 28 Pac. 604. But the facts in the case at bar are materially different from those in the cases above noticed. Here the appellant had no counsel in the trial court, and did not exercise the right of challenge. There is nothing in the record to show that he was not prejudiced by the failure of the court to give the information required by the statute to be given,-nothing which enables us to avoid the general presumption that error is prejudicial. See People v. Gaines, 52 Cal. 479. The general rule that every one is presumed to know the law cannot be successfully invoked in a criminal case against a statute which provides that the defendant must be specially instructed as to what the law is on a particular point.

The minutes of the court, of the date of May 22, 1893, contained on pages 3, 4, and 5 of the transcript, show what was done at the trial, from the calling of the cause to the return of the verdict,—all occurring on said May 22d. Commencing on page 12 of the transcript, there is some printed matter without date, in which there is a statement that on May 22d there were certain conversations between the court, the counsel for the people, and the defendant, about the jurors. Following this, on page 14, there is matter which shows that there was a session of the court on December 30, 1893, -more than seven months after the trial, and after the appeal had been taken,-at which certain minutes of the trial were ordered corrected; and, so far as it can be ascertained from the transcript, the said statement, commencing on page 12, was ordered to be made nunc pro tunc at the said session of December 30th. This statement is relied on by respondent as showing that appellant was sufficiently informed of his right to challenge the jurors. While courts have a wide latitude in amending their records, it is extremely doubtful if a court can, in a criminal case, amend minutes which constitute part of a judgment roll after an appeal has been taken, and without notice. To do so would be, at least, the exercise of a very dangerous power. But, assuming that it can be rightfully done, we do not think that the statement in question at all shows a substantial compliance with the requirement of said section 1066 of the Code. The judgment is reversed, and a new trial ordered.

We concur: FITZGERALD, J.; DE HAVEN, J.

103 Cal. 513

PEOPLE v. MALLON. (No. 21,093.)

(Supreme Court of California. Aug. 11, 1894.)
CRIMINAL LAW—EVIDENCE—STATEMENTS MADE IN
DEFENDANT'S PRESENCE—ASSAULT WITH INTENT
TO COMMIT ROBBERY—INSTRUCTION—HARMLESS
ERROR.

1. It is not error to admit evidence of statements made by a person indicted with the defendant on trial, and who has pleaded guilty. in the presence of defendant, where it shows what the conduct of defendant was at the time, and that he did not deny the statements. People v. Ab Yute 54 Cal 89 distinguished

the conduct of derendant was at the time, and that he did not deny the statements. People v. Ah Yute, 54 Cal. 89, distinguished.

2. On the trial for assault with intent to commit robbery, a charge that if "you have no doubt he aided and participated in the assault, and have a reasonable doubt as to the intent of the assault, you must give him the benefit of that doubt, and in that case you must find him guilty of simple assault," did not assume any fact.

Department 2. Appeal from superior court, city and county of San Francisco; W. R. Daingerfield, Judge.

Joseph Mallon was convicted of an assault with intent to commit robbery, and he appeals from the judgment and from an order denying his motion for a new trial. Affirmed.

Agustus Tilden, for appellant. Atty. Gen. Hart, for the People.

McFARLAND, J. The appellant Mallon was charged, jointly with one Foran, with assault, with intent to commit robbery, upon the person of one John Tieck, and was convicted as charged. He appeals from the judgment and from an order denying his motion for a new trial. Only two points are urged

for a reversal: (1) That the court erred in admitting certain testimony of Crockett and Donovan, witnesses for the prosecution; and (2) that the court erred in giving a certain instruction, which, it is contended, assumed that an assault had been committed.

It is doubtful if the record shows any sufficient objection to that part of the testimony of Crockett and Donovan which is claimed to be inadmissible; but, assuming that it does, we do not think that there was error in admitting said testimony. These witnesses were allowed to testify, among other things, to certain statements made by the said Foran (who had pleaded guilty) in the presence of appellant; and it is this part of their testimony that is claimed by appellant to have been improperly admitted. testimony, standing by itself, and without any connection with the conduct of appellant when the alleged statements were made, would no doubt have been clearly hearsay and inadmissible. But it is established law that while a statement made in the presence of the accused is not admissible as being itself evidence of any fact narrated in such statement, it is admissible, primarily, for the purpose of showing that the accused acquiesced in the statement, either by express assent or by silence, or by such conduct as fairly implied assent. People v. McCrea, 32 Cal. 98; People v. Estrado, 49 Cal. 171. Such testimony should, no doubt, be received guardedly. If not followed by any proof of the conduct of the accused, it should be stricken out; and, if requested by the defendant's counsel (which was not done in the case at bar), the court should instruct the jury that such statement was limited as evidence to the purpose above indicated. But it is not error to admit such statements in the first instance. In the case at bar, we think that it clearly appears what the conduct of defendant was when Foran was making his statements, and that he did not deny them. During the testimony of Crockett as to said statements, and after an objection had been made by defendant's counsel, the court said, "I assume that what the defendant at bar said and did in the course of that conversation will come out;" and the court then asked the witness, "What did the defendant here on trial,—what did he say?" to which the witness responded, "He didn't say anything when he told him that." And the witness afterwards said: "We were all together in one group. The defendant Mallon said nothing." The witness Donovan, after testifying to certain statements made by Foran to defendant, said that "He didn't answer at all," and, further, that when the witness asked the defendant, "You were there?" he replic 1, "Do you suppose I was a damn fool, to tell you I was there?" The case at bar, therefore, is not within the principle of People v. Ah Yute, 54 Cal. 89, invoked by appellant. In that case Mr. Justice Ross, delivering the opinion of the court.

said that certain statements made in the presence of the defendant were hearsay and inadmissible because they stood "without any proof whatever as to the conduct by the defendant in reference to those accusations," and distinguished the case from People v. McCrea and People v. Estrado, which were approved. As, therefore, the rulings of the court below are not erroneous upon the ground taken by appellant, it is not necessary to inquire whether or not the said statements of Foran were admissible upon the ground of a proven conspiracy between the latter and the appellant to commit the crime charged.

2. The instruction complained of is as follows: "In case you have no doubt he aided and participated in the assault, and have a reasonable doubt as to the intent of the assault, you must give him the benefit of that doubt, and in that case you must find him guilty of simple assault." We do not see that this instruction assumes any fact. It is contended that it assumes that there was an assault committed, but if that be conceded it could in no way have prejudiced appellant. It was clearly shown, and undisputed, that an assault was committed on Tleck by Foran, with whom appellant entered Tieck's store, and that it was committed in the presence of appellant. Appel-'ant testified to that himself. Judgment and order appealed from affirmed.

We concur: FITZGERALD, J.; DE HA-VEN, J.

103 Cal. 582

WICKERSHAM v. CRITTENDEN et al. (No. 19,340.)

(Supreme Court of California. Aug. 17, 1894.)

JUDGMENT — ALTERATION AFTER AFFIRMANCE ON APPEAL.

A minority stockholder in a bank, in certain actions on behalf of himself and other stockholders against C., the majority stockholder, the bank, and other defendants, recovered judgments against C. "to and for the use of" the bank, and "to be paid to" the bank "for its use and benefit," together with "his costs and disbursements herein taxed," at sums stated. Held, that the trial court could not, after such judgments were affirmed on appeal, on plaintiff's petition, order the clerk to pay plaintiff his attorneys' fees in such cases out of the money paid to the clerk on the judgments.

Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Two actions by A. G. Wickersham against James L. Crittenden, the Bank of San Luis Obispo, and others, in which there were judgments against defendant Crittenden for the use of defendant bank. From an order requiring the clerk to pay plaintiff \$1,000, as attorneys' fees, out of money paid to the clerk on such judgments, defendants appeal. Reversed.

Graves & Graves and James L. Crittenden (Henry S. Foote, of counsel), for appellants.

Lippitt & Lippitt and Wilcoxon & Beuldin, for respondent.

McFARLAND, J. This is an appeal by the appellants, Crittenden and the Bank of San Luis Obispo, from an order of the superior court directing its clerk to pay certain moneys to the respondent, Wickersham, for attorneys' fees alleged to have been paid out by him to his attorneys in certain actions. Wickersham and Crittenden were stockholders in the Bank of San Luis Obispo, a corporation; Crittenden owning a fraction over one-half of the capital stock of the bank, and Wickersham owning about two-thirds of the other half. They disagreed about the business and management of the bank, and Wickersham brought two actions against Crittenden, the bank, and certain other defendants. He alleged in his complaint in each action that he brought it for himself and stockholders other than the defendants. In one of the actions he recovered judgment, "to and for the use of the Bank of San Luis Obispo," against Crittenden, for \$548.19, together with "his costs and disbursements herein, taxed at the sum of \$111.30." In the other action he recovered judgment against Crittenden for \$2,716.78. "to be paid to the defendant the Bank of San Luis Obispo, for its use and benefit," and "his costs herein, taxed at the sum of \$69.40." In each case an appeal was taken to this court, and the judgment was affirmed. When the remittiturs went down to the superior court, Crittenden paid the amounts of the judgments "into court" for the satisfaction of the judgments; by which is meant, we suppose, that he paid the money to the clerk of the court. Afterwards, Wickersham filed a petition in the court, in which he stated that the moneys recovered on said judgments were for the benefit of the said bank and all its stockholders, and not for himself alone, and that he had paid out to his attorneys in said actions certain. amounts of money; and he prayed for an order that he be paid the amount of the attorneys' fees out of the said money paid in by Crittenden, which, it seems, was still in the hands of the clerk. The bank and Crit tenden appeared and demurred to the petition; but, after a hearing and the introduction of evidence, the court made an order that the clerk pay to Wickersham \$1,000 as attorneys' fees in said two actions, and that he pay the balance of said money to said bank. It is not necessary to determine here whether or not in said two actions, which were practically between the main stockholders of a corporation contending for the control of its management and business, the prevailing party was entitled to recover attorney fees in addition to statutory costs and disbursements. The judgments as rendered in the superior court were affirmed in this court, and were, of course, final judgments, and they did not include attorneys' fees. They directed the moneys recovered, together with the stated costs, to be paid to the bank; and the superior court could not, upon petition or motion, change or modify these final judgments by ordering the moneys recovered to be disposed of in any way other than provided in the judgments themselves. If respondent has any legal claim against the bank for money advanced to attorneys for conducting said actions, he must prosecute that claim by an ordinary civil action against the bank; but he cannot, upon motion, have a final judgment substantially opened and changed so as to include his claim. The cases cited by respondent (Alemany v. Wensinger, 40 Cal. 294; In re Paschal, 10 Wall. 493; and Trustees v. Greenough, 105 U.S. 527) are not in point. Those cases merely declare the principle that in a proper case a trustee may be allowed, out of the trust fund, attorneys' fees expended in the necessary preservation or management of the fund; but there was no point made in them as to the method or procedure by which the allowance could be obtained, and in neither of them was an order like the one in the case at bar involved, made after a final judgment had been affirmed by the appellate court, and when there was no continuous administration of a trust. In those cases the order was made during the pendency of the litigation, and became part of the final judgment. The order appealed from is reversed.

We concur: FITZGERALD, J.; DE HA-VEN, J.

(103 Cal. 497)

Ex parte THOMAS. (No. 21,157.) (Supreme Court of California. Aug. 4, 1894.)

ADULTERY-WHAT CONSTITUTES.

Mere adultery, without open and notorious cohabitation, is not a criminal offense in California (St. 1871-72, p. 380), and a conviction thereof is void.

In bank.

Petition by one Thomas for a writ of habeas corpus, for the purpose of obtaining his discharge from the custody of the sheriff of San Francisco county, Cal., to which he was committed on being convicted of adultery. Writ granted, and petitioner discharged.

Geo. W. Monteith, for petitioner. W. S. Barnes, for respondent.

PER CURIAM. The return to the writ of habeas corpus issued herein shows that the petitioner was convicted in the police court of the city and county of San Francisco of the crime of adultery, and thereupon sentenced to be imprisoned in the county jail for one year, and that he is now held in custody under commitment based upon said judgment. The judgment is void. Adultery

is not made a crime by any statute of Callfornia. It is the living together in open and notorious cohabitation and adultery that is made criminal by the statute (St. 1871-72, p. 380), and it has been rightly held that mere adultery, without the notorious cohabitation, does not constitute the offense (People v. Gates, 46 Cal. 53). The judgment being void, the imprisonment is necessarily unlawful, and the prisoner must be discharged. It is so ordered.

(108 Cal. 506)

QUINT v. HOFFMAN et al. (No. 18,306.) 1
(Supreme Court of California. Aug. 8, 1894.)
IBBIGATION DISTRICT — COLLATERAL ATTACK—EXCESSIVE LEVY OF ASSESSMENTS — VALIDITY—INJUNCTION AGAINST COLLECTION—WHEN REFUSED.

1. The organization of an irrigation district cannot be collaterally attacked in an action by landowners to enjoin the collection of assessments by the officers of the district.

2. Under the Wright act (section 22), which

2. Under the Wright act (section 22), which provides that the board of directors of an irrigation district shall levy an assessment "sufficient to raise the annual interest on the outstanding bonds" of the district, such board has no power to levy an assessment in excess of such an amount.

3. A landowner cannot enjoin the collection of an excessive levy of assessments by the board of directors of an irrigation district until he has paid the amount the board had the pow-

er to levy.

Department 1. Appeal from superior court, Glenn county; Seth Wellington, Judge.

Action by Herman Quint against George W. Hoffman and others, claiming to act as directors of the Central irrigation district, P. H. Graham, claiming to act as collector of such district, and others, to enjoin defendant Graham from selling lands for assessments levied in the year 1892. From an order dissolving a temporary injunction, plaintiff appeals. Affirmed.

Geo. H. Maxwell, Maxwell & McEnerney, R. A. Long, G. D. Dudley, and Maxwell, Dorsey & Soto, for appellant. Johnson & Johnson and R. Percy Wright, for respondents.

GAROUTTE, J. This is an action commenced by the plaintiff to enjoin the defendant P. H. Graham, as collector of Central irrigation district, from selling any lands of the plaintiff, and of others similarly situated, for assessments levied in the year 1892. A temporary injunction was issued upon the filing of the complaint, which was subsequently dissolved upon the ground that the facts stated therein were not sufficient to entitle the plaintiff to the relief demanded, and thereupon this appeal was taken from such order of dissolution. The only question presented by this appeal is, does the complaint state sufficient facts to entitle the plaintiff to a perpetual injunction?

1. The organization of the Central irrigation district is assailed, and it is insisted that the validity of that organization may

be attacked collaterally in this proceeding by showing that the board of supervisors acted without their jurisdiction in effecting its organization. This position cannot be maintained. An irrigation district of this character is a public corporation, formed under a general law, and its object is the promotion of the general welfare. People v. Irrigation Dist., 98 Cal. 206, 32 Pac. 1047, and cases there cited. Corporations organized under the act of the legislature popularly known as the "Wright Act" being public corporations, it is immaterial whether they be corporations de jure or de facto. That is a matter which cannot be inquired into upon a collateral attack; and in a case like the present, where the validity of an assessment levied by such a corporation is the subject of litigation, the validity of such assessment does in no way rest upon the fact of the de jure character of the corporation. This principle must be considered settled law in this state. Dean v. Davis, 51 Cal. 411; Reclamation Dist. v. Gray, 95 Cal. 601, 30 Pac. 779; Swamp-Land Dist. v. Silver, 98 Cal. 53, 32 Pac. 866. If appellant's contention goes to the extent that this corporation is not even a corporation de facto, the allegations of the complaint are not sufficient to support such contention. 2. It is insisted that plaintiff is entitled to the relief sought, upon the ground that the levy of the tax was at a rate greater than is authorized by the Wright act. This assessment was levied under section 22 of that act, which provides that "the board of directors shall then levy an assessment sufficient to raise the annual interest on the outstanding bonds." In pursuance of this provision the board of directors made, and had entered upon its minutes, the following order: "The assessment book of Central irrigation district for the year 1892-3 having been completed, and the assessments of property therein having been equalized, and it appearing therefrom that the total assessed value of property in said district for the year 1892-3 is the sum of \$2,643,217, the board of directors proceed to consider the amount required to be raised in order to meet the annual interest on bonds of said district during said year. After due deliberation thereon, it is ordered by the said board of directors of said Central irrigation district that an assessment be, and the same is hereby, levied and ordered collected on each \$100 assessed valuation of property in said Central irrigation district, for district purposes aforesaid, for the fiscal year 1892-3, as follows, to wit: for bond fund, \$1.55 on each \$100; total levy of assessment for the purpose before mentioned, \$1.55 on each \$100." The bonds issued by and outstanding against the district amounted to \$574,000, and the amount of money necessary to be raised to pay the interest upon said bonds, at the rate fixed by the act itself, would be \$34,440; yet the amount which would be

raised under the aforesaid levy would ex-

ceed that sum by more than \$5,000. While the views we entertain upon another branch of the case prevent plaintiff from securing the relief in this action desired, still the question here presented as to the true construction of section 22 of the Wright act may be said to be directly involved in a proper solution of this litigation, and the question is not only a new one, but one so important to both taxpayers and corporations that we deem it advisable to consider it at the present time. in order that these district corporations, in the future, may so shape their course as to keep within their powers under the law. This board of directors is a creature of the statute, and it can do nothing unless authorized by the statute. Its powers are limited, special, and express, and it can assume no power by inference or implication. It exceeded its power in making a levy of \$1.55 upon the \$100. The statute says it had the power, and it was its duty, to levy an assessment sufficient to pay the annual interest. But it exceeded its power by levying an assessment largely in excess of that amount. By this section of the act, certain burdens only could be cast upon the land of the taxpayers of the district, and they had the right to insist upon a rigid compliance with this provision of the statute, and that no additional burdens be had, for it is the only section of the act providing for the levying of a tax and the raising of money regardless of the advice or wishes of the parties who are called upon to pay that tax. Money raised under this section of the act can be applied to but one single purpose. The law contemplates no other application of it. Again, the interest upon the bonds must be paid semiannually, and the amount to be raised is a matter of exact mathematical computation. The tax is levied upon the real estate of the district, and, when the assessment has been made and equalized, it would seem the rate to be levied is a matter readily ascertainable. The board has no right to assume that the tax upon any particular tract of land will not be paid by the owner, or by a sale of the land itself. The question of the amount to be raised is not one of discretion, but of pure legal right. If the board could fix the rate at \$1.55 per \$100, it would have the same right to double that rate, and thus entirely disregard its statutory authority. This it cannot do. In acting under this section, as well as its conduct of all other affairs of the district, it must ever keep its eye upon the statute. The statute furnishes the only road upon which it may safely travel. All others not only lead to danger, but their use is forbidden to it by the law. It is evident in the present case that the board adopted the course laid down in section 41 of the act, and deducted 15 per cent. from the assessment roll for anticipated delinquencies. But the error of the board lies in the fact that the provisions of section 41 are not



applicable to section 22. Neither does section 22 contain any authority for a deduction based upon anticipated delinquencies. The lawmaking power, in enacting section 41, appeared to recognize the fact that special authority was necessary to justify the course followed in fixing the rate as there declared; but, whether the omission to insert a similar provision in section 22 was intentional or not, it is not our province to decide. Certainly, no good reason is apparent why the provision, if a salutary and necessary one, should be found in section 41, where small amounts of money are contemplated to be raised by taxation, and be absent from section 22, which not only provides for the payment of interest upon all bonds issued, but for the payment of the bonds themselves. It cannot be held that a judicial discretion is vested in the board of directors to fix the levy at any rate which it might deem sufficient to raise the amount necessary to pay the annual interest. The legislature has no power to vest a board with any such discretion. Such a construction of the provision would render it unconstitutional. The principle here involved was directly adjudicated upon in the case of Houghton v. Austin, 47 Cal., at page 652. It was there held that the legislature could not delegate this power to any board or person. The provision of the statute then under consideration provided that the state board of equalization, after allowing for delinquencies in the collection of the taxes, should fix a rate sufficient to raise the amount of revenue directed by the legislature. It was held in that case that the board had no authority to make any estimate for delinquencies in collection. In the act under present investigation, there is not even an attempt of the legislature to clothe the board with authority to take into consideration, in making the levy, any question as to anticipated delinquencies. For the foregoing reasons, we conclude that the board of directors exceeded its power in fixing the rate at \$1.55 upon the \$100.

3. Notwithstanding the levy was in excess of the power of the board, and the tax was more than plaintiff could be compelled to pay, still he owed the district a portion of the tax levy, upon his own showing; and he will not be heard, in a court of equity, until he has paid the amount the board had the power to levy upon his land. The amount which he honestly owes the district was readily ascertainable, and he should have paid it. It was a matter of computation equally as exact as the computation showing that the levy was at too high a rate; and upon the elementary principle that, if a part of a tax is valid and authorized, such portion must be paid before a party will be allowed to come into a court of equity to make complaint, we think plaintiff is entitled to no relief in this action. Gas Co. v. January, 57 Cal. 614; Esterbrook v. O'Brien,

98 Cal. 671, 83 Pac. 765. For the foregoing reasons, the judgment is affirmed.

We HARRISON. concur: J.: VAN FLEET, J.

103 Cal. 563

PEOPLE v. SMITH. (No. 21,080.) (Supreme Court of California, Aug. 17, 1894.) FORGERY-INDICTMENT-EVIDENCE.

1. An indictment for passing a forged

1. An indictment for passing a forged check, which fails to state that defendant knew the same was forged, is defective.

2. Where forgery of a check is charged in the first count of an indictment, and the passing of it is charged in the second, the allegations of the first count cannot be read with the second for the purpose of surplying a defet there. ond, for the purpose of supplying a defect there-

3. Where, on the trial of an indictment containing two counts, one of which is defective, evidence pertinent to both is received under a ruling that both are good, a verdict will not be sustained because the evidence is sufficient to sustain a conviction on the count which is good.

4. Where an indictment for forgery charges that the name forged was "R. S. S.," proof that the name was "R. G. S." is sufficient, as the middle initial of a name is not material.

Commissioners' decision. Department 1. Appeal from superior court, Sonoma county: R. F. Crawford, Judge.

S. A. Smith was convicted of forgery, and appeals. Reversed.

A. M. Johnson, for appellant. Atty. Gen. Hart, for the People.

SEARLS, C. Defendant was convicted of the crime of forgery, and appeals from the judgment and from an order denying a new There were two counts in the information filed against him. In the first it is charged that he did on or about November 6, 1893, willfully, unlawfully, knowingly, and feloniously, and with intent then and there to defraud, prejudice, and damage R. S. Southerland and the Santa Rosa Bank (a corporation, etc.), falsely make, forge, and counterfeit a certain check, in the words and figures as follows, to wit: "Santa Rosa, Cal., Nov. 6, 1893. No. 191. Santa Rosa Bank, pay to John W. Fields, or bearer, \$17.50 dollars. R. S. Southerland. [Indorsed] J. W. Fields." The second count charges that defendant did thereafter, and on the 8th day of November, 1893, "utter, publish, and pass, as true and genuine, a certain forged, false, and counterfeit check, which said check was the same check referred to in the first count of this information, which check is in the words and figures as follows [then follows a copy of the check, precisely as in the first count], with intent thereby to prejudice. damage, and defraud the said R. S. Southe, and and the said Santa Rosa Bank." The information closes in the usual form. It will be perceived the second count fails to aver that the defendant passed as true the check, "knowing the same to be false," etc., as specified in section 470 of the Penal Code. No

objection was taken to the information, by demurrer or otherwise. At the trial, defendant, by his counsel, objected to evidence under the second count of the information, upon the ground that said second count did not state a public offense, in that there was no allegation that defendant knew the check was forged. The objection was overruled, and an exception noted. Evidence was received upon said second count. The ruling of the court admitting such evidence is assigned as error.

To constitute forgery by uttering or passing of a forged instrument, as defined in section 470 of the Penal Code, three important factors are requisite: (1) It must be uttered, published, passed, or attempted to be passed, as true and genuine; (2) it must be known by the person uttering or passing it to be false, altered, forged, or counterfeited; (3) it must be with intent to prejudice, damage, or defraud some person. These three essential elements going to constitute the crime must all be present, and must all be substantially charged in the indictment or information. In the present information the second prerequisite, viz. knowledge on the part of defendant of its falsity, is not charged. The contention of the respondent is that the clause in the second count of the information, that the "said check was the same check referred to in the first count of this information," is such a reference to the first count as serves to incorporate its allegations in the second count, and hence that the second count is sufficient. The language used will bear no such construction. Its object is apparent. Either to forge a check, or to pass it with guilty knowledge, etc., is a forgery. Each may be charged singly as constituting the crime, or, if charged together, they constitute but one offense. A single offense may be charged in separate counts without being amenable to the objection of charging more than one offense, to do which is interdicted by our Penal Code. In People v. Shotwell, 27 Cal. 394, it was held that where the forgery of a check was charged in one count, and the passing of a check in another count, they would not be presumed to be the same instrument or to constitute the same offense, even though copies of the check were set out in each count, and were alike verbatim et literatim. Since that decision, it has been the practice in criminal pleading, in such cases, to use apt expressions showing that the offense specified under different statements or counts is one and the same. The expression quoted from the second count of the information serves to fill this office of showing the offense to be the same as that specified in the first count, and nothing more. It follows that the second count of the information failed to state an offense, and the proffered testimony relating thereto should have been rejected. This was a defect which was not waived by a failure to demur, but one which went to the very essence of the cause of action, and

which might be raised at any point in the progress of the case. Pen. Code, § 1012. Some of this testimony was no doubt admissible in support of the first count of the information. The possession of an instrument recently forged, by one claiming under it, like the possession of goods recently stolen, is evidence against the possessor. So, too, the declaration of the defendant that he had worked for Southerland; that the latter had no money to pay him, and had given him the check, etc.,-was admissible under the charge of forgery. Com. v. Talbot, 2 Allen, 161. But when it was admitted as evidence of uttering and passing as genuine under the second count, and when the court refused the instruction of defendant that the second count of the information charged no offense. and that defendant could not be convicted thereunder, it was manifest error. It may be claimed that, conceding the error, there was one good count in the information, with ample evidence in its support, and hence that the judgment is supported by the good count, and will not be reversed. At common law it was held that where an indictment contained two counts, and at a trial no evidence was introduced in favor of one of them, a general verdict and judgment would be upheld upon the ground that the presumption will prevail that the judgment of the nisi prius court was rendered upon the good count, and not upon the unsupported This case differs materially from those involving that question. Here there are two counts,-one good and the other bad. court holds them both good. There is a verdict of guilty upon both counts, upon which judgment is pronounced. Error has intervened, and the good cannot be separated The presumption must be from the bad. that as both were held good, and evidence introduced in support of both, the judgment is upon both, and hence that it is erroneous. See People v. Mitchell, 92 Cal. 590, 28 Pac. For this error the judgment and order 597. appealed from should be reversed, and a new trial had, or the information set aside and a new information filed, as the court below may determine.

There is another question raised by appellant which may come up on a second trial, and which will be briefly noticed. The information charged the defendant with forging a check, signed R. S. Southerland, with intent to defraud R. S. Southerland and the Santa Rosa Bank. The testimony at the trial showed that "R. G. Southerland" was the true name of the party whose name was sought to be forged, and appellant claims the variance was fatal. (1) At common law the name of an individual consists presumptively of one Christian, baptismal, or given name, and also one surname, family name, or patronymic. (2) The common law recognized but one Christian name. Hence, the middle name or names, or the middle initial letter or letters, of a person's name, are not material, either in civil or criminal proceedings; and a variance between the pleading and proof in respect to such middle names or initials is, in this country, as at common law, regarded as immaterial. Massachusetts is an exception to this rule. People v. Ferris, 56 Cal. 442; People v. Lockwood, 6 Cal. 205; People v. Boggs, 20 Cal. 433; Miller v. People, 39 Ill. 457; Tucker v. People, 122 Ill. 583, 13 N. E. 809; Langdon v. People, 133 Ill. 382, 24 N. E. 874; State v. Smith, 12 Ark. 622. The identity of R. G. Southerland as the party intended in the forged instrument was complete. There was no error in the admission of evidence or instructions under this head.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial had, or the information set aside, and a new information filed, as the court below may determine.

103 Cal. 577

PEOPLE v. LANDMAN. (No. 21,115.)
(Supreme Court of California. Aug. 17, 1894.)
CRIMINAL LAW—INSTRUCTIONS—PRESUMPTION OF
INTENT—ASSAULT WITH INTENT TO KILL.

1. On a trial for assault with intent to murder, a charge that, if defendant voluntarily assaulted the prosecuting witness with a deadly weapon, in such manner that the natural consequences would be the death of the witness, then the law presumes that the defendant intended to kill the witness, is error, as the question of intent is one of fact, to be decided by the jury.

2. In order to convict of assault with intent

2. In order to convict of assault with intent to kill, the facts proven must be such that if death had resulted from the assault the same would have been murder.

Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Gustave Landman was convicted of assault with intent to commit murder, and appeals. Reversed.

Daney & Wright, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The defendant was convicted of an assault with intent to commit murder, and now prosecutes this appeal from the judgment and order denying his motion for a new trial. At the request of the prosecution the court gave the jury the following instruction: "Every person is presumed to intend what his acts indicate his intention to have been; and if the defendant, at the time and place alleged in the information, voluntarily assaulted the prosecuting witness with a deadly weapon, in such a manner that the natural and ordinary consequences of such assault would be to kill the said witness, Stanovitch, then the law presumes that the defendant intended to kill the said witness, Stanovitch; and, unless it appears from the evidence that the intention of the defendant

was other than his acts indicated, the law will not hold him guiltless." It is now argued by the attorney general that the foregoing instruction should not be construed as an attempted exposition of the law bearing upon the specific offense charged in the information, but that it related and was pertinent to other and lower offenses necessarily included therein, and that as to such offenses it stated the true rule. To support his contention he says the "intent" to which the instruction was directed was "the intent to kill," and not the "intent to murder." Again, he says the word "guiltless" does not refer to the offense of assault with intent to commit murder, but that such portion of the instruction means that the defendant will not be held guiltless of any and all offenses. We think the argument unsound. In the first place, there is no such offense designated in our Criminal Code as an assault with a deadly weapon with intent to kill. The entire instruction is framed with a view of enlightening the jury upon a question of law as to the intent to kill; and, upon respondent's construction, it would be uncalled for and not demanded by the exigencies of the case, for an intent to kill is only material in this case when we view such an intent as one to commit murder. Again, the fair interpretation of the language of the court is that, under the circumstances depicted by the evidence stated, the defendant could not be held guiltless of the specified crime charged in the information. A jury would so understand it beyond any doubt. Looking at the instruction from this standpoint, it is clearly erroneous, for it trenches upon the province of the jury in passing upon matters of fact. In the offense here charged a specific intent is the all-important element, and it is essentially a question of fact for the jury to decide. When a specific intent is an element of the offense, no presumption of law can ever arise that will decide this question of intent, and therein is found the vice of the present instruction. The saving clause found in the latter portion of it does not cure the objection we have suggested. If it serves any purpose whatever, it casts upon the defendant the burden of introducing evidence to disprove a state of facts created by a presumption of law, and no such burden can be cast upon a defendant in a case charging an offense of the present character. Of course, under these circumstances, a person's intent cannot be proven by direct and positive evidence, yet it is none the less a question of fact, to be proven like any other fact in the case, and all the circumstances surrounding the assault furnish the rule upon which its proper solution depends. As fully and entirely supporting these views, we cite Roberts v. People, 19 Mich. 401; Patterson v. State, 85 Ga. 131, 11 S. E. 620; Lawson, Pres. Ev. p. 271; People v. Mize, 80 Cal. 42, 22 Pac. 80.

The court refused to give the following instruction asked by the defendant: "In order to justify a verdict of guilty of the crime of assault with intent to commit murder, the facts and circumstances proven in a case must be such that if death had resulted from the shooting the crime would have been murder, and not manslaughter; for if the crime, in a case of death, would have been only manslaughter, the defendant cannot be convicted of the offense charged." This instruction should have been given, for it is sound law. If death should result from an assault with intent to commit murder. no case can be imagined where the assailant would not be guilty of the crime of murder. Indeed, the death of the party assaulted is the only element necessary to change the offense from assault with intent to commit murder to that of murder. It may be suggested that the converse of this principle does not necessarily follow, to wit, if the killing is murder there must necessarily have been an intent to commit murder. See People v. Mize, 80 Cal. 42, 22 Pac. 80. For the foregoing reasons, it is ordered that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: VAN FLEET, J.; HARRISON, J.

103 Cal. 588

RAMBOZ v. STOWELL. (No. 19,345.) (Supreme Court of California. Aug. 18, 1894.) ESTOPPEL BY DEED.

Where a married woman represents that she is a widow, and, for a valuable consideration, executes a deed of land as a single woman, and after her husband's death, without consideration, deeds the land to her daughter, who has actual notice of the prior deed, the daughter is estopped from denying that her mother was a widow when the prior deed was executed.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by Jane Ramboz against N. W. Stowell to quiet title to land. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Davis & Matthews and C. C. Stephens, for appellant. Wm. D. Stephens, for respondent.

VANCLIEF, C. Action to quiet title to a lot of land in the city of Los Angeles. It is admitted that Margaret J. Starkey was the owner of the lot in question on June 13, 1878, as her separate property, and both parties claim title from her. On that day, Mrs. Starkey, for a valuable and sufficient consideration, signed, sealed, and delivered to Helen L. Grinnell a deed of the lot, the acknowledgment of the execution of which was certified by a notary public (A. C. Holmes) in the form required for an unmarried woman, and not otherwise, and the deed was recorded on the same day. On September

19, 1887, Helen L. Grinnell, in consideration of \$11,000, conveyed the lot to defendant by deed recorded October 4, 1887. On May 13, 1891, Mrs. Starkey, for the nominal consideration of \$100, but without any valuable consideration, conveyed the lot to plaintiff, who is her daughter, and who, on the following day (May 14, 1891), commenced this action. At the date of the deed to plaintiff she had actual notice of the prior deed of her mother to Helen L. Grinnell. The trial court gave judgment for defendant upon a finding that the plaintiff was estopped from denying that Mrs. Starkey was a widow at the time she acknowledged her deed to Helen L. Grinnell; and whether or not this finding is supported by the pleadings, and is justified by the evidence, are the only questions requiring special consideration.

That the answer states facts sufficient to constitute an estoppel, within the rule deducible from the cases of Reis v. Lawrence, 63 Cal. 129, and Hand v. Hand, 68 Cal. 135, 8 Pac. 705, I have no doubt.

As to the sufficiency of the evidence, it is admitted that Mrs. Starkey was married to Thomas Starkey, in Ohio, in 1844; that she and her husband lived together until some time in 1869, when they separated at Chicago, Ill.; that in 1870 she came to Los Angeles, in this state, where she continuously resided until 1880, except that in 1877 she visited Chicago for about three weeks, and there met her husband, who remained with her during that visit; that her husband was never in this state; and that he died in 1885. It also appears that she went to Arizona in 1880, and returned to Los Angeles in 1884, where she has ever since remained. court found that she abandoned and deserted her husband in the state of Illinois in 1869. and this finding seems fairly inferable from the admitted fact that she left him in that state, there being no evidence that he ever left or deserted her. J. S. Severance testified, in substance, that during the year 1878 he was agent for Helen L. Grinnell, who then and ever since resided in New York; that, as such agent, he attended to and conducted the transfer of the premises in question from Mrs. Starkey to Helen L. Grinnell, which was consummated by the acknowledgment of the deed on June 13, 1878; that during the negotiations for that transfer, and before the acknowledgment of the deed, Mrs. Starkey told him that she was a widow, and in a previous transaction with her she had expressly represented herself to be a widow; and that he never had any notice that she was a married woman at the time she executed the deed to Helen L. Grinnell, until since the commencement of this action. C. Holmes, the notary by whom the acknowledgment was certified, testified that, in taking acknowledgments of women, it had been his invariable custom to ask them whether or not they were married, and to take and certify their acknowledgments accordingly, and

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that, from the form in which he had certified the acknowledgment of Mrs. Starkey, he was positive that she must have informed him that she was not married; otherwise, he would have drawn the certificate in the form required by law for married women, and would not have drawn it in the form in which it is. Of all this he was very positive, although he did not remember that particular transaction. Then, to prove that Mrs. Starkey had generally represented herself to the public as a widow, other witnesses were called and examined, as follows: G. W. Gillette testified that, while he was county recorder, in 1875, Mrs. Starkey acknowledged a mortgage before him, in the body of which she was described as "a widow," and in the certificate of acknowledgment he had certified that she "declared herself to be a widow," and that he would not have so certified if she had not so declared, but that, independently of the record, he had no very distinct recollection of the particular transaction. J. J. Warner, who was a notary in 1876, testified that in that year Mrs. Starkey acknowledged a deed before him, in the certificate of her acknowledgment of the execution of which he had described her as "a widow;" that, although he had no recollection of having so described her, "the word 'widow' could not have been inserted in the certificate unless the party making the acknowledgment had told me, then and there, that she was a widow." E. H. Owen testified that, as deputy county clerk, he had taken the acknowledgment of Mrs. Starkey to the execution of a deed in 1875, certified in the form required for unmarried women, and that he would not have taken it in that form without having asked her the question whether she was married or not. Messrs. Gillette, Severance, and Owen each testified that he had done considerable business with and for Mrs. Starkey, and had been well acquainted with her, and had always understood, from what she said or did, that she was a widow. In rebuttal of the foregoing, Mrs. Starkey flatly denied that she had ever in any manner represented herself to be a widow or unmarried prior to the death of her husband. Horace Hall, who had acted as attorney for Mrs. Starkey, testified that in 1877 or 1878 she sold a lot to Mrs. Osterman, and during the transaction the attorney for Mrs. Osterman asked her whether she was a widow or a married woman, and she answered that "she did not know whether she was wife or widow; that her husband disappeared some years before, and she did not know whether he was living or dead." Mrs. Mary Hall testified that she had taken a deed from Mrs. Starkey in 1876, and that Mrs. Starkey never represented to her that she was a widow, but always told her that she was married. There is no evidence, however, that either Mr. or Mrs. Hall ever communicated the facts to which they testified to any other person, nor does it appear how the deeds referred to by them were acknowledged, or that Mrs. Starkey ever acknowledged any instrument as a married woman. I think the evidence for defendant tended to prove that, before and at the time she executed the deed to Helen L. Grinnell, Mrs. Starkey falsely represented to Severance, the agent of Grinnell, that she was unmarried, intending thereby to deceive them, and that they and the defendant acted upon such representations, believing them to be true, not only in paying the purchase money, but in paying all the taxes and street assessments during the period of 18 years immediately prior to the commencement of this action, and without notice of the falsity of the representations, or that Mrs. Starkey intended to lay any claim to the land. The evidence of intentional misrepresentation is considerably stronger than in the case of Reis v. Lawrence, supra, wherein there appeared to be no reason to doubt that Mrs. Lawrence honestly believed that she had been divorced from her husband.

Certain evidence objected to by plaintiff's counsel was admitted temporarily, with the understanding that the court would pass upon the objections before judgment, and it appears that the court did not afterwards expressly decide whether the evidence objected to was admissible or not; and this is assigned as error for which the judgment should be reversed. All the evidence thus admitted was either properly admissible or harmless; so that, even if the court erred in failing to decide the questions raised, the plaintiff could not have been injured thereby. I think the judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

In re MUERSING'S ESTATE. (No. 18,311.) (Supreme Court of California. Aug. 18, 1894.)

Administration—Qualifications of Administrator—Public Administrator.

1. Code Civ. Proc. § 1738, providing that the public administrator must not be interested in the expenditures on account of any estate he administers, does not disqualify a public administrator, who, before his appointment, furnished the coffin for deceased.

A nonresident is incompetent to nominate an administrator.

Department 1. Appeal from superior court, Merced county; Joseph H. Budd, Judge.

Application for letters of administration on the estate of H. W. Muersing, deceased. From an order denying his application, and appointing the public administrator, F. V. A. De Stuers appeals. Affirmed.

J. W. Knox, for appellant. T. C. Law and W. A. Nygh, for respondent.

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VAN FLEET, J. H. W. Muersing died intestate in the county of Merced, leaving an estate therein, but no relative resident of the state, his next of kin being his father, a non-resident. Two applications were made for letters of administration upon the estate,—one by A. G. Clough, as public administrator of the county; the other by one F. V. A. De Stuers, basing his right to administer upon the request and nomination of the father of deceased. The court appointed Clough, the public administrator, and denied the application of De Stuers, and the latter appeals from the order.

The point relied upon by appellant for a reversal of the order is the alleged incompetency of Clough, the public administrator, to administer upon the estate, by reason of the fact that he held a demand against the estate which would have to be paid during the course of administration. The fact upon which this objection was based, as disclosed by the evidence, was that the undertaking firm of Clough & Nordgren, in which the respondent, Clough, was a partner, had furnished the coffin and burial outfit for the deceased, for which they would have to be paid out of the estate. Appellant contends that, by reason of this fact, respondent is disqualified from administering the trust, and relies upon the provisions of section 1738 of the Code of Civil Procedure as sustaining this contention. But that section has no application. It provides that "the public administrator must not be interested in the expenditures of any kind made on account of any estate he administers, nor must he be associated in business or otherwise with any one who is so interested." It is apparent that this section does not undertake to state a rule of disqualification, but simply prescribes a very salutary rule of official conduct to govern the public administrator in the discharge of his duty, and prevent his trafficking to his advantage in the estate. It does not render incompetent as administrator one who, under the circumstances disclosed here, or otherwise, becomes a creditor of an estate before his appointment, but furnishes a ground upon which, for a violation of its provisions, the administrator would be subject to removal. There is nothing in this section, nor in the various other provisions of the Code relating to estates of deceased persons, which have been called to our attention, tending to sustain the theory that the mere fact of being a creditor of, or having a demand against, an estate, disqualifies one from appointment as administrator. Section 1369, Code Civ. Proc., prescribes the grounds which render one incompetent to serve as administrator, of which this is not one, and the courts have no right to add to the disqualifications prescribed by the legislature. In re Bauquier, 88 Cal. 312, 26 Pac. 178, 532, and cases there cited.

Appellant seems to have abandoned any claim of right to letters based upon the nomination of the father, since that feature of the

case is mentioned only incidentally in his statement of facts, and is not recurred to in the points. If it is to be regarded as a point made in the case, however, there is nothing in it. The evidence shows that the father lives in Holland, and, upon the death of his son, sent a cablegram requesting the appointment of De Stuers as administrator of the estate. Conceding that this was an authorized way to make such request, and that it was properly before the court for consideration, it had no legal significance. The father, not being a resident of the state, was not competent or entitled to serve as administra-Code Civ. Proc. § 1369. And, being incapable himself of administering, it was not competent for him to nominate an administrator. Estate of Beech, 63 Cal. 458; Estate of Kelly, 57 Cal. 81; Estate of Morgan, 53 Cal. 243. The court was therefore bound to disregard the request. Not being incompetent, the public administrator was entitled to letters, as against the appellant. Code Civ. Proc. § 1365. Order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

103 Cal. 431 CURRIER v. HOWES et al. (No. 19,213.) Supreme Court of California. July 26, 1894.)

(Supreme Court of California. July 26, 1894.) RIGHT OF WAY-LANDS BOUNDED BY ALLEY-EX-TENT OF EASEMENT.

1. Where an owner of land lays off an alley extending into such land, marking its boundaries by fences, and conveys lots bordering thereon with an express grant of right of way through such alley, the rights of purchasers are presumed to extend to the limits of the alley so designated.

designated.

2. Where the owner of land establishes an alley extending across the rear of a lot subsequently conveyed, with a right of way "to and from said lot" through such alley, the right of way extends along the whole rear of such lot.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by A. T. Currier against F. C. Howes and others. There was a judgment for plaintiff, from which defendants appealed. Affirmed.

Allen, Conrey & Miller, for appellants. Brunson, Wilson & Lamme, for respondent.

SEARLS, C. This is an action to restrain the defendants from obstructing an alley or private way, and from taking or holding possession thereof, excavating therein, or erecting buildings thereon, etc., and to recover damages for injury thereto. The cause was tried by the court without the intervention of a jury, written findings filed, and judgment rendered thereon in favor of the plaintiff for \$10 as damages, and enjoining the defendants as prayed for in the complaint. The defendants appeal from the final judgment, and support their appeal by a bill of exceptions.

In 1866, George O. Tiffany was the owner in fee and possessed of certain land in Los

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Angeles, bounded on the north by Third street, on the east by Spring street, and on the west by Fort street (now known as "Broadway"), which land he subdivided and sold in lots to sundry persons. Either for his own convenience, or to enhance the price of lots, or from some other cause, said Tiffany laid out an alley 10 feet in width from Fort street, running east, and extending either to the rear of lot 13, or across the entire rear of lot 13, where it terminates in a cul de sac. In other words, it is a blind alley, open at one end only. Plaintiff and the defendants here, or some of them, are seised and possessed of lots in this tract of land, holding by sundry mesne conveyances under said Tiffany. As there is no question made in regard to the regularity of the chain of title from Tiffany to the parties herein, for brevity's sake it may be said plaintiff is seised of a lot or lots of land bounded on the north by Third street, and extending southerly to the line of the alley, under a deed executed May 16. 1874, by said Tiffany, which contains the following clause: "Also the right of passage by alley way ten (10) feet wide from Fort street to the rear of said lot for passage to and from said lot, but for no other purpose;" or, as contained in a deed from the same grantor, executed June 5, 1874, to remedy some supposed defect in the former deed: "This conveyance to include the right of passage of alleyway ten (10) feet wide from Fort street to the rear of the premises hereinbefore described for passage to and from, but for no other purpose." Defendants are seised and possessed under Tiffany, by conveyance executed October 12, 1876, of a lot or lots fronting on Spring street, and extending back west along the south line or rear of plaintiff's lot, and are the owners and holders of the fee of the alleyway. The several conveyances relating to title were duly recorded at or about the date of their execution. Defendants, about October, 1889, entered upon the east 40 to 45 feet of what is claimed to be the alleyway, and commenced the construction of a brick building thereon, which, if completed, will occupy the whole of the same along the rear or south line of plaintiff's lot, except 15 to 20 feet thereof at the southwest corner thereof.

The case, as presented, involves two principal questions: (1) The first being whether, as a matter of fact, the alleyway extended from Fort street, to and along the entire rear or south end of plaintiff's lot to the southeast corner, or whether it terminated at or near the southwesterly corner thereof. (2) As to the construction to be given to the clause in the deed of conveyance whereby plaintiff is granted the right of passage through the alley.

As to the first question it may be said that the allegation of the complaint is that the alley extends along the entire rear or south line of plaintiff's lot, which is 60 feet in

width. The finding of the court sustains the allegation. This finding, like most of the others, is challenged by the defendants as not being sustained by the evidence. It must be admitted that the testimony in the case is more than usually indefinite and unsatisfactory. It would throw much light upon the case if it fixed the dates of facts more particularly. The testimony, as it is, tends to show that, commencing with 1872, Tiffany began to sell lots bounded by this alley, and continued so to do for, say, five years, during which time he sold all the land bordering on the alley in question, consisting of seven or eight lots, in all of which cases except two he granted a right of way through this alley by deed, and in the excepted cases he granted the fee to the alley, and in one of them such fee was granted subject to the easement. It also appears that the alley in rear of plaintiff's lot was fenced throughout and on both sides, from the southeast corner of plaintiff's lot to Fort street, prior to 1879 or 1880, but the time at which such fence was constructed does not appear. The plain inference is that it was so fenced, at least on the south side, by Tiffany, as the fact does appear that it was fenced when the land now owned by defendants vested in his immediate grantee under a mortgage in 1879, and the evidence tends to show that it has been bounded by fences ever since, except as to unimportant breaks. There was also testimony going to show that the alley has been used for the purposes of ingress and egress, and as a passageway, by the persons living along it, the defendants included. The evidence was sufficient to support the finding. There was certainly a substantial conflict in the evidence, and, as we are not authorized in such cases to disturb the findings of the court below, it can subserve no useful purpose to state the testimony of defendants. or to comment upon it. It has been held by this court that, where lots are laid off and sold as per a map fronting upon what purports to be a street, it amounts to a dedication of the street as to the purchasers. Stone v. Brooks, 35 Cal. 489; People v. Reed, 81 Cal. 70, 22 Pac. 474; Archer v. Salinas City. 93 Cal. 43, 28 Pac. 839. It must follow upon principle, that where the owner of land lays off an alley through, or extending into, said land, and designates its boundaries and extent by substantial fences, and conveys lots bordering upon such alley with an express grant of a right of way for egress and ingress through such alley, the rights of the purchasers will be presumed to extend to the limits of the alley thus designated.

2. As to the second proposition, the contention of the defendants and appellants is that the grant of a right of passageway for passage "to and from said lot" cannot be construed so as to grant a right of way "along" the whole length of the rear of the lot, when the language is "to and from" the rear.

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Brossart v. Corlett, 27 Iowa, 288, and Somerset v. Railroad Co., 46 Law T. (N. S.) 883, are cited in support of this contention. The case last cited is not at hand. Brossart v. Corlett was a case in which one Lyon, the owner of certain lots in a block of land in Iowa City, sold a portion thereof, and conveyed with the following reservation to himself: said Lyon reserving to himself, his heirs and assigns, the right of way to and through said above-described premises for wagons and foot passengers, from Washington street to the eastern boundary of his (Lyon's) premises, situate on said lots 5 and 6, forever." The object of the action was to have a way opened over the land conveyed by Lyon, not only to the eastern boundary thereof, but along the line of his own land, and upon that conveyed. Defendant had judgment, and on appeal such judgment was affirmed. The court said: "The rule, we grant, is that an easement appurtenant to an estate is so to every part thereof, whatever the subdivision at the time or subsequently. But it is just as true that the servient estate is not to be burdened to a greater extent than was contemplated at the time of the creation of the easement." The court then proceeds to reason that in the light of the surrounding circumstances, one of which was the construction given by the parties to the reservation by their acts for 8 to 17 years, the language used must be, under the circumstances of that case, construed to mean "to the line of plaintiff's land," and not "along such line after reaching it." Dillon, C. J., dissented from the majority of the court. It will be observed that the above case was one in which the grantor reserved a right of way or easement in land conveyed by him, and that in such cases covenants and reservations in case of doubt are construed more strongly against the covenantor or grantor. The general principle is "that, if an easement becomes appurtenant to an estate, it follows every part of the estate, into whomsoever hands the same may come by purchase or descent." Washb. Easem. (4th Ed.) p. 42. And, where the owner of land to which a right of way is appurtenant sells or devises it in separate parcels to different persons, it is held that each of such persons acquires a right of way as appurtenant to his particular part of the land. Lansing v. Wiswell, 5 Denio, 213; Watson v. Bioren, 1 Serg. & R. 227; Codling v. Johnson, 9 Barn. & C. 933; Hill v. Miller, 3 Paige, 253. And if, as in this case, the easement is acquired by deed, no length of time of mere nonuser will operate to impair or defeat the right. Nothing short of a use by the owner of the premises over which it was granted, which is adverse to the enjoyment of such easement by the owner thereof, for the space of time requisite to create a prescriptive right, will destroy the right granted. Washb. Easem. (4th Ed.) pp. 717, 718, and cases cited.

The court having found that the alley in

question, extending across the rear of the plaintiff's lot, was laid out by George O. Tiffany, the owner of all the land in question, "for the use and occupation of such persons as might thereafter purchase parts or portions of land fronting or bounded by said lane or alley," etc., and the said Tiffany having conveyed the lot owned by plaintiff with the right of ingress and egress, as hereinbefore specified, the conclusion is irresistible that plaintiff is entitled to ingress and egress to and along the entire rear line of the lot so conveyed, and that the attempt of defendants to construct a building upon a portion of such alley in rear of plaintiff's lot was in violation of his easement or right of way therein. Appellants claim that the testimony fails to show that the alley was laid out by Tiffany for the benefit of parties who should thereafter purchase lots bordering upon it. We may concede the point, and the fact remains that there was evidence to show that he laid out the alley for that or some other purpose, and having done so, and conveyed the abutting lots with a right of way through the alley, and the same result follows. It was there as a patent fact, and the right conveyed, in view of the facts, must be construed in favor of plaintiff to extend to it as such existent fact. There was evidence that at one time a chicken house about 15 feet by 10 was constructed upon the extreme easterly end of the alley by placing a roof upon the fences, and by a partition at the west end thereof, and that it was finally removed by the owner of the fee of the alley; but how long it remained cannot be determined from the testimony, as neither the date of its con-This was struction or removal is given. doubtless evidence tending to show that the land was not subject to an easement, but it was by no means conclusive. The same may be said of an orange or lemon tree, or both, said to have stood in the alley. There were three exceptions taken to the introduction of evidence, none of which are important, and, as they are not urged here by appellant, they The judgment apneed not be discussed. pealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

HOWARD v. McCHESNEY. (No. 19,334.) (Supreme Court of California. Aug. 14, 1894.) PROCESS — SERVICE OF SUMMONS BY PUBLICATION—SUFFICIENCY.

1. A decree of foreclosure is not void for insufficiency of the affidavit of a publication, to be for two months in a certain weekly newspaper, where the affidavit stated that the summons was published therein every week and weekly for more than two months from the 26th day of November, 1891, to the 11th day of February, 1892, although the affidavit also contains a

statement of publication on each seventh day between the two dates except one; the previous direct statement not being overcome by the subsequent statement.

2. It was competent for the court to allow in evidence a second affidavit showing that publication was made on the date omitted in the enumeration made in the first affidavit.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Proceeding by Bryant Howard against J. H. McChesney to set aside a decree of foreclosure entered against him by default. From an order denying the motion to set aside such decree, plaintiff appeals. Affirmed.

E. W. Hendrick, for appellant. E. W. Britt, for respondent.

McFARLAND, J. This is an appeal by the defendant, McChesney, from an order denying his motion to set aside a decree of foreclosure entered against him by default. His motion is not based upon section 473, Code Civ. Proc. He does not ask to be allowed to answer to the merits. It was not made until more than a year after the rendition of the judgment. It rests entirely upon the theory that the judgment is absolutely void. and could, therefore, be set aside at any time on motion. Service was had on appellant by publication, and he bases his contention that the judgment is void upon the ground of the insufficiency of the affidavit of publication made before the entry of the decree, and attached to the judgment roll. The publication was, by the order of the court, to be for two months in a certain weekly newspaper; and the affidavit stated that the summons was published in said newspaper every week and weekly "for the period of more than two months from the 26th day of November, 1891, to the 11th day of February, 1892, viz." Then follows a statement of each seventh day between said two dates, except that the 21st of January, 1892,—a regular day for the issuance of said paper,—was omitted from the enumeration. The omission of that day is the only alleged defect in the affidavit. Before the motion to vacate was heard, the court allowed the person who made the first affldavit to file a second one, which showed that publication was made on said January 21st. The order must be affirmed. The judgment is not void on its face. It contains a recital of due service, and there is nothing in the record inconsistent with such recital. The previous direct statement in the affidavit that summons was published each week for two months between two named dates is not overcome and rendered valueless by the subsequent statement under a videlicit. The most that can be said about the affidavit is that it is ambiguous. That which follows a videlicet does not destroy that which precedes it. The general rule, rather, is that, if repugnant to the preceding matter, it will be rejected. Brown v. Berry, 47 Ill. 177; 2 Abb. Law Dict. 447, 635. Moreover, the court clearly had the right to allow in evidence the second affidavit which cleared away any possible doubt which there might be about the meaning of the first. See Herman v. Santee (decided August 13th by department 1 of this court) 37 Pac. 509, and cases there cited. The order appealed from is affirmed.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

4 Cal. Unrep. 736 QUILL v. JACOBY et al. (No. 19,330.) (Supreme Court of California. Aug. 18, 1894.) VENDOR AND PURCHASER—RESCIESION OF CON-TRACT-PERFORMANCE.

1. In an action to rescind a contract for the 1. In an action to rescind a contract for the sale of land, which provided that the grantor was to build a levee along a river, whether the levee was completed within a reasonable time is a question for the court sitting as a jury; and, in the absence of any proof of damages to the grantee from failure to complete the same a finding that it was completed within a reason. a finding that it was completed within a reasonable time will not be disturbed, though the work was not completed for four years.

2. Where a contract for the conveyance of

land facing on a street provides that a levee shall be constructed on the "west side of the said tract" which side faces a street, the construction of the levee in the center of the street is a compliance with the provision.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by James Quill against A. Jacoby and another. There was a judgment for defendants, and plaintiff appeals. Affirmed.

M. C. Hester, for appellant. Graff & Latham, for respondents.

SEARLS, C. On the 13th day of July, 1887, James Quill, the plaintiff and appellant herein, entered into two written contracts with A. Jacoby and L. Thorn, the defendants and respondents, by each of which the plaintiff agreed to purchase, and the defendants to sell and convey, a specified lot in the "Jacoby and Thorn Subdivision," in the city of Los Angeles. For one lot appellant was to pay \$800,-\$300 down, and the remainder in two equal payments of 200 each, at six and twelve months, respectively. For the other lot he was to pay \$700 in three equal installments,—one at the date of the execution of the contract, and the others at six and twelve months, respectively. One of the lots was designated as "Lot 4," and the other as "Lot 3," both in block L of said tract. The deferred payments were to bear 10 per cent. interest per annum. The contracts were identical in date and form, except as to description of lots and the amounts of payment. Respondents were to convey the lots to appellant upon payment of the final installment of the purchase price. The contract contained the following further stipulation: That respondents would construct and build a levee along the west side of said

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tract, in accordance with the plans and specifications as furnished by the council of the city of Los Angeles, and, if the last payment hereinbefore provided for should grow due before said levee has been accepted by the city as completed, then the last payment above referred to shall be deferred until said levee has been accepted by the proper officers of Los Angeles city, but shall be immediately due and payable on the acceptance of said work by the authorities of the city of Los Angeles." The agreement further provided that completion of the levee at an earlier date should not cause the last payment to become due before the expiration of the year from the date of the agreement as therein specified. Appellant made the payments, except the last, which was postponed until January 6, 1891, by reason of the nonconstruction of the levee, at which last-mentioned date appellant served upon respondents a written offer to relinquish and transfer to them all his interest in the lots under the contract, and demanded a repayment of the money by him paid on account of the contracts, specifying the sums so paid, which being refused, this action was brought to recover the money thus paid, aggregating \$1,107 and interest.

Defendants in their original answer admitted the levee was not constructed: averred that a reasonable time for the construction thereof had not elapsed: averred that it was impracticable to construct such levee until its continuation above and along Los Angeles river was built; averred their willingness to construct it as soon as the connections could be made; averred a contract between the city of Los Angeles and a railroad company, by which the latter was engaged in building the whole of the levee in question, including that along the west side of the lots. The answer also denied an offer to rescind, retransfer, etc. By a supplemental answer defendants averred the completion and acceptance of the levee on or before April 11, 1892. The cause was tried by the court without the intervention of a jury, and written findings filed, upon which judgment was entered in favor of the defendants for costs. Plaintiff appeals from the judgment and from an order denying his motion for a new trial.

The eighth finding of the court, which involves the main question in the case, is as follows: "That the levee along the west side of said tract, in accordance with the plans and specifications as furnished by the council of the city of Los Angeles, is fully completed, and was in process of completion prior to the 1st day of January, 1891; and the commencement of the construction of said levee and the completion thereof were within a reasonable time after the making of said contract by and between the plaintiff and defendants." The objections made to this finding are: (1) That the evidence shows that no levee has ever been made along the

west side of the tract mentioned in the contracts; (2) that the evidence and pleadings show that prior to January 6, 1891, no levee had been commenced along the west side of said tract; (3) that the evidence shows that nearly four years elapsed after contract made before completion of levee, and that it could have been built in three months. It appears from the evidence that the land agreed to be conveyed to plaintiff lies on the east side of the Los Angeles river, fronting upon a street or boulevard of, say, 100 feet in width, running between it and the river; that a levee in front of lot 3, in block L (lot 4 being in the rear of lot 3, and not fronting on the boulevard), would be of no avail to keep out the water of the river unless continued up the river, say, one mile; that about the time of the execution of the agreement a plan was devised for the construction of the levee by property owners in interest, and a contract was let for the work, under which a levee was constructed from the upper end to within about 3,000 feet of this tract, when the work ceased from the difficulty in getting timber and lumber. Defendants afterwards sought to obtain the necessary timber and lumber, but failed to do so. They subsequently agreed with the Los Angeles Terminal Railway Company that the latter should construct the embankment or levee. and have and use it as a roadbed for its railway. The embankment is from 8 to 10 feet high. The exact time of its construction in front of plaintiff's lot only appears inferentially from the testimony of H. F. Stafford, as engineer and a witness for plaintiff, who says that on the 24th of September, 1891, he "made a survey of the land and of the levee that has been constructed by the Terminal Railroad along that portion of the subdivision showing blocks * * * and L., as the same is delineated on the map." It was therefore constructed prior to September 24. 1891. It will be observed that the agreement specified no time within which the levee was to be built. If constructed within the year, it did not hasten the date of the last payment for the land; but, if not constructed and accepted within the year, the effect of the delay was to defer such last payment until the levee was completed and accepted by the city of Los Angeles. What was a reasonable time for the construction of the levee (conceding that question to be involved) depended largely upon the magnitude and character of the work to be performed, and all the surrounding circumstan-The facts entering into the question were peculiarly within the province of a jury, or the court sitting as such, and in the absence of any allegation or proof of advantages which would have accrued to appellant, by an earlier construction of the levee. or of damage to him by the delay, we are not prepared to say that the finding of the court is contrary to the evidence. Non constat but that the fact that the last payment

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was deferred until the levee was completed may have fully compensated appellant for the delay.

The objection that the finding that the levee was "in process of completion prior to the date of the rescission of the contract by appellant" is contrary to the admission of the answer, and the evidence is technically correct. The answer admits that defendants had not commenced the construction of the levee, but avers that the railroad company had commenced building it on the 10th day of November, 1890, and had been continuously engaged thereat up to the time of answer, all of which it averred was well known to plaintiff, and in the supplemental answer they aver its completion. No part of it in front of the lots in question had been constructed up to January, 1891. The further objection that no part of the levee was ever constructed "along the west side of said tract" is without merit. Appellant contends that it should have been along the west line of the "boulevard," whereas in fact it was in front of lot 3, and on or near the center of the boulevard. Lot 3, as indicated on the map referred to in the agreement, lies on the east side of, and fronts on, the boulevard. We may indulge the presumption that a conveyance of the lot will include the fee to the middle of the street, but know of no presumption under which it can be made to include the whole of the street. The embankment, being at this point apparently in the middle of the boulevard, must be on or near the line. The object of the levee was no doubt to protect the land from overflow from the river, and there is no suggestion that it is not efficacious to that result. The question whether or not the boulevard includes a portion of the river is one not raised by the pleadings, and, if raised, could cut no figure in the determination of the question involved here, for the reason that the failure of title, if any, is not of any land agreed to be conveyed. Upon the facts as found by the court, the conclusions of law are correct. Indeed, it may well be doubted whether, assuming the facts to be as stated in the complaint, a case is made under which plaintiff was authorized to rescind the contract. "Where the failure be but partial, leaving a distinct part as a subsisting and executed consideration, and leaving also to the other party his action for damages for the part not performed," a rescission cannot be had. Pars. Cont. (8th Ed.) p. 679. In Franklin v. Miller, 4 Adol. & E. 599, Littledale, J., says: "It is a clearly-recognized principle that if there is only a partial failure of performance by one party to a contract, for which there may be a compensation in damages, the contract is not put an end to." It would seem that, when the parties stipulated that the last payment upon the land should be deferred until the levee was constructed, they agreed upon the consequences which should follow a failure to construct the levee, and

that in such a case, there having been no time specified within which it was to be constructed, the delay should not, unless greatly extended, give a right to a rescission. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

In re LOWENTHAL. (No. 21,090.)
(Supreme Court of California. Aug. 23, 1894.)
DISBARMENT OF ATTORNEY—WHEN GRANTED.

An application to disbar a lawyer for appropriating funds collected by him will not be entertained till the truth of the matter has been settled in a criminal prosecution, or in an action to recover the money. Wyatt v. Stephens (Cal.) 36 Pac. 586, followed.

Application to disbar H. H. Lowenthal, an attorney at law. Application denied.

J. D. Sullivan and Herbert Choyinsky, for relator.

PER CURIAM. This is an accusation against an attorney at law, charging him with a breach of professional duty to his client. After the filing of the accusation, it was considered by the court in connection with a similar charge against Stephens, and the citation was denied upon the grounds stated in the decision in that case. 36 Pac 586. It seems, however, that, by some inadvertence, no order has been formally entered in this case. Citation denied.

WOODRUFF et al. v. PERRY et al. (No. 19,-405.)

(Supreme Court of California. Aug. 25, 1894.)
IRRIGATION TAX-VOID ASSESSMENT — ENJOINING SALE.

Where an assessment for irrigation purposes is void because not authorized by vote of the electors of the district, a sale thereunder will be enjoined, as such invalidity would not appear in the tax deed.

Department 2. Appeal from superior court, San Diego county; E. S. Torrance. Judge.

Action by Woodruff and others against Wesley Perry and Otay Irrigation District to enjoin a sale under a tax levy. There was a judgment for plaintiffs, from which defendants appeal. Affirmed.

C. H. Rippey and D. L. Withington, for appellants. D. L. Murdock, for respondents.

DE HAVEN, J. The assessment referred to in the complaint, not having been authorized by a vote of the electors of the Otay Irrigation District, was illegal, under the rule announced in the case of Tregea v. Owens. 94 Cal. 317, 29 Pac. 643; and inasmuch as the

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invalidity of such assessment would not appear upon the face of the deed to be given the purchaser at the sale, on account of the tax levied by such assessment becoming delinquent, the plaintiffs are entitled to the injunction given by the judgment appealed from. Pixley v. Huggins, 15 Cal. 127; Burr v. Hunt, 18 Cal. 303. Judgment affirmed.

We concur: FITZGERALD, J.; McFAR-LAND, J.

103 Cal. 607
ABBOTT ▼. 76 LAND & WATER CO. (No. 18,287.)

(Supreme Court of California. Aug. 25, 1894.)

Malicious Conversion—Punitive Damages—
Sufficiency of Evidence.

A judgment for punitive damages, in an action for the malicious conversion of certain wheat, peaceably taken by defendant under a bona fide claim of title, and by the advice of reputable counsel, will be set aside, where the only evidence of malice is a statement made by defendant at the time,—that it was too rich for plaintiff to litigate with.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge. Action by O. L. Abbott against 76 Land & Water Company. There was a judgment for plaintiff, from which defendant appeals. Reversed.

W. S. Goodfellow and L. L. Cory, for appellant. Thompson & Thompson and Geo. B. Graham, for respondent.

McFARLAND, J. Action to recover for the wrongful conversion by defendant of certain wheat alleged in the complaint to have been the property of plaintiff, and to have been of the value of \$305. It is averred that the wheat was taken maliciously, and for the purpose of oppression. The jury returned a verdict for plaintiff in the sum of \$5,827, for which amount judgment was rendered for plaintiff. Defendant appeals from the judgment, and from an order denying its motion for a new trial.

Of course all of the verdict over and above \$305 (assuming the wheat to be of that value), and 7 per cent. per annum interest thereon, was for punitive damages, or smart money: and we see no evidence in the record warranting such a verdict, or any verdict at all, not confined to compensation for the actual detriment suffered by respondent on account of the conversion of the wheat. The admitted facts are that in December, 1885, appellant, being the owner of a certain tract of land, made a lease (or cropping contract) thereof to respondent for a term ending October, 1886. The lease granted the privilege of extending it for two years, and also an option to respondent to purchase the land at a certain price. Before the expiration of the first term a second lease was made by appellant to respondent, which did not state the Under this lease or option to purchase. cropping contract one-fifth of the wheat

raised on the land annually was, when sacked, to be the property of the appellant. Respondent contended that under these leases he had the option of purchasing the land under the second lease. During the running of the second lease he offered to purchase the land at the price named in the first lease,the land having greatly increased in value,and appellant denied his right to purchase; and in July, 1888, respondent commenced an action to compel appellant to convey to him the said land. The action was decided in the trial court in favor of respondent, and was, upon appeal, affirmed by this court in January, 1891. 87 Cal. 323, 25 Pac. 693. In August, 1888, the appellant took the wheat sued for in this present action. It was taken from said leased or cropped land; appellant claiming to own it, as one-fifth of the wheat raised that year, and belonging to appellant. There is nothing to show that the appellant did not, in perfect good faith, litigate respondent's right to purchase the land from which the wheat was taken. He was advised by eminent counsel that respondent had not such right, and the question presented was one about which lawyers might well differ. See Abbott v. Water Co. (Cal.) 36 Pac. 1. And there was no evidence which justified the jury in finding that the act of taking the wheat was malicious, or done for the purpose of oppression. Appellant claimed, and in good faith, so far as it appears, that it owned the land and the wheat, and demanded it of respondent, who denied its right to take it, and forbade the removal of the wheat. Appellant's agents then went some distance, to the city of Fresno, to consult their counsel, who advised them what to do. He told them that the wheat belonged to appellant; that, if the wheat was taken away by respondent, appellant would lose its rent; that they should go and take the wheat, if they could do so peaceably, but not to use force; and that, if they could not get it peaceably, to come back, and he would commence legal proceedings. Acting on this advice, appellant's agents went to the land on another day, and, no other person being present, they took the wheat. No threats, violence, or force was used. Of course, as the litigation about the option to purchase the land terminated long afterwards in favor of respondent, appellant is liable for the value of the wheat taken; but the verdict is, confessedly, for over \$5,000 more than such value. The respondent testified that, when he was about to commence his action to enforce his right to purchase the land, one of the officers of the appellant said to him that the appellant was too rich for him to litigate with; and this item of testimony seems to be about the only basis of a verdict for nearly 20 times the amount of the detriment suffered by respondent. There was some evidence erroneously admitted as to certain matters occurring long after the taking of the wheat, and with reference to differences

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between the parties about other property; but even that evidence, if it had been properly admitted, would not have justified the verdict in this case. As to the act of taking the wheat, upon which this present action is founded,-to which alone the evidence should have been confined,—there is nothing in the record to warrant the jury in finding that it was not done under a bona fide claim of right, and without malice or oppression. Respondent was therefore entitled only to compensation for the conversion. Indeed, the verdict was in the teeth of the following instruction given in the trial court: "You are further instructed that the defendant had a perfect legal right to rely on the advice of its attorneys, and that if you find from the evidence that P. D. Wigginton was a reputable attorney in the state of California, and he gave certain advice to the defendant corporation, which it followed in good faith, and that in so following such advice the defendant took the wheat as shown by the evidence. then in that event the defendant did not act maliciously, and the plaintiff can recover of the defendant only the actual damage suffered by reason of the conversion." See Selden v. Cashman, 20 Cal. 57; Dorsey v. Manlove, 14 Cal. 553; Phelps v. Owens, 11 Cal. 28. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

108 Cal. 538

JOHNSON v. YUBA COUNTY. (No. 18,290.) (Supreme Court of California. Aug. 15, 1894.) ELECTION—LIST OF NOMINATIONS—PUBLICATION— STATUTE—CONSTRUCTION—EXPENSE—LIABILITY OF COUNTY-ACTION-PLEADING.

1. Pol. Code, § 1194, as amended by Act March 20, 1891, p. 168, provides that at least 10 days before an election the county clerk shall 10 days before an election the county clerk shall publish in two newspapers the nominations to office certified to him by the secretary of state, and those filed with him; that he shall make not less than two publications before election day, one being on the last day the paper is issued before election day; and that the list of nominations published shall be arranged in the order and form in which they will be printed on the ballot. Held, that the statute does not require the publication of a separate list of nominations for each political subdivision of the county having offices to fill, but requires only the publication of one general list.

2. The cost of such publication is a county charge.

charge.

3. In an action against a county to recover for publishing such list, plaintiff need not allege that there is money in the county treasury to meet the demand, or that the allowance of the demand would not exceed the limit of liability which the county is authorized to contract for the fiscal year.

Department 1. Appeal from superior court, Yuba county; E. A. Davis, Judge.

Action by Frank W. Johnson against the county of Yuba, Cal., to recover for services rendered in publishing certain lists of nominations, as required by statute. From orders sustaining a motion to strike parts of the complaint, and sustaining a demurrer to and dismissing the complaint, plaintiff appeals. Reversed.

W. H. Carlin, M. E. Sanborn, and Richard Belcher, for appellant. E. P. McDaniel and J. H. Craddock, for respondent,

VAN FLEET, J. The superior court did not err in striking from the complaint the matter objected to as irrelevant and redun-The action was to recover for services rendered in publishing the list of nominations required to be published by the county clerk, under section 1194 of the Political Code, for the general election in November. 1892, in the county of Yuba. The allegations contained in the matter stricken out proceeded upon the theory that the statute required the publication of a separate list of the nominations, complete in itself, for each of the political subdivisions of the county having offices to fill; each list to contain, besides the names of those nominated for state and county offices, only the names of the district or township nominees in the county to be voted for in a particular district or township, and, in pursuance of this theory, alleged the publication of 13 separate lists,-1 for each of 2 supervisor districts, and 1 for each of 11 judicial townships. The statute will bear no such construction. It provides that: "At least two days before an election to fill any public office, the county clerk of each county shall cause to be published in at least two newspapers of general circulation within the county the nominations to office certified to him by the secretary of state, and also all those filed with the county clerk. He shall make not less than two publications in each of such newspapers before election day, one of such publications being made upon the last day upon which such newspaper is issued before the day of election. The list of such nominations published by the county clerks of the respective counties shall be arranged in the order and form in which they will be printed upon the ballot." Reasonably construed, this language contemplates the publication of one general list of all nominations upon which the people of the county will be called to exercise their choice. The evident purpose of the statute is the education of the voters of the county in their duties as electors, by informing them of the names of those proposed for their suffrages for the various offices to be filled at the ensuing election, and the general order and form in which the names will appear on the ballot to be voted, that the voters may thus be afforded the opportunity to acquaint themselves with the character and fitness of such nominees, and how to mark their tickets, thus enabling them to more readily and intelligently discharge their duty on the day of election. This purpose is as well so'> served by the publication of one general list embracing all the nominations as it would be

by the mode adopted by appellant's assignor. It is not, as appellant erroneously contends, an exact copy or fac simile of the official ballot that is to be published, but a "list of nominations." Nor is it contemplated, apparently, that the information to be furnished by such publication will be necessarily as exact in all respects as that to be had by the voter from an inspection of the "sample ballot" provided for in section 1210, Pol. Code, to be furnished to voters five days before election, or the official ballot to be voted on election day, but is rather to prepare the mind of the voter in a general way, as above indicated, for a more ready understanding of such official ballot, when he comes to vote. To adopt a construction which would sustain the attitude of appellant would be simply to impose an unreasonable burden of expense upon the taxpayers without any corresponding benefit. The matter, being irrelevant to the cause of action stated, was properly reached on a motion to strike out.

We think, however, that the complaint was not open to the objections raised by the demurrer, and that the latter should have been overruled. The objection that the cost of the publication provided for by the act is not made a county charge is untenable. It is a part of the county advertising, and falls within the provisions of subdivision 23, § 25, of the county government act (St. 1891, p. 305), by which the supervisors are authorized to provide for such advertising. Nor is it any ground of demurrer that it is not alleged that there was money in the county treasury to meet the demand, or that the allowance of the demand against the county would not exceed the limit of liability which the county was authorized to contract for the fiscal year. This was purely matter of defense, if it existed. Johnson v. Sacramento Co., 65 Cal. 481, 4 Pac. 463. think the other objections urged to the complaint equally untenable. Judgment reversed and cause remanded, with directions to the lower court to overrule the demurrer.

We concur: HARRISON, J.; GAROUTTE, J.

103 Cal. 631

PEOPLE v. WELLS. (No. 21,089.) (Supreme Court of California. Aug. 31, 1894.)

PERJURY-EVIDENCE.

In a prosecution for perjury for testifying on the trial of one D. for the larceny of a cow, that he met the cow going towards D.'s house early in the morning, and that D. took it up. corroborative facts are insufficient without direct testimony of one witness that such meeting did not take place.

Department 2. Appeal from superior court, Fresno county; S. A. Holmes, Judge.

John Wells was convicted of perjury, and appeals. Reversed.

Frank H. Short, for appellant. Atty. Gen. Hart, for the People.

GAROUTTE, J. The appellant has been convicted of the crime of perjury, and now appeals from the judgment and order denying his motion for a new trial. Section 1968 of the Code of Civil Procedure provides that perjury must be proved by the testimony of two witnesses, or one witness and corroborating circumstances. This declaration of the Code clearly means that the falsity of the accused's statements must be shown to the jury by the positive testimony of two witnesses, or of one witness and circumstances corroborating the statement of such witness, in order that the defendant may be legally convicted of the crime of perjury. other words, the law prescribes a different rule of evidence in this class of cases, both as to the kind and amount, as compared to the great majority of violations of the law. The rule is different as to the kind of evidence, for positive evidence is absolutely necessary, and circumstantial evidence alone is never sufficient. Again, for nearly all violations of the law the evidence of one credible witness is sufficient to support a conviction, but in prosecutions for perjury the rule is clearly to the contrary.

In the present case, one Dillwood was upon trial charged with grand larceny in stealing a cow, the cow being found in Dillwood's barn about 11 o'clock a. m., and having been stolen some miles away upon the previous The defendant in this case appeared at the trial as a witness in Dillwood's interest, and testified that, about 8 a. m. of the same morning, he was traveling in his cart upon the public highway near Dillwood's house, and met this cow upon a bridge, the cow then going towards Dillwood's house, and that he then saw Dillwood drive the cow into his barn, and at that time Dillwood stated that the cow was not his cow. It was alleged in the information that this testimony was false, and the charge of perjury is based thereon. We will not enter into a discussion as to the materiality of this evidence as bearing upon the grand larceny charge, but will concede it to be material. It is then left for us to consider the sufficiency of the evidence introduced at this trial to support the verdict.

As we have already suggested, in order that the evidence may be sufficient, there must be positive testimony to a contrary state of facts from that sworn to by the defendant at the previous trial. For instance, to support the charge of perjury as to the alleged false statement of defendant that he met the cow at the time stated upon this particular public highway, it was necessary to produce the positive testimony of one witness at least that such meeting did not take place, as that the defendant was not at that time at that place, or that the cow was not there; and the same rule is equally applicable to the remaining portions of the alleged false testimony. The corroborating circumstances disclosed by the record are sufficiently established, but the one witness to furnish the positive testimony of the commission of the perjury was not produced at the The record discloses no witness who testifies that the aforesaid meeting between the defendant and the cow did not take place. The falsity of defendant's statements as to the alleged meeting may well be termed the "corpus delicti," and in cases like the present the corpus delicti must be proven by the positive evidence of at least one witness. The defendant's testimony given in the grand larceny case, and as set out in the information, is only proven to be false by incidents and circumstances occurring at other times and places; and, while such evidence in a case of the present character is proper as furnishing the corroborating circumstances required by the section of the Code we have quoted, it in no sense takes the place of the positive and direct evidence of one witness as to the corpus deliciti demanded by the statute. As supporting the general principle that the direct testimony of one witness is necessary to prove the charge of perjury, see 1 Greenl. Ev. § 257, and 3 Russ. Crimes, marg. p. 78. In the case of U. S. v. Wood, 14 Pet. 430, it is held that a person may be convicted of perjury upon certain kinds and classes of documentary evidence, and thus the offense be proven without the testimony of a living witness; but it is said in that case: 'It must be conceded no case has yet occurred in our own or the English courts where a conviction for perjury had been had without a witness speaking to the corpus delicti of the defendant, except in a case of contradictory oaths by the same person." As to whether or not a confession of the defendant would be sufficient evidence to stand in lieu of the testimony of the one witness we are not called upon to decide, as the evidence found in the record pertaining to an alleged confession is wholly insufficient to prove it. For the foregoing reasons, the judgment and order are reversed, and a new trial ordered.

We concur: McFARLAND, J.; FITZGER-ALD, J.

108 Cal. 634
'TEMPLE ST. CABLE RY. CO. v. HELLMAN et al. (No. 19,138.)

(Supreme Court of California. Aug. 31, 1894.)
Set-Off-Corporations-Contracts-Burden of Proof-Breach of Contract.

1. Where a railroad company, as an inducement to establish a baseball park, to increase its traffic, executes its note, and exacts in return a contract secured by a bond providing for the payment of the note on failure to perform the contract, the principal and sureties, when sued on the bond, are entitled to set off against the amount of the note, with interest, any money paid pursuant to the contract.

2. The giving of a note has a little or the contract.

2. The giving of a note by a street railway for the purpose of increasing its legtimate busi-

ness is not ultra vires.

3. After defendant has by its contract ad-

mitted the execution of a note by plaintiff in pursuance of the contract, the burden of proof to show want of authority in executing it is on the defendant.

defendant.

4. Where a contract made in consideration of a note stipulates that action may be taken immediately after its breach, a prior payment of the note is not necessary to recovery on the contract.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action on a bond by the Temple Street Cable-Railway Company against Marco Hellman and others. Judgment for plaintiff. Reversed.

Graff & Latham, for appellants. Chapman & Hendrick, for respondent.

BEATTY, C. J. On May 5, 1890, the plaintiff was a corporation owning and engaged in operating a street railway at Los Angeles, and the defendant Marco Hellman was conducting a baseball park on First street, in that city. For the purpose of increasing the traffic on its road, the plaintiff, at the date mentioned, executed to Hellman its negotiable promissory note for \$5,500, payable in two years, with interest at the rate of 10 per cent. per annum, which he transferred to a third party, who, at the commencement of this action, was the owner and holder there-In consideration of the receipt of this note, Hellman on his part agreed, among other things, to discontinue the playing of baseball at the First street grounds, and within 60 days to establish, and for two years thereafter to maintain, a first-class baseball park on a tract of land adjacent to plaintiff's line, of which he had become the lessee. further agreed to give at the new grounds not less than 104 games of baseball or other equivalent entertainment each year, to provide suitable accommodations for the public. and to pay over to the plaintiff monthly 10 per cent. of the gross receipts for admissions. The other defendants, in order to induce the plaintiff to enter into this contract and to execute its said promissory note to Hellman, became his sureties on a bond in the penal sum of \$7,000, conditioned for the faithful performance by him of the principal contract, or, in case of the violation of any of its stipulations, to save the plaintiff harmless on account of its promissory note. Hellman having failed to complete his preparations to open the new grounds within 60 days, he and his sureties, on July 5th, obtained an extension of time until August 1st, and on the 2d of August they obtained a further extension of time until October 1st. Both of these extension agreements were in writing, and contained various stipulations in regard to continuing the games at the First street grounds, division of the gate receipts, indemnity to plaintiff for loss of fares, and other matters not requiring special notice. In addition to these things, Hellman and his sureties, at the time of obtaining the second extension, executed a new contract of indem-

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nity to the plaintiff, which, after referring to and reciting the more material portions of the various contracts, etc., above mentioned, contains, among others, the following stipu-"That in case said Marco Hellman fails to perform any of the agreements mentioned in the said contract of May 5, 1890, as modified by the agreement of extension of July 5, 1890, and this agreement, or fails to perform any of the covenants on his part contained in the agreement of July 5, 1890. or this agreement, at the time in said contract or in said agreements mentioned, they will pay the amount of the note mentioned in the said contract and the interest therein provided, and said company shall have the right to immediately begin suit against said Marco Hellman and the sureties on said bond to recover the amount of the said note and the interest therein provided. This provision shall not be construed a waiver of any other right of action which the said company may have for breach of said contract of agreement." Hellman never complied with his agreements, but, after giving only about a dozen entertainments, abandoned the enterprise, and forfeited his lease. Thereupon, on September 2, 1891, and before the plaintiff's note had been paid or was due, this action was commenced against Hellman and his sureties. Plaintiff recovered a judgment for \$6,737.50, from which, as well as from an order overruling their motion for a new trial, the defendants appeal.

Much of the argument on the part of appellants is devoted to a discussion of the nature of the action,-a point which does not seem to us to present any serious difficulty. Assuming that the plaintiff had the power to enter into this particular contract, and that its note was duly executed, it had two remedies for a breach of the principal contract by Marco Hellman,-it could either sue him for the profit it would have made by performance of his agreement, or it could sue him and his sureties on the second contract of indemnity for the amount of its promissory note for \$5,500 and interest. Having this choice of remedies, the plaintiff elected to pursue the latter, and its complaint is entirely sufficient to entitle it to the relief sought. All the facts above detailed are fully set out, along with other formal allegations showing the right of the plaintiff to recover from Hellman and his sureties the amount of plaintiff's note, the proceeds of which he had received and which it had bound itself to pay. But the appellants contend that to allow the plaintiff to recover the full amount of its note and interest, after a partial performance by Hellman of his contract, and receipt by plaintiff of some of the profit and advantage of performance on his part, is unjust and unfair, and is the enforcement of a penalty or an award of liquidated damages in a case where a stipulation for liquidated damages is unlawful. They say that, upon the same theory that allows a recovery of the full amount of the note and interest after a few games had been played at the new grounds, and receipt by plaintiff of the increased fares on its road caused by the giving of such games, the like amount must have been recovered if all but the last one of the 208 games had been given, and the plaintiff had actually received a large profit from the giving of such games. In the view we entertain of the rights of the parties under the contract, this argument has no force. Whatever the plaintiff received as the result of Hellman's partial performance he and his sureties have a right to set off against the amount of the note and interest. The plaintiff, not being able or willing to prove the profits it would have made by performance on the part of Hellman, elects to resort to the bond of indemnity on account of its note. It is clearly entitled to that indemnity in full, but it is entitled to nothing more. If it has received anything from Hellman, much or little, defendants are entitled to a corresponding deduction from the full amount of the liability assumed. But it is for them to allege and prove the amount so received. If this view is correct,-and we are satisfied it is,the case is relieved of all the difficulty suggested in the argument of counsel.

It follows, however, from this view, that the judgment of the superior court is for too large a sum. The utmost amount which the plaintiff could in any case have recovered in this form of action is \$6,600; i. e. \$5,500 principal, and two years' interest thereon, at 10 per cent., amounting to \$1,100. The superior court seems to have added to these sums \$137.50, or a quarter's interest, which is found to have been paid by the plaintiff on the note. But this quarter's interest is a part of the \$1,100, and cannot be added to it. It also appears that plaintiff received from Hellman, at different times, sums amounting to \$207. 50, which should be deducted from the full amount of the \$6,600. The amount of any increased fares that may have been received by plaintiff in consequence of the playing of a few games at the new grounds does not ap-This disposes of the principal questions discussed in the argument, but there remain to be noticed a few minor objections.

The giving of its note by plaintiff was not ultra vires. The object was to increase its legitimate business, and the case, as to this point, is within the principle of the decisions in Vandall v. Dock Co., 40 Cal. 83, and Zienwaldt v. Railroad Co., 1 Pac. Coast Law J. 123. The admissions of the defendants in the contracts executed by them were sufficient evidence prima facie to warrant the superior court in finding that the note of the plaintiff was duly executed, and renders harmless the error, if error it was, in overruling defendants' objection to the testimony of the witness Wood. After their repeated admissions of the execution of the note, the burden was on the defendants to show want of authority on the part of the officers of the corporation

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to execute it. It is no objection to the right of plaintiff to recover that it had not paid its note before this action was commenced. The defendants expressly agreed that the action might be immediately commenced upon the failure of Hellman to perform any of his agreements, irrespective of the payment or maturity of the note.

In accordance with the foregoing views, it is necessary to reverse the judgment, for the error of the superior court in awarding too large an amount, but it does not seem to be necessary to order a new trial. The judgment is reversed, and the cause remanded, with directions to the superior court to modify its judgment as follows: The plaintiff should have judgment for \$6,600, less \$207.50,—i. e. for \$6,392.50,—with legal interest thereon from May 5, 1892, the date of the maturity of plaintiff's note, and costs in the superior court.

We concur: McFARLAND, J.; FITZGER-ALD, J.; GAROUTTE, J.; HARRISON, J.; DE HAYEN, J.

4 Cal. Unrep. 743

PACIFIC COAST RY. CO. v. RAMAGE, Tax Collector. (No. 19,343.)

(Supreme Court of California. Sept. 1, 1894.)
RAILROAD COMPANIES—TAXATION—DOUBLE TAXATION.

When a railroad company, empowered by charter to build its road between termini in different counties, lays its tracks at one terminus on a wharf, and the whole railroad is assessed by the state board of equalization, pursuant to Const. art. 13, § 10, providing that the roadbed, rails, and rolling stock of all railroads operated in more than one county shall be assessed by that board, an assessment of the wharf by the county tax collector does not constitute double taxation. since the wharf is not a necessary part of the railroad, and brings in a separate income.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by the Pacific Coast Railway Company against George W. Ramage, tax collector, to set aside an assessment. Judgment for defendant. Plaintiff appeals. Affirmed.

Wilcoxon & Bouldin and J. M. Wilcoxon, for appellant. F. A. Dorn, for respondent.

TEMPLE, C. This appeal is from the judgment and upon the judgment roll. The complaint shows that plaintiff, a corporation, is engaged in operating a steam railway between Los Olivos, in Santa Barbara county, and Port Harford, in San Luis Obispo county. The defendant is the tax collector of San Luis Obispo county. During the ilscal year of 1892–93, plaintiff was, and still is, the owner of a railway in San Luis Obispo county, 39.5 miles, and no more, of which 9 miles, and no more, were in Santa Fe school district, in said county, which said 9 miles the state board of equalization assessed for that year at \$46,123.47, and no more, which

taxes were paid by plaintiff. That the county assessor, in addition, arbitrarily and without authority, assessed a portion of the railroad so assessed by said state board of equalization at the sum of \$6,000, upon which a tax is levied of \$79.25, which is claimed to constitute a lien upon said property. is a proper averment as to the threat of the tax collector to sell the property for the tax, and that the invalidity of the tax does not appear from the face of the assessment, and a prayer for an injunction. The answer consists of denials. The findings are as follows: "This cause came on regularly for trial before the court on the 24th day of July, 1893, upon the complaint of plaintiff and the answer of defendant, both parties being represented by counsel. Evidence was introduced by both parties, and the cause submitted for decision, and the court now finds the facts of said case to be as follows: That in the year 1874, by an act of the legislature of the state of California, entitled 'An act to provide for the construction of a railroad from the Bay of San Luis Obispo, in the county of San Luis Obispo, to Santa Maria, in the county of Santa Barbara,' approved March 27, 1874 (St. 1873-74, p. 695), John M. Price, Juan V. Avila, N. Goldtree, H. M. Newhall, John O'Farrell, F. S. Wensinger, Charles Goodall, and Christopher Nelson, or their successors or assigns, were chartered and did construct a railroad extending from the town of Santa Maria to the Bay of San Luis Obispo, and extended to what was then known as the 'People's Wharf,' on said bay. That prior to the year 1874 one John Harford constructed a wharf on said bay, at a point about one mile northwest of said wharf, known as the 'People's Wharf.' That plaintiff is now, and at all the times set forth in the complaint herein was, a corporation formed and existing under and by virtue of the laws of the state of California, for the purpose of, and was and is engaged in, operating a steam railway between Los Olivos in Santa Barbara county, and Port Harford, in San Luis Obispo county. That on the . -, 1874, this plaintiff succeeded to the interest of said John Harford in and to said wharf built by him, and also to the interest of John M. Price, Juan V. Avila, N. Goldtree, H. M. Newhall, John O'Farrell, F. S. Wensinger, Charles Goodall, and Christopher Nelson, and their successors and assigns, in and to said railroad, and then extended said railroad about one mile to the Harford wharf, and from time to time, prior to the year 1890, extended said Harford wharf into the Bay of San Luis Obispo, beyond low-water mark; and ever since the year 1890 the said wharf has been of the following dimensions, to wit: Commencing at the hotel, a point below lowwater mark, the wharf is 16 feet wide for 452 feet, at which point it commences at 22 feet, and runs to 78 feet broad for 416 feet. It then tapers from 78 feet to 56 feet for 256 feet, and is 56 feet broad for 144 feet, at the

end of which distance it broadens from 56 feet to 108 feet for 288 feet, and from which distance it is 108 feet broad to its far end, 320 feet, making a total length of 1,876 feet. That said plaintiff, prior to the year 1890, built upon and there has ever since been on the outer end of said wharf belonging to plaintiff a building as follows: A large onestory building, 60 feet broad by 228 feet long, within which is located the depot of said company, railroad office, telegraph office, station house, and waiting rooms, in a room 18x 22 feet in size. That plaintiff maintains upon said wharf its line of track, and two double switches extended to the extreme end of sald wharf, for the purpose of receiving and discharging freight and passengers carried by water, and said track and switches are a portion of its main line of track. Said double switches are located on both sides of said building. That defendant is now the duly elected, qualified, and acting tax collector of San Luis Obispo county. That, for the fiscal year 1892-93, plaintiff was, and is now, the owner of a line of railway as above set forth, which measured a distance, counting from the water end of said wharf or structure to where the same crosses the line between San Luis Obispo and Santa Barbara counties, of 39.5 miles, all of which was in the first-named county, which was duly assessed for taxation by the state board of equalization, and apportioned by said board to San Luis Obispo county during said fiscal year. That thereafter, and during the time for assessment of property by county assessors, the assessor of San Luis Obispo county regularly assessed and added to the assessment of plaintiff for said year the following items: Franchise granted by the board of supervisors, \$500; furniture, \$250; safe and scales, \$500; machinery and tools, \$1,500; 3 wagons, \$75; 1 A. horse, \$75; 273,000 feet of lumber, \$5,460; 100 cords of wood, \$400; other personal property, not described, \$500; wharf and warehouse at Port Harford, \$6,000. That all taxes assessed as aforesaid for said fiscal year upon all of said assessments have been paid by plaintiff, except a tax of \$75, levied upon 'wharf and warehouse at Port Harford, valued at \$6,000,' which with costs, percentages, etc., now amounts to the sum of \$79.25, which is claimed to constitute a lien on the property of plaintiff. That plaintiff owns no wharf or warehouse at Port Harford other than the one hereinbefore described, and did not own any such during said fiscal year. That said sum of \$79.25 has not been paid by plaintiff because it claimed that the same was illegal and a double assessment. That defendant, as tax collector, as aforesaid, has advertised the said property last above mentioned for sale, to satisfy said last-named sum, and threatens to sell the same therefor. That, under and by virtue of the following clause in a license ordinance of the board of supervisors of said San Luis Obispo county, plaintiff pays a license tax to said county of

\$25 per quarter, and did so during the whole of said fiscal year. The clause is as follows: Every person, association, or corporation engaged in the business of conducting or carrying on a bridge, ferry, wharf, chute, or pier, for the accommodation of the public or others, for hire, whose average yearly receipts therefrom exceed \$10,000, shall pay a license tax in the sum of \$25 per quarter.' plaintiff during said fiscal year did conduct a wharf as hereinbefore described, for hire, and its receipts therefrom for wharfage exceeded \$10,000." Conclusions of law: "In my opinion, said wharf and building thereon was legally assessed by the county assessor, not being the class of property assessable by the state board of equalization, under section 10, art. 13, Const. Cal. See Santa Clara Co. v. Southern Pac. R. Co., 118 U. S. 394, 6 Sup. Ct. 1132. The plaintiff claims that the property is assessed double, because the number of miles of road assessed by state board in the county will, as measured on the ground, include distance enough to extend the road assessment to end of wharf. I assume, as a conclusion of law, that the mileage assessed by state board was based upon data returned by plaintiff to that board for assessment. Let judgment enter for defendant for his costs. Plaintiff will take nothing by this action."

The contention of the appellant is that the assessment of the wharf by the county assessor is double taxation; that the same was properly assessed by the state board; that the length of the wharf is included in the mileage of railroad assessed by the state board; and that, the railway having been built upon the wharf, it constitutes the "roadbed," which the state board was to assess. Const. art. 13, § 10. It is also contended that, inasmuch as the assessment includes the roadbed, the assessment is void, although it were conceded that the wharf and warehouse are something more than a mere roadbed or roadway, because the unlawful part cannot be separated from that which is lawful. California v. Central Pac. R. Co., 127 U. S. 1, 8 Sup. Ct. 1073. The invalidity of the assessment, if any, does not appear upon the face thereof. The presumption is that it is valid. Has the plaintiff shown its invalidity? I think not. The wharf is a structure in navigable waters of the state. It could not be lawfully constructed without the grant of authority in some form from the state. The incorporation of the plaintiff did not necessarily confer upon plaintiff that right. The points between which they are authorized to construct and operate a railway are not shown further than that they are operating such a road between Port Harford and Los Olivos. Port Harford is somewhat indefinite. wharf was constructed by a private individual, presumably under lawful authority, and apparently the wharf was purchased by plaintiff after the construction of the rail-

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way built by plaintiff's predecessors. Under such circumstances, the fact that plaintiff has since extended its track over the wharf does not necessarily imply that it rightfully did so as a part of the railway that it was authorized by its charter to build and operate. The wharf, in its nature, is not necessarily a part of a railway. This wharf pays a large income as a wharf. Had it remained the property of Harford, and the railroad been constructed upon it, the presumption would have been that the track was for the convenient use of the wharf, as well as of the railway, and it would not have constituted a part of the railway for purposes of taxation. I do not think the findings show that it does now. In the case of City of San Francisco v. Central Pac. R. Co., 63 Cal. 467, it appeared that the ferry was a part of the line of the railroad as described in its articles, and it was claimed that the ferryboat upon which the tracks were laid constituted a portion of its roadbed, but it was held otherwise. Here it is not made to appear that the wharf constitutes any part of the line of the road. The fact that the mileage assessed by the state board would include the length of the wharf is immaterial. That was undoubtedly as it was given in by plaintiff. But whatever length they gave in it could not extend beyond the two termini which are required to be fixed in their articles. I think the judgment should be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

103 Cal. 568

PEOPLE v. GORDON. (No. 21,077.) (Supreme Court of California, Aug. 17, 1894.) CRIMINAL LAW—RECEPTION OF EVIDENCE—CROSS-EXAMINATION—REMARKS OF COUNSEL—ASSAULT WITH INTENT TO KILL.

1. Under Pen. Code, § 1094, providing that the court may in its discretion depart from the prescribed order of evidence, its action in ex-cluding evidence because it was not introduced in its regular order will not be disturbed on

appeal.

2. On a trial for shooting, where defendant testified as to his habit of carrying a revolver, was proper on cross-examination to ask him if he could identify as his own a revolver shown him, under Pen. Code, § 1323, providing that a defendant may be cross-examined as to all matters about which he was examined in chief.

3. A witness for the prosecution, in answer to a question on cross-examination as to whether, after the shooting, defendant did not walk up the street leisurely, replied, "No, sir; he walked as though he was a little anxious." Held, that a motion to strike out the anious."

swer as not responsive was properly denied.

4. A conviction will not be reversed because the prosecuting officer asked an improper ques-tion, when an objection to the same was sus-tained, and the jury was instructed to give it no he⊶d.

5. Evidence as to the character of defendant must be confined to his general reputation.

6. In an action for assault with intent to kill, it was proper to refuse to charge that, if defendant was in such condition of mind from in-toxication as to be incapable of forming an intent to commit the offense, the jury must ac-quit; as the offense includes the crime of assault with a deadly weapon, and intent is not an ele-ment of that crime.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; E. S. Torrance, Judge.

Elmer E. Gordon was convicted of assault with a deadly weapon, and appeals. firmed.

Daney & Wright, for appellant. Atty. Gen. Hart, for the People.

SEARLS, C. The appellant was tried in the superior court in and for the county of San Diego for the crime of assault with a deadly weapon upon L. D. Hauser, with the intent to commit murder, and was convicted of the crime of an assault with a deadly weapon, and was by the judgment of the court sentenced to imprisonment for the term of one year in the state prison at San Quentin. The appeal is from the judgment, and from an order denying a new trial.

At the trial, after the prosecution and defense had introduced their testimony, and while the prosecution was introducing testimony in rebuttal, counsel for the defendant asked leave to recall, for further cross-examination, L. D. Hauser, the prosecuting witness, for the purpose of laying a foundation for impeaching said witness by showing that he had declared soon after the shooting that defendant did not fire the pistol to hit him, etc. Counsel claimed that he only received information of the existence of the declaration on the morning of the day the offer was The court denied the request, and the action is assigned as error. The Penal Code (section 1093) provides that, after the prosecution and defense have respectively offered their testimony, "the parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case." Section 1094 provides that in any case, for good reasons, the court may, in its sound discretion, depart from the order prescribed in the preceding section. The matter being confided to the discretion of the court, an appellate court cannot review the action of the trial judge, except where it is apparent there has been an abuse of such discretion. Wright v. Willcox, 9 C. B. 650; People v. Cook, 8 N. Y. 67; Williams v. Sargeant, 46 N. Y. 482. Our own decisions are full upon the point to like effect. There is no abuse of discretion shown. The reason given by the court was sufficient to authorize the refusal; and. if no reason had been given, this court could not reverse the ruling in such a case without an affirmative showing of an abuse of discretion. It follows that the error is not well

There was no error in the ruling of the Digitized by

court in permitting the prosecution to ask the defendant, who was a witness in his own behalf, on cross-examination, to identify a revolver shown him, "and to tell the jury whether or not it was his revolver." his direct examination he had stated that the reason he had a revolver on the day of the difficulty was that he had purchased it a few weeks earlier, and carried it nights when he went home with his money from his fruit stand, and laid it on a shelf in the morning when he came back, but that morning (the day of the difficulty) had forgotten to leave it, etc.1 Having thus testified as to a revolver, it was proper to ask him to identify it. People v. Gallagher, 100 Cal. 466, 35 Pac.

Defendant's counsel asked a witness on cross-examination the following question, in reference to the manner in which defendant walked up the street after the shooting: "He walked up the street very leisurely, did he not?"-to which the witness answered: "No. sir: he walked as though he was a little anxious." Defendant moved to strike out the answer as not responsive, which was refused, and an exception noted. The first part of the answer was responsive to the question, and the remainder, if indefinite, might easily have been explained by a question as to the meaning of the term used by the witness. The real point of the inquiry related to the condition of the defendant as to sobriety or drunkenness at the time, and it may well have been that the witness used the expression as indicating the presence of reasoning faculties. In any event, it was of little

When counsel for the defendant objected to a question asked of a witness for the prosecution in rebuttal, as to the witness having passed the place of business of Cherry within the last year or two, the court stated, "I do not see any materiality in it anyway," and sustained the objection. I agree with the court in saying that there was no materiality in the proposed testimony, and the court had an undoubted right in giving the reason for his ruling. Had the question been confined to the time when Cherry had testified to his passing his place, it might possibly have been relevant, though of little importance.

E. J. Louis, a witness for defendant, had testified in chief that he had known the defendant for about three years, and knew his general reputation for peace and quietness in that community during that time, and that it was good. Upon cross-examination the district attorney asked this question: "Don't you know as a fact that his wife procured a divorce from him on account of cruelty and inhuman treatment within the last

two years?" An objection was sustained to the question, and the jury instructed to give no heed to the question. The point is still made that the conduct of the district attorney was prejudicial to the rights of the defendant, tended to prejudice the jury against him, and that the judgment for that cause should be reversed. The case of People v. Wells, 100 Cal. 459, 34 Pac. 1078, probably goes as far in the direction pointed out by appellant as any well-considered case extant. That was an aggravated case, in which the court evidently believed the public prosecutor had wantonly and repeatedly transcended the limits of a fair investigation with the object of prejudicing the rights of the defendant, and poisoning the minds of the jurors, and this court reversed the judgment. The case here is very different. No evidence of a desire or design to do injustice to the defendant is apparent. At most, all that can be said is that the district attorney asked an improper question, which was objected to, the objection sustained, and the jury instructed to disregard it. The fact that the question was improper seems to be tacitly conceded. The rule is as follows: If evidence of good character is given in behalf of the prisoner, evidence of bad character may be given in reply; but in either case the evidence must be confined to the prisoner's general reputation, and the individual opinion of the witness as to his disposition, founded on his own experience and observation, is inadmissible. There is no doubt that, when a witness is put upon the stand to attack or defend character, he can only be asked on the examination in chief as to the general character of the person whose character is the subject of the inquiry, and he will not be permitted to testify to particular facts elther favorable or unfavorable to such person. To this extent, it is believed, there is no divergence of opinion among authors or jurists. But there are many respectable authorities to the effect that, when the witness who has thus testified is subject to cross-examination, he may then be asked, with a view to test the value of his testimony, as to particular facts. Having testified as to the defendant's general good character, his opinion and the value of it may be tested by asking the witness on cross-examination whether he has ever heard that the person in question has been accused of doing acts wholly inconsistent with the character which he has attributed to him. 3 Rice, Cr. Ev. pp. 604, 605; State v. Merriman, 34 S. C. 16, 12 S. E. 619; Jackson v. State, 78 Ala. 471; Steele v. State, 83 Ala. 20, 3 South. 547; 1 Tayl. Ev. § 352; Oliver v. Pate, 43 Ind. 182; State v. Arnold, 12 Iowa, 480; Leonard v. Allen, 11 Cush. 241; Carpenter v. Blake, 10 Hun. 358. In such cases it is not the truth of the particular facts, but circulating rumors of them, which form a part of the general repute, and go to make up one's good or bad character. The doctrine is illustrated Digitized by **GOO**

¹ Pen. Code, § 1323, provides that a defendant in a criminal action cannot be compelled to be a witness against himself; but, if he offers himself as a witness, he may be cross-examined as to all matters as to which he was examined in chief.

by the case of Reg. v. Wood, 5 Jur. 225, where a witness for a defendant charged with highway robbery, having testified to the good character of the prisoner, was asked on cross-examination whether he had not heard that the prisoner was suspected of having committed a robbery in the vicinity a few years before. It was objected that this was a particular fact, raising a collateral issue. Baron Parke overruled the objection, and remarked: "The question is not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one." If, therefore, we concede the district attorney was wrong in putting the question, he was in such good company and backed by such an array of authority that no inference of intended oppression or injustice to the defendant can be presumed; and to suppose that the jury were unduly influenced thereby is to place a very low estimate upon their intelligence and capacity.

The court instructed the jury on its own motion, and at the request of counsel for the defendant gave nineteen out of twenty-three instructions presented by him. Those given presented the case in as favorable an aspect on behalf of defendant as the law would warrant. Three of the four refused related to the intoxication of the defendant at the time of the commission of the alleged crime, and sought to establish the proposition that if defendant was in such a condition of mind, from intoxication, at the time of the alleged commission of the offense as to be incapable of forming an intent to commit the offense, or that he committed the act without being conscious thereof, or that the jury entertained a reasonable doubt as to his condition in those respects, they should acquit. In lieu thereof, the court instructed the jury in the language of section 22 of the Penal Code, and then instructed them that in the charge of an assault to commit murder the specific intent to take life is a necessary element of the crime, and that, in considering the question whether the defendant is guilty or not of this offense, they should take into consideration the question of his intoxication, etc., but that the charge also involved the charge of an assault with a deadly weapon, and that in this last charge no specific intent is necessary to constitute the crime, and hence as to that charge the question of intoxication was improper to be considered. This distinction was proper. People v. Franklin, 70 Cal. 641, 11 Pac. 797; People v. Marseiler, 70 Cal. 98, 11 Pac. 503. The other instruction refused was in the following language: "In considering the testimony of the witness Hauser, as well as the testimony of every other witness, you have a right and it is your duty to consider the circumstances under which he testified, and the manner in which he gives his testimony; and if you should believe from the testimony that the letter introduced by the defendant was either written or delivered by the witness Hauser, or that it was written or delivered at his suggestion, or with his knowledge and consent, then you have a right and it is your duty to consider that fact in weighing the testimony of such witness." The instruction was objectionable, for the reason that it sought to single out the witness Hauser, and call the especial attention of the jury to him and his testimony, on account of an anonymous letter received by the witness Cherry, who is a brother-in-law of the defendant, which letter suggested that Hauser could be sent away if it was managed right, etc. There was no evidence whatever that Hauser wa. the author of or connected in any way with the letter, except that he had passed the place of business of Cherry two or three times on the day preceding the morning when the letter was found, under the door of Cherry. Hauser denied all knowledge of the letter, and several circumstances tended to corroborate his statement. The witness Cherry admitted that he had previously and the night after the trouble visited Hauser, and sought "to know if there was any way of getting it fixed up, if he could not withdraw the case, and he said he could not" He also testified that "Hauser never made any remark to me that would indicate that he wanted me to give him money in consideration of his not appearing in this case." The fact is very apparent that, on account of the mother and sister of the defendant, the friends of the latter were anxious to stifle a prosecution, and that the witness Hauser informed them the matter was in the hands of the law, and he had nothing to do with its adjustment. Defendant was fairly tried and convicted, upon testimony amply sufficient to uphold the verdict, and the judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

In re HOWE.

(Supreme Court of Oregon. Aug. 2, 1894.)

CRIMES — WHAT CONSTITUTE — CONSTITUTIONAL LAW—STATUTES—HABEAS CORPUS.

1. A violation of 2 Hill's Ann. Laws, \$ 2465, as amended in 1893, providing that county warrants, indorsed "Not paid for want of funds," shall draw interest from such indorsement until the treasurer gives notice that there are funds to redeem them; that such notice shall be given when he has as much as \$1,500 belonging to the county; and that, on failure to comply with such section for 10 days, he shall be punished by a fine.—is a criminal offense.

2. Act 1803, entitled "An act to amend section 2465 of 2 Hill's Annotated Laws of Oregon," is not in violation of Const. art. 4, § 20, providing that every act shall embrace but one





subject, and matters properly connected therewith, which subject shall be expressed in the

3. A civil and criminal provision may be embraced in the same act.
4. On appeal from a judgment refusing to

discharge petitioner from arrest on a habeas corpus proceeding, where the return shows that petitioner is detained by virtue of five separate commitments, regular on their face, the presumption is in favor of the legality of such imprisonment; and since, under Hill's Code, § 628, making the return open to denial, petitioner could have shown, if the facts warranted, that the several commitments were for the same offense, but failed to do so, no presumption to that effect can be indulged in.

Appeal from circuit court, Klamath county; W. C. Hale, Judge.

In the matter of the petition of William E. Howe, on application for discharge from imprisonment. From a judgment refusing him a discharge, he appeals. Affirmed.

N. B. Knight, for appellant. H. L. Benson, for respondent.

BEAN, C. J. This is an appeal brought to reverse a judgment against the petitioner, in refusing to discharge him from arrest on a habeas corpus proceeding. From the petition it appears that on July 9, 1894, one O. H. Harshbarger filed two informations with a justice of the peace in Klamath county, charging the petitioner with having on hand, as treasurer of said county, on the 31st day of March and on the 12th day of April, 1894, respectively, the sum of \$4,739, county funds applicable to the redemption of outstanding county warrants, and, for more than 10 days after said dates, neglecting to give the notice required by section 2465 of 2 Hill's Ann. Laws. The petitioner was duly examined, and held to bail in the sum of \$1,000 on each of the charges, and in default thereof committed to jail; and on July 11, 1894, J. T. Henley, John W. Wells, and Charles S. Moore each filed an information with the same justice of the peace, charging the petitioner, as such county treasurer, with having on hand on the 13th, 23d, and 24th of April, 1894, respectively, the sum of \$4,000, for the redemption of such warrants, and, for more than 10 days after said dates, neglecting to give the notice required by law. On each of these charges the petitioner was also held to bail in the sum of \$1,000, and in default thereof committed to jail. Upon the petition being filed a writ of habeas corpus was issued, and duly served upon the sheriff of said county, who, for his return, alleged that on the 9th day of July, 1894, he arrested the petitioner under a warrant of arrest issued by a justice of the peace of said county for violating section 2465, 2 Hill's Ann. Laws, and held him in his custody by virtue of five separate commitments issued and signed by said justice of the peace, copies of which he attached to, and made a part of, his return. A demurrer to the return being overruled, the court ordered the petitioner remanded to the custody of the officer, from which order

he brings this appeal, claiming that he is unlawfully restrained of his liberty, because (1) section 2465, as amended in 1893, does not make the neglect of a county treasurer to publish the notice required a crime; (2) the act of 1893 is void because the subject thereof is not expressed in the title as required by section 20, art. 4, of the constitution; (3) matters of a criminal and civil nature cannot be included in the same legislative act; (4) the several delinquencies for which the petitioner was committed constitute but one offense, and therefore he could be held only on the first commitment. Of these questions in their order.

1. It is contended that the object and intent of the legislature, as expressed in the section referred to, were to provide a civil remedy against a defaulting county treasurer, and not to make his neglect of official duty a crime. But it seems to us the language of the section is conclusive upon this point. After providing that all county warrants indorsed "Not paid for want of funds" shall draw interest from the date of such indorsement until the treasurer gives notice. by publication in some newspaper printed or circulated in the county, that there are funds to redeem such outstanding warrants. it further provides that such notice shall be given when the county treasurer has as much as \$1,500 belonging to the county, and then continues: "Any county treasurer failing to comply with the requirements of this section for the period of ten days shall, upon conviction thereof, be punished by fine not less than five hundred nor more than one thousand dollars." Laws 1893, p. 60. The terms "conviction" and "punishment" each have a well-settled legal meaning, and are used in the law to designate certain stages and incidents of a criminal prosecution; and when the legislature declared that for a violation of his official duty a county treasurer should, on conviction thereof, be punished, it manifestly intended that the proceedings against him should be on the criminal, and not the civil, side of the court. That the legislature did not see fit to declare such delinquency either a misdemeanor or felony is of no consequence in this proceeding. It provided what should constitute the offense, and the punishment, and this is sufficient.

2. The act of 1893 is entitled "An act to amend section 2465 of Hill's Annotated Laws of Oregon," and within State v. Phenline, 16 Or. 107, 17 Pac. 572, is not necessarily in violation of the constitution. Hill's Annotated Laws is an authorized compilation of the statutes of Oregon (Laws 1885, p. 142); and to refer in the title of a legislative act to the particular section of such compilation sought to be amended is a sufficient statement of the subject for a mere amendatory act, and, if the provisions of the amendment could have been included in the original act without violating the constitution, it is valid. State v. Laughlin, 75 Mo. 358; Improvement Co.

v. Arnold, 46 Wis. 214, 49 N. W. 971; People v. Willsea, 60 N. Y. 507. Now, section 2465 is section 8 of an act entitled "An act relating to county treasurers," approved January 19, 1854; and it is clear that a provision in the act thus entitled, making a violation of any of the official duties of a county treasurer, as prescribed therein, a crime, and punishable as such, would not have been in violation of the provision of the constitution requiring the subject of an act to be expressed in the title. State v. Shaw, 22 Or. 287, 29 Pac. 1028. Hence, the act of 1893 is not obnoxious to such constitutional provision.

3. It is next contended that a civil and criminal provision cannot be embraced in the same act; but this question was considered and decided in O'Keefe v. Weber, 14 Or. 55, 12 Pac. 74, adversely to this contention, and therefore requires no further consideration.

4. And finally it is claimed that under any view the petitioner has committed but one offense, and should be discharged from the four other commitments. The argument is that when a county treasurer neglects for 10 days after he has \$1,500, in county funds, applicable to the redemption of outstanding warrants, to give the notice required by law, the crime is complete, and if he should thereafter keep the same money, for any length of time, without giving another notice, it would constitute but one offense. But, if it be conceded that this is a correct interpretation of the statute, it does not appear that the petitioner's arrest and commitment were for neglecting to give a second or subsequent notice in respect to the same money. The only question on this appeal arises on a demurrer to the return of the officer. Merriman v. Morgan, 7 Or. 68; Barton v. Saunders, 16 Or. 51, 16 Pac. 921. From the return it appears that the petitioner is detained by virtue of five separate commitments from a court of competent jurisdiction, regular and valid on their face; and the presumption is therefore in favor of the legality of such imprisonment, and the burden of impeaching its legality is on the petitioner. Church, Hab. Corp. (2d Ed.) § 236. This return was, by virtue of section 628 of the statute, open to denial, or its justification to the sheriff might be controverted by the allegation of any fact showing either that the imprisonment was unlawful, or that the petitioner was entitled to be released. In such case the statute requires the court to proceed in a summary way to hear such evidence as may be produced in support of or against the imprisonment or restraint, and dispose of the case as law and justice may require. Under this provision of the statute the petitioner could have alleged and shown, if the facts warranted, that the several commitments were for the same offense; but, not having done so this court cannot include in any presumptions to that effect. Each of the charges against the petitioner may have been for a separate violation of the statute, and there is nothing in the proceedings to show that they were not. From these conclusions it follows that the judgment of the court below must be affirmed.

RASH v. JENNE et ux.

(Supreme Court of Oregon. July 30, 1894.) COVENANT OF WARRANTI-MEASURE OF DAMAGES.

In an action for breach of a covenant of warranty, it appeared that defendant placed with S. lands for sale,—S. to retain, as his commission, all over a fixed amount; that plaintiff bought some of the land, and took a contract from S. as agent; that, to facilitate the sale of the land, defendant conveyed the land to P., in trust to convey to such persons as S. might sell to, the deed containing a covenant of warranty; and that plaintiff received a deed from the trustee. Held, that the warranty in the deed from defendant to P. inured to the benefit of plaintiff, and that the measure of damages was the amount paid and interest, notwithstanding a large part of this amount was retained by S. as commission.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by E. S. Rash against W. D. Jenne and Ida J. Jenne to recover damages for breach of covenant of warranty. Judgment was rendered for plaintiff for less than amount claimed by her, and she appeals. Reversed, and judgment ordered for plaintiff for full amount.

J. F. Watson, for appellant. Geo. H. Williams, for respondents.

BEAN, C. J. This is an action to recover damages for the breach of a general covenant of warranty in a conveyance of real property. and arises upon the following facts, as appear from the pleadings and findings of the court: On January 8, 1889, the defendant, being the owner of a tract of land near the city of Portland, containing 11.45 acres, placed it in the hands of one G. M. Stearns, of the firm of Telfer, Stearns & Co., as his agent for the sale thereof, with the understanding that Stearns should sell the property, and pay or cause to be paid to defendant \$300 per acre for the same, and as compensation for his services he was to retain all he received therefor in excess of said amount per acre. In pursuance of this arrangement, and with a view to the sale and disposition of the land in lots and blocks todifferent purchasers, he, at his own expense and for his own convenience, caused the same to be surveyed, laid out, and platted as the town site of Avalon, containing 12 blocks. lettered from A to L, inclusive, and on the 23d of January, 1889, negotiated a sale of blocks A, F, G, H, I, J, K, and L, as so laid out, to Aunack, Averill & McCallum for \$3,097, and received a deposit of \$100 on such contract, and on the same day negotiated a sale of blocks B and C to the plaintiff for \$1,200, their reasonable market value. received \$20 as part payment of the purchase

price, and thereupon executed a receipt in the name of "Telfer, Stearns & Co., Agents," acknowledging such payment, stating therein the terms of sale, and the time and amounts of the deferred payments, and delivered the same to her, without disclosing his principal. Afterwards, and on the 4th day of February, 1889, the defendant and wife, at the request of and with "notice that Stearns had secured purchasers for certain portions of the land," although they "did not know who the purchasers were, nor the portions bought by each, nor the amounts to be paid by any of such persons," executed and acknowledged the town plat of Avalon, as owners of the property, and at the same time, at Stearns' request, and as part of the same transaction, executed and delivered their deed conveying the land in question, describing it by metes and bounds, to the Portland Trust Company, "in trust to hold and convey the legal title to such person or persons as Stearns had sold or might sell portions thereof." Said deed purports to be given for the consideration of one dollar, and contains the covenant of warranty upon which this action was brought. At the time of the execution and delivery of the town plat and deed, defendant received through the trust company the sum of \$3,450, being the amount for which Stearns was to account to him, of which sum Aumack, Averill & McCallum furnished \$2,997, the balance due on their purchase, and Stearns advanced the remainder. After the receipt of the deed, and on the same day, the trust company issued to Aumack, Averill & McCallum a certificate to the effect that it was holding blocks A, F, G, H, I, J, K, and L for them, and also issued a certificate to Stearns, of like nature and effect, for blocks B, C, D, and E, and on the next day, at the request of Stearns, issued a certificate to the plaintiff for blocks B and C, in recognition of her said contract of purchase of January 23d. Afterwards, and in accordance with the terms of her contract, the plaintiff paid the remainder of the purchase price of blocks B and C, and on the 27th day of December, 1889, received a deed of conveyance therefor from the trust company, "in fulfillment of its trust," but without a covenant of warranty. Being subsequently evicted, because of the failure of title, she brought this action against the defendant, on the covenant of warranty contained in his deed to the trust company, to recover the purchase price paid by her, and interest there-The court below found, as a conclusion of law, that plaintiff was only entitled to recover one-sixth of the amount actually received by the defendant through the trust company, with legal interest thereon from the 4th day of February, 1889, because the value of blocks B and C was about one-sixth the value of the whole tract; and from the judgment given upon this finding she appeals to this court, claiming that she is entitled to recover the full amount paid by her

for blocks B and C, together with interest thereon from the date of her purchase.

The defendant does not deny his liability to the plaintiff on his covenant of warranty, but contends that the measure of damages is such a proportion of the purchase money received by him as the value of the property purchased bore to the value of the whole tract at the time of her purchase. This contention is based upon the theory that, prior to the sale by Stearns to the plaintiff, he had purchased the property from the defendant, and as a consequence, in making the sale, was acting for himself, and not as agent of the defendant, and therefore the deed to the trust company was made in trust for him, and not plaintiff. But this position is contrary to the findings of fact, as we understand them, as well as the answer, in which it is admitted that, prior to the conveyance by the defendant to the trust company, Stearns was his agent for the sale of the property, and that such agency did not cease until the conveyance was made. As the sale to plaintiff was prior to that time, and the deed to the trust company was made for the purpose, with the knowledge, and under the circumstances hereinbefore stated. it seems manifest, if we are to be bound by the findings of fact and pleadings, that the sale to the plaintiff was made by the defendant through his agent, and the deed to the trust company was in trust for her, as a means of consummating the contract. It is true there is a finding that, on January 23d, Stearns entered into a parol contract with the defendant to purchase blocks B, C, D, and E, and that he deposited with the defendant \$100 as a part of the purchase price of said blocks, but it does not appear that this contract was ever completed or carried Indeed, the other findings completely negative such a conclusion. No such defense or claim is made in the answer, and, on the date of this alleged contract, Stearns, as agent, sold two of the blocks to the plaintiff: and defendant did not know, at the time he made the deed to the trust company, to whom the land had been sold, but made the deed for the benefit of persons to whom Stearns, as his agent, had sold the property. From the pleadings and findings of fact, we are bound to conclude that the sale to plaintiff was made by Stearns as the agent of the defendant, and the conveyance to the trust company was adopted as a convenient method of transferring the title to This being so, the conclusion is inevitable that the covenant of warranty in such deed inured to the benefit of the plaintiff, to the same extent as if the conveyance had been made directly to her, and for the breach thereof the measure of damages is the consideration paid, and interest, although, by an arrangement-of which plaintiff had no knowledge-between defendant and the agent who made the sale, a large portion, or even all, of the money, was retained by the agent,

as compensation for making the sale of the property in question and other property. If the plaintiff bought the property of the defendant, either directly or through an agent, and his covenant of warranty was for her benefit, she is entitled to recover, as damages for a breach thereof, the consideration paid by her, and interest, whether any of the money reached the hands of the principal or not. Bloom v. Wolfe, 50 Iowa, 286. The judgment will therefore be reversed, and the cause remanded, with directions to enter judgment in favor of plaintiff, on the findings of fact, for the amount claimed.

(26 Or. 155)

HEDIN v. CITY & SUBURBAN RY. CO. (Supreme Court of Oregon. July 30, 1894.)

STREET RAILROAD—INJURY TO CHILD—QUESTION FOR JUEY.

1. In an action by a parent against a street railway for injuries to his minor child, it appeared that plaintiff was in moderate circumstances, and sent the child, who was about three years old, to play under the care of its nine year old brother. The child was hurt while crossing the street alone to its mother, who had called the children. Held, that it was for the jury whether plaintiff was guilty of contributory negligence.

2. Where the accident happened at a cross-

2. Where the accident happened at a crossing, and the car ran 128 feet after the accident before it was stopped, the grade being only one-half inch in 2½ feet, the negligence of defendant

is for the jury.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by N. G. Hedin against the City & Suburban Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

R. Mallory, for appellant. Raleigh Stott, for respondent.

MOORE, J. This is an action brought by the plaintiff to recover damages for expenses incurred in the care of and medical attendance rendered to his minor daughter, and for the loss of her services, on account of injuries caused by one of defendant's electric cars running over her while, as is alleged, being carelessly and negligently propelled at an unusual and dangerous rate of speed by the employes of defendant, whereby the two small fingers and a part of the palm of her right hand were cut off, and the third finger of said hand was bruised and mutilated. After denying the material allegations of the complaint, the defendant, in substance, alleged that the plaintiff carelessly and negligently permitted said minor child to go unattended upon a public street in which he well knew defendant's cars were running at frequent intervals, and that, while one of its cars was moving on said street at a moderate and lawful rate of speed, the said child carelessly and negligently ran immediately in front thereof, and so near thereto that it was impossible for its employes

though using all the means in their power, to stop the car in time to prevent the injury. The allegation of new matter contained in the answer having been denied in the reply, the cause was tried, and a verdict and judgment rendered against the defendant, from which it appeals.

The bill of exceptions shows that when plaintiff rested his case the defendant moved for a nonsuit, for the reason that there was not sufficient evidence in support of the complaint to be submitted to the jury, which motion having been overruled by the court, an exception was taken, and it is now contended that it should have been sustained. It is also claimed that it was negligence per se on the part of plaintiff to permit a child of such tender years to go unattended upon a public street where such dangerous machines as a car propelled by electric power were known to be running at frequent intervals. The record shows that plaintiff introduced evidence tending to prove the following facts: That the injury occurred April 23, 1893, on the public crossing at the intersection of Johnson and Fourteenth streets in the city of Portland; that defendant's railway track runs north and south on said Fourteenth street. and that from Glisan street north to Johnson street, a distance of about 720 feet, said track has a descending grade of about one-half inch in every 21/4 feet; that electric cars had been substituted on said street for those propelled by horses but three or four days prior to the injury; that an ordinance of said city permitted the defendant to run its cars at a rate of eight miles per hour; that the car in question was running very rapidly down the grade, and, after striking the child, it ran 128 feet before it was stopped; that the plaintiff, who by occupation is a stone mason. lived on the east side of Fourteenth, about 100 feet north of Johnson street, and, with the aid of his wife, who, without any help, kept eight boarders, supported their family, consisting of two boys of the age of nine and seven years, respectively, the girl injured, aged three years and nine months, and another girl, aged two years and seven months, by their joint labor; that, the plaintiff having no playground for the children on his premises, his wife on the day in question sent them to a vacant block at the southwest corner of Fourteenth and Johnson streets, where they had been in the habit of playing; that between 6 and 7 o'clock in the evening, and while it was yet daylight, plaintiff's wife called the children to their supper, and went to the sidewalk in front of their house to meet them, as was her custom: that when reaching the sidewalk she saw defendant's car coming rapidly down Fourteenth street, after having just entered it from Glisan street, and also saw her children coming from the block upon which they had been playing to the sidewalk in front of it at the northeast corner, where they remained for an instant; that, having seen the posi-

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tion of the car and of the children, she did not warn them of the danger, or tell them not to cross the street; that when the car had reached a point from 100 to 200 feet from the children, the little girl in question started and ran across the street in front of it, which so frightened her mother that she did not warn her to turn back, thinking, as she says, that the child could cross the track before the car reached her; that the car struck the child just after she had crossed the track, inflicting the injury complained of; and that the plaintiff had sustained the amount of damages which he sought to recover.

Did this state of facts authorize the court to submit the case to the jury? It may be conceded that, if the plaintiff permitted a child of her tender years to go unattended upon a street where electric cars were known to be passing at frequent intervals, and she there sustained an injury, it was such negligence on his part as would prevent a recovery for damages sustained in consequence of the loss of her services (Booth, St. Ry. Law, § 390, and cases there cited); but we do not think counsel's assumption of the fact is supported by the evidence, which shows that plaintiff's wife sent the little girl in question, with the other children, to play on the vacant block, and that immediately prior to the injury she was accompanied by her brother, whom she left standing on the crossing when she ran across the street. Her escape from him does not necessarily prove that she was unattended. In passing upon the question presented by the motion there were two elements to be considered: First, did the plaintiff, by his negligence in not exercising greater care over this little child, contribute to its injury in such a manner as to preclude his recovery? And, second, was the defendant's agent, at the time of the injury, exercising ordinary care and prudence in the management of its car? The parent of a minor child should, so far as his financial ability will permit, throw around it such a mantle of protection against injury from any cause as to shield it from all danger; and the measure of this protection should be in an inverse ratio to the helplessness and indiscretion of the infant. When a parent whose means are limited has done all that can reasonably be expected from one in his condition, he will not be debarred from a recovery for the loss of his child's services in consequence of an injury caused by the negligence of others because he has not exercised the same degree of care in protecting his child as would reasonably be expected from parents having more means at their command. All the circumstances. therefore, that tend to show the degree of care exercised by a parent or guardian over his child for its protection are to be considered. and, in case of injury to the child by the negligence of others, his conduct is to be measured by what would reasonably be expected from a prudent person of his

financial condition and station in life. Shear. & R. Neg. § 72.

The defendant would not be liable for any injury unless its agent had failed to exercise ordinary care and prudence in the control and management of its car. The degree of diligence required of the motorman is to be measured by all the circumstances and con ditions bearing upon the question of prudence or negligence happening and existing at the time of the accident. At a public crossing of its track it is the duty of one about to cross to take proper precautions to prevent accidents, but this requirement upon the part of the public does not absolve the defendant from the exercise of greater watchfulness at such places than at other points on its line. Booth, St. Ry. Law, \$ 305. The motorman owed a greater duty to the child in question, in consequence of her age and indiscretion, had he seen her in time to prevent the accident, than to a grown person possessing apparent organs of percepception and reasoning faculties. O'Flaherty v. Railway Co., 45 Mo. 70. The circumstances to be considered on the part of the plaintiff as tending to show the degree of protection which he might be reasonably expected to afford are that he was in moderate financial condition, and unable to maintain help in the care of his child; that he had no playground for its comfort and enjoyment; and that the child, from the time she left home to an instant prior to the injury, was with her brother; while the circumstances to be considered on the part of the defendant as tending to prove its want of ordinary care and prudence are the speed of the car, the injury at a public crossing, and that the person injured was a small child. In view of these facts and circumstances, could the court, as a matter of law, rightfully withdraw the question from the jury, and say that the negligence of the plaintiff was the primary cause of the injury and therefore no recovery is possible? The question of negligence is generally one of fact, and not of law. If there be any dispute as to the facts, it is clearly a question for the jury; or, if there be no dispute as to the facts, but there may reasonably be a difference of opinion as to the inferences and conclusions deducible therefrom, it is the province of the jury to determine the question. Beach, Contrib. Neg. § 163. In this case it appears that the child injured was in company with her elder brother, who appeared before the jury. His competency and ability to protect her did not depend so much upon his age or size as upon his discretion and knowledge of the apparent danger; and because the child deserted him, and upon the rapid approach of the car ran to her mother, does not necessarily prove that he was incompetent for the trust, but rather that the child placed more confidence in her mother than in him. The fact of his presence with his sister was proven, and from his age and

general intelligence an inference was to be drawn of his ability to protect her. It was also proved that the car ran a given distance after the accident occurred before it was stopped, and from this fact an inference of its speed was deducible. "To draw such inferences," says Lyon, J., in Hoppe v. Railway Co., 61 Wis. 357, 21 N. W. 227, "is peculiarly the function of the jury, as this court has held in many cases." "Whenever a motion for nonsuit is made," says Lord, C. J., in Herbert v. Dufur, 23 Or. 462, 32 Pac. 302, "every intendment, and every fair legitimate inference which can arise from the evidence, must be made in favor of the plaintiff." Conclusions were to be drawn from the facts proved as to whether the plaintiff had exercised that degree of care and extended to his child that measure of protection required of one in his financial condition and station in life, and as to whether, from the facts proved, the defendant was in the exercise of ordinary care and prudence in the management of its car at the time of the injury. If the elder brother had knowledge of the apparent danger, and sufficient discretion and judgment to care for and protect his sister, or if his mother had reason to believe, and did believe, that he possessed such knowledge, judgment, and discretion, it was not negligence to send the children to play together; and, in any event, it was a question for the jury to say whether there had been any negligence in the care of the child. Hoppe v. Railway Co., supra. In the case of O'Flaherty v. Railway Co., 45 Mo. 70, the facts showed that a little girl, aged about two years and eight months, had been sent, under the protection of an elder sister, about eight years of age, to a lot across the street, to play, and get fresh air; that, after being there for a time, the child, unobserved by Its elder sister, escaped, and undertook to make its way home across the street, where it was run over and killed by one of defendant's cars. In an action by the parents to recover damages for killing the child, the court, in commenting upon the facts of the case, said: "I think it may be stated as a sound proposition that to constitute negligence in the parents there must be an omission of such care as persons of ordinary prudence exercise and deem adequate for the required purpose. In the present case it appears that the unfortunate little child was never permitted to go out on the streets alone unattended, but it was frequently sent out under the care of its sister. Although the sister was but eight years old, she might have been entirely adequate to afford it protection under ordinary circumstances. It is the only attendance many people are capable of affording their children. To say that it is negligence to permit a child to go out to play unless it is accompanied by a grown attendant, would be to hold that free air and exercise should only be enjoyed by the wealthy, who are able to employ such attendants; and would amount to a denial of these blessings to the poor." It appears from the foregoing that there might reasonably have been a difference of opinion as to the inferences and conclusions to be deduced from the facts proved; and in such case the question of negligence should always be submitted to the jury, even if there be no dispute as to the facts, and hence there was no error in overruling the motion for a nonsuit.

The notice of appeal presents other questions relating to the admission of evidence and to the giving and refusal to give certain instructions. The bill of exceptions contains a complete transcript of the stenographer's notes of the trial, including all the evidence. together with the exceptions taken and allowed to its admission, in regular order as they occurred. A judge, in settling a bill of exceptions, where a motion of nonsuit had been sustained by him, would hesitate to certify that there was no evidence to sustain the cause of action; or, where such motion had been denied, he would certainly have some delicacy in certifying that the evidence and inferences and conclusions to be deduced therefrom fally warranted him in submitting the question to the jury; and hence it is generally deemed essential that all evidence introduced prior to the motion for a nonsuit should be incorporated in a bill of exceptions when the order of a court overruling or sustaining such a motion is brought up for review. Johnston v. Railway Co., 28 Or. 94, 31 Pac. 283. Because the evidence necessary to review the action of the court upon the motion for a judgment of nonsuit appears in the bill of exceptions is no reason why the other questions and the particular errors relied upon should not be separately stated and pointed out. The bill of exceptions in the case at bar does not comply with the rule announced by this court in the case of Eaton v. Navigation Co., 22 Or. 497, 30 Pac. 311, and for the reason there given the other questions will not be considered. follows that the judgment of the court should be affirmed, and it is so ordered.

DODSON v. DODSON.

(Supreme Court of Oregon. July 30, 1894.)

PARTNERSHIP—PAROL AGREEMENT — INTEREST IN
REALTY.

Plaintiff erected on his ward's premises fish wheels, and operated them for his own benefit. Upon majority of the ward, it was agreed by parol to operate the wheels in partnership, plaintiff to have a half interest in the wheels and premises. Nothing was paid by plaintiff or the partnership for such property. Held, in an action to dissolve the partnership, that, there being no written instrument conveying such interest, as required by Hill's Ann. Laws, § 781, the fish wheels, being realty, were not partnership property.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by Ira Dodson against Hiram E.

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Dodson for the dissolution of a partnership. There was a decree dissolving the partnership, and ordering the property to be sold. Defendant appeals. Modified.

The plaintiff is the father of the defendant. The son arrived at the age of majority January 10, 1890. For several years prior to this date the plaintiff was also the general guardian of defendant. The date of his appointment as such is not fixed definitely, but from the evidence it is reasonable to conclude that the appointment was made in the year 1881. On the 16th day of March, 1881, the defendant became the owner in fee simple of lot 2, section 36, and lot 1, section 35, township 2 N., range 6 E., in Multnomah county, Or., and continued to be such owner until the 19th day of August, 1891, when he deeded all his interest therein to one Samuel J. Gorman; reserving, however, to himself, "the right to erect, maintain, and forever keep two (2) fish wheels on the Columbia river, opposite and adjacent to said property, and to have the right of ingress and egress along the shore thereto." Some time during the year 1882 the plaintiff erected a fish wheel upon a portion of the premises, which being washed away by high water, he and one Guinean built another during the same year, and engaged in the fishing business together. The following year the plaintiff and one Denny built another wheel upon the premises, Denny at the same time buying the interest of Guinean in the first wheel, whereupon the plaintiff and Denny continued the business for some time. employing the two fish wheels therein. In 1887 the plaintiff bought Denny's interest in the wheels and business, and leased them to one Warren for the years 1888 and 1889. So that in 1890, when the son became of age, the wheels described in plaintiff's complaint as "the two stationary fish wheels on the Columbia river between Warrendale and Maple Dell" were upon the premises of the defendant. The plaintiff, as guardian of the defendant, was never licensed by the county court to build the wheels upon the premises of the defendant, nor does he claim to have erected them in the capacity of guardian, but solely in his individual capacity. The record shows that on the 19th day of January, 1891, the plaintiff was, by order of the county court, discharged as guardian, with the written consent of his ward. The suit is for dissolution of a copartnership, the sale of the copartnership property, and a division of the funds between the members thereof. The complaint alleges, in substance, that on or about the-- day of January, 1891, plaintiff and defendant entered into an oral agreement, wherein and whereby it was agreed that plaintiff and defendant should be equal partners and owners in two stationary fish wheels on the Columbia river (describing their location); that in said contract of partnership it was further agreed that plaintiff and defendant should operate said wheels jointly, and should share equally in the labor and expense of operating the same, and in the profits arising therefrom, and the losses, if any; that plaintiff and defendant continued so to operate said wheels, and to divide the profits thereof, during the seasons of 1891 and 1892; and that on or about the 20th day of December, 1892, the defendant, by force of arms, excluded the plaintiff from said copartnership property. These allegations are all put in issue by the answer. The plaintiff was mistaken in fixing the date of said agreement and the commencement of said alleged copartnership as in January, 1891. He evidently intended to fix said date a year earlier. The plaintiff testifies that on or about the 10th day of January, 1890, "he [defendant] agreed that I could have half,-one-half of the fish and interests in the wheels,—the fishing interests there." Upon cross-examination he says: In 1890 "I had an agreement to go into partnership for the wheels,-a verbal agreement. It was some time along in January or February after be [defendant] became of age." The defendant, being called as a witness in his own behalf, denied these statements in toto, but the old gentleman was corroborated in some measure by the testimony of Judge J. C. Moreland, touching the admissions of the defendant, to the effect "that the fish wheels were partnership property, and they were to run together, and the profits divided," but his recollection of the conversation was not distinct. The plaintiff and defendant operated the wheels together up to December 20, 1892, sold the "catch" from time to time, and divided the proceeds. They also seem to have participated jointly in defraying the expenses of the business, but the evidence does not disclose that plaintiff paid anything for an interest in the wheels. The decree of the court below was in favor of plaintiff, declaring the fish wheels and premises partnership property, and ordering the same sold and proceeds divided, from which decree defendant appeals.

F. P. Mays, for appellant. Richard W. Montague, for respondent.

WOLVERTON, J. (after stating the facts). The only question in this case is whether, conceding the alleged contract set up in plaintiff's complaint to have been clearly proven, it contravenes the statute of frauds, as it was not in writing. The contention of plaintiff is that, the parties having entered into partnership relations for the purpose of engaging in the fishing business, the "fish wheels and fishing rights" are held as a necessary incident to the partnership business, and that the statute of frauds has no application. It is admitted by counsel on both sides that the interest in the fish wheels and fishing rights appurtenant thereto is an interest in real property. It is impossible for a partnership, as such, to hold the legal title to real property. It must stand in the name of some person or persons, or a corporation, the corporation being a person in law. How are we to know, then, what real property is partnership property, and what is not? "The general rule is undoubtedly this: Real estate purchased for partnership purposes, and appropriated to those purposes, paid for by partnership funds, and necessary for partnership purposes, always becomes partnership property. * * The three elements above stated must unite, in order to make the real estate necessarily partnership property." T. Pars. Partn. 364; Dyer v. Clark, 5 Metc. (Mass.) 562; Howard v. Priest, Id. 582; Knott v. Knott, 6 Or. 142; Sherwood v. Railway Co., 21 Minn. 127. Partnership real property thus held, whether by one or more members of the firm, is, by an equitable conversion, regarded as personal property, for the purpose of paying debts and adjusting the equities between the parties; and the individual member or members holding the legal title become trustees for the partnership in respect to the property, as personalty. Fairchild v. Fairchild, 64 N. Y. 479. The prevailing elements of a resulting trust are found present, and are necessary to impress partnership real property with the characteristics of personalty. There must be a disposition, conveyance, or transfer of the legal estate, and a consideration paid by the beneficiary. And yet another element is necesary to impress the realty with these characteristics. It must be appropriated to the purposes of the partnership. The beneficiary is always the partnership, and the persons holding the legal estate are usually the partners. or some one of their number; but it may be an outside party, having nothing to do with the partnership. When these three elements are potent factors in a partnership transaction, the equitable conversion spoken of takes place, and the real property of the partnership is considered personalty, for the purposes of paying debts and adjusting equities between the partners. But whether held as personalty, or under the conditions of a resulting trust, it is equally unaffected by and is without the statute of frauds. Hill's Ann. Laws Or. § 781, provides that "no estate or interest in real property, nor any trust or power concerning such property, * * * can be created, transferred, or declared otherwise than by operation of law, or by a conveyance or other instrument in writing," etc. Real property may, however, be appropriated to partnership purposes, and often is, and may be essentially necessary for such purposes, and not be the property of the partnership.

It now remains to apply the facts of this case to the principles of law herein announced. That a partnership existed between plaintiff and defendant from about January or February, 1890, to the commencement of this suit, there is but little doubt. The lower court so found, and this court finds no reason to disturb that finding. The parties divided the profits of the business, and shared in the expenses of the concern, and treated with and recognized each other in full accord

with the existence of a partnership. At the date upon which the parties entered into this copartnership the defendant was the owner in fee of the two wheels and real property described in the complaint. What effect must be given to the contract of copartnership, as touching this property? The plaintiff's statement of the contract is that "he [defendant] agreed that I could have half,one-half of the fish and interests in the wheels,-the fishing interests there." But it is not disclosed by this or any other testimony that plaintiff paid defendant anything for this half interest, or undertook or agreed to pay anything therefor, nor did the partnership, as such, ever pay, or undertake or agree to pay, any consideration for this prop-There was no purchase of it by the partnership with partnership funds. Such a contract, being in parol, could not have the effect to transfer from the defendant to plaintiff a half interest in the premises and fish wheels. It was a mere nudum pactum, so far as the land and such wheels were concerned. "A parol agreement by the buyer of lands to admit another into partnership with him is void, under the statute of frauds, as not different from the contract of buyer and Bates, Partn. § 302. Nor could it have the effect to create a trust concerning land, so as to secure a beneficial interest in the plaintiff for the payment of partnership liabilities, and much less a joint personal interest with the defendant. Smith, J., in Parker v. Bowles, 57 N. H. 496,-a case wherein two parties had actually purchased and taken deeds each for an undivided onehalf interest in premises occupied by a mill which was thereafter operated by them as partners,-says: "The referee has found that there was no actual notice and no written agreement, and of course no record, by which any conversion of property from separate to partnership estate was effected. He has also found that Atwood purchased half of the mill property with the expectation of going into partnership in the lumbering business with Bowles, and did go into partnership with him, and that they considered and agreed between themselves to treat the real estate which they occupied in transacting their partnership business as partnership property. This agreement was not in writing signed by them, and it therefore seems clear that no trust concerning this land could be created, so as to secure a beneficial interest in the owners for the payment of their partnership liabilities by their parol agreement. Indeed, our statute expressly forbids it. [Citing statute, which is similar to the statute of Oregon in that respect.] When land is purchased with partnership funds and for partnership purposes, there is an implication of law that the land is held for the partnership. But, where it is purchased with the separate funds of the partners, it cannot, by a verbal agreement between themselves, be converted into copart-

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nership property, because no trust in lands can be created, unless by writing, except such as arises or results by implication of law; and parol evidence is not admissible to prove any declaration of trust, or agreement of the parties for a trust, although it is received to establish a fact from which the law will raise or imply a trust." Alexander v. Kimbro, 49 Miss. 529; Wheatley's Heirs v. Calhoun, 12 Leigh, 269, 277.

There are some cases which hold, where persons have been let into a partnership by parol under an agreement that they should become partners in the realty held as an incident to the business, after long and continued existence of the partnership, and payment of the consideration, either in part or whole, that they had acquired an interest in the realty by virtue of such copartnership agreement. But those cases are sustained upon the principle of part performance, and that it would be inequitable to allow the other partners to retain the benefits, and at the same time appropriate the entire realty. Of such are the cases of In re Farmer, Ex parte Griffin, 10 Chi. Leg. News, 395, and Marsh v. Davis (Kan.) 6 Pac. 612, and others of the same class. But these cases have no application here, as no consideration was paid by plaintiff, and there has been no part performance. The plaintiff claims, however, that he expended, in putting in these fish wheels upon the premises of the defendant, some \$7,000, and gave the son an allowance during his minority of from \$30 to \$40 per month, and that this and other smaller expenditures in his behalf was accepted by the son, upon final settlement of the guardianship, as a consideration for the half interest in the fish wheels and premises. Upon the other hand, the plaintiff cut large quantities of wood from the premises during the minority of the son, and received rents and profits from the land and fish wheels, and it does not appear that he ever filed an account with the county court as guardian of the son. The defendant therefore claims that plaintiff was in his debt. But, however this mignt have been at the time the alleged contract was entered into, these differences were not discussed or considered, nor was there any settlement between these parties in regard to them until quite a year afterwards (January 19, 1891), when defendant filed his written consent in the county court to the discharge of plaintiff as his guardian, and the exoneration of his bondsmen. So that at the time the contract was entered into no consideration for the agreement was in the mind of either party; hence it cannot be said that plaintiff parted with anything of value, or that he has performed, even in part. his part of the agreement. The counsel for each party cite Knott v. Knott, 6 Or. 142, and Flower v. Barnekoff, 20 Or. 132, 25 Pac. 870, as authority in support of their respective theories. In the case first mentioned the land was a "necessary incident to the copartnership business," and was purchased with partnership funds, which latter element of the trust is entirely lacking in the case at bar. The case of Flower v. Barnekoff belongs to another class, of which Dale v. Hamilton. 5 Hare, 369, is the leading case. The land, in this class of cases, constitutes the "substratum of the partnership,"-the commodity in which it deals,-and is in no way an incident of the business. The doctrine of these cases is "that the plaintiff might first prove by parol the existence of the partnership as an independent fact, and, that being established, might then show by the same evidence his interest in the lands considered as the substratum of the partnership." So that the two classes of cases are entirely distinct, and certain elements are necessary and requisite as potent factors in creating the trust in the former which are dispensed with in the latter. Hence, it is apparent that the doctrine of the case of Flower v. Barnekoff is not in all respects applicable to the facts of the case at bar. The record shows that a receiver has been appointed in this case, and that funds of the partnership are in his hands, received by him since the commencement of this suit. These funds ought to be divided between the partners. The decree of the lower court will be modified in accordance with this decision, leaving out of the account the fish wheels and realty, as the same are not partnership property.

GREER v. SQUIRE.

Supreme Court of Washington. July 9, 1894.)
TRIAL—Sufficiency of Findings — Description
IN DRED—SURVEY.

1. An appeal will not be dismissed because of appellant's failure to request the court to find facts other than those found in respondent's favor, as the facts so found should be sufficient to sustain the judgment.

2. In construing a deed describing land by government survey, the corners of the survey, as actually established, and not as they ought to have been established, are the true corners, notwithstanding their location may not be such as is designated in the plat or field notes. Squire v. Greer, 26 Pac. 2:22, 2 Wash. St. 209, modified.

3. The presumption is that the corners have

3. The presumption is that the corners have been established at the places indicated by the field notes, and the burden of proving otherwise is on him who disputes their correctness.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by George H. Greer against William Squire to determine adverse claims to real estate. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Ira A. Town and W. W. Likens, for appellant. Parsons, Corell & Parsons and C. P. Culver, for respondent.

DUNBAR, C. J. Respondent moves to dismiss this appeal for the reason that there are no exceptions to the findings of fact, and no request to find any other facts. We think the exceptions taken were sufficient.

There should have been findings of fact to sustain the judgment, but the findings should be made in the interest of the prevailing party, the respondent nere, and he should not be allowed to plead an omission on his part, to prevent this court from hearing the case upon the merits. The motion will therefore be denied.

This case involves a question of an irregular government survey of section lines, or rather of subdivision lines of sections. In 1882 respondent, Greer, sold to appellant, Squire, a certain tract of land, a portion of the description of which was as follows: "The southwest quarter of Sec. 30, Tp. 20 N., R. 3 E., W. M.," containing, with other lands described in the deed, "304 acres, more or less." At the time of the purchase, it appears from the evidence that the land was surveyed, and the north line of the land described in the deed was established, and a fence erected on said line, if not with the assistance, at least by the consent, of the respondent. The appellant entered into possession of the land, while the respondent maintained possession of the land immediately north of the line established, and upon which the fence was erected, he claiming to own said land north of said line under a homestead claim. Several years after, viz. -, it was discovered, or claimed to be discovered, that, by the original survey made by the United States deputy surveyor, section 30 had not been divided equally from north to south by running the line an equal distance between the north and south boundaries of the section, but that, commencing at the center of the east boundary of the section, the line had been run in a diagonal direction, bearing north, and the quarter post established 55 chains north of the southwest corner of the section, instead of 40 chains north, which would have been an equal division of the section; thereby, if following the literal description of the deed, making the northern boundary of the land conveyed on the west side of the section 15 chains north of the point which was presumed to be the northwest corner of the land sold, at the time the deed was executed, and possession taken under it, and thereby increasing the area of the land described in the deed to the extent of about 42 acres. After the discovery of this irregular survey the appellant claimed title to this excess, and this action was brought by the respondent to quiet his title to the same.

It is claimed by the appellant, as we have above stated, that the land actually sold was marked out on the face of the earth so that the number of acres was found to be 304, and that it was actually sold at so much per acre. This case was before this court before, and is reported in 2 Wash. St., at page 209, 26 Pac. 222. The judgment of the trial court in that case was reversed, and the case remanded to the lower court, with instructions to retry the same in accordance with the opinion rendered by this court. It seems

to us, however, that the case has been tried on the same theory as that upon which it was tried before it came to this court in the first instance. It is possible that the opinion expressed by this court was not as clear and distinct as it should have been, and may have unfortunately misled the appellant in his construction of the same. In that case the statement of facts certified to by the court was as follows: "The only question involved and the only point in controversy herein is as to the government location of the northwest corner of the southwest quarter of section 30, township 20 north, range 3 east, Willamette meridian. The plaintiff contends that it is 40 chains north of the southwest corner of section 30, and the defendant contends that it is 55 chains north of the southwest corner of section 30," etc. And this court, from the best information it could get, said: "While the record here does not disclose the testimony sufficiently for this court to determine definitely the rights of the parties, it does disclose enough to show error in the court, in that the conclusions of law were not justified by the statement of facts; and we conclude that the judgment of the court was rendered on the theory that the court could correct the government surveys, and establish government corners at points other than the points located by the government. This seems to have been the theory on which the case was tried. The presumption is that the grantor intended to convey the lands embraced within the boundaries described according to the government survey, and the investigation of the court must be directed towards ascertaining the fact where the government corners are actually established, and not where they ought to have been established." It probably might have been well if the opinion of the court had stopped here, as it is evidently the portion expressed afterwards that the appellant has relied upon, and that portion of the opinion would more pertinently apply in cases where a reformation of a deed was sought. But it seems to us that, construing this opinion with reference to the case that the court was adjudicating, it can be plainly seen that the court reversed the case for the purpose of ascertaining where the government corners were actually located, and that when this fact was determined it would be the controlling fact in the case; for we think the law is well established that the true corner is where the United States surveyor established it, notwithstanding its location may not be such as is designated in the plat or field notes. In Campbell v. Clark, 8 Mo. 553, it was held that, in ascertaining the boundaries of lands purchased from the United States according to the government surveys, the boundary lines actually run and marked by the public surveyors are to be taken and considered as the true boundaries, although such marked boundaries may not correspond with the courses and distances; that the sections and their subdivisions thus ascertained

are to be considered as containing the exact ; quantity expressed in the returns of the surveyors, whatever may be the actual quantity contained in such sections and subdivisions. And it was also held that, although such corners or boundaries may have been effaced or destroyed, yet, if the locality be established by other testimony, it would prevail, even though the computed contents did not correspond with such monuments. In McEvoy v. Loyd, 31 Wis. 142, it was held that a conveyance of the east half of a certain quarter section of land, "containing twenty acres according to the government survey," conveys the whole of the described subdivision, as determined by the monuments established by the original survey, whatever may be the actual quantity of land therein." In that case the court said: "Therefore, the language in this conveyance, containing twenty acres according to the government survey,' does not limit the quantity conveyed, providing there were more in this subdivision than that amount; for it was the manifest intention of the parties to convey according to the government survey, and if there had happened to have been a deficiency in this subdivision the plaintiff would not have been required to make the quantity conveyed 'twenty acres.'" In Martin v. Carlin, 19 Wis. 454, it was held that original monuments, when ascertained, are satisfactory and conclusive evidence of the lines originally run, which are the true boundaries of the tract surveyed, whether they correspond with the plat and field notes of the survey or not. "Monuments," say the court, "are facts, while field notes and plats, indicating courses, distances, and quantities, are but descriptions which serve to assist in ascertaining those facts."

In fact, we think there is no authority which does not sustain this rule. The case of Cragin v. Powell, 128 U. S. 691, 9 Sup. Ct. 203, cited and relied upon by respondent, in no way tends to support respondent's contention, but especially prohibits the courts from changing the surveys originally made by the government surveyors. There it was enunciated that the power to make and correct surveys of the public lands belongs to the political department of the government; "and the reason of this rule," say the court, quoting the opinion of Justice Catron in the case of Haydel v. Dufresne, 17 How. 23, "is that great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done, and divisions more equitably made, than the department of public lands could do."

We have examined the other cases cited by respondent, and are not able to discover that they in any wise militate against the rule laid down above. This was the rule laid down by this court in Cadeau v. Elliot, 7 Wash.

205, 34 Pac. 916, although the court in that case—we think, very correctly—stated that the presumption would attach that the corners had been established at the places indicated by such field notes, and that the burden is upon him who disputes their correctness, and that the proof of such actual establishment must be clear and convincing; and though, under all the circumstances of this case, as shown by the record, we are loth to disturb this verdict, yet it seems to us that under the law and the testimony-which we are compelled to take notice of, and which seems to us to be clear and positive, or as clear and positive as testimony can well be concerning the establishment of disputed government corners, and which testimony is virtually uncontradicted-we are forced to the conclusion that the original corner, as established by the United States deputy surveyor, was not at a point equidistant between the north and south boundaries of section 30, but that it was 55 chains north of said south boundary, and that the land described in the deed is in the northwest quarter of the southwest quarter of said section 30.

Upon the second trial of this case in the court below the court, imposing what seem to us to be rather severe terms, allowed the respondent to amend his complaint to correspond with the facts proven; but, by an inspection of the amended complaint, we are unable to see that it materially differs from the first amended complaint. Under the allegations of the second amended complaint. the only question contested, or which could be legally contested, was whether the land in dispute was in the southwest quarter or the northwest quarter of section 30. If the land described was, as a matter of fact, not actually the land which was intended to be conveyed by the contracting parties, the respondent's remedy would be an action for the reformation of the deed; but this remedy not having been sought in this action, and the proof conclusively showing to our minds that the land in controversy falls within the description in the deed, the judgment must be reversed. But inasmuch as this is an equitable cause, over which the court has complete jurisdiction, and the record in our opinion exhibits a state of facts which are properly triable under such a complaint as we have above indicated, we think it would be too harsh a judgment to dismiss the cause, but the case will be remitted to the lower court with leave to respondent to amend his complaint. It is true that the court allowed one amendment, and respondent did not avail himself of his proper rights; but, inasmuch as it is possible that he was misled by the former opinion of this court, we do not think that he ought now to be precluded from offering the proper amendment, if he so desires. The judgment will therefore be reversed, with leave to amend as above indicated.

ANDERS, HOYT, and SCOTT, J., concur.

(2 Okl. 180)

IRWIN . IRWIN.

(Supreme Court of Oklahoma, Sept. 8, 1894.) DIVORCE—COMPLAINT—JURISDICTION OF PROBATE COURT—ACT CONFERRING JURISDICTION—RATIFICATION BY CONGRESS—REPEAL BY TERRITORI-AL LEGISLATURE - SESSIONS OF COURT - HOW DETERMINED.

1. By the act of congress ratifying section 7, art. 31, c. 70, St. Okl., the probate courts were vested with jurisdiction to hear and determine actions for divorce.

termine actions for curvoice.

2. A complaint in divorce proceedings which alleges "that on or about February, 1892, and on divers other occasions prior and subsequent thereto, defendant was guilty of cruel and inhuman treatment to the plaintiff, in this, to wit, slapped said plaintiff; that for a long time past said defendant has cursed and abused said plaintiff by calling her vile names; and that defendant fails, refuses, and neglects to provide for the plaintiff and children according to his station in life,"—Acid sufficient in the absence of a motion to make more definite and certain.

certain.

3. Section 16, art. 81, c. 70, St. Okl., provides for issuing an order, without bond, disposing of the property of the parties pending divorce proceedings.

4. Where the judge of a probate court adjourns the court without fixing in the order of adjournment any time at which such court shall reconvene, held that such an order precludes the court from again convening until the time fixed by law for the next regular session of court sion of court.

5. The act of congress ratifying the law of the territorial legislature granting to probate the territorial legislature granting to probate courts jurisdiction in actions for divorce was in the nature of permissive legislation, and did not take from the legislature the power to re-

peal such act.

6. The legislature of Oklahoma having repealed the law which gave the probate courts jurisdiction in actions for divorce, held, that such repeal divests probate courts of jurisdiction. tion in such actions. Scott, J., dissenting.

(Syllabus by the Court.)

Appeal from probate court, Payne county. Action by Eliza Jane Irwin against Lorenzo Irwin for a divorce. From a judgment and decree for plaintiff, defendant appeals. Reversed.

January 14, 1893, Eliza Jane Irwin commenced proceedings before the probate judge of Payne county for divorce and alimony. The complaint filed in said cause is as follows: "In the Probate Court in and for Payne County, Territory of Oklahoma. Eliza Jane Erwin, Plaintiff, v. Elonzo Erwin, Defendant. Complaint: That the plaintiff is now, and has been for more than two years last past, a bona fide resident of the territory of Oklahoma, and is now a bona fide resident of the county of Payne. That the plaintiff and defendant were duly married on the 14th day of March, 1883, and lived together till January 7, 1893. That on or about February, 1892, and on divers other occasions, prior and subsequent thereto, said defendant was guilty of cruel and inhuman treatment to said plaintiff, in this, to wit, slapped said plaintiff. Plaintiff further alleges that, for a long time past, said defendant has cursed and abused said plaintiff by calling said plaintiff vile names. Plaintiff further al-

leges that said defendant failed, refused, and neglected to provide for said plaintiff and her minor children according to his station in life. That said plaintiff and defendant have had born to them as the fruit of their marriage three children, whose names and ages are as follows: Louis Walter, aged six years; Leroy Edmond, aged four years; Lela Pearl, aged one year. That the defendant is not a fit person to have the care, custody, and education of said children. That said plaintiff and defendant separated on the 8th day of January, 1893, and have not lived or cohabited together. That the defendant is the owner of personal property of the value of six hundred dollars. Wherefore plaintiff prays that the bonds of matrimony heretofore existing between said plaintiff and defendant be dissolved and held for naught, and that said plaintiff be granted a divorce, and that she be given the care, custody, and control of the minor children, and that she have judgment for \$300 alimony, to be paid as the court may direct, and such other and proper relief as to the court may appear just and equitable." The foregoing complaint was duly verified, and on the same day plaintiff filed her affidavit in the cause, stating, in substance, that the defendant was the owner of certain personal property, consisting of six head of horses, one span of mules, one jack, one jenny, two milk cows and calves, together with household goods, all of the aggregate value of \$600; that she was without means to support herself and children; that defendant had entirely abandoned her and the children, and refused to contribute to their support; that she had a meritorious; cause of action against defendant; and that defendant was threatening to convey away his said property, for the purpose of preventing her from collecting her alimony and preventing her from collecting any judgment she might secure in the action for alimony. She also prayed for an order enjoining defendant from selling or disposing of his property until the final determination of the suit. A summons was duly issued upon the complaint, entitled as follows: "Eliza Jane Erwin, Plaintiff, v. Elorenzo Erwin, Defendant:" and on the face of the summons the defendant is designated as "Elorenzo Erwin." and he is directed to appear and answer to the complaint on the 16th day of February, 1893, and, unless he so appear and answer, that judgment for a decree of divorce and \$300 alimony, statutory attorney's fees, and costs will be rendered against him. Upon the back of the summons appears the certificate of the officer showing service on the 19th day of January, and designating defendant as "Elonzo Erwin." On January 14th, the same day upon which the complaint and the affldavit for injunction were filed, it appears from the record that the probate judge issued an order allowing a sum of money (the amount not appearing) for the support of plaintiff and her children during the pend-

ency of the action, and also enjoined defendant from selling or disposing of any of his property during the pendency of the ac-February 16th the defendant appeared, and filed a motion as follows: "Now comes Lorenzo Irwin, for the purpose of making this motion, and for no other purpose whatever, and moves the court to desist from entering any order or decree or judgment against him in the above-entitled action in every particular wherein the same is intended to affect him, the said Lorenzo Irwin, for the following among other reasons, to wit: (1) Because this court has no jurisdiction in action to obtain a divorce; (2) because nothing appears in any of the pleadings on file in the above-entitled cause to authorize or give jurisdiction to any court to entertain a proceeding for divorce; (3) because the pretended summons or process in the above-entitled cause is a nullity in its terms, conditions, and requirements, and does not warrant a court to entertain jurisdiction of any divorce matter thereunder; (4) because all orders made and process issued in the above cause have been so made and issued contrary to law, as appears upon the pleadings on file therein; (5) because there is nothing in any of the pleadings, files, or process herein to authorize this court to make any order or decree or judgment as against him, the said Lorenzo Irwin." This motion was duly signed by George P. Uhl, attorney for Lorenzo Irwin; and, after consideration, the same was by the court over-No further or other appearance was made before the probate judge by the defendant; and after passing upon the motion of defendant, which ruling occurred on February 18th, the record discloses the following order: "Be it remembered that now, at this time, 4 o'clock p. m., Feb. 18, 1893, there being no further business before the court, it is ordered and adjudged that this court be, and the same is hereby, adjourned. Attest, February 18, 1893: Chas. W. Mc-Graw, Clerk." February 20th the plaintiff obtained leave, and filed an amended complaint, which corrected the names of both plaintiff and defendant, and, as corrected, they read "Eliza Jane Irwin" instead of "Eliza Jane Erwin," and "Lorenzo Irwin" instead of "Elorenzo Erwin," and on the same day called the case for trial, and proceeded to hear and determine the questions involved. Judgment was rendered for plaintiff, granting her a divorce and the care, custody and control of the children, also decreeing plaintiff alimony, and setting aside to plaintiff, as such alimony, six head of horses, one span of mules, one wagon and double harness, one-half of a stack of hay, and all household goods belonging to both plaintiff and defendant. There appears in the judgment rendered a finding to the effect that defendant was commonly known by the names of "Lorenzo Irwin," "Elonzo Irwin," and "Elorenzo Irwin," and that his surname

was commonly spelled "Erwin" and "Irwin." In the record also appears an order as follows: "Be it remembered that now, at this time, February 20, 1893, the probate court in and for said county of Payne was duly convened by order of court at the hour of 2 o'clock p. m.," etc. "Among the proceedings actually had were the following, to wit." Then follow the minutes showing the trial and judgment in the case here under consideration. Upon the record, as thus presented. the defendant below brings the case here for reversal, and assigns error as follows: (1) The probate judge had no jurisdiction in actions for divorce. (2) The complaint fails to state a cause of action for divorce. (3) The injunction was improperly issued, there being no notice or bond. (4) The court was not in session at the time the divorce was granted, the same having been adjourned for the term prior thereto. (5) The original proceedings were not against plaintiff in error.

George P. Uhl, for appellant. W. B. Williams and Robt. A. Lowrey, for appellee.

DALE, C. J. (after stating the facts). We think the probate court had jurisdiction in actions for divorce at the time this proceeding was instituted. Section 4966, St. Okl. 1890, provides that divorce may be decreed by the district and probate courts of this territory. Under the organic act of Oklahoma the legislature had no power to vest in probate courts jurisdiction to try causes for divorce, as such jurisdiction was vested in the district courts; section 9 of the organic act expressly providing that "said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the constitution or laws of the United States, or of the territory, affecting persons or property." This provision of our organic act clearly intended to and did vest in the district courts of Oklahoma all the powers usually given to district courts of the different states, which includes power to hear and determine actions for divorce. Perhaps, as a better expression of the intention of congress upon this subject, attention should be directed to the latter clause of section 11 of our organic act, which reads as follows: "The supreme and district courts of said territory shall have the same power to enforce the laws of the state of Nebraska hereby extended to and put in force in said territory as courts of like jurisdiction have in said state, but county courts and justices of the peace shall have and exercise the jurisdiction which is authorized by said laws of Nebraska." The jurisdiction to hear actions for divorce, under the laws of Nebraska, was in the district courts. Probate courts, in that state, do not have any jurisdiction in such cases. No question, then, can arise as to the intention of congress in framing our organic act. Section 4966, supra, in so far as it attempted to give the probate courts of this territory jurisdiction in divorce cases, was a nullity until congress should, in the exercise of its powers, breathe into it life. This was done, as will be seen by an examination of general section 109, Comp. Laws Okl. 1893. Among other matters, that section provided "that in addition to the jurisdiction granted to the probate court and the judges thereof in Oklahoma territory, by legislative enactment, which enactments are hereby ratified, the probate judges of said territory are hereby granted such jurisdiction in townsite matters and under such regulations as are provided by the laws of the state of Kansas." If the legislature had no power to give to probate courts jurisdiction in matters of divorce, the act of congress ratifying the same was sufficient; and in Finch v. U. S., 1 Okl. 396, 33 Pac. 638, in passing upon this same question, this court has so held; and in such decision, in considering whether or not it was necessary for congress, in ratifying the law, to do more than to refer to the same in such a manner as to make certain the intention of congress, this court said: "Beyond question, the lawmaking power may pass a statute giving the force of law to an instrument, previous statute, or document without setting it forth at length. It is sufficient if it can be made certain. 7 Lawson, Rights, Rem. & Pr. § 3758, and cases therein cited. This has frequently been done by congress, and no further example need be cited than section 11 of our organic act." We find, then, that, the legislature having clearly intended to vest jurisdiction in probate courts to try and determine actions in divorce, and congress having assented to such legislative enactment, at the time this suit was instituted in the court below, jurisdiction obtained. Before we conclude this opinion, it will be necessary to again discuss the question of jurisdiction of the probate courts to try and determine actions for divorce under the present laws of Oklahoma. We now pass to the second assignment of error.

It is contended that the complaint fails to state a cause of action. The complaint is very indefinite in its specifications, and, if held to be a sufficient complaint in divorce, it must appear so from the allegations therein, which read as follows: "That on or about February, 1892, and on divers other occasions, prior and subsequent thereto, said defendant was guilty of cruel and inhuman treatment to said plaintiff, in this, to wit, slapped said plaintiff. Plaintiff further alleges that, for a long time past, said defendant has cursed and abused said plaintiff by calling her vile names. Plaintiff further alleges that defendant failed, refused, and neglected to provide for said plaintiff and her children according to his station in life." The sufficiency of the complaint was not questioned below in any manner, unless the second ground set forth in the motion of appellant may be considered as having put the complaint in issue. However that may be, the motion could have no greater effect or force than a demurrer; and had appellant simply filed a demurrer, and stood upon the same, he would have saved all the rights he has by filing his motion.

It may be said that the complaint is not drawn in good form, and that the allegations relied upon are for the most part conclusions; yet enough can be gathered from the language used to justify the court in concluding in what manner the appellant has violated the law of marriage contract. Cruel and inhuman treatment is charged as one of the grounds of complaint. If the complaint merely stated that appellant had been guilty of cruel and inhuman treatment, without specifying in what manner, a demurrer would be sustained to such an allegation; but where the language referred to is followed with or preceded by words specifically setting forth acts which, if supported by evidence, might be sufficient upon which to support a decree, the court would not err in holding that the complaint stated a cause of action. In this case it is alleged that "on or about February, 1892, and on divers other occasions, prior and subsequent thereto, defendant was guilty of cruel and inhuman treatment, in this, to wit, slapped said plaintiff." It is contended that the complaint should show that such slapping was done in anger, or with intent to injure the party complaining. No doubt, such an additional allegation would strengthen the complaint, and leave nothing to inference; but the language used must all be considered together, and, if the intent of the pleader plainly appears, such intention will be sufficient, in the absence of a motion to make more definite and certain. In this case it appears from the words used that the defendant, upon numerous occasions, in a cruel and inhuman manner, slapped plaintiff. By the term "slapped" is evidently meant "struck" or "beat;" and, while the latter terms are usually employed to convey the meaning of physical pain, injury, or mental distress, yet, where the term "slapped" is used as an evidence of cruel and inhuman treatment, the mind receives the same impression. And so with the second allegation, that, "for a long time past, said defendant has cursed and abused said plaintiff by calling her vile names." This is a charge which upon its face conveys in a direct and positive manner the charge of cruel and inhuman treatment. The word "cursed" is susceptible of but one meaning. Its synonyms are "malediction," "imprecation," "execration." Where used by one towards another, it is intended to convey hate and detestation, and as an invocation for harm or injury. When a husband curses his wife, he is guilty of the grossest character of cruelty and inhumanity. It has been well stated that "to the credit of woman be it said that she usually lives in an atmosphere far removed from profanity, and a devoted wife

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and mother must be inexpressibly shocked when curses fall from the lips of a husband, conveying to her mind the fact that her husband hates and detests her." So, too, in the use of vile names by the husband towards the wife. To a sensitive woman, of virtuous character, in no way could a husband evince his cruelty and inhumanity more completely than by calling his wife vile names, and, like the word "cursed," the word "vile" has also a well-defined meaning. When used as it appears in the complaint, it means "debased," "lost to decency," and may mean much more. But, giving to it the narrowest scope possible, it conveys to the mind, when spoken of a woman, the impression that she is base, degraded, and entirely wanting in everything that goes to make a woman respectable. It would add but little to the complaint if the particular kind of vileness which the husband assumed the wife to be guilty of was specifically described in the complaint; and, after consideration, we are of the opinion that, upon its face, the complaint states a cause of action; and, if the defendant was not fully informed as to the nature of the cause charged against him, he had his remedy by motion to make more definite and certain. In the absence of such motion, the complaint should stand.

The third assignment of error is not well taken. Section 4975, Okl. St., provides, among other matters, for the issuing of an order for the disposition of the property of the parties to a divorce proceeding pending the litigation, and the same section further provides that no bond shall be required of either party.

However, we find in the fourth assignment of error good reasons for setting aside the judgment of the trial court. It appears from the transcript of the record filed in this case that on February 18, 1893, the probate court adjourned, and that the divorce was granted on February 20th,-two days thereafter. The order of adjournment on the 18th is as follows: "Be it remembered that now, at this time, 4 o'clock p. m., February 18, 1893, there being no further business before the court, it is considered, ordered, and adjudged that this court be, and the same is hereby, adjourned." This order is attested by the clerk, and by him duly signed. It is contended by appellee that it must be presumed from the fact that the court was in session on February 20th that it was not finally adjourned on the 18th inst. But we cannot presume for or against a record of the trial court. It is here to speak for itself, and if, from its terms, we can determine a fact, we cannot in the least go outside. In all cases wherein a party seeks a divorce, the pleadings, practice, and proceedings in the probate court are the same as if the cause were to be tried in the district court. The law defining the duties of probate judges (section 2, art. 14, c. 19, St. 1890) provides for holding terms of court on the first Mondays in January, March, May, July, September, and November of each year, and continuing so long as shall be necessary. Such law expressly contemplates regular terms of court, opening at stated times, and closing when the business for the term is concluded. These terms are held and conducted in all respects the same as are those of the district courts. It will not be contended that a divorce can be granted by a judge in vacation, nor that a court has power to convene in session after a final adjournment for the term until the next regular term commences. The language used by the court in its order adjourning the court on February 18th is almost, if not precisely, what a court would use in making a final adjournment for the term. The statute says that the court shall continue so long as shall be necessary. The order of adjournment reads: "There being no further business before the court," etc., thus following the exact idea of the statute in providing for the ending the sessions of the court. Again, does not the fact that no time is fixed in the order adjourning court for the reconvening of the same conclusively establish the status of the adjournment? If the order had stated that the court adjourned sine die, would it have been any stronger, in effect, than the one made? In Bouvier the definition of the word "adjourn" is given as follows: "To put off; to dismiss till an appointed day, or without any such appointment." If an adjournment is had without fixing any specified time, the law determines the time at which the court shall convene to be at the beginning of the next term. Suitors and litigants take notice of the law which fixes the commencement of a term of court, but no person can be held to have notice of the convening of a court unless such notice is given by law or by the order of the court. To retain the power within himself, and to control the times at which his court shall convene, the judge must at each adjournment specify a time certain as the date when his court will again meet, or lose the power to hold any further sessions until the time as fixed by law. If this were not true, great injustice would frequently happen to litigants. A court could, as was done in the case under consideration, adjourn without fixing a time to again convene, and, at a time entirely optional with the court, again convene and proceed to transact business, and render judgments and decrees, which might work great injustice if such business were done in the absence of either of the parties to an action. And yet no redress could be had by the aggrieved party, because the court would be in regular session, and his judgments in all respects in conformity with law. It was not the intention of the legislature to make it possible for courts to so transact their business, and no litigants should be kept in ignorance of the times when the court will sit. We think the judgment of the lower court was not rendered at a time when the court was, under the law, in session, and therefore such judgment is set aside. Holding to this view, it is unnecessary to discuss the sixth assignment of error.

We have reached a point in this case where we deem it necessary to determine whether or not the probate courts of this territory now have jurisdiction to hear and determine actions for divorce, and, if not, what disposition should be made of this case. The question of jurisdiction in actions for divorce is one of vital interest in this territory. Should this court fail to pass upon the question at this time, the decision rendered in this case would be construed by the public generally in a manner contrary to the judgment of this court, and suits now pending and others instituted would proceed to judgment with the apparent approval of this tribunal. To avoid such a condition, and considering the question fairly in the case for disposition, we will briefly discuss the question.

In this territory, as we have heretofore pointed out, the probate courts had jurisdiction in actions for divorce only because congress assented that they might act in accordance with the law passed by the territorial legislature. This enactment of our legislature will be found in the Statutes of 1890. Chapter 70, art. 31, § 7, of such act is as follows: "Divorce may be decreed by the district and probate courts of the territory on petition filed by any person who, at the time of filing such petition, is and shall have been a bona fide resident of the territory for the last two years previous to the filing of the same, and a bona fide resident of the county at the time of and for at least six months immediately preceding the filing of such petition, which bona fide residence shall be duly proven by such petitioner to the satisfaction of the court trying the same, by at least two witnesses who are resident free holders and house holders of the territory. * * *" Τt will be observed that the complaint filed in this cause alleges that the plaintiff was within the requirements of the law relative to her residence. Nowhere except in the statute above quoted did the legislature of this territory attempt to confer jurisdiction upon the probate courts to try and determine actions for divorce. In Chapter 50, St. Okl. 1890, the legislature of this territory, under the head of "Marriage Contracts," vested the jurisdiction in the district courts to dissolve the marriage relations. See Section 1, art. 2. Such provision is not a part of the legislative enactment, ratified by congress; and, the jurisdiction given to the probate court being a limited one, it can take nothing except that expressly granted. The last legislature repealed in toto the act passed in 1890. granting to probate courts jurisdiction in divorce proceedings; and we now have upon our statutes only the one law of divorce, found in article 28, c. 66. This law places the jurisdiction to try and determine actions

for divorce exclusively in the district courts. It provides grounds for divorce in addition to those enumerated in the Laws of 1890, and it was the evident intention of the legislature to do away with the granting of divorces by the probate courts of this territory. It is for this court now to determine whether or not the legislature could take from the probate courts a jurisdiction granted in the manner heretofore pointed out. It will be conceded in the outset that congress may legislate for a territory, or grant that power to the people themselves, who act through their legislature. Thus, congress may pass an entire code of laws for the government of its territories, and make no provision whatever for the convening of the legislatures. But to further the best interests of the people of a territory, to inculcate in them a spirit of self-government, thereby making them sooner fitted for statehood, congress has seen fit to pass an organic act, which operates as a constitution for the territory. Within the lines laid down in such organic act the legislature may pass laws, and it may be said that what is not prohibited is within the power of the legislature to act upon. The organic act having limited the jurisdiction of the probate courts, it was beyond the power of the legislature to enlarge such jurisdic-Therefore, when the legislature attempted to give to the probate courts power to grant divorces, they exceeded the legislative grant expressed in the organic act, congress having kept the entire control of that matter. In order to give life to the act of the legislature, congress spoke as follows: "Provided, that in addition to the jurisdiction granted to the probate court and the judges thereof, which enactments are hereby ratified, the probate judges are hereby granted such jurisdiction in townsite matters," etc. Did congress intend this as original or permissive legislation? Did such ratification have the same force and effect as if made a part of the organic act, or did congress merely intend to enlarge the powers theretofore granted to the legislature? If the former, the jurisdiction of the probate courts remains. If the latter, the repeal of the law by the legislature carried with it the repeal of the jurisdiction of the probate courts. There is but little of authority from the courts upon this question. In Utah, in Cast v. Cast, 1 Utah, 112, the supreme court held that under their organic act, in effect the same as that of this territory, the probate courts had no jurisdiction in divorce proceedings. Afterwards, in Ferris v. Higley, 20 Wall. 375, the supreme court of the United States held to the view that the act of the territorial legislature conferring on the probate courts a general jurisdiction in civil and criminal cases, both in chancery and at common law, was inconsistent with the organic act of Utah, and therefore void. Subse quently, the supreme court of Utah, un Whitmore v. Hardin, 3 Utah, 121, 1 Pac. 465, in effect reversed the former decision of the supreme court of that territory, and held that the legislature could properly grant to probate courts jurisdiction in actions for divorce. But after the decision in Cast v. Cast, and before the later decision in Whitmore v. Hardin, congress passed an act, approved June 23, 1874, which expressly conferred upon the probate courts of Utah concurrent jurisdiction with the district courts in matters of divorce. In Whitmore v. Hardin the case did not turn upon the question of jurisdiction, as that matter had been put at rest by congress, but was considered upon the proposition of the effect to be given to a decree of divorce granted by a probate court at a time prior to the date upon which congress had acted. The court very ably reviews the whole matter, and concludes that the legislative enactment, in so far as it conferred jurisdiction on probate courts in divorce proceedings, was valid. The theory upon which the court reached its conclusion was that, at the time this government was created, independently of Great Britain, neither the common-law nor chancery courts of England had jurisdiction in actions for divorce, but such jurisdiction was vested in the ecclesiastical courts. The lastnamed courts also had jurisdiction of causes which in this country are given to the probate courts. That congress, in adopting the organic act of Utah, had provided that the jurisdiction of causes arising in that territory should be in supreme, district, and probate courts and justices of the peace, giving to district courts common-law and chancery jurisdiction, and that such jurisdiction did not refer to actions for divorce, because it did not obtain in the common-law and chancery courts. In examining the decision by which the court arrived at this conclusion, one is impressed somewhat with the fact that, for the first 20 years of the existence of that territory, the probate courts had exclusive jurisdiction in matters of divorce; that the legislative enactment granting such jurisdiction was not questioned until the decision was rendered in Cast v. Cast, supra; and that property rights, supposed to have been settled for years, were dependent upon sustaining the validity of the jurisdiction of the probate courts. And, after considering the decisions within our reach, we have but little to guide us, and must determine the question from the standpoint of reason.

Jurisdiction to try actions for divorce is conferred by legislative enactments. In this country it does not inhere in any court, and such jurisdiction must be by express statute, or by such plain intendment as to be equivalent to an express statute. It is well settled that the probate courts in this territory can have no jurisdiction in actions for divorce except such as is conferred by special enactment, and that the legislature of this territory had not the power to vest in such courts the jurisdiction. We need not close our minds to the

circumstances surrounding the action of congress in ratifying the act of our territorial legislature, and the reasons why such legislature passed two separate divorce laws at its first session. By reason of a contention for the location of the territorial capital, almost the entire time of the session of the legislature was spent before any attempt was made to pass a code of laws for our territory. Congress provided that the laws put in force by our organic act should cease to be the law of the territory at the adjournment of the first session of the legislature. Near the end of such session the legislature hastily adopted portions of codes from different states, and in so doing, in some instances, adopted conflicting laws upon the same subject, and especially upon divorce. Thus, under the head of "Marriage Contract," the jurisdiction in divorce was placed in the district courts, and a 90-days residence was all that was required to enable a person to commence proceedings; while, under "Procedure Civil," jurisdiction in such actions was placed in both district and probate courts, and a residence of two years was made a prerequisite to the commencement of the action; and in many other respects our statutes were inharmonious. In some instances our legislature enacted laws entirely beyond the scope of their power, notably one in relation to contest cases before the United States land offices. Congress had made no provision for compelling the attendance of witnesses before the United States land offices; and, in order to cure such defect, the legislature passed a law providing that any person might be compelled to answer to a summons issued out of the probate court, there made to give his testimony under penalty for contempt, and that such testimony should be reduced to writing, and forwarded to the land office, to be received by the register and receiver, and considered by them as fully as if such testimony had been taken in the land office. There was much debate in the legislature as to the effect of this law, and whether or not it was one within the power of the legislature to pass. There was but small consideration given to the subject of di-When congress passed its ratifying vorce. act, it included the law of the legislature relative to compelling the attendance of witnesses before probate judges in contest cases in the land offices, as well as the law granting jurisdiction to probate courts in divorce proceedings. It is fair to presume that, at the time congress passed the ratifying act, that body particularly had in mind the legislative enactment relating to compulsory methods of obtaining testimony in land-office proceedings, because such law was subjected to a great deal of public criticism. Suppose that the legislature should attempt to repeal such law, carrying with such repeal the procedure providing that the register or receiver must issue the notice and authority to take the testimony; the repeal would unquestionably make the jurisdiction worthless, because it would

leave no procedure whereby such jurisdiction could become operative, and we do not doubt that the procedure and practice are matters entirely within the control of the legislature. It will be seen, therefore, that congress must have intended to place in the legislature much of the responsibility for carrying into effect the laws enacted by such body.

The interpretation of a statute has been well stated as "the art of finding out the true sense of any form of words,-that is, the sense which their author intended to convey. -and of enabling others to derive from them the same idea which the author intended to convey." It is for this court to declare the intent of congress. If such intent appears in the language used, we need investigate no further, but must content ourselves with declaring such intent. Reverting again to a principle, formerly announced,-that congress may legislate for a territory or permit the people of such territory to act through its own legis'ature,—it will be seen that this act emanated first from the legislature; that it was a thought or purpose which had no place in the mind of congress until presented to that body by the people of this territory, through its chosen body,—the legislature. The law never would have had an existence as an independent creation by congress. It was by grace of congress that this territory was permitted to act in the matter. Blackstone divides laws into four parts: "Declaratory," "Directory," "Remedial," and "Vindicatory." Later authors have made other distinctions; and there is one class of statutes which may be denominated as "Permissive," and which come under the head of "Declaratory Statutes," as defined by Blackstone. In speaking of permissive statutes, Sutherland lays down this rule: "When statutes are couched in words of permission, or declare that it shall be lawful to do certain things, or provide that they may be done, their literal signification is that the persons, official or otherwise, to whom they are addressed, are at liberty or have the option to do those things or refrain, at their election."

What is the signification of the language used by congress in ratifying the divorce act of our legislature? Considering the circumstances surrounding the passage by congress of such act, we are bound to presume that congress had given the matter but little, if any, thought, for the reason that attention had mainly been directed to another act of our legislature. Neither can it be said that the wisdom of granting to probate courts jurisdiction in action for divorce was a matter of concern to that body. Neither do we think that, in the hasty manner in which the legislature passed the act, had such body ever seriously considered the question of extending to the probate courts jurisdiction in divorce actions. In fact, we believe that the passage of the law by our legislature was unintentional, and that the same thing is equally true of congress. But, however that may be, we re-

gard the action of congress as being in the nature of a license to the legislature of this territory, as of not having been intended as a command, but as a permission, and that the law should have no greater effect than a law of our legislature; that congress did not, by ratifying the legislative enactment, place it without the power of such legislature to repeal the same; and, this being true, it follows that, where the act was repealed, such repeal carried with it the jurisdiction of the probate courts.

Some question may arise in the mind of the lower court as to the proper disposition of this cause when it shall again come before that tribunal, and we deem it proper to state that, in our opinion, section 754 of the Code of Civil Procedure has a clause which provides that such court may again try this cause; that such court, having had jurisdiction when the action was instituted, has not lost such jurisdiction, because the legislature. in adopting the present Code, also incorporated a saving clause in the section referred to. which is broad enough to permit the court below to proceed until the final determination of this action. The judgment of the lower court is reversed, and the cause remanded for rehearing.

SCOTT, J., dissenting; the other justices concurring.

SCOTT, J. (dissenting). I must dissent from the opinion of the court in this case, and, with due respect for the judgment of my associates, I shall take strong grounds against their decision, as wholly unsupported by authority, such as to warrant the construction placed upon the points of law involved. I shall speak as briefly as possible to present my views of the law of the case.

I am called upon to concur in a holding that the probate courts of Oklahoma territory, under the present statutes, have no jurisdiction in actions for divorce, at a time when the question is not properly before this court. The court reverses this case on grounds that fully justify such a holding. viz. that the lower court had, in law, adjourned its session sine die when the cause was tried and determined, and that hence its proceedings were coram non judice, and void. In the judgment of reversal, upon this ground, as stated, I fully concur. The court then goes on to determine a question not before it, which may be stated, in the language of the court as contained in the opinion, thus: "We have reached a point in this case where we deem it necessary to determine whether or not the probate courts of this territory now have jurisdiction to hear and determine actions for divorce, and, if not, what disposition should be made of this case. The question of jurisdiction in actions for divorce is one of vital interest in this territory. Should this court fail to pass upon the question at this time, the decision rendered in this case

would be construed by the public generally in a manner contrary to the judgment of this court, and suits now pending and others instituted would proceed to judgment with the apparent approval of this tribunal. To avoid such a condition, and considering the question fairly in the case for disposition, we will briefly discuss the question." The court then goes on to discuss the question, as will be shown hereafter in this dissent, and concludes as follows: "Some question may arise in the mind of the lower court as to the proper disposition of this cause when it shall again come before that tribunal, and we deem it proper to state that, in our opinion, section 754 of the Code of Civil Procedure has a clause which provides that such court may again try this cause; that such court, having had jurisdiction when the action was instituted, has not lost such jurisdiction, because the legislature, in adopting the present Code, also incorporated a saving clause in the section referred to, which is broad enough to permit the court below to proceed until the final determination of this action. The judgment of the lower court is reversed, and the cause remanded for rehearing." I concur with the court in its determination that this case should be tried de novo in the lower court, under the law as it existed at the time this action was instituted; but I dissent from the holding that a decision is necessary or proper, at this time, in this case, as to the present jurisdiction of probate courts in actions for divorce. This case was filed in the probate court of Payne county on January 14, 1893; and exception could not have been taken or saved as to the jurisdiction which has been conceded by the court to have existed until August 14, 1893, the date the Kansas Code went into effect. It was an action pending before the Civil Code of Kansas, as adopted by the legislature, went into effect. Hence the case comes fully within the saving clause enacted by the legislature at the same time (St. 1893, p. 888, § 4633), referred to by the court, which reads as follows: "The provisions of this Code do not apply to proceedings in actions or suits pending when it takes effect. They shall be conducted to final judgment or decree in all respects as though it had not been adopted. But the provisions of this Code shall apply after a judgment, order, or decree heretofore or hereafter rendered to the proceedings to enforce, vacate, modify, or reverse it." The court holds the judgment to be absolutely void. In this much I have concurred, and, of course, the rendition of a void judgment by the lower court, without the fault of the parties, should not deprive either of them of the right to have the action determined under the law as it existed at the date it was instituted, and the saving clause just quoted was designed to achieve this end. Hence the question decided, in the nature of things, cannot in any conceivable manner now be injected into this case by

either of the parties, and much less by the court. It is certainly gross error to determine a legal proposition affecting the jurisdiction of an inferior court without the question coming to us for consideration in the manner and form provided by law, and without first permitting such inferior court to pass upon its own jurisdiction. The action of this court is a determination of the jurisdiction of another court upon a jurisdictional question not before it, and the determination of this jurisdictional question must appear at once to be in the nature of a proclamation or manifesto to the public that the probate courts have no jurisdiction in divorce actions. I cannot bring myself to conclude that the opinion of the court upon this proposition, under the circumstances, reaches the dignity of, or is even comparable to, obiter or gratis dictum, although it will receive the respect due to the private opinion of the learned judge delivering the same and the other members of the court concurring there-This jurisdictional question is just as distinct from the one raised in this caseviz. that the lower court had adjourned sine die-as though the case appealed had been a replevin suit tried in the same manner and under the same circumstances in the probate court; and, as a matter of course, if this be true, it cannot be held binding on this court as a precedent, and consequently can have no significance as a judicial decree. The court appears to apprehend that the probate courts will mistake their jurisdiction,-and in order to avoid this, and in order to advise the public of this fact, issues a public decree or proclamation to beware. With the same reason, the court should not stop at defining the jurisdiction of probate courts in divorce actions, but should also take up the subject of replevin, attachment, money demand, damages, libel and slander, partition, etc., and advise the probate court of its jurisdiction in such actions. More than this, with the same reason, the district courts and all inferior courts should be advised and instructed as to their jurisdictional bounds. If this were correctly declared, and the inferior courts should abide by the direction and instruction, no errors would ever be committed in the lower courts, and consequently no cases would come to this court on appeal, unless, perchance, the court should fail to instruct them upon a legal question that might arise in the course of their proceedings. This would revolutionize the functions of the supreme court as an appellate tribunal, and convert the inferior courts into machines to execute the laws as directed in these proclamations. That would be but little variant from the manifestoes of a sovereign to his subjects to observe the laws of the realm. All this is so obviously out of place as a function of the supreme court as an appellate tribunal that I cannot content myself to further discuss the proposition. 1 cannot assent to the exercise of such extraordinary supervisory jurisdiction. I solemnly and earnestly, but respectfully, assert it to be an unwarranted exertion of appellate powers, contrary to the plain provisions of our statutes and the law of the land.

I regard this point as fatal, but as the court concludes, by a denial of the jurisdiction of the probate courts, to hear and determine actions for divorce upon principles to which I can never agree, I feel it my duty to follow the reasoning in the opinion, specifying my grounds of dissent, lest my silence might be taken as an assent to the law as therein laid down upon the various propositions. That there may be no mistake as to the grounds of my dissent, I quote from the opinion of the court as follows: "We need not close our minds to the circumstances surrounding the action of congress in ratifying the act of our territorial legislature, and the reason why such legislature passed two separate divorce laws at its first session. By reason of the contention for the location of the territorial capital, almost the entire time of the session of the legislature was spent before any attempt was made to pass a code of laws for our territory. Congress provided that the laws put in force by our organic act should cease to be the law of the territory at the adjournment of the first session of the legislature. Near the end of such session, the legislature hastily adopted portions of the codes from different states, and, in so doing, in some instances adopted conflicting laws upon the same subject, and especially upon divorce. Thus, under the head of "Marriage Contract," the jurisdiction in divorce was placed in the district courts, and a 90-days residence was all that was required to enable a person to commence proceedings; while, under "Procedure Civil," jurisdiction in such actions was placed in both district and probate courts, and a residence of two years was made a prerequisite to the commencement of the action; and in many other respects our statutes were inharmonious. In some instances our legislature enacted laws entirely beyond the scope of their power, notably one in relation to contest cases before the United States land offices. Congress had made no provision for compelling the attendance of witnesses before the United States land offices, and, in order to cure such defects, the legislature passed a law providing that any person might be compelled to answer to a summons issued out of the probate court, there made to give his testimony under penalty for contempt, and that such testimony should be reduced to writing, and forwarded to the land office, to be received by the register and receiver, and considered by them as fully as if such testimony had been taken in the land office. There was much debate in the legislature as to the effect of this law, and whether or not it was one within the power of the legislature to pass. There was but small consideration given to the subject of divorce. When congress passed its ratifying act, it included the law of the legislature relative to compelling the attendance of witnesses before probata judges in contest cases in the land office, as well as the law granting jurisdiction to probate courts in divorce proceedings. It is fair to presume that, at the time congress passed the ratifying act, that body particularly had in mind the legislative enactments relating to compulsory methods of obtaining testimony in land-office proceedings, because such law was subjected to a great deal of public criticism. Suppose that the legislature should attempt to repeal such law, carrying with such repeal the procedure providing that the register or receiver must issue the notice and authority to take the testimony. The repeal would unquestionably make the jurisdiction worthless, because it would leave no procedure whereby such jurisdiction could become operative; and we do not doubt that the procedure and practice are matters entirely within the control of the legislature. It will be seen, therefore, that congress must have intended to place in the legislature much of the responsibility for carrying into effect the laws enacted by such body. The interpretation of a statute has been well stated as the art of finding out the true sense of any form of words,—that is, the sense which their author intended to convey,—and of enabling others to derive from them the same idea which the author intended to convey.' It is for this court to declare the intent of congress. If such intent appears in the language used, we need investigate no further, but must content ourselves with declaring such intent. Reverting again to a principle formerly announced,-that congress may legislate for a territory, or permit the people of such territory to act through its own legislature,-it will be seen that this act emanated first from the legislature; that it was a thought or purpose which had no place in the mind of congress until presented to that body by the people of this territory, through its chosen body,—the legislature. • • • What is the signification of the language used by congress in ratifying the divorce act of our legislature? Considering the circumstances surrounding the passage by congress of such an act, we are bound to presume that congress had given the matter but little, if any, thought, for the reason that attention had been directed to another act of our legislature. Neither can it be said that the wisdom of granting to probate courts jurisdiction in actions for divorce was a matter of concern to that body. Neither do we think that, in the hasty manner in which the legislature passed the act, had such body ever seriously considered the question of extending to the probate courts jurisdiction in divorce actions. In fact, we believe that the passage of the law by our legislature was unintentional, and that the same thing is equally true of congress. But, however that may be, we regard the action of congress as being in the nature of a license to the legislature of the territory,

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as not having been intended as a command, but as a permission, and that the law should have no greater effect than the law of our legislature; that congress did not, by ratifying the legislative enactment, place it without the power of such legislature to repeal the same; and, this being true, it follows that, where the act was repealed, such repeal carried with it the jurisdiction of the probate court."

The propositions of law that I will discuss are too well known to the bench and the bar to need citation of numerous authorities, and the legislative enactments that bear upon the question to be determined are too clear and expressive to require the application of the rules of statutory construction. In the first place, it is well understood that in England, prior to 1857, the subject of divorce belonged to the ecclesiastical courts and to parliament. St. 20 & 21 Vict. (1857) c. 85, created a court of divorce and matrimonial causes, with exclusive jurisdiction in all matrimonial affairs. They are now heard in the probate and divorce divisions of the high court of justice. In our country it was formerly a very common thing for the legislature to grant divorces by special acts; but this rarely occurs now, and in many states it is forbidden by the constitution. In nearly all the states the jurisdiction is conferred upon courts possessing equity powers. Divorce jurisdiction is sui generis. It has never been classed as either civil or criminal. It has never been understood in law that the inhibition upon the legislative department against exercising judicial functions prevents the legislature from granting divorces, notwithstanding the exercise of such power may involve a judicial investigation. Unless forbidden by the constitution, the legislature of a state may grant divorces. A notable instance of the exercise of this power by a territorial legislature is reviewed in the case of Maynard v. Hill, 125 U. S. 203-209, 8 Sup. Ct. 723. In this case, Field, J., speaking for the court, held that the act of December 22, 1852, of the territory of Oregon, divorcing one Maynard and wife, was constitutional. To this last-named question I will advert later, for a brief discussion of the inherent power of a state or territorial legislature to grant divorces or confer the jurisdiction upon the courts within their legislative domain. Thus our divorce jurisdiction descended, and a brief review of it brings us to the undisputed proposition that, before a court can exercise jurisdiction in actions for divorce in this country, such jurisdiction must be conferred by express statutory authority. About this there can be no contention. It is a principle of law that no lawyer or court of to-day would controvert. The court in this case announces this rule as follows: "Jurisdiction to try actions for divorce is conferred by legislative enactment. In this country it does not inhere in any court, and such jurisdiction must be by express statute, or by such plain intendment as to be equivalent to an express statute." The jurisdiction of the probate courts of this territory is then declared by the court thus: "It is well settled, then, that the probate courts in this territory can have no jurisdiction in actions for divorce, except such as is conferred by special enactment, and that the legislature of this territory had not the power to vest in such court the jurisdiction." The court further declares that congress conferred jurisdiction upon the probate courts by ratifying certain acts of the territorial legislature, reaching its conclusions from a consideration of the following several provisions: "Sec. 9. That the judicial power of said territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace. The supreme court shall consist of a chief-justice and two associate justices, any two of whom shall constitute a quorum. They shall hold their offices for four years, and until their successors are appointed and qualified, and they shall hold a term annually at the seat of government of said territory. The jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of the justices of the peace, shall be as limited by law: provided, that justices of the peace, who shall be elected in such manner as the legislative assembly may provide by law, shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute, or where the debt or sum claimed shall exceed one hundred dollars: and said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction, and authority for redress of all wrongs committed against the constitution or laws of the United States or of the territory affecting persons or prop-Section 4966, p. 903, St. 1890, reads: erty.'' "Divorce may be decreed by the district and probate courts of this territory on petition filed by any person who, at the time of filing such petition, is and shall have been a bona fide resident of the territory for the last two years previous to the filing of the same, and a bona fide resident of the county at the time of and for at least six months immediately preceding the filing of such petition, which bona fide residence shall be duly proven by such petitioner, to the satisfaction of the court trying the same, by at least two witnesses who are resident freeholders and householders of the territory. And the plaintiff shall, with his petition, file with the clerk of the court an affidavit subscribed and sworn to by himself, in which he shall state the length of time he has been a resident of the territory, and stating particularly the place, town, city or township in which he has resided for the last two years past, and stating his occupation, which shall be sworn to before the clerk of the court in which said complaint is filed." Section 3376. St. 1890, reads: "Marriage is dissolved only:

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First, by the death of one of the parties; or, second, by the judgment of a court of competent jurisdiction decreeing a divorce of the parties. The effect of a judgment decreeing a divorce is to restore the parties to the state of unmarried persons. The district court in each county or subdivision, has such jurisdiction in an action as is provided in civil procedure." Section 1639, Id., makes the procedure of the district court applicable to cases pending in the probate court: "In all cases commenced in said probate court wherein the sum exceeds the jurisdiction of justices of the peace, the pleadings and practice and proceeding in said court both before and after judgment shall be governed by the chapter on civil procedure of the territory governing pleadings and practice and proceedings in the district court. In all cases commenced in said probate court that are within the jurisdiction of justices courts the practice and proceedings and pleadings both before and after judgment provided for in the justices procedure of the territory shall be applicable to the practice, pleadings and proceedings of said probate court." Congress subsequently ratified these several provisions of the legislature, which ratifying clause will be found at page 1026, 26 Stat. (Supp. Rev. St. U. S. p. 929): "Provided, that, in addition to the jurisdiction granted to the probate court and the judges thereof in Oklahoma territory by legislative enactments, which enactments are hereby ratified, the probate judges of said territory are hereby granted such jurisdiction in townsite matters and under such regulations as are provided by the laws of the state of Kansas." The territorial legislature, at its last session (1893), adopted the Civil Code of Procedure of the state of Kansas. It is now in force, and contains no grant of jurisdiction to the probate courts to hear and determine actions for divorce.

The subject, then, is thus concentrated: Is an act of congress necessary to invest jurisdiction in the probate courts in actions for divorce? If this be true, in point of law, will anything short of an original act of congress, or its equivalent in the shape of congressional tegislation, confer such jurisdiction? Conceding the premises of the majority of the court that the act referred to is a permissive statute (which I by no means do), is not a permissive statute as complete an act of congress as any other, and can a territorial legislature repeal a permissive statute enacted by congress any more than any other? If an act of congress is necessary to confer upon probate courts jurisdiction in divorce actions, do not the probate courts possess that jurisdiction still, in the absence of an act of congress repealing it? Is an act of congress ratifying an act of the territorial legislature an act of congress, and, if it is, can a territorial legislature repeal it? Is not the act of congress referred to a remedial statute, and not a per-

missive one? Is it not one of the offices of a remedial statute to ratify a previous enactment,-curing defects, and making it valid? Has the legislature in this territory the inherent power to grant divorces, and, if so, has it the power to confer jurisdiction upon the probate courts? These are all questions that appeal to common reason and understanding, as well as legal principles. I will first concede, for the sake of argument, that the court is correct in its conclusion that without an act of congress, or without the clause ratifying the act of the territorial legislature, the probate courts of this territory could not lawfully have exercised divorce jurisdiction. Conceding this proposition, then, the question is thus simplified: Does the ratification of this territorial legislation reach the dignity of an act of congress? If so, then the territorial legislature cannot repeal it: if not, then the probate courts never had jurisdiction in divorce cases. The majority opinion of the court declares that the probate courts must obtain their jurisdiction from congress, and, to be consistent, should admit one or the other of the propositions that the probate court never had any jurisdiction in divorce cases. or that they have it still. Assuming the correctness of the premises, the proposition is self-evident, and, consequently, unanswerable. Logic, pure or applied, would lose its force in all it embraces in the face of such a proposition. When a bill passes both houses of congress, and receives the signature of the president of the United States according to law. containing an enacting clause, and embracing but one subject, within the constitutional meaning, who is able to consistently say that it is not an act of congress? Indeed, it would be just as reasonable to contend that an act of congress is not an act of congress. It makes no difference whether the act ratifies the enactment of a territorial legislature, or revises the tariff laws of the United States; the subject-matter of the legislation becomes an act of congress just the same.

If the territorial legislature can repeal this part of the jurisdiction so granted, why may it not, if the reasoning of the court be correct. repeal all the jurisdiction conferred upon the probate court by the organic act and otherwise, and abolish the office? If the territorial legislature cannot enlarge this jurisdiction, how can it take such jurisdiction away? The reasoning of the court, in my judgment, is unsound in contending that because congress gave approval to the territorial act by ratification, instead of conferring the jurisdiction by passage of an original bill, it is within the power of the legislature to take away such jurisdiction at its pleasure. I fail to see the distinction thus sought to be drawn. If the statute was an absolute nullity before its ratification by congress, to confer the jurisdiction and remedy the mischief the superior legislative authority of congress became necessary; and it makes no difference whether the grant came as a ratification

of the void act already framed and passed by the territorial legislature, or whether congress itself framed a law in words and terms exactly like it. The learned chief justice, in speaking for the court in this case, denotes the act of congress as a permissive statute. and classes a permissive statute as one "which comes under the head of 'Declaratory Statutes,' as defined by Blackstone;" but with this conclusion I cannot agree, even for the sake of argument. It is purely a remedial statute, as clear, expressive, comprehensive, and unmistakable as any ever enacted by a legislative body. I quote further from the opinion of the court: "The law never would have had an existence as an independent creation by congress. It was by the grace of congress that this territory was permitted to act in the matter. Blackstone divides laws into four parts: 'Declaratory,' 'Directory,' 'Remedial,' and 'Vindicatory.' Later authors have made other distinctions; and there is one class of statutes which may be denominated as 'Permissive,' and which come under the head of 'Declaratory Statutes,' as defined by Blackstone." The opinion defines a permissive statute thus: "In speaking of permissive statutes, Sutherland lays down this rule: 'When statutes are couched in words of permission, or declare that it shall be lawful to do certain things, or provide that they may be done, their literal signification is that the persons, official or otherwise, to whom they are addressed, are at liberty or have the option to do those things or refrain, at their election.'" If a discussion of elementary principles is necessary to determine this question, correct premises should be assumed in the beginning. The act of congress referred to is not a permissive statute, as stated by the learned chief justice, but a remedial one, as before stated. Suth. St. Const., at section 434, thus defines remedial statutes: "These have been defined in very general terms as those which, in brief, are made to correct defects in the existing law, for amendments of the law; those which have for their object the redress of some existing grievance, or the introduction of some regulation conducive to the public good. They may be either affirmative or negative, as they command or prohibit anything in particular to be done or omitted. Guided by the general principles which underlie and justify liberal construction, the court must continually add to the list; for, in the construction of fluctuating and luxuriant legislation by the numerous legislative bodies in this country, there will be frequent occasions to apply these principles to new cases, to cure defects and abridge superfluities which, in the phrase of Blackstone, 'arise either from the general imperfection of all human law, from the change of time and circumstances, from mistake and unadvised determination of unlearned or even learned judges, or from any other causes whatever.' Instances are chiefly valuable as illustrations of these prin-

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ciples, and to teach their true scope and spirit. Statutes enacted to promote and facilitate the administration of justice are prominent in the category of remedial statutes. Acts providing for a change of venue for convenience of witnesses, or to obtain an impartial trial, regulating the practice of law, or to expedite litigation, are remedial." See, also, authorities cited; Bearpark v. Hutchinson, 7 Bing., at page 186; Van Hook-v. Whitlock, 2 Edw. Ch. 304-310; Fairchild v. Gwynne, 16 Abb. Pr. 31; 1 Cooley, Bl. 86, 87; Mitchell v. Mitchell, 1 Gill, 66; Griffin v. Leslie, 20 Md. 15; Wright v. Hamner, 5 Md. 375; People v. Tibbets, 4 Cow. 384; 2 Co. Inst. 251, 325, 393. Blackstone's definition of a declaratory law is "one whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down." Cooley, in his admirable work on Constitutional Limitations (page 112), says: "Legislation is either introductory of new rules or declaratory of existing rules. A declaratory statute is one which is passed in order to put an end to a doubt as to what is the common law or the meaning of another statute, and which declares what it is and ever has been." Bouv. Law Dict. "Statute;" Aust. Jur. Lect. 37. Sutherland on Statutory Construction, at section 205, defines a permissive statute thus: "A permissive statute is one which allows certain acts or things to be done without commanding them; as, for example, when it allows persons of a certain description, or indeed any person, to make a will, to pre-empt lands, to vote, or to form corporations. Of this nature is a statute which permits a candidate at an election at the polling place or canvass, or a clergyman accused of an ecclesiastical offense to attend the proceedings of the commission appointed to inquire into the accusation. Such statutes confer a privilege or license which the donee may exercise or not, at pleasure, having only his own convenience or interest to consult." See, also, authorities cited; Potter, Dwar. St. 74; Endl. Interp. St. \$ 310; Nicholl v. Allen, 1 Best & S. 934; Brockbank v. Railroad Co., 7 Hurl. & N. 834; Rockwell v. Clark, 44 Conn. 534.

Our own supreme court, in Chandler v. Colcord, 1 Okl. 266, 32 Pac. 330, referring to the act of congress in question (Green, C. J.), uses this language: "The act of congress is a remedial statute, and should be liberally construed to effect the purpose intended; and it is the opinion of the writer that congress intended to and did ratify the whole act of the legislative assembly, as well the provisions extending the jurisdiction of the probate court, as the provisions which furnish the procedure and give the appeal." From this eminent authority it will be observed that the contention of the court that the statute is a permissive one, and only intended as a license or permission to the legislature, is not based upon sound reasoning or supported by authority. If congress had in-

tended to permit the legislature to repeal the law at its pleasure, the statute would have contained a proviso to that effect, and that portion of the act would have been permissive,-"permission or license, which," " as Sutherland says, "may be exercised or not, at pleasure." I am unable to understand upon what theory the court could reasonably proceed to construe a remedial statute as a permissive one, when it contains no language of permission, direct or implied, upon which to base such construction. The opinion of the court, in this respect, as will be observed by a perusal of it, or that portion quoted, seems to be based upon the alleged fact that neither congress nor the legislature had given this question much consideration, and the act was ratified hurriedly, improvidently, and unintentionally; and because it had been framed and adopted by our own legislature, instead of being enacted as an original bill by congress, it thereby became and was intended as a permissive statute, and, upon this reasoning, hold it to be permissive, "under the head of 'Declaratory Statutes,' as defined by Blackstone." I know of no such rule for the construction of statutes. A clear, unambiguous statute needs no construction, except what the language itself gives. It is only in cases where the language is ambiguous that the courts seek to determine the legislative intent. Section 237, Suth. St. Const., reads as follows: "It is beyond question the duty of the court, in construing statutes, to give effect to the intent of the lawmaking power, and seek for that intent in every legitimate way, but, first of all, in the words and language employed; and if the words are free from ambigu and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instruments, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation." See authorities cited. Marshall, C. J., in The Paulina's Cargo v. U. S., 7 Cranch, 52, referring to an act of the legislature of Rhode Island, says: "In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it." The statute itself furnishes the best means of its own exposition; and, if the sense in which the words were intended to be used can be clearly ascertained from its parts and provisions, the intention thus indicated will prevail, without resorting to other means of aiding in the construction. Suth, St. Const. § 219; Green v. Weller, 32 Miss. 650. Even when the court is convinced that the legislature really meant or intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity. Smith v. State, 66 Md. 215, 7 Atl.

49; Woodbury v. Berry, 18 Ohio St. 456; Bradbury v. Wagenhorst, 54 Pa. St. 182. If the legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety, and policy of its passage. Plank-Road Co. v. Woodhull, 25 Mich. 99; People v. Briggs, 50 N. Y. 553. The courts have then no power to set aside or evade its operation by forced and unreasonable construction. If it has been passed improvidently, the responsibility is with the legislature, and not with the courts. Leonard v. Wiseman, 31 Md. 201; State v. Vicksburg & N. R. Co., 51 Miss. 361; Rohrbacher v. Mayor, etc., Id. 735; Winter v. Jones, 10 Ga. 190. When the meaning of a statute is clear, and its provisions are susceptible of but one interpretation, that sense must be accepted as the law. The consequences, if evil, can only be avoided by a change of the law itself, to be effected by the legislature, and not by judicial construction. Arthur v. Morrison, 96 U. S. 108. When the words of a provision are plainly expressive of an intent not rendered dubious by the context, no interpretation can be permitted to thwart that intent. The interpretation must declare it, and it must be carried into effect, as the sense of the law. Johnson v. Railroad Co., 49 N. Y. 455; Fitzpatrick v. Gebhart, 7 Kan. 35; People v. Schoonmaker, 63 Barb. 49; Bradbury v. Wagenhorst, 54 Pa. St. 182. See, also, Suth. St. Const. pp. 312-315.

It is well said that the certainty of the law is next in importance to its justice, and, if the legislature has expressed its intention in the law itself with certainty, it is not admissible to depart from that intention on any extraneous considerations or theory of construction. Very strong expressions have been used by the courts to emphasize the principle that they are to derive their knowledge of legislative intention from the words or language of the statute itself, which the legislature has used to express it, if a knowledge can be so derived. See Suth. St. Const. § 236, and cases cited. In Denn v. Read, 10 Pet. 524, McLean, J., in speaking of construction of statutes, says: "This, it must be admitted, when we consider the mischief the law was probably intended to remedy, is a somewhat technical construction of the act, and cases may be found where courts have construed a statute most liberally to effectuate the remedy; but, when the language of the act is explicit, there is great danger in departing from the words used to give effect to the law which may be supposed to have been designed by the legislature." In Gardner v. Collins, 2 Pet. 58 (Story, J.), this language is used: "What the legislative intention was can be derived only from the words they have used, and we cannot speculate beyond the reasonable import of these words. The spirit of the act must be extracted from the words of the act, and not from conjectures aliunde." This abundant authority cited

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should certainly be sufficient from which to conclude that it is improper for the court to go beyond what is expressed in the statute, and consider matters aliunde, including the alleged fact that the act was hurrledly and improvidently passed. If it were necessary, congress meant to invest the probate courts with jurisdiction,—a thing that the legislature had attempted to do, but had failed. statute is clear and expressive in its terms, containing no ambiguity. It states directly, clearly, and concisely that the legislative enactments of the territorial legislature are hereby ratified, and there it ends. There is no necessity for the determination of the legislative intent, except to hold that the statute means just what it says, which is plain and unmistakable.

Conceding the premises of the court, however, a little further, the question of public policy presents itself for consideration. The effect of the decision, if it becomes final, will be the annullment of several hundred decrees for divorce,-all those granted since August 14, 1893, by the probate courts. It would seem fruitless to further discuss these questions, but I feel that my duty under my official oath requires that I should in this connection, under the circumstances surrounding us in this new country, portray my convictions as they have become established in the past. I feel a certain and abiding faith that this court is committing very grave error, and this without a sufficient and dispassionate consideration of the alarming consequences of its judgment. All the text writers and all the opinions in reported cases tread ightly when legal controversies of this character are approached,-when a mistaken or even well-advised determination will result in such widespread and disastrous consequences. In the case of Maynard v. Hill, 125 U. S. 203, 8 Sup. Ct. 723, Justice Field makes the following observations: "Such acts are not to be set aside or treated as invalid because, upon careful consideration of their character, doubts may arise as to the competency of the legislature to pass them. Rights acquired or obligations incurred under such legislation are not to be impaired because of subsequent differences of opinion as to the department of government to which the acts are properly assignable. With special force does this observation apply when the validity of acts dissolving the bonds of matrimony is assailed, the legitimacy of many children, the peace of many families, and the settlement of many estates depending upon its being sustained." In Starr v. Pease, 8 Conn. 541, Doggett, J., observes: "The power is not limited by the constitution of the United States, or by that of the state. In view of the appalling consequences of declaring the general law of the state or the repealed acts of our legislatures unconstitutional and void .-- consequences easily conceived, but not easily expressed, such as bastardizing the issue, and subjecting the parties to punishment for adultery,-the court should come to the result only on a solemn conviction that their oath of office and these constitutions imperatively demand it." It is true that I have no means of accurately judging the extent of the public distress that will result from the decision in this case; but it is true that numerous divorces have been granted by the various probate courts of this territory since the adoption of the new Code (August 14, 1893), and, upon the supposed validity of those divorces, marriages have been contracted, children will be born, and property rights have vested. decision will make innocent people guilty of adultery and bigamy, will make bastards of their children, and give rise to endless and expensive litigation, both civil and criminal, for years and years to come. Public policy. indeed, should receive its share of consideration in this grave legal controversy.

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I now advert to a brief discussion of the power of state and territorial legislatures to grant what is known as 'legislative divorces," with the suggestion, first, that I regard this proposition as infinitely more serious than the line of reasoning adopted by the court as grounds for the denial of the jurisdiction of the probate courts. It is well settled that a state or territorial legislature may grant a divorce a vinculo matrimonii, unless expressly forbidden by their constitution or organic act. The organic acts of all the territories since the admission of Wisconsin contained the provision giving the territories the power of legislation upon all rightful subjects of legislation. The subject of divorce has always been conceded to be a rightful subject of legislation, both in this country and England, unless expressly forbidden. In the case of Crane v. Meginnis, 1 Gill & J. 474, the supreme court of Maryland say: "Divorces in this state, from the earliest times, have emanated from the general assembly, and can now be viewed in no other light than as regular exertions of legislative power." In Starr v. Pease, supra. the court said: "The law has remained in substance as it was when enacted in 1667. During all this period the legislature has interfered, like the parliament of Great Britain, and passed special acts of divorce a vinculo matrimonii; and almost ever since the constitution of the United States went into operation, now 42 years, and for 13 years of the existence of the constitution of Connecticut, such acts have been, in multiplied cases, passed and sanctioned by the constituted authorities of our state." In Maynard v. Hill. supra, Field, J., on this branch of the question, says: "The same doctrine is declared in numerous other cases, and positions similar to those taken against the validity of the act of the legislative assembly of the territory-that it was beyond the competency of a legislature to dissolve the bonds of matrimony-have been held untenable. These decisions justify the conclusion that the division

of the government into three departments, and the implied inhibition through that cause upon the legislative department to exercise judicial functions, was neither intended nor understood to exclude legislative control over the marriage relation. In most of the states the same legislative practice on the subject has prevailed since the adoption of their constitutions as before, which, as Mr. Bishop observes, may be regarded as a contemporaneous construction that the power thus exercised for many years was rightly exercised. The adoption of late years in many constitutions of provisions prohibiting legislative divorces would also indicate a general conviction that, without this prohibition, such divorces might be granted, notwithstanding the separation of the powers of government into departments by which judicial functions are excluded from the legislative department. There are, it is true, decisions of state courts of high character, like the supreme court of Massachusetts and of Missouri, holding differently, some of which were controlled by the reculiar language of state constitutions. Sparhawk Sparhawk, 116 Mass. 315; State v. Fry, 4 Mo. 120, 138. The weight of authority, however, is decidedly in favor of the position that, in the absence of direct prohibition, the power over divorces remains with the legislature. We are therefore justified in holding-more, we are compelled to hold-that the granting of divorces was a rightful subject of legislation, according to the prevailing judicial opinion of the country, and the understanding of the profession, at the time the organic act of Oregon was passed by congress, when either of the parties divorced was at the time a resident within the territorial jurisdiction of the legislature." inherent power of a territorial legislature to grant divorces is clearly sustained by the United States supreme court in this case. The court then discusses the contract relation of marriage and divorce, holding it not to be a contract, within the meaning of the federal constitution, and that the legislature was not, by granting divorces, impairing the obligations of a contract.

it being conceded, then, by all the authoricies, that marriage and divorce is a rightful subject of legislation when not expressly prohibited by some competent authority, has the legislature the right to delegate or confer this jurisdiction upon such courts as it sees fit, within its legislative domain? The organic act of this territory provides that the legislature may legislate upon "all rightful subjects of legislation not inconsistent with the constitution and laws of the United States" (section 6); and, further, that the "supreme and district courts shall possess chancery as well as common law jurisdiction and authority for redress of all wrongs committed against the constitution or laws of the United States or of the territory aflecting persons or property," and that "the

jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts and of justices of the peace, shall be as limited by law" (section 9). Where, then, from these provisions, does jurisdiction in divorce matters abide? It is well settled by all the authorities that divorce jurisdiction is sui generis not a matter of either common-law or chancery jurisdiction; and, being neither a subject of chancery and common-law jurisdiction, the organic act of this territory has conferred upon no court any jurisdiction in actions for divorce, unless the words "and authority for redress of all wrongs committed against the constitution or laws of the United States affecting persons or property" confers such powers upon the supreme and district courts. Then, if no authority has been granted by the organic act to any court, and the subject of divorce is a rightful subject of legislation, would not the legislature of this territory have power to delgate its inherent right of granting divorces to any court in its wisdom it desired? Under this view, an act of congress ratifying the act of a territorial legislature would be unnecessary; and, if this be true, would the fact that congress had ratified it place it beyond the power of the legislature to repeal it, in the face of the organic act, conferring upon the legislature power over all rightful subjects of legislation? Would congress, by so ratifying the act, intend to circumscribe the legislature in respect to further granting or taking away this branch of the jurisdiction of such courts? In Ferris v. Higley, 20 Wall. 375, the court (Miller J.) observes: "We may, I think, assume without much hazard that defining the jurisdiction of the probate court, or, indeed, of any court, may be fairly included within the general meaning of the phrase 'rightful subject of legislation.' Nor do we think there is anything in such legislation inconsistent with the constitution of the United States. There remains, then, only the further inquiry whether it is inconsistent with any part of the organic act it-• • The common-law and chancery jurisdiction here conferred on the district and supreme courts is a jurisdiction very ample and very well understood. It includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice. The jurisdiction of the justices of the peace is specifically limited as regards the moneyed value on which it may decide, and by the exclusion of matters concerning real estate. Of the probate courts it is only said that a part of the judicial power of the territory shall be vested in them. What part? The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law and in the jurisprudence of this country. It is a tempting subject to trace the history of the probate of wills, and the administration of the

personal estates of decedents, from the time it was held to be a matter of exclusive ecclesiastical prerogative down to the present. It is sufficient to say that through it all, to the present hour, it has been the almost uniform rule among the people who make the common law of England the basis of their judicial system to have a distinct tribunal for the establishment of wills and the administration of estates of men dying either with or without will. These tribunals have been variously called 'prerogative courts,' 'probate courts,' 'surrogates,' 'orphans' courts,' etc. To the functions more directly appertaining to wills and the administration of estates have occasionally been added the guardianship of infants and control of their property, the allotment of dower, and perhaps other powers related more or less to the same general subject. Such courts are not in their mode of proceeding governed by the rules of the common law. They are without juries, and have no special system of pleading. They may or may not have clerks, sheriffs, or other analogous officers. They were not in England considered originally as courts of record, and have never, either in that country or this, been made courts of general jurisdiction, unless the attempt to do so in this case be successful. * * * It is supposed that a sufficient answer to this course of reasoning is found in the declaration of the ninth section of the organic act, already cited, that the jurisdiction of the several courts therein provided for 'shall be as limited by law.' The argument is that this refers to laws to be thereafter made by the territorial legislatures, and that, as the power of that body extended to all rightful subjects of legislation, it extended to this of totally changing the jurisdiction of these courts. We are not prepared to say that in deciding what law is meant in this phrase, 'as limited by law,' we are wholly to exclude laws made by the legislature of the territory. * * * But we hold that the acts of the legislature are not the only law to which we must look for the powers of these territorial courts. The general history of our jurisprudence and the organic act itself are also to be considered, and any act of the territorial legislature inconsistent with the latter must be held void." The final decision of the court in this case was that the organic act did not mean to confer any right of chancery or common-law jurisdiction upon the probate courts, and that the territorial legislature exceeded its powers in conferring such authority. This case does not decide that the territorial legislature of Utah had no power to confer divorce jurisdiction upon the probate courts. As stated in the beginning, no court can exercise jurisdiction in divorce matters in the absence of statutory provisions, but how far a territorial legislature may give power to courts in these matters has never been so strenuously denied as to render it a subject of much judicial investi-

gation. The supreme court of Utah seems to be the only court that has passed directly upon this question. It was first decided in Kenyon v. Kenyon that the legislature had the authority to confer upon the probate courts the power to try and determine divorce cases, but in Cast v. Cast, 1 Utah, 112, the case of Kenyon v. Kenyon, was overruled. In the case of Whitmore v. Hardin, 3 Utah. 121, 1 Pac. 465, the question was again before the Utah court; and the case of Kenyon v. Kenyon was sustained, and that of Cast v. Cast overruled. Before this last case was decided, congress settled the question in that territory by the act of June 23, 1874, defining the jurisdiction of the territorial courts, and by such act granting power to the probate courts to hear and determine divorce matters.

Thus, as stated, I regard this question as the most serious of the two; and, in my judgment, if the probate courts of this territory have no jurisdiction in these matters, they have lost it by reason of the fact that divorce is a rightful subject of legislation, and that congress did not intend, by ratifying that which needed no ratification, to take from the legislature this, as a rightful subject of legislation conferred by the organic act; but in either case the question of public policy should not be disregarded in making up a determination of the matter in this court. Asstated in the outset, however, these questions are not properly beforeus, and I have only discussed the principles involved in a general way. When a case is presented embracing these questions, clearly-defined views can be given in detail as to the jurisdictional bounds of the probate courts of this territory; but, in the meantime, the advancement of far-reaching, perilous, and abstract conclusions on questions not coram nobis is a dangerous precedent for this court to establish. I yet have faith that the court will reconsider its determination in this case, and have thus lengthened my general views for such benefit as the court may be able to derive therefrom, knowing that the great volume of business on hand renders the full and complete investigation of profound and intricate legal questions, requiring deep research and consideration, almost impossible, and at the same time respectfully performing my duty as a member of this court, under my official oath, to dissent from judgments and conclusions to which I cannot agree.

BACON v. McCHRYSTAL et al.1

(Supreme Court of Utah. July 27, 1894.)

ACTION FOR MONEY PAID UNDER PAROL PURCHASE OF LAND — WITHDRAWAL OF QUESTION FROM JURY.

In an action to recover money paid by plaintiff under a parol contract of purchase of land, it appeared that defendant had no title;

¹ Rehearing denied.

that plaintiff demanded a return, which was refused; and that after the action was brought the holder of the title tendered plaintiff a deed on condition that the latter pay an additional \$4.00. Before suit brought, defendant promised to return the money paid him. Held that, as plaintiff was entitled to recover, it was not error to withdraw from the jury all questions as to such oral contract of purchase.

Appeal from district court, third district; before Justice G. W. Bartch.

Action by L. W. Bacon against John H. McChrystal and Noah McChrystal to recover money paid John H. McChrystal under a parol contract for the sale of certain land by the latter to plaintiff. From a judgment for plaintiff against defendant John H. McChrystal, the latter appeals. Affirmed.

Bennett, Marshall & Bradley and Maurice M. Kaigh, for appellant. O. W. Powers, Ogden Hiles, and D. N. Straup, for respondent.

SMITH, J. This is an action brought by respondent to recover from appellants \$1,200, paid as part of the purchase price under a parol contract for the sale and purchase of land, with interest thereon from the date of payment, and the sum of \$5.18, taxes paid on the land by respondent. Judgment was rendered against John H. McChrystal, from which he takes this appeal.

The court instructed the jury to the effect that they were to disregard the evidence which had been received showing a parol contract for the sale of land, and this instruction was excepted to by the appellant, and is the chief point relied upon on this appeal. The record discloses the fact that the respondent made an oral agreement to purchase certain land from the appellant, John H. McChrystal. The entire consideration for the land was \$1,600, \$1,200 of which was paid by the respondent at different times before the commencement of this suit. It turned out that John H. McChrystal did not have title to the land he had sold, but the title was in Noah McChrystal, the other defendant. Plaintiff demanded a return of the money paid. Failing to obtain it, he brought this action. Some six weeks afterwards, Noah McChrystal executed a warranty deed to the plaintiff of the land which was embraced in the verbal contract, and offered to deliver it to plaintiff, provided plaintiff would pay an additional \$400, which plaintiff refused to do. About the facts above stated there is no dispute in the record. There is evidence tending to prove that before the suit was brought, and before any tender of the deed was attempted, and in fact before Noah McChrystal ever made a deed, or offered to make one, John H. Mc-Chrystal promised, unconditionally, to return the money he had received. This, however, is disputed, or at any rate not so clearly proven as the other facts in the case. Under such circumstances, was it error for the court to withdraw from the consideration of the jury all questions as to the oral contract for the purchase and sale of land? We think not. It is no doubt settled by the weight of authority that money paid under a contract void by the statute of frauds may be recovered by the person who pays the same from the person to whom it is paid, in an action for money had and received, such as this is. It is also true that the great weight of authority is to the effect that such an action cannot be maintained if the person who receives the money under such contract, void by the statute, offers to fully perform the contract on his part. In other words, if a person selling land by a verbal contract, as in this case, has a perfect title himself, and offers to convey it to his vendee upon demand, the vendee cannot complain that the contract is void because the other party, who is the one that is required to be bound by writing, agrees to perform, and does not seek to avoid it; but in such case. in order that the offer to perform may be a defense to the action, the offer should be made in apt time, and should be made by some person competent to perform. In this case there are two undisputed facts which prevent such defense from being made by the appellant: First, he had no title to the land; and, second, the deed which was offered by Noah McChrystal, who held the title, was not tendered until nearly two months after this suit had been commenced. Under such circumstances, it can hardly be claimed that the appellant was prejudiced by the refusal of the court to submit the question to the jury as to whether or not there was in fact a verbal contract for the sale of land. It would seem from the record before us that the verdict is right; being for the amount of money actually paid to the defendant John H. McChrystal, and for which the plaintiff has, up to the present time, received absolutely nothing. We think the judgment should be affirmed, and it is therefore ordered that the judgment be affirmed, with costs.

MERRITT, C. J., and MINER, J., concur.

CUPIT v. PARK CITY BANK.¹
(Supreme Court of Utah. July 27, 1894.)

ATTACHMENT — NOTICE OF MOTION TO DISCHARGE
—SUFFICIENCY.

Under Comp. Laws 1888, § 3326, relating to attachments, and providing that defendant may apply for a discharge of the writ on the ground that the same was improperly issued, the notice of such motion must specify the grounds of the motion.

Appeal from district court, third district; before Justice G. W. Bartch.

Action in attachment by Thomas Cupit against the Park City Bank. From an order granting a motion to discharge the at-

Rehearing granted.

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tachment, and overruling a motion to strike defendant's notice of motion and affidavit from the files, plaintiff appeals. Reversed.

W. I. Snyder and Powers & Straup, for appellant. Brown & Henderson, for respondent.

MINER, J. This action comes here on appeal from an order discharging the attachment. 'The writ of attachment was issued upon an affidavit which set forth, as a ground for issuing the writ, "that the defendant had disposed of its property with intent to defraud its creditors," and, as a further ground, "that the defendant frauduiently took plaintiff's \$2,000 on the 7th of June, 1893, knowing well that it, the defendant, was insolvent; that the defendant fraudulently took the said M. S. Aschheim Mercantile Company's \$873.12, knowing well that it, the said defendant, was insolvent." This latter claim was assigned to plaintiff, together with six other causes of action, forming the subject-matter of this action, aggregating nearly \$6,000. The defendant gave notice of a motion to discharge the attachment, in the following language: "Take notice that on an affidavit of which the annexed is a copy, and on all papers filed and served in this action, the undersigned will move the court on the 25th day of November, 1893, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, to discharge the attachment in this action, and for such other order as may be just," -and in support of such notice filed the following affidavit:

"Territory of Utah, County of Summit—ss.: A. B. Richardson, being duly sworn, deposes and says that on the 12th day of June, 1893, he was, ever since has been, and now is, vice president of said defendant, the Park City Bank; that the affidavit for attachment filed in said-entitled cause is untrue; that the said defendant did not on the 12th day of June, 1893, or at any other time, assign and dispose of its property, or any part thereof, with intent to defraud its creditors. A. B. Richardson.

"Subscribed and sworn to before me this 22nd day of November, 1893. Bart Wherrit, Notary Public, Summit County, Utah."

Thereupon, the plaintiff filed his motion to strike said notice of motion and affidavit from the files, on the grounds—First, that the property attached had since been placed in the hands of the receiver, and defendant has no interest therein; second, that it does not appear that the writ was improperly or irregularly issued; third, that the notice and affidavit raise no material issue of fact or law; fourth, that the affidavit to discharge does not deny any material fact set out in affidavit for attachment. Upon a hearing this motion was overruled, upon which error is assigned.

Our statute (section 3326, Comp. Laws 1889), like that of California, provides that the defendant may apply, on motion to the court, for a discharge of the writ of attachment on the ground that the same was improperly or irregularly issued. In Freeborn v. Glazer, 10 Cal. 337, the court held that in such cases the notice of motion to discharge the attachment should specify the grounds of the motion, and wherein it would be arged that the writ was improperly issued. The notice gave no information to the adverse party as to the character of the objections which would be taken. We think the notice of motion in this case was defective, in not specifying the ground upon which the motion was based. The opposite party was entitled to know in advance of the hearing what the particular objection was that he was called upon to meet, and our statute does not obviate the necessity of specifying in the notice to dissolve the writ the particular points of irregularity upon which the motion will be based. The provision in the statute prescribing that notice may be given of the motion "on the ground that the same was improperly or irregularly issued" is only a provision that, wherever the writ is improperly issued, that fact will authorize this application to discharge. It is like a great variety of provisions indicating the general ground or reason upon which parties may proceed, or the action of the court may be based, and which are never held to obviate the necessity of specifying the points of objection upon which the moving party may rely. If the point be stated, it may be possible for the opposite party to answer it, and the object of the rule is to give him a fair opportunity to do so. This doctrine is sustained by Freeborn v. Glazer, 10 Cal. 387; Loucks v. Edmondson, 18 Cal. 204; Donnelly v. Strueven, 63 Cal. 183; Drake, Attachm. § 145; Osborne v. Robbins, 10 Mich. 277; 1 Wade, Attachm. § 279, note 16. If any demurrer was interposed to the complaint, it does not appear from the abstract, nor does it appear that any ruling was ever made upon such demurrer. The complaint sets up a cause of action against the defendant, and, had a demurrer been interposed, it should have been overruled. There are many other questions raised by this appeal, but we think the one passed upon is the one decisive of the case. We are of the opinion that the plaintiff's motion to strike defendant's motion and affidavit to discharge the attachment from the files should have been granted, and that the court erred in discharging the attachment. The judgment of the court below, dissolving and discharging the attachment, is set aside and vacated. and the case is remanded to the court below for further proceedings.

MERRITT, C. J., and SMITH, J., concur.



CHAMBERLIN v. WATTERS et al. (Supreme Court of Utah. July 27, 1894.) GARNISHMENT—SCHOOL BOARD NOT LIABLE.

A board of education is not liable to garnishment for salary due a teacher, as Comp. Laws 1888, § 3455, authorizing garnishment of corporations, applies only to private corporations.

Appeal from district court, fourth district; before Justice James A. Miner.

Action by L. E. Chamberlin against W. W. Watters and the board of education of Ogden city. There was a judgment against defendant Watters, but in favor of the board of education, from which judgment plaintiff appeals. Affirmed.

Lessinger & Beckwith, for appellant. E. M. Allison, Jr., for respondent.

BARTCH, J. This is an action to recover the sum of \$453.75, due on a promissory note. Judgment was entered in favor of the plaintiff for this sum, upon confession of the defendant. It appears from the record that the defendant Watters was a teacher in one of the public schools of Ogden, Utah, and that while the judgment remained unsatisfied there was due him, as salary, from the board of education, the sum of \$190. Proceedings supplementary to execution were instituted, and an attempt made to garnish the defendant's salary in the hands of the board. Upon the hearing these proceedings were dismissed, and the board of education discharged. The plaintiff appealed from this order, as well as from the order overruling a motion for a new trial. The question is raised whether, under our laws, in proceedings supplementary to execution, a board of education is subject to process of garnishment because of any indebtedness due to a teacher for salary.

Section 3455, Comp. Laws 1888, provides: "After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon proof by affidavit or otherwise, to the satisfaction of the judge, that any person or corporation has property of such judgment debtor, or is indebted to him in an amount exceeding fifty dollars, the judge may, by an order require such person or corporation, or an officer or member thereof, to appear at a specified time and place, before him, or a referee appointed by him, and answer concerning the same." It is contended by counsel for appellant that this section is applicable to a board of education. It is clear that under our laws a board of education is a public municipal corporation. It forms one of the departments of the municipality. Its functions are exclusively of a public character, and its acts are performed for the public benefit. Its relation to the public is the same as that of any other municipal corporation. If, then, a board of education is subject to the process of garnishment, the phrase "any person or corporation" must embrace both public and private corporations, as is insisted in this case. There appears to be nothing in the context of the statute which would lead to such a conclusion, nor is there anything to indicate that such was the intention of the legislature. It seems quite clear that the term "corporation" was used in the statute as a word of limitation, and refers solely to private corporations organized for private purposes, and does not refer to public corporations, or such as are created by law for the benefit of the people. Nor can a public or municipal corporation be subject to such proceedings upon any principle of public policy, for it forms a part of the government, and the public interests will not permit it to become involved in litigation between private individuals, in which such a corporation has no interest. Such proceedings would not only engage such public corporation in much vexatious and expensive litigation, but would also occupy the time of its servants and officials in the management of affairs wholly foreign to the object of its creation, to the neglect of corporate duties. The interests of the public would thus become subservient to those of the private individual, and the money in the public treasury would be consumed at the bar of the courts in controversies between debtors and creditors, in which the public would have not the slightest interest. To fully appreciate the public inconvenience which would inevitably follow if such proceedings were held to apply to public corporations, it is but necessary to refer to the vast amount of revenue which such corporations are called upon to collect and disburse, and to the inconvenience which would follow in the settlement of their multitudinous accounts, and in the management of their affairs, if the money in the treasury was subject to be tied up indefinitely by such process. While such a proceeding, doubtless, would be desirable on the part of the creditor. to enforce his claim against the officer or servant of the corporation, yet we are of the opinion that public policy will not allow the corporation to be thus hampered in the administration of its affairs. We are aware that some of the cases are opposed to the conclusion reached, but it is apparent that it is supported by the great weight of authority. Drake, Attachm. § 516; 1 Dill. Mun. Corp. § 101; Merwin v. City of Chicago, 45 Ill. 133; City of Erie v. Knapp, 29 Pa. St. 173; School Dist. v. Gage, 39 Mich. 484; Hawthorn v. St. Louis, 47 Am. Dec. 141; Switzer v. City of Wellington (Kan.) 19 Pac. 620; McDougal v. Supervisors, 4 Minn. 184 (Gil. 130); Burnham v. City of Fond du Lac. 15 Wis. 211.

But there is another reason why the contention of counsel cannot avail the appellant. In the case at bar the defendant Watters was a teacher in one of the public schools in the city of Ogden, regularly employed by the

board of education, which board was created by authority of the legislature for the benefit of the public. Thus employed, he was a public servant, receiving a stipulated salary; and no portion of such salary, so long as the money remained in the hands of the board, was subject to the process of garnishment. There is perhaps no class of persons more intimately connected with the welfare of the municipality than the teachers in the public schools. Their labors are of interest to the entire body of the people. As a general rule they belong to that class of persons who depend upon their salaries for the support of themselves and families. As a class, they are honorable, industrious public servants, and are generally poorly paid. If their wages, intended for the support of those dependent upon them, were subject to process of garnishment, the public might be deprived of their services at any time, and suffer great inconvenience because of interruptions in the management of the schools which would thus occur. The children of the country cannot be educated without competent teachers. and those teachers, usually devoting their whole time to their vocation, must have the necessaries of life; and their salaries ought not be subject to process which will tie them up, in the hands of a board of education, for an indefinite length of time, in disregard of the public interest. The territory has undertaken to establish, at great expense, a system of public schools, and it cannot allow the wages of the teachers to be intercepted, at the risk of the efficiency of the system being thereby impaired. Bulkley v. Eckert, 3 Pa. St. 368; Bivens v. Harper, 59 Ill. 21; Hightower v. Slaton, 21 Am. Rep. 273; Allen v. Russell, 78 Ky. 105; Wallace v. Lawyer, 23 Am. Rep. 661.

There appears to be no error in the rulings of the court, as shown by the record. The judgment is affirmed.

MERRITT, C. J., and SMITH, J., concur.

(10 Utah, 305)

DUPEE v. ROSE.

(Supreme Court of Utah. July 27, 1894.) TRUST DEED - FORECLOSURE BY SUIT.

The beneficiary of a trust deed with power of sale given as security for a loan may sue in equity to foreclose the same, as the power of sale is merely cumulative to such right.

Appeal from district court, third district; before Justice S. A. Merritt.

Suit by Jacob A. Dupee against Frederick W. Rose. There was a judgment for defendant, and plaintiff appeals. Reversed.

F. B. Stephens and B. X. Smith, for appellant. Frank Pierce, for respondent.

BARTCH, J. Appellant brought this suit to foreclose a trust deed. It appears that on April 1, 1891, J. B. Blazer and wife executed

and delivered to the appellant, plaintiff below, their promissory note in the sum of \$900, payable April 1, 1894, and secured it by trust deed on a certain parcel of land, in favor of Frank B. Stephens, as trustee for plaintiff. Afterwards the respondent purchased the property, and assumed the payment of the indebtedness secured by the trust deed. The interest was paid, but default was made in the payment of the principal. The court sustained a demurrer to the complaint, and, the plaintiff refusing to amend, dismissed the action. From this judgment the appeal was prosecuted.

The principal and in fact the only material question raised is whether the plaintiff had the right to resort to a court of equity to foreclose the trust deed. The instrument is in form a trust deed, and contains the provisions usually recited in such instruments used to secure the payment of debts. It shows on its face the amount of the indebtedness secured for the benefit of the cestui que trust, and contains the usual power of sale to be exercised by the trustee in the event of default in the payment of such indebtedness. It provides for redemption upon payment of the debt. Such an instrument is, in effect, a mortgage. It is true, it differs from an ordinary mortgage, in that it contains a power of sale, which may be exercised without resorting to a suit for foreclosure, but this may be said of some forms of mortgages which contain the similar powers. It is well settled that such a mortgage may be foreclosed, and a deed of trust to secure the payment of a debt is substantially the same thing, both in law and equity, as a mortgage with a power of sale. In neither case does the addition of the power of sale change the character of the instrument. In either case it is still a conveyance of land for the security of a debt, same as an ordinary mortgage. In either case it passes the legal title to the grantee, unless the natural effect of the instrument is controlled by statute. Both classes of instruments convey only a defeasible title, with the right of redemption in the one the same as in the other. The fact that in one the conveyance is direct to the creditor, and in the other to a third person for his benefit, causes no difference, in effect, between the two classes of instruments. At law, both purport to convey the legal title to the grantee,—the creditor or the trustee. equity, the title, the land, and deed, in either case, stand merely as a security for the debt. The debt is the principal thing, and the mortgage or trust deed given to secure it is a mere incident, upon which it depends. A trust deed of this character is a different thing from a deed of trust given for the purpose of raising a fund to pay a debt, for there the title vests absolutely in the grantee, it being an indefeasible conveyance for the purposes of the trust; and there is no right to redeem. In such a case there can be no foreclosure, and the terms of the trust cannot be

disregarded. Nor can it be released, on the margin of the record, as is provided by statute in case of a trust deed given as security for a debt, which in this territory may be released precisely in the same manner as a mortgage. Comp. Laws Utah 1888, §§ 2641, 2642; Sess. Laws 1890, p. 90.

A power to sell contained in a trust deed, given as security for a debt, does not divest a court of chancery of jurisdiction to enforce the rights of the parties thereto; nor does it abridge the right of the party who receives such an instrument as security to resort to a court of chancery, instead of proceeding under the power. Such a power is merely cumulative, additional to that granted by law, and the person whose debt is secured may proceed under the power, or foreclose in the manner provided by law for the foreclosure of mortgages, in which latter case the grantor has the right to redeem same as under a mortgage. Jones, in his treatise on the Law of Mortgages (volume 1, § 62), says: "A deed of trust to secure a debt is, in legal effect, a mortgage. It is a conveyance made to a person other than the creditor, conditioned to be void if the debt be paid at a certain time, but, if not paid, that the grantee may sell the land, and apply the proceeds to the extinguishment of the debt, paying over the The addition of the surplus to the grantor. power of sale does not change the character of the instrument any more than it does when contained in a mortgage. Such a deed has all the essential elements of a mortgage; it is a conveyance of the land as security for a debt." In Story, Eq. Jur. § 1018, the law is stated as follows: "The particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that wherever a conveyance, assignment, or other instrument transferring an estate is originally intended between the parties as a security for money or for any other incumbrance, whether this intention appear from the same instrument or from any other, it is always considered in equity as a mortgage, and consequently is redeemable upon the performance of the conditions or stipulations thereof." In 2 Perry, Trusts, § 602d, the author says: "A mortgage is a pledge or security for a debt, whatever may be the form which the transaction takes, whether a simple mortgage deed in form, or a mortgage with a power of sale, or a deed of trust, or a deed absolute on its face, accompanied by an agreement, in writing, to reconvey or to sell or to do any other thing upon the payment of a certain sum of money. Courts of equity look upon it as a mortgage, and deal with it as such." See, also, Id. §§ 602a-602c. Mr. Justice Miller, in Shillaber v. Robinson, 97 U. S. 68, delivering the opinion of the court, said: "If there is a power of sale, whether in the creditor or in some third person to whom the conveyance is made for that purpose, it is still, in effect, a mortgage, though in form a deed of trust, and

may be foreclosed by sale in pursuance of the terms in which the power is conferred, or by suit in chancery." 2 Pom. Eq. Jur. § 995; Lawrence v. Trust Co., 13 N. Y. 200; Mc-Donald v. Vinson, 56 Miss. 497; Thompson v. Marshall (Or.) 27 Pac. 957; Eaton v. Whiting, 3 Pick. 484; Insurance Co. v. White, 106 Ill. 67; Woodruff v. Robb, 19 Ohio, 212; Webb v. Hoselton, 4 Neb. 308; Morrison v. Bean, 15 Tex. 267; Bank v. Chapelle, 40 Mich. 447. Counsel for respondent has cited us to the case of Koch v. Briggs, 14 Cal. 257. This case appears to sustain the position contended for, but we think the law is well settled by the weight of authority that, where a trust deed is given merely as a security for the payment of a debt, it is, in effect, a mortgage, and that the power of sale therein contained does not prevent a resort to a court of chancery. We think the demurrer should have been overruled. The judgment is reversed, and cause remanded for further proceedings in accordance herewith.

SMITH and MINER, JJ., concur.

PETTIT et al. v. DUKE, Treasurer. (Supreme Court of Utah. July 27, 1894.)

Assessments—Sprinkling Streets—Injunction.

1. A city authorized to levy taxes for local assessments for "sewerage, paving and other like purposes" (1 Comp. Laws, art. 15, pp. 644, (45), cannot levy such assessments for sprinkling streets.

2. The collection of an illegal tax levied against several hundred landowners may be enjoined, thereby avoiding a multiplicity of suits.

Appeal from district court third districts

Appeal from district court, third district; before Justice C. S. Zane.

Action by Orson H. Pettit and others against Harry T. Duke, treasurer of Salt Lake City, to enjoin the collection of local assessment taxes. There was a judgment for defendant, and plaintiffs appeal. Reversed.

Richards & Richards, for appellants. E. D. Hoge, for respondent.

MERRITT, C. J. This is an action brought by about 400 real-estate owners in Salt Lake City to enjoin the defendant from collecting a sprinkling tax levied by a local assessment on their premises abutting on certain streets of said city. The plaintiffs set out in their complaint certain ordinances of Salt Lake City creating sprinkling districts, and ordinances levying a tax of seven cents per linear or front foot on their property in such districts, for the purpose of paying the expenses of sprinkling the streets; and the plaintiffs allege that "they are the owners of certain parcels of real estate abutting on said streets, and that their property has been assessed for the payment of said taxes; that the defendant has demanded payment of the same, and threatens to enforce the collection thereof if the tax is not paid at once, by the sale of their said property, which would be an irreparable injury to the plaintiffs." It is further alleged that said tax is illegal and void, and that defendant has no authority to collect the same, for the reason that Salt Lake City had no authority to levy taxes, by local assessment, for sprinkling purposes. The defendant demurred to the complaint on the ground that the facts stated were not sufficient to constitute a cause of action. The demurrer was sustained by the court below, and, plaintiffs declining to amend, judgment was entered in favor of defendant, dismissing the complaint of plaintiffs, and from that judgment this appeal is taken.

The position taken on behalf of the city is that the tax is valid, but it is further urged that, whether valid or not, the facts stated in the complaint are not sufficient to entitle plaintiffs to relief by injunction. It is apparent from the complaint that several hundred persons are charged with this tax, and that it is assessed upon numerous pieces of real estate. The sale of this property by the collector would create a cloud upon the title to hundreds of pieces of land, and not only cause irreparable injury to the owners, but would produce a multiplicity of suits. We cannot doubt the power of a court of equity, in such case, to enjoin the collection of the tax, if illegally assessed.

The question to be determined by the court 4s whether Salt Lake City had the charter power to levy a tax by local assessment for the purpose of paying the expense of sprinkling streets. It is well settled that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power is plainly, unmistakably conferred. The authority must be given by express words or necessary implication. The legislature has expressly conferred upon the city power "to levy and collect taxes for general or special purposes on real estate and personal property" and "for the lighting, sprinkling and cleansing of streets." 1 Comp. Laws, p. 621. It has also given the city power to levy taxes by local assessment for "sewerage, paving and other like purposes," including street improvements and repairs, waterworks, and gas mains. 1 Comp. Laws, art. 15, pp. 644, 645. But the sprinkling of streets is not included in the enumeration of instances in which local assessments may be levied. It is a principle universally declared and admitted that municipal corporations can levy no taxes, general or special, upon the inhabitants or their property, unless the power be plainly and unmistakably conferred. It has, indeed, often been said that it must be specially granted in terms; but all courts agree that the authority must be given, either in express words or by necessary implication, and it cannot be collected by doubtful inferences from other powers, or powers relating to other subjects, nor deduced from any consideration of convenience or advantage. This rule applies to proceedings by municipal corporations under the delegated

right of eminent domain, and it extends equally to proceedings under the taxing power, including special assessments for local improvements. 2 Dill. Mun. Corp. §§ 763-765, and notes; Commissioners v. Loague, 129 U. 8. 493, 9 Sup. Ct. 327. It is a well-established rule of construction that where a statute grants a power or right the powers not mentioned in the enumeration are intended to be excluded. Suth. St. Const. \$ 325. In the language of the supreme court of the United States in the case of U.S. v. Arredondo, 6 Pet. 725, "expressio unius est exclusio alterius" is a universal maxim in the construction of statutes. When the legislature conferred upon Salt Lake City the power to levy taxes by local assessment for the purposes mentioned in the statute, it excluded, by implication, all other local assessments, except for like purposes. All the purposes mentioned in the statute are permanent improvements, and confer special and peculiar benefits upon the property assessed, by enhancing its value. This is an essential element in determining the validity of local assessments. Mr. Cooley, in his work on Taxation (pages 416, 417), says: "Special assessments are made on the assumption that a portion of the community is to be specially and pecuniarily benefited, in the enhancement of the value of property peculiarly situated, as regards a contemplated expenditure of public funds; and in addition to the general levy they demand that special contributions, in consideration of the special benefit, shall be made by persons receiving it. The justice of demanding the special contribution is supposed to be evident in the fact that the persons who are to make it, while they are made to bear the cost of a public work, are at the same time to suffer no pecuniary loss thereby, their property being increased in value by the expenditure to an amount at least equal to the sum they are required to pay. This is the idea that underlies all these levies." Municipal authorities cannot levy an assessment for an improvement without express legislative permission. The power cannot be inferred from the general welfare clause in the charter, nor from the ordinary grant of power to levy taxes, nor from the power to make improvements; and the language of the statute or charter conferring authority will be strictly construed, and confined to cases that are clearly and unmistakably within its scope. The power to make an improvement does not imply or carry with it the power to levy a special assessment upon property benefited to pay for the improvement. Such assessments can only be made where the power to do so is plainly conferred and strictly followed. 2 Beach, Pub. Corp. § 1166, and note; 15 Am. & Eng. Enc. Law, p. 1192.

The legislature has expressly conferred upon the municipality power to divide the city into districts, and levy taxes by local assessment for "sewerage, paving and other like purposes," including street improvement and repairs, waterworks, and gas mains, but street sprinkling is not included in the enumeration of instances in which this power may be exercised. It will not do to say that the words "other like purposes" grant the power, because sprinkling is not a like purpose. It is not a permanent improvement, like sewerage and paving, and it does not confer such special benefit upon the abutting property as the law requires in order to sustain a local assessment. Suth. St. Const. § 270. The sprinkling of streets is not a permanent improvement, like sewerage and paving. It is only useful while the work is continued, and in a few hours the beneficial effects are gone, and the property is worth no more than before the streets were sprinkled. It does not enhance the market value of the abutting property, and therefore the city cannot demand special contribution, by local assessment, to bear the cost of the public work. City of Chicago v. Blair (Ill. Sup.) 36 N. E. 829. In that case the supreme court of Illinois, in deciding a case where it was sought to levy an assessment upon abutting property for street sprinkling, say, inter alia: "It cannot, we think, in any just sense, be said that street sprinkling is an improvement, within the contemplation of article 9 of the cities and villages act. In the nature of things, the sprinkling is only useful while the work is continued. In a few hours the beneficial effects are gone, and the property is worth no more than before the street was sprinkled. It is insisted, however, that all improvements—the building of sidewalks, the paving of streets, of however lasting material-are evanescent, and that in a few years, at most, they will necessarily require renewing, and that it will make no difference whether it be water put upon the street, or wood or granite; that all alike are but temporary in character. In a sense, this is true, but not in a practical sense. It is common experience that well-paved streets and convenient and durable sidewalks, furnishing access to property, do in fact enhance its market value. It is, however, insisted that the sprinkling of the streets during the summer months renders the occupation of the adjacent property more enjoyable and comfortable, and that, therefore, the property is enhanced in value. Doubtless, the same result would follow by placing vases at convenient points on the street, to be filled every morning with fresh-cut flowers, or by open-air concerts, in which music should be selected with reference to the taste of the adjacent dwellers. So the employment of an efficient police force, whereby greater safety was felt, would add to the enjoyment and comfort of persons residing upon the street. The proper watering and clipping of the grass upon lawn and terrace, the removal of garbage from the premises, besides saving expense to the occupant, would add to the enjoyment, and possibly the healthfulness, of the locality. These all might be

improvements, and increase, while they continued, the desirability of property in that locality; but they are not improvements, either of the property or of the street, within the legislative contemplation when granting power to make local improvements by special assessment. The tendency of municipal government to arrogate to itself power, and to encroach upon the right of the citizens, has led to the establishment of salutary rules of construction, limiting their powers to those expressly granted or arising by reasonable and necessary implication from the grant. It cannot, we think, be assumed that the legislature intended, by the language employed, to confer power upon the municipality to require work of the class provided for in this ordinance to be done by special assessment, even though it be held to be public work which the municipality is authorized to perform. Such power does not arise by implication from the powers expressly conferred, nor is it essential to the declared objects and purposes of the corporation." And the following cases are in harmony with the foregoing decision, and fully sustain the principles therein stated. Hammett v. Philadelphia, 3 Am. Rep. 615; Washington Avenue. 8 Am. Rep. 255; Trumpler v. Bemerly, 39 Cal. 490. We think the tax was levied without authority of law, and is therefore illegal and void. The demurrer should have been overruled, and the injunction granted. The judgment of the lower court is reversed.

MINER, SMITH, and BARTCH, JJ., con-

PETTIT et al. v. CLUTE, Assessor.

(Supreme Court of Utah. July 27, 1894.)

Appeal from district court, third district; be-

Appear roll district court, third district; before Justice C. S. Zane.

Action by O. H. Pettit and others against E. R. Clute, assessor and collector of Salt Lake City, to enjoin the collection of local assessment taxes. There was a judgment for defendant, and plaintiffs appeal. Reversed.

S. H. Lewis, W. T. Gunter, and Richards & Richards, for appellants. E. D. Hoge, for respondent.

MERRITT, C. J. In this case the judgment of the lower court is reversed, on authority of the case of Pettit v. Duke (decided at the present term of this court) 37 Pac. 568, the questions involved being the same in both cases.

MINER, BARTCH, and SMITH, JJ., concur.

PARK v. PARSONS et al.

(Supreme Court of Utah. July 27, 1894.)

CHATTEL MORTGAGES-FRAUDULENT CONVEYANCES -RIGHTS OF CREDITORS.

1. A mortragee of personal property held as indemnity may, with the mortgagor's consent, take possession of such property, and sell it under foreclosure, where such transaction is carried out in good faith, and it will be valid and binding on the mortgagor's creditors.

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2. The mortgagee having taken possession of the goods at the time the mortgage was given, the fact that the foreclosure sale was void for irregularity, and passed no title to him, would not divest him of his right of possession as mortgagee, nor render the property liable to seizure at the instance of the mortgagor's creditors.

Appeal from district court, third district; before Justice C. S. Zane.

Action by Boyd Park against E. H. Parsons and another to recover the value of goods alleged to have been wrongfully seized by defendants. From a judgment for plaintiff, defendants appeal. Affirmed.

Whittemore & Waite, for appellants. Sutherland & Howat, for respondent.

SMITH, J. On the 16th day of September, 1891, the plaintiff, being surety on the note of one J. F. Allen for the sum of over \$9,000, took a chattel mortgage from Allen on a stock of drugs owned by Allen, situate in Salt Lake City. The mortgage was delivered on September 19, 1891; and on the same day Park, the mortgagee, took exclusive possession of the mortgaged personal property. On October 5, 1891, the plaintiff, with the consent of the mortgagor, Allen, caused his mortgage to be foreclosed, and had the mortgaged property sold by the sheriff of Salt Lake county. At the sale the plaintiff became the purchaser, at the sum of \$7,500. After the sale the plaintiff continued in the possession of the property thus bought by him, and while he was in possession the defendants, Parsons and Dyer, acting as United States marshal and deputy, levied on the goods, as the property of Allen, at the suit of certain attaching creditors. Park sued the officers for the value of the goods taken, and recovered judgment for \$833.97. A motion for a new trial was overruled, and this appeal is brought to reverse the judgment and order denying a new trial. No question is made but that the mortgage was given to Park in good faith, to indemnify him as surety for Allen. Two questions are raised on this appeal: (1) The mortgage having been given to Park to indemnify him against loss, it is claimed he could not take possession of the mortgaged property, or sell it, until he had been compelled to pay the note, or had been otherwise injured. (2) That the sale by the sheriff in the foreclosure was not in accordance with the power in the mortgage; that, therefore, plaintiff obtained no title by such sale, and therefore the goods were subject to seizure and sale.

To sustain the first point the appellant has cited us to several cases in which it is held that an indemnity mortgage cannot be foreclosed until the mortgagee has paid the debt for which he was security, or has been otherwise injured. We have examined these cases carefully, and find they would sustain the appellant's contention if this were a controversy between the mortgagor and mortgagee.

In such case the foreclosure cannot be had until the mortgagee has been damnified. Any other rule would permit the mortgagee to violate his contract. The following among other cases hold to this rule: Griggs v. Railway Co., 10 Mich. 117; Lathrop v. Atwood, 21 Conn. 117; Wiltsie, Mortg. Forec. p. 50. But these cases have no application to the case at bar, for the reason that the mortgagor expressly consented that Park, the mortgagee, might take possession and sell. The contract for delay in foreclosure was for his benefit, and not for that of his creditors; and if he saw fit to waive this advantage, and allow his mortgagee to foreclose, the entire transaction being in good faith, we can discover no reason why he may not do so. No case has been cited that intimates that such a transaction, so made in good faith, is not conclusive upon everybody; and no case to which our attention has been called holds that a mortgagee of personal property held as indemnity may not take possession of the mortgaged property, and hold it until he is relieved from the liability to loss. It is quite manifest that Allen had the right, at the time he made the mortgage and delivered possession to Park, to have made a sale outright of the property, for a sufficient consideration; and, had he done this, no creditor could in any wise complain. There is no dispute but that there was a sufficient consideration to support the transaction that actually did take place, and we hold that it was valid and binding on creditors and all others.

What we have already said on this first point all applies to the second one. The conditions of the power to sell in the mortgage were for the benefit of the mortgagor, and, if he saw fit to waive them, we think he might do so, and his act binds his creditors. But there is another complete answer to this second proposition. We have seen that Park, as mortgagee, had the absolute right, and we think it was his duty, to take possession of and hold the mortgaged stock of goods, this being the case. If it be conceded that the sale by the sheriff was wholly irregular and utterly void, still Park was the purchaser. There was no change in his possession from the day the mortgage was executed down to the time the defendants made their levy; and, if the sale passed no title, it can hardly be claimed that it had the effect to divest him of his right of possession under his mortgage, and the only right which Allen's creditors could have would be to require Park to account for the value of the property. See Whittemore v. Fisher, 132 Ill. 256, 24 N. E. 636; Drayton v. Chandler, 93 Mich. 383, 53 N. W. 558. The sale was made with the full consent of the mortgagor, and under such circumstances, both upon principle and authority, we think, constituted a valid transfer of the property. See Welcome v. Mitchell, 81 Wis. 566, 51 N. W. 1080; McConnell v. Scott, 67 Ill. 274; Harris v. Lynn, 25 Kan. 281 (Library Ed. 196). The judgment and order appealed from are affirmed, with costs to respondent.

MINER and BARTCH, JJ., concur.

CARY-LOMBARD CO. v. SHEETS et al. (Supreme Court of Utah. July 27, 1894.)

MECHANICS' LIENS — OWNER — SUBCONTRACTOR— WHEN LIEN ATTACHES — PAYMENTS TO CON-TRACTOR.

1. One in possession of land under contract for a deed is an owner, within Laws 1890, p. 24, § 1, establishing mechanics' liens, and providing that any person having an assignable interest shall be deemed an owner.

2. Under Laws 1890, p. 25, § 2, giving a lien to subcontractors, and section 19, providing that such lien shall relate back to the com-

2. Under Laws 1800, p. 25, § 2, giving a lien to subcontractors, and section 19, providing that such lien shall relate back to the commencement of the work or the furnishing of materials, a subcontractor's lien attaches on the date of furnishing the first material; and payments thereafter made by the owner to the contractor, though before the lien is filed, are made at his own peril.

Appeal from district court, third district; before Justice G. W. Bartch.

Action by the Cary-Lombard Company against Charles Sheets and Thomas W. Partridge to enforce a mechanic's lien. There was a judgment for plaintiff, from which defendants appealed. Affirmed.

S. P. Armstrong and C. O. Whittemore, for appellants. J. M. Bowman, for respondent.

MINER, J. In this case it appears that the appellant Partridge, having a contract interest in land belonging to one Elmira Shearman, contracted with Charles Sheets, the contractor, by which Sheets was to furnish material and build a house upon the premises, for which Sheets was to receive \$2,200, in certain payments, as the building progressed. Elmira Shearman held the legal title to the land, and Partridge was in possession under contract of purchase. Elmira Shearman furnished Partridge \$2,200, with which to build the house, and, when paid for, Partridge was to receive the legal title. The findings of fact by the referee show that Partridge had an equitable interest in the land. Sheets commenced the work June 9, 1890, and continued the work of furnishing material for completing the house up to July 19, 1890, and then ceased to do any more work or furnish any more material, without the fault of Partridge. The plaintiff, from time to time, from June 9 to July 12, 1890, furnished Sheets with building material with which to construct the house, for which Sheets agreed to pay plaintiff the sum of \$934, but actually paid only the sum of \$408.21, leaving unpaid to plaintiff \$525.79, which sum was still due plaintiff at the time he filed and served his lien, July 29, 1890. Partridge had paid Sheets, according to the contract, as the building progressed, the sum of \$1,496.75, before July 29, 1890, and before the filing and serving the notice of mechanic's lien on Partridge. On July 29th there was unexpended upon the house, under the contract, the sum of \$706.25, and Sheets still owed plaintiff for lumber \$525.79. Partridge then completed the house, necessarily expending thereon \$722.79, or about \$16.50 in excess of the contract price. The court, on motion, set aside the conclusions of law by the referee, and entered a decree that plaintiff had a lien against the property for the sum of \$646.52, due and owing plaintiff from Sheets, and ordered sale of the property to satisfy the decree. This decree and judgment are appealed from, and error is assigned in the refusal of the court to affirm the report of the referee, and in setting aside the conclusion of law found by the referee, and in granting the decree, under the facts found. We deem it unnecessary to discuss any of the assignments of error except the last. The questions presented are whether or not Partridge was the owner or had such an interest in the property as would authorize a mechanic's lien to attach to it; and, second, when, if at all, such lien should attach, so as to affect the rights of the owner who had made full payment to the contractor before the lien was filed.

Under section 1, p. 24, Sess. Laws 1890, "whoever shall do work or furnish materials by contract, express or implied, with the owner of any land, to any amount, for the construction, * * * of any building * * * shall have a lien thereon * * * for the amount and value of the work so done, or material so furnished to the extent of the interest or claims of such owner thereto at the time of the commencement to do such work or to furnish such materials. Said lien shall likewise attach to another or greater interest in any of such property acquired by such owner at any time subsequent to such commencement to do work or to furnish materials and before the establishment of said lien by process of law, * * any person having an assignable, transferable or conveyable interest or claim in or to any land, building, structure or other property mentioned in this act, shall be deemed an owner." Under the findings of fact, Mr. Partridge had an equitable interest in the premises. He had contracted with Sheets to build the house for him. Mrs. Shearman had furnished him \$2,200 with which to build the house on this land, and when Partridge had paid for the land he was, by contract, to receive the legal title to it. He was in possession when the contract was made, and had the supervision of the building. Such being the case, he must be held to have had an assignable, transferable, or conveyable interest and claim to the land and premises, sufficient to be the owner, within the meaning of the statute. Such lien under the statute may also be extended to any other or greater interest which such owner may acquire to such property



thereafter, and before the lien is established by process of law. Morrison v. Carey-Lombard Co., 9 Utah, 70, 38 Pac. 238; Sess. Laws 1890, p. 25, § 2. Under Sess. Laws 1890, p. 29, § 19, "all such liens shall relate back to the time of the commencement to do work or to furnish materials, and shall have priority over any and every lien or incumbrance subsequently intervening, or which may have been created prior thereto, but which was not then recorded, and of which the lienor under this act had no notice." It will be seen that, under the findings of fact, Sheets performed the labor and furnished the material between the 9th of June and the 19th of July, 1890, and that the plaintiff commenced furnishing material for the building June 9th, and continued to furnish such material until July 12, 1890. The plaintiff's lien was filed July 29th, or within 17 days from the date of the last material furnished. This brings the act of filing the lien within the 40 days limited by sections 10 and 11, p. 26, Sess. Under these statutes, from the Laws 1890. day the subcontractor or material man commences to furnish material, it is notice to the owner, and to all other persons thereafter contracting with the owner, that the property is burdened with a lien, and no previous notice is required to be given the owner than the fact of the delivery of the material for the construction of the building. Such lien relates back to the time of the furnishing materials, and under section 2, referred to, the subcontractor has a lien upon any and all such property in like manner as said principal contractor under section 1 of the act. Sections 1 and 2 refer to those persons who shall do work, while section 12 refers to that class of persons who shall intend to do work or intend to furnish materials at some future day. If one enters into a contract with another of a higher degree, to do work or furnish materials at some future day, he may, under section 12 of this statute, file this statement; and from the time he files it "he shall have a lien for such work thereafter done by him, or for such materials thereafter furnished by him not exceeding the sum stated or the probable value thereof," and such sum shall in no case "be a lien upon the property to any greater extent than the indebtedness of said owner to the contractor." Section 16. The effect of these provisions is to protect him against, and to give him priority over, any other subcontractors who might commence to do work or to furnish materials between the date of his contract and the date of his entering upon the performance of it; and no lien can attach in favor of any such claimant until he files this statement, or begins to work or to furnish materials. Any other construction of these provisions of the statute would render sections 1 and 2 repugnant to section 12, and give no effect to the former, as applied to subcontractors, which would be contrary to the proper rule of construction,-that when an act is susceptible of two constructions, and one gives effect to all its provisions and the other does not, the one giving effect to all should be adopted. These questions were carefully and ably considered by Mr. Justice Bartch in the case of Morrison v. Carey-Lombard Co., 9 Utah, 70, 83 Pac. 238, and were referred to in Teahen v. Nelson, 6 Utah, 363, 23 Pac. 764, to which reference may be had.

We are of the opinion that the lien of the plaintiff attached at the time the first materials were furnished the contractor; that Partridge, the owner, was bound to take notice of such lien, and any payments made by him to the contractor after such lien attached must be held to have been made at his risk and peril. Upon the whole case, we find no error. The judgment of the district court is affirmed, with costs.

MERRITT, C. J., and SMITH, J., concur.

(10 Utah, 334)

NEPONSET LAND & LIVE-STOCK CO. v. DIXON et al.

(Supreme Court of Utah. July 27, 1894.)

FAILURE TO RECORD DEED-NOTICE.

The failure of a grantee who is in possession of the land to record his deed does not render it void as to subsequent purchasers, as possession is notice to all the world of the holder's rights.

Appeal from district court, fourth district; before Justice James A. Miner.

Ejectment by the Neponset Land & Live-Stock Company against Julia I. Dixon and George Eastman, her guardian. There was a judgment for defendants, and plaintiff appeals. Affirmed.

W. L. Maginnis, for appellant. A. G. Horn, Evans & Rogers, and Kimball & Gilbert, for respondents.

BARTCH, J. This is an action in ejectment brought by the plaintiff against the defendants, Julia I. Dixon, who is an insane person, and George Eastman, Sr., her guardian, to recover possession of a certain strip of land, being a part of section 24, township 8 N., range 6 E. It is 40 chains long by 6 chains and 10 links wide, and it, together with other land in the same section, was formerly owned by Albert H. Dixon, who was the patentee. Albert H. Dixon was at one time the husband of Julia I. Dixon, but at the time the transactions over which this controversy arose took place he was divorced from her. In the suit for divorce, it appears the court ordered him to convey to the defendant Julia I. Dixon a piece of land in section 24, the north line of which should be 94 rods north of the south line of the section, and on the 8th of June, 1891, he conveyed to her, by warranty deed, a piece of land, the north line of which was 99 rods north of the south line of section

¹ Rehearing denied.

24, and this included the strip of land in question. The defendants took immediate possession, and were so in possession on the 16th day of September, when the same grantor conveyed by deed, with other land, this same strip of land in controversy, to the plaintiff, and this last deed was placed of record before the deed of the defendant Julia I. Dixon. On the trial the jury returned a verdict in favor of the defendants, and the court entered judgment accordingly; and, upon motion for a new trial having been denied, the plaintiff appealed. There was a vast amount of evidence introduced in relation to the several government surveys, but, as both parties derive their title through a common source, and as the land in question is admittedly included and described in each conveyance, we think the questions arising under the several surveys are not material to the decision of this case.

The question which is decisive of the rights of the parties is whether the unrecorded deed of the defendant Julia I. Dixon is void as to the plaintiff company, under the facts and circumstances relating to the several conveyances. Counsel for appellant contends that the failure to record the prior deed produced such a result, as to the subsequent purchaser; and such contention must prevail, unless the appellant, at the time of its purchase, had actual notice of the prior conveyance of the land in question to the defendant Julia I. Dixon. It does not appear from the evidence that the plaintiff ever was in possession of the land in dispute, but it does appear therefrom that the defendants went into possession, harvested crops from a portion of the land, and were so in possession at the time of the purchase of it by the plaintiff. Under our laws, a conveyance of real estate, to operate as notice to third parties, must be recorded in the office of the recorder of the county wherein the land is situate; but, as between the parties thereto, such conveyance is binding without such record, and so, likewise, it operates as to all parties who have had actual notice. Comp. Laws 1888, \$ 2611. When the plaintiff was negotiating for the purchase of the land in question, the defendants were the actual occupants thereof, and this was notice to the plaintiff of the existence of prior rights against the property. and was sufficient to comply with the demands of the law, because such occupancy was sufficient to put a reasonably prudent man upon inquiry, and such inquiry would have led to actual knowledge of the rights under which the defendants held possession, and of the state of the title. Such occupancy therefore amounted to actual notice to all the world. This court, on a former occasion, in reference to the same question, through Mr. Justice Blackburn, said: "We think, therefore, that a person, at his peril, deals with or purchases real estate of one, in the possession of another, although said

possession may be consistent with the record title. It is easy to find out the real situation by inquiry of the party in possession, and it is his duty to do so." Toland v. Corey, 6 Utah, 392, 24 Pac. 190; Pom. Eq. Jur. 5 597. It also appears from the evidence that the grantor informed an officer of the plaintiff, at the time of the delivery of the deed, that he had conveyed the land in question to his wife; and, while there seems to be conflict in the evidence on this point, yet, the jury having passed upon it, this court, under the circumstances apparent from the record, will not inquire as to what influence it may have had upon the jury in arriving at their verdict.

Numerous errors have been assigned upon the rulings of the court in regard to the admissibility of evidence, and upon its charge to the jury; and, while they have not escaped our notice, yet, upon due consideration, we are of the opinion that none of them are of sufficient materiality to the decision of this case to require separate discussion. There appears to be no reversible error in the record. The judgment is affirmed.

MERRITT, C. J., and SMITH, J., concur.

(10 Utah, 338)

MEXICAN INTERNATIONAL BANKING CO. v. LICHTENSTEIN.

(Supreme Court of Utah. July 27, 1894.)
CONTRACTS—SALE OF LOTTERY TICKETS—PARI
DELICTO.

A principal cannot recover money received by its alleged agent from the sale of lottery tickets delivered to the latter by the former under an agreement that he shall account for the proceeds.

Appeal from district court, third district; before Justice S. A. Merritt.

Action by the Mexican International Banking Company against Henry Lichtenstein. There was a verdict for defendant, and, from an order granting plaintiff a new trial, defendant appeals. Reversed.

Frank Pierce, for appellant. S. H. Lewis and C. Ira Krebs, for respondent.

SMITH, J. The plaintiff is a corporation engaged in the lottery business under the name of the Juarez Lottery, with headquarters in Mexico. It delivered lottery tickets to defendant in San Francisco, to be sold. The defendant accounted to it for something over \$25,000 of the proceeds of the sales of such lottery tickets, and paid over that amount, but retained and failed to pay over \$1,682.75. The plaintiff sues to recover this balance for money had and received to plaintiff's use. The defendant, in his answer. claims the tickets were valueless, and that he is not liable. The case was tried by a jury, and after hearing plaintiff's evidence the court instructed the jury to bring in a

¹ Rehearing denied,



verdict for the defendant. Motion for a new trial was made by plaintiff, and granted. From the order granting a new trial the defendant prosecutes this appeal.

The evidence of plaintiff proved that it furnished lottery tickets to the defendant, and that the defendant sold them for the plaintiff, and collected \$1,682.75 which he refused to pay over to the plaintiff. The only question raised by the appeal is, can the plaintiff recover of the defendant the money collected by him from the sale of the lottery tickets which he received from plaintiff, and sold for it? The transaction took place in San Francisco. The laws of California were introduced in evidence, and, among other things, provide (Pen. Code, § 321): person who sells, gives, or in any manner whatever furnishes or transfers to or for any other person any ticket, chance, share or interest, or any paper, certificate or instrument purporting or understood to be or to represent any ticket, chance, share or interest in or depending upon the event of any lottery, is guilty of a misdemeanor." It is not denied that the plaintiff and defendant together set about to deliberately violate this statute, and deliberately intended and contrived together to commit, and did commit, the crime inhibited by it. The contention on the part of the respondent is that, the defendant being an agent of plaintiff, and having received these lottery tickets as its agent, and having sold them, he cannot question the right of his principal to an accounting by reason of any defect in their title, or for the reason that in fact no value was parted with when the tickets were sold. The proposition, as stated by respondent in his brief, is as follows: "An agent who has received money from or in behalf of his principal cannot defeat an action brought by the principal to recover it upon the ground that the contract under which the money was paid, or the transaction from which it was realized, or the purpose to which it was devoted, was illegal." Many authorities are cited which sustain this proposition. Planters' Bank of Tennessee v. Union Bank of Louisiana, 16 Wall. 483; McBlair v. Gibbes, 17 How. 232; Brooks v. Martin, 2 Wall. 70: Mechem, Ag. § 526; Story, Ag. p. 620; Armstrong v. Bank, 133 U. S. 433-470, 10 Sup. Ct. 450. Many other cases are cited, and may be found, which, in a general way, sustain the proposition contended for by the respondent. The real vice of the contention on the part of the respondent-and, it would appear, the real error committed by the trial court in granting the new trial-was in holding that the defendant was an agent of the plaintiff at all. Both these parties, plaintiff and defendant, were engaged in the commission of crime, each actively participating Under our statute, both are principals in that act. No contract between themselves could change their relations, so far as the law is concerned. Each was ac-

tively aiding and assisting in the commission of a crime, and now, having committed the crime, and procured the fruits of the criminal enterprise, they come into the civil courts, and ask the agency of the law in a division and application of the proceeds of their criminal adventure. The question is, can this be permitted? It is not simply a case where the plaintiff, in good conscience, ought not to insist upon the bargain made through an agent with a third person, nor is it a transaction voidable on account of its being against public policy, but the transaction is criminal in itself,-criminal in California, where it was effectuated, and criminal in Utah, where the civil courts are asked to divide the proceeds of the crime. This, it seems to us, is the distinction between the cases cited by the respondent and cases which hold to the doctrine that the civil court, where it finds both parties in equal fault, leaves them in the same condition in which it finds them. Two cases are cited by appellant which appear to be directly in point in this case: Lanahan v. Pattison, 1 Flip. 410, Fed. Cas. No. 8,036, and Udall v. Metcalf, 5 N. H. 396. Both these cases appear to be exactly alike. The one at bar, and the matter in controversy in each, was money received by a so-called agent for the purchase price of lottery tickets. It was held that the plaintiff, the lottery company, in neither case could recover. The employment of an agent to sell tickets in a lottery is void. See Mechem, Ag. § 38. Therefore, the relation never in fact exists. As we have already stated, both parties are principals. They are both in equal fault, and it would appear to be a monstrous doctrine if participants in crime may invoke the power of the civil courts to determine which of them is entitled to a particular share of the spoils resulting from their criminal adventure. If they may do this in a lottery case, there certainly can be no reason why it may not be done in a case where one steals, and the other receives and sells the stolen goods, there being an agreement to that effect in advance. If an action were filed for an accounting by the thief against the person with whom he had an agreement to receive and sell stolen goods, and who in fact so received and sold them, it is hardly possible that any civil court would hesitate to dismiss such action upon the bare presentation of it. In fact, such cases have arisen, and the solicitors have been punished for contempt for bringing such matters to the attention of the civil courts, and the parties hanged. See Everet v. Williams, 2 Poth. Obl. (by Evans) 3; Spalding v. Preston, 21 Vt. 9. We fail to see any reason why this case does not belong to exactly the same class. This money no more belongs to the plaintiff or defendant than if it had been stolen by one or the other of them, or both. They have simply obtained it by means of a criminal enterprise, and the degree of crime in no wise changes the relation of the parties to each other. In Sykes v. Beadon, 11 Ch. Div. 195, Lord Eldon said he would not sit to take an account between two robbers on Haunslow heath. No more will we sit to take an account between two thieves from San Francisco, and that is what we are asked to do here. We are clearly of the opinion that it is a matter which ought never to have been brought to the attention of any civil court. The order of the court below granting a new trial is reversed, and the cause remanded to the court below to dismiss the action.

MINER and BARTCH, JJ., concur in the result reached.

BARTON et al. v. SOUTH JORDAN CO-OP-ERATIVE MERCANTILE & MANUF'G INST.¹

(Supreme Court of Utah. July 27, 1894.)
ATTACHMENTS—PRIORITY OF LIEN—MISNOMER.

ATTACHMENTS—PRIORITY OF LIEX—MISNOMER.

Z., in an action against the S. J. C. Mercantile Institution, levied an attachment. B., subsequent to such levy, attached the same property in an action against the same defendant, but, on discovering that its proper name was the S. J. C. Mercantile & Manufacturing Institution, amended his complaint, and levied an alias attachment. Afterwards, Z. (who had recovered judgment), with leave of the defendant, amended his complaint. There was no corporation of the first name. Held, that Z.'s attachment lien was prior.

Appeal from district court, third district; before Justice S. A. Merritt.

Attachment by Barton Bros. against the South Jordan Co-operative Mercantile & Manufacturing Institution. From a judgment adjudging plaintiffs' attachment subsequent to that of another attaching creditor, plaintiffs appeal. Affirmed.

Jones & Schroeder, for appellants. Richards & Richards, for respondent.

BARTCH, J. This is a case in which one attachment creditor of the defendant corporation claims a lien on the property superior to that of another such creditor. It appears from the record that on January 8, 1894, the Zion's Co-operative Institution brought an action against the South Jordan Co-operative Mercantile Institution to recover the sum of \$1,893.19, and levied, through the United States marshal, a writ of attachment upon a stock of merchandise in the defendant's possession. On January 11, 1894, judgment was entered in favor of the plaintiff and against the defendant. On January 12, 1894, the appellants commenced an action against the same defendant to recover \$570.70, and by the same officer attached the same merchandise. After judgment had been rendered for the plaintiff in the first action, and suit had been brought by the appellants, it was dis-

covered that a mistake in the name of the defendant had been made in both actions, by omitting the words "& Manufacturing" after the word "Mercantile," and before the word "Institution." On January 15, 1894, the appellants filed an amended complaint, so as to correct the error caused by the omission, and on the next day levied an alias writ of attachment on the same goods by the same officer. On January 17, 1894, the plaintiff in the first action, by consent and agreement in open court of all parties to that action, and by order of court, amended its complaint by inserting the omitted words, and amended the record so as to state the true name of the defendant; and on the same day the United States marshal readvertised the goods levied upon for sale under execution in the first action, and it appears, as a result of the sale under that execution, he had in his possession \$800. On January 27, 1894, the appellants obtained judgment for their claim, and on the 29th execution was issued therefor to the same officer. On February 15, 1894, the appellants moved the court for an order directing the officer to apply a sufficient amount of the money in his hands on the execution in favor of the appellants to satisfy their judgment. This motion was denied, and an appeal prosecuted to this court.

The only material question raised is whether the appellants, under the facts and circumstances apparent from the record, have a paramount lien on the funds in the hands of the officer. It is contended by counsel for appellants that there was an attempt to substitute a new defendant after judgment, and that neither at the time of the amendment. nor at the hearing of appellants' motion to apply the money in satisfaction of their judgment, was there any evidence introduced to show the identity of the South Jordan Cooperative Mercantile Institution and the South Jordan Co-operative Mercantile & Manufacturing Institution. If there was any doubt on the point of identity, such doubt would seem to have been removed by the affidavit of one of the counsel for the appellants, as shown by the record, a portion of which reads as follows: "Affiant furthe. states that there is no such corporation as South Jordan Co-operative Mercantile Institution, but that the true name of the corporation whose property was attached herein was and is South Jordan Co-operative Mercantile & Manufacturing Institution." plain and to the point, and agrees perfectly with the amendment. With such an affidavit in the record, how can counsel question the identity of the defendant? If the amendment worked no change of defendant, how could it alter the status of the several parties to the proceedings? It could produce no hardship on the appellants, for it left them in the same position in which they were before it was made,-junior lienors. Nor does it appear that they were misled by

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¹ Rehearing denied.

it, for they were acquainted with all the facts in relation thereto. Nor was there any claim of fraud or collusion between the plaintiff and defendant in the first action. The omission was simply a mistake which both attachment creditors innocently made. It was technical, merely, and attended with no serious consequences. The defendant was present in open court, and consented to the amendment. It thereby waived its right to object to the action of the court, and a subsequent attaching creditor can take no advantage because of such waiver, unless it causes substantial injustice to such creditor. It was within the sound discretion of the court. under all the circumstances, and in furtherance of justice, to allow the amendment to be made, and to order the record to be amended nunc pro tunc. A district court has the power to amend its records, even after the term; and the court below having exercised its discretion, upon its own view of the facts, this court will not interfere. An amendment to a complaint, as in the case at bar, which causes no increase in the amount to be recovered, and introduces no new cause of action, will not dissolve an attachment. 2 Comp. Laws Utah 1888, § 3256; Drake, Attachm. §§ 273, 287; Ang. & A. Corp. p. 77, § 4; Slicer v. Bank, 16 How, 576; Jones v. Lewis, 47 Am. Dec. 338; Barber v. Briscoe. 9 Mont. 341, 23 Pac. 726; Cartwright v. Chabert, 49 Am. Dec. 742; Frink v. Frink, 80 Am. Dec. 189; Rudolf v. McDonald, 6 Neb. 163; King v. Burnham, 129 Mass. 598; In re Schroeder's Estate, 46 Cal. 305. It is the duty of the court, in every stage of an action, to disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties. 2 Comp. Laws Utah 1888, § 3258.

We are of the opinion that the amendment in this case was not fatal to the lien of the first attachment creditor, that his lien is paramount to that of the appellants, and that the court did not err in its ruling. The judgment is affirmed.

MINER and SMITH, JJ., concur.

CITY OF SPRINGVILLE v. JOHNSON.

(Supreme Court of Utah. July 27, 1894.)

TAXATION — LANDS OWNED BY MUNICIPAL CORPOBATIONS EXEMPT.

Lands owned by a city are not taxable, being exempt under 1 Comp. Laws, § 2009.

Appeal from district court, first district; before Justice H. W. Smith.

Action by the city of Springville against Don C. Johnson. There was a judgment for plaintiff, from which defendant appealed. Affirmed.

A. D. Gash and Williams, Van Cott & Sutherland, for appellant. Sutherland & Howat, for respondent.

v.37P.no.10-37

MERRITT, C. J. This action was brought by plaintiff to quiet title. The plaintiff is a municipal corporation organized under a special charter (1 Comp. Laws, p. 474). For many years prior to 1892, it was the owner of about 900 acres of land, situate within its corporate limits, which was not used for any corporate purpose, but was rented for pasturage of cattle, from which the city derived revenue. Taxes for county and territorial purposes were assessed against this land in 1892, and upon failure of the city to pay such taxes the lands were sold to defendant. A bill was filed by plaintiff in the court below for a decree that the land was exempt from taxation, and that the tax sale thereof was void; that plaintiff be quieted and confirmed in its title and ownership of the land. On the trial of the case the court found (1) that the facts stated in the complaint were true: (2) that the real property described in the complaint, in 1892, was situated within the limits of Springville, a municipal corporation having a charter as a city, and the same was then owned, and had been for many years, by the said city, and used for profit by the said city, by renting the said lands for pasturage. As conclusions of law, the court below held that the plaintiff was the owner in fee of the land, that it was not liable to taxation, and the proceedings to tax the same were illegal and void; and a decree was entered annulling the sale of said premises, and quieting and confirming title of plaintiff.

The only question in the case is whether the real estate owned by the plaintiff, and described in the complaint, was liable to taxation for county, school, and territorial purposes in 1892. By legal implication and by express statute, it was so exempt. By a general provision the revenue law professes to make all property within the territory taxable. Even in the absence of any express exemptions, it is settled by the authorities that the property of a municipal corporation could not be subject to taxation under such general provision. It is a principle of interpretation of statutes that they do not apply to the sovereign, unless named. The state is sovereign, and all public corporations partake of sovereignty, and the rules exempting sovereigns apply to such corporations. End. Interp. St. §§ 161, 163. In Van Brocklin v. State of Tennessee, 117 U.S. 151, 173, 6 Sup. Ct. 670, the court uses this language: "General tax acts of a state are never, without the clearest words, held to include its own property or that of its municipal corporations, although not in terms exempt from taxation." In the case of U.S. v. Railroad Co., 17 Wall. 322, the supreme court of the United States say: "A municipal corporation, like the city of Baltimore, is a representative, not only of the state, but is a portion of its governmental power. * * * As a portion of the state in the exercise of a limited portion of the powers of the state, its revenues, like those of the state, are not subject to taxa-

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tion." Low v. Lewis, 46 Cal. 550; People v. Doe, 36 Cal. 220; Cooley, Tax'n, 172; Directors of Poor v. School Directors, 42 Pa. St. 21. The statute of the territory contains an express exemption. 1 Comp. Laws, p. 720, § 2009, subsec. 2, provides that: property situate in this territory is taxable, except * * * (3) Property owned by this territory, or any county, city or school district." By section 2 of the charter of Springville, general powers are given as follows: "The inhabitants of said city, by the name and style aforesaid, shall have power * * * to purchase, receive and hold property, real and personal, in said city; to purchase, receive and hold real estate beyond the city for burying grounds or other public purposes for the inhabitants of said city; to sell, lease, convey and dispose of property, real and personal, for the benefit of said city; to improve and protect said property, and do all other acts in relation thereto as a natural person." 1 Comp. Laws, p. 474, § 2. Power is here given to buy, sell, and hold property in the city, without restriction. The next specification of power is equally as expressive: "The city may improve its real property and hold it to derive revenue by leasing or selling, and by the standard of the rights of natural persons." Appellant's counsel have devoted the greater part of their brief in citing authorities on the construction of statutes. We do not deem it necessary to devote attention to them, for, while they are doubtless good law when applied to statutes whose language is ambiguous, in this case the exemption from taxation of the property of cities is so clear and expressive that there would seem to be no room for any doubt, or necessity of resorting to any rule of construction. The exemption is absolute, and depends upon no condition but ownership by the city. Railroad Co. v. Dennis, 116 U. S. 665, 6 Sup. Ct. 625. The judgment is affirmed.

MINER and BARTCH, JJ., concur.

PEOPLE ex rel. MURPHY, County Attorney, v. McALLISTER.

(Supreme Court of Utah. July 27, 1894.)

MUNICIPAL CORPORATIONS—APPOINTMENT AND REMOVAL OF OFFICERS — POWERS OF MAYOR AND COUNCIL.

1. Under Sess. Laws 1892, p. 17, c. 18, § 3, authorizing the mayor of Salt Lake City to appoint all officers theretofore appointed by the council the mayor has no power of removal.

council, the mayor has no power of removal.

2. Under the charter of Salt Lake City (Comp. Laws 1888, § 313), providing that persons appointed to office may be removed by a two-thirds vote of the council, for cause, and after hearing, and that all officers appointed by the council may be removed at any time by two-thirds vote, an appointive officer can only be removed by the council for cause, and after hearing.

Appeal from district court, third district; before Justice S. A. Merritt.

Quo warranto, at the relation of the county

attorney, on the complaint of Alma S. Kendall against James G. McAllister. There was a judgment for defendant, from which plaintiff appealed. Reversed.

N. W. Sonnedecker and Frank Pierce, for appellant. E. D. Hoge, for respondent.

BARTCH, J. This is an action in the nature of quo warranto, brought under chapter 5, 2 Comp. Laws Utah 1888, p. 337, to test the right of the respondent to hold the office of inspector of provisions for Salt Lake City, and to discharge the duties and receive the emoluments thereof. The defendant demured to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. After arguments of counsel the demurrer was sustained, and, the plaintiff electing to stand by his complaint, judgment was entered in favor of the defendant. From this judgment the plaintiff appealed, assigning as error the sustaining of the demurrer and the entering of judgment for the defendant. Among other facts stated in the complaint, it appears that on the 18th day of November, 1892, the appellant, Alma S. Kendall, was appointed to the office of inspector of provisions in and for Salt Lake City. Pursuant to his appointment he qualified, was duly commissioned, and then entered upon the discharge of the duties of his office, and ever since has held the same and performed the duties thereof. It further appears that on the 24th day of November, 1893, while the appellant was performing the duties of such inspector, Hon. R. N. Baskin, as mayor of Salt Lake City, submitted to the city council a writing which reads as follows: "From the Mayor. Gentlemen: I hereby appoint Mr. A. C. Young to the office of inspector of provisions for the city, in place of A. S. Kendall, who is hereby removed, and submit the appointment to you for confirmation. Respectfully, R. N. Baskin, Mayor." The council refusing to confirm the appointment of Young, the mayor, on the 2d day of January, 1894, in a similar way, and without specifying any cause for the removal of Kendall, submitted the appointment of James G. Mc Allister "to fill the vacancy caused by the removal of A. S. Kendall." It appears that this appointment was referred to the committee on sanitary rules and quarantine, and it afterwards reported that they had carefully investigated the matter, and recommended that the appointment of McAllister be confirmed by the council. Thereupon, the council, on the 16th day of January, 1894, adopted the following resolution: "Resolved, that the office of inspector of provisions be and the same is hereby declared vacant, and that Mr. Kendall be and he is removed." The council then confirmed the appointment of McAilister. Thereupon, Kendall presented his bill for services, and was refused payment thereof, and his services were no longer recognized by the council. Such are the facts set out in the complaint, so far as they appear necessary to the decision of this case. Both parties to this action have argued the case on its merits, without raising any objection to the form of the pleadings, and it will therefore be considered on the questions presented in the briefs of counsel.

The first question presented is whether the mayor of Salt Lake City has the power to remove an appointive officer. The statute law for appointment and removal of city officers in Salt Lake City, so far as material and applicable to this question, is as follows: "There shall be appointed * * * inspectors * * * and such other officers and agents as the city council may from time to time direct and appoint." Comp. Laws Utah 1888, p. 339, § 312. Section 313 provides: "Every person elected or appointed to any office under the provisions of this act, may be removed from such office by a vote of two-thirds of the city council; and no officer shall be removed except for cause, nor unless furnished with the charges; and the council shall have power to compel the attendance of witnesses and the production of papers when necessary for the purpose of such trial, and shall proceed, within ten days, to hear and determine upon the merits of the case; and if such officer shall neglect to appear and answer such charges, then the council may declare the office vacant. All officers appointed by the council may be removed at any time by vote, at discretion of two-thirds of said council, and any officer may be suspended until the disposition of charges preferred against him." Section 314 provides, "Whenever any vacancy shall happen by the death, resignation or removal of any officer, such vacancy may be filled by the city council," and then provides how certain officers shall qualify before entering upon the discharge of their duties. Section 353 provides that the council shall have power "to regulate the inspection of tobacco, also of flour, meal, pork, beef, and other provisions, and salt to be sold in barrels, hogsheads or other vessels," and section 356 empowers the council to appoint inspectors, and regulate their duties, and prescribe their fees. Section 400 reads as follows: "The mayor of Salt Lake City shall have power to appoint, by and with the advice and consent of the city council, the regular police of said city, to the number which may from time to time be prescribed by the city council, and remove the same at pleasure," etc. These several sections are found in the charter of Salt Lake City, and at the time of the passage of the general act providing for the incorporation of cities, approved March 8, 1888, they comprised the law relating to the appointment and removal of city officers. Sections 312 and 356, above quoted, confer upon the city council the power to appoint certain city officers, including an inspector of provisions; and this power seems to exist under either section, but more specifically under the latter, so far as inspector of pro-

visions is concerned, for that section refers to, and must be read in connection with, section 353, which confers the power to regulate the inspection of provisions upon the council. Section 313 vests the power of removal in the city council, and provides how a removal may be effected; and section 314 empowers the council to fill any vacancy caused by the death, resignation, or removal of any officer. Under the sections thus far considered, there is vested in the mayor absolutely no power either of appointment or of removal. Nor does a careful examination of the laws relating to this subject reveal any such power vested in the mayor from January 18, 1851, when the first charter was granted to Salt Lake City, to March 13, 1884, when, for the first time in the history of this legislation, there was vested in the mayor power to appoint, with the concurrence of the council, the regular police of the city, and "to remove the same at pleasure," as is provided in section 400, above quoted. As to all other officers, except the police, the power of the council remained undisturbed. While, subsequent to the passage of the act of 1884, there were various amendments made to the charter, yet it will be observed, upon examination of the amendments, that there was no further material change made in the power of appointment and removal of officers until the passage of the act approved February 27, 1892. It is evident from the history of legislation upon the subject under consideration that, until the passage of the act of 1892. it was always the intention and policy of the legislature to vest the appointment and removal of officers in Salt Lake City in the city council. The only departure appears to be the act of 1884, and this is limited to police. The law of 1892, in some respects, made material changes in the powers previously conferred upon the mayor and council, for the mayor was no longer constituted a member and chairman, but was clothed with the veto power, and the council was empowered to select its president from among its own members. It seems the intention was to abrogate the close relation which had hitherto existed between the council and the mayor. The act further provides in section 3, c. 18 (found in Sess. Laws 1892, p. 17), as follows: "That hereafter the mayor shall appoint, by and with the advice and consent of the council, all officers who are now made appointive by the said council." This section clearly abridges the power of the council, by vesting in the mayor the right to appoint, with the concurrence of the council, all officers whose appointment was hitherto within the power of the council. This includes the inspector of provisions.

It is insisted by counsel for respondent, that the power of appointment thus conferred upon the mayor necessarily carries with it, as incidental thereto, the power to remove, and that it is a continuing power, which may be exercised at the pleasure of the mayor.

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The legislative authority is not questioned in this case, and assuming, therefore, that this is a rightful subject of legislation, which it clearly is, then it is within the province of the legislature to place the power of appointment in one person, or in a body of persons, and so likewise as to the power of removal. The legislature, in section 313, above quoted, has expressly authorized the council to remove all appointive officers; and this authority still continues in the council, unless it was repealed by the act of 1892. This act does not in express terms repeal any of the provisions of section 313. It simply repeals such laws as are inconsistent with its provisions, and it is difficult to see wherein any provision of section 313 is inconsistent with the law of 1892. Nor is any provision of the former law repugnant to the latter. When the two laws are read together, their meaning appears perfectly clear, and they present no ambiguity. Upon what principle of construction, then, does the later law repeal the former? There is nothing in its provisions to indicate that such was the intention of the legislature, and, if it had intended such a result, it would have been easy to effect it by express enactment or plain inference. can such legislative intent be gathered from the history of legislation upon this subject, because the power of removal was uniformly vested in the council, except in the single instance of the police, by the act of 1884. Both statutes must be construed together and given effect, if possible, for a repeal by implication is not favored in law. Even where some of the provisions of a former statute are inconsistent with or repugnant to a later one, the repeal by implication will operate only to the extent of such inconsistency or repugnancy. When, as in the case at bar, there is a difference in the purview of two statutes, though relating to the same subject, the former is not repealed by the latter, in the absence of a repealing clause; and the legislature, when enacting the later law, is presumed to have knowledge of all former laws relating to the same subject. The doctrine of repeal by implication proceeds on the ground that it was the intention of the legislature, and such intention must be manifest before the repeal can become effectual. Suth. St. Const. §§ 138, 160; U. S. v. Claflin, 97 U. S. 546; Hudson Furniture Co. v. Freed Furniture & Carpet Co. (Utah) 36 Pac. 132. Nor can the position of counsel for respondent be sustained upon any principle of natural justice, for under such a power vested in the mayor the proceeding in case of removal would be ex parte, as well as summary,without notice or opportunity to be heard,and yet it is contrary to common justice that a party should be condemned unheard. can it be sustained on consideration of the highest interest of the municipality, for it would be placing an unlimited power in the hands of one man, which would enable him, at his mere will, partisan zeal, or caprice, to

remove every appointive officer in the city, regardless of the rights and safety of the people. Such a power is despotic in its nature, and can only be conferred by legislative authority, and will not be aided by judicial construction. While, in the case at bar, the power of removal may have been exercised under the apprehension that it was demanded in the interests of the public service, yet we are of the opinion that such power did not exist in the mayor, as incident to his power of appointment, because the power of removal is, by statute, conferred upon the council.

Counsel for respondent seem to rely on the case of Ex parte Hennen, 13 Pet. 256, as sustaining their position. In that case the petitioner was appointed clerk of the district court of the United States for the eastern district of Louisiana by the judge of the court, and had served a number of years as such clerk, with satisfaction to the court, when he was removed by the successor of the judge who had appointed him, and another party appointed in his place. Under a certain provision of the constitution of the United States, congress conferred the power to appoint the clerks of those courts upon the judges thereof, but was silent as to the power of removal and tenure of office, and the constitution likewise is silent as to the power of removal and tenure of office of clerks. After hearing the case on an application for a rule to show cause why a mandamus should not issue against the judge to show cause why he should not restore the petitioner to the office, the court was of the opinion that the power to appoint a clerk was vested exclusively in the district court, and the office was held at the discretion of the court, and denied the rule prayed for. Mr. Justice Thompson, delivering the opinion of the court, said: "It cannot for a moment be admitted that it was the intention of the constitution that those offices which are denominated 'inferior offices' should be held during life: and, if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appoint-The court clearly recognizes "statutory regulations," and the plain inference is that in a case where the power of removal is fixed by law the doctrine of removal, as incident to the power of appointment, does not The other cases cited by counsel for respondent are to the same effect.

The remaining question to be considered is whether the city council can remove appointive officers at its mere discretion, without preferring charges, and affording an opportunity to be heard. The appellant was so removed. To determine this question, it again becomes necessary to refer to the statutes which have a bearing on the subject. The first clause of section 313, above referred

to, provides that, "every person elected or appointed to any office * * * may be removed by a vote of two-thirds of the city council," and that "no officer shall be removed except for cause nor unless furnished with the charges; and shall have an opportunity of being heard in his defense." The latter part of the section provides that "all officers appointed by the council may be removed at any time by vote, at discretion of two-thirds of said council." Counsel for respondent claim that under this last clause the officer in question was effectually removed, and this even though the mayor had no power of removal. It is contended that this clause had the same force and effect as if it were a separate section. The question is, what is the meaning of the word "discretion," as used in the section? It will be noticed that in the first paragraph the word "discretion" is not used after the word "vote," as in the latter, but other words are used to indicate the procedure to effect a removal. In the latter the word "discretion" is employed, without any other words to determine such procedure. To impute to this word its ordinary meaning-that of unrestrained exercise of choice or will-is to create a conflict between the two parts of the same section. In the construction of statutes, to avoid such conflict or repugnance, the meaning of words may be expanded, and likewise the meaning of words may be restricted. The intent of the legislature must prevail, when that can be gathered from the statute, and all parts of the statute must be given effect, if possible. Suth. St. Const. §§ 218, 219. It is evident that the discretion here intended is to be exercised after a hearing for cause, as provided in the first part of the section. The legislature has further provided to the same effect in subdivision 87 of section 1755, Comp. Laws Utah 1888, which empowers the council "to appoint police and watchmen and to define their powers and duties, and to remove all officers of the city for misconduct, and to provide for filling such vacancies as may occur in any elective office, and to create any office that may be deemed necessary for the good government of the city; to regulate and prescribe the powers, duties and compensation of all officers of the city not herein provided for." Under this section the council has the right to remove only for misconduct, and this applies to all officers of the city. This law is a part of the general incorporation act above mentioned, and amends the city charter, which is further amended by section 1764, which reads as follows: "The appointive officers of the city shall hold their respective offices for two years, unless sooner removed by the city council." There are several other provisions of statutes which might be referred to as having some bearing on this case, but they are merely cumulative, and therefore not necessary to this decision. The last section quoted fixes the terms of office of all appointive officers, and when this is considered in connection with the other. sections which confer the power of removal upon the council, and define the manner in which it may be effected, it seems difficult to conceive how an appointive officer can be summarily removed in Salt Lake City, regardless of any defense he may have as against the attack upon his name and fame; and yet the process for removal under the statute is essentially of a judicial character, for the law says no officer shall be removed except for cause or misconduct, nor without charges preferred, and opportunity given for defense. How, then, can the council assume to remove arbitrarily, at mere pleasure or will? It is not sufficient to say that cause exists. If the process of removal is judicial, it seems clear that the officer has a right to be heard in his defense, to face his accusers, and then, when he has had this privilege, and has accepted the opportunity, and been heard, or has refused such hearing, the council may, in the exercise of its discretion, remove him or not, as the evidence may warrant. It is demanded by the first principle of justice that 10 person shall be condemned without an opportunity to be heard, and this principle courts have no right to disregard, unless in obedience to the mandate of positive law. The law makes the council the judge in such cases, and ordinarily its opinion or decision is conclusive, but it cannot dispense with the proceeding prescribed by statute. The mere fact that in the opinion of the council an officer has been guilty of misconduct in office, or that good cause for his removal exists, will not justify the exercise of its discretion in a summary way. The officer must be furnished with specific charges, and then have an opportunity to call witnesses in explanation of his conduct or acts. His tenure of office is fixed by law, and he is entitled to the emoluments thereof. By his appointment he acquires rights of which he cannot be deprived, except by proceeding had in strict compliance with the statute. It is true he has no right of property which could be the subject of conveyance, yet he has a right or title to the office and its emoluments, which courts will recognize as a valuable interest or privilege entitled to protection. The conditions of removal are express, and clearly set forth in the statutes, and cannot be disregarded as immaterial. A removal for cause is a judicial act which affects the reputation and rights of the accused. It is in law a punishment for crime, and the proceeding provided by statute can no more be dispensed with in such a case than a court can disregard the statutory provisions in the trial of a cause where a person is charged with the commission of an offense.

From an examination of the history of judicial proceedings, it will be seen that officers clothed with the power of removal for cause have frequently attempted its exer-

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cise at pleasure, ex parte, and such examination will also show how futile have been their efforts. Mechem, in his treatise on the Law of Public Offices and Officers, in section 454, after referring to the power of removal, where the office is held at the pleasure of the appointing power, says: "But on the other hand, where the appointment or election is made for a definite term, or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause for which the power is to be exercised must first be determined, after notice has been given to the officer of the charges made against him, and he has been given an opportunity to be heard in his defense." In the same treatise, in section 455, the author says: "Proceedings for the removal of an officer for cause are judicial in their nature, and must be had before tribunals clothed with judicial powers. The fit and appropriate tribunal, therefore, in ordinary cases, is the court of law; but the judicial power may be, and often is, expressly conferred upon the governor, mayor, or other officer or board having the power of removal. The proceeding being thus a judicial one, the power must be exercised under the same limitations, precautions, and sanctions as in other judicial proceedings." In Meade v. Deputy Marshal, 1 Brock. 324, Fed. Cas. No. 9,372, which was a case involving the right to remove an officer, Chief Justice Marshall said, "It is a principle of natural justice, which courts are never at liberty to dispense with, unless under mandate of positive law, that no person shall be condemned unheard, or without an opportunity of being heard." Ex parte Ramshay, 18 Adol. & E. (N. S.) 190, was a case where the Earl of Carlisle, chancellor of the duchy of Lancaster, removed a county judge under a statute which made it lawful for the chancellor to remove such an officer, "if he shall think fit, to remove for inability or misbehavior any such judge." Lord Campbell, C. J., delivering the judgment of the court, said: "The chancellor has authority to remove a judge of a county court only on the implied condition, prescribed by the principles of eternal justice, that he hears the party accused. He cannot legally act upon such an occasion without some evidence being adduced to support the charges, and he has no authority to remove for matters unconnected with inability or misbehavior in the office of county court judge." The Queen v. Archbishop of Canterbury, 1 El. & El. 545, was a proceeding by mandamus under a statute which enacted that a curate whose license had been revoked by the bishop might, within one month after service upon him of such revocation, appeal to the archbishop of the province, "who shall confirm or annul such revocation as to him shall ap-

pear just and proper." A curate's license having been revoked, he appealed to the archbishop, who, without giving the appellant an opportunity to be heard, confirmed the revocation. Lord Campbell, referring to the archbishop, said: "He was bound to hear the appellant, and he has not heard him. It is one of the first principles of justice that no man should be condemned without being heard. We do not say whether the archbishop's decision was right or wrong. We say only that he has not heard the petitioner." In Page v. Hardin, 8 B. Mon. 648, the supreme court of Kentucky said: "The secretary being removable for breach of good behavior only, the ascertainment of the breach must precede the removal. In other words, the officer must be convicted of misbehavior in office. And we shall not argue to prove that, in a government of laws, a conviction whereby an individual may be deprived of valuable rights and interests, and may, moreover, be seriously affected in his good fame and standing, implies a charge and trial and judgment, with the opportunity of defense and proof. The law, too, prescribes the duties and tenure of the office, and thus furnishes a rule for the decision of the question involved. Such a proceeding for the ascertainment of fact and law, involving legal right, and resulting in a decision which may terminate the right, is essentially judicial. and has been so considered here and elsewhere." In that case the secretary was an appointive officer, and was removed by the governor without notice and hearing. Dullam v. Willson, 53 Mich. 392, 19 N. W. 112, Justice Champlin, delivering the opinion of the court, said: "There must be charges specifying the particulars in which the officer is subject to removal. It is not sufficient to follow the language of the constitution. The officer is entitled to know the particular acts of neglect of duty, or corrupt conduct, or other act relied upon as constituting malfeasance or misfeasance in office: and he is entitled to a reasonable notice of the time and place when and where an opportunity will be given him for a hearing, and he has a right to produce proof upon such hearing." In Com. v. Slifer, 25 Pa. St. 23. Chief Justice Lewis said: "We are unwilling to believe that the governor intended, without cause, to remove an officer appointed for a term of years, before the term had expired. That he possessed the power of removal is conceded, but the power is to be exercised upon cause shown. It exists only where 'the officer fails and neglects faithfully to perform the duties of the office.' It is true that the executive is made the judge, and that his 'opinion' or judgment is conclusive, so far as relates to the question of removal. But that judgment is not to be pronounced without notice, without any charge or specification, and without any opportunity given to the officer to make his defense." Dill. Mun. Corp. §§ 253, 255; Board v. Johnson, 124 Ind.

145, 24 N. E. 148; State v. Board of Police Com'rs, 88 Mo. 144; Foster v. Kansas, 112 U. S. 201, 5 Sup. Ct. 8, 97; Andrews v. King, 77 Me. 224; Murdock v. Trustees of Phillips Academy, 12 Pick. 243; Reg. v. Owen, 15 Adol. & E. (N. S.) 476.

The law appears to be well settled, by the great weight of authority, that where, as in the case at bar, the power of removal exists only for cause, and its exercise is regulated by statute, an officer who is rightfully in office cannot be removed without an opportunity to be heard in his defense, upon charges preferred. Our conclusion is that the mayor had no power to remove the appellant, and that the city council, having the power, failed to exercise it lawfully. The resolution passed by the council was, in legal contemplation, void, and ineffectual to deprive the appellant of his right to the office. Not being legally removed, he had a right to discharge the duties and receive the emoluments thereof, until lawfully removed. or until the expiration of the term, as provided by statute. It follows that there was no vacancy in the office in question at the time of the appointment of the respondent, and that, therefore, his appointment was void, for the power to appoint only exists where there is a vacancy. Mechem, Pub. Off. § 113. We think the court below erred in sustaining the demurrer. The judgment is reversed, and cause remanded for further proceeding in accordance herewith.

MINER and SMITH, JJ., concur.

DRAKE et al. v. REGGEL et al. (Supreme Court of Utah. July 27, 1894.) PUBLIC LANDS—TOWN SITES—FAILURE TO RECORD —CLAIM.

1. Under Act Feb. 17. 1869, relating to town sites, which requires the claimants of any interest in land to file a statement containing a description of the land and the right claimed, and provides that all persons failing to make such statement shall be barred from claiming any estate therein, in law or equity, the failure of a life tenant, who is also trustee of the remainder-men, to file a statement showing the interest of the cestuis que trustent, bars them from afterwards claiming their interest, though some of them were not born at the time, and the others were minors, and the trustee thereby acquired a fee to the land.

2. The record of a deed in the mortgage record is not constructive notice of the deed to subsequent purchaser.

Appeal from district court, third district; before Justice C. S. Zane.

Action by Harriet Tuttle Drake and others against Rachel Reggel and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

J. G. Sutherland, J. W. Judd, and W. H. Dickson, for appellants. Bennet, Marshall & Bradley, Chas. B. Jack, Richards & Moyle, C. O. Whittemore, S. P. Armstrong, and Williams & Van Cott, for respondents.

MERRITT, C. J. This is an appeal on the judgment roll from a judgment in favor of respondents. It appears from the record that on August 8, 1865, George Cronyn executed to his daughter, Lizzie D. Wilson, a deed of the premises in controversy. This deed, appellants claim, conveyed a life estate to Lizzie D. Wilson, with remainder in fee to such of her heirs as she might appoint. She died without making any appointment, and it is contended that appellants, her heirs, take in equal shares under the Cronyn deed,the general intent of the grantor, that they should take, being capable of enforcement; the particular intent, that Lizzie D. Wilson might appoint among them, having failed.

At the time of the execution of the Cronyn deed the grantor had no other right or title to the land than a simple possession. The land was public land of the United States, and no statute then provided for its sale. The laws of the United States applicable to the disposal of public lands were not extended to Utah territory until July 16, 1868 (15 Stat. 91). The town-site act, under which title was obtained, was enacted March 2, 1867, and the act of the territorial legislature prescribing the necessary regulations thereunder was passed February 17, 1869. act contains numerous provisions regulating the rights of settlers, and the manner in which their rights should be ascertained. The second section enacts that, within 30 days after the entry of the town site by the corporate authorities, they shall give a prescribed public notice thereof. Section 3 prescribes that, within six months after the first publication of such notice, "each and every person, * * * claiming to be the rightful owner of possession, occupant or occupants, or to be entitled to the occupancy or possession of such lands, * * * shall file a statement in writing, with the probate clerk of the county, containing a description of the land claimed and the specific right claimed therein. That the filing of such statement shall be considered notice to all persons claiming any interest in the lands, of the claim of the person filing the same, and that all persons failing to make and deliver such statement within the time limited in this section, shall be forever barred from the right of claiming or recovering such land, or any estate or interest therein, or any part, parcel or share thereof, in any court of law or equity." Section 4 prescribes procedure for a trial in a case of adverse claims; and section 5, for a hearing and determination as to claimants' right, where there are no adverse claimants, and for the execution of the mayor's deed to the person adjudged to be entitled thereto. The mayor entered the town site of Salt Lake City, including the premises in controversy; and on March 26, 1872, Lizzie D. Wilson filed with the clerk of the probate court of Salt Lake county her statement describing said premises, but alleging "that she is entitled to a life estate in the said piece or parcel of land, remainder to her lawful heirs, and prays that a fee-simple deed may issue to her, the said Lizzie D. Wilson," and further referring to the Cronyn deed, by the book and date of its record, as the source of her right. On the hearing her testimony was reduced to writing, under the statute, and she testified that she entered into possession and held as heir of her father, George Cronyn, who occupied the premises up to his death. The probate court adjudged Lizzie D. Wilson to be the lawful owner of possession of the said premises, and to be entitled to a deed thereof in fee simple; and the mayor of Salt Lake City, in pursuance of such adjudication, executed to her a deed of the same, in fee simple. She afterwards conveyed, in fee, the premises to the various respondents, or to their grantors. The respondents all purchased in good faith, for adequate considerations, and without any actual notice of the Cronyn deed, which was, however, recorded in the office of the county recorder of Salt Lake county prior to such purchases, and on the 23d day of October, 1871, in Book C, pp. 329, 330, of Mortgage Records. Lizzie D. Wilson died intestate, and without making any appointment, and prior to the institution of this suit. Appellants are her heirs. It is not claimed that any of them filed with the clerk of the probate court the statement required by the act of February 17, 1869; and, unless they are in some way excepted from the bar of the statute, they would be precluded from claiming or recovering the land in question under any right or title existing at the time when such statement should have been filed. The right they now set up reaches back to the time of the execution of the Cronyn deed. If their construction of that deed be correct, they were entitled to an estate in such land, capable of being the basis of a statement and adjudication. It is true that, at the time this statement should have been filed, some of the appellants were not born, and the remainder were minors. But the statute contains no express exception as to persons under disabilities, and no such exception can be ingrafted on it by construction. Stringfellow v. Cain, 99 U. S. 610. And where a right vests in a class, as such, the action or laches of the members of the class in being binds those yet unborn.

But it is contended that Lizzle D. Wilson, being, as claimed, entitled to a life estate, stood in a relation of trust towards those entitled in remainder, and that the trustee having, by a breach of duty, acquired the title, equity will hold her as trustee for the remainder-men, notwithstanding their failure to file the required statement. In other words, that although the statute attempts to bar any one so failing from thereafter claiming any "estate" in any "court of law or equity," there is one particular estate which such person can still claim in a court of equity. We find nothing in the statute to

warrant this conclusion. In referring to a similar statute of the territory of Colorado, the supreme court of the United States said: "No language could be more explicit to make the failure to deliver the statement within the time specified a bar-an absolute barto the recovery of the same, however strong might be the equitable claim to the land so Cofield v. McClelland, 16 Wall. 335; Rogers v. Thompson, 9 Utah, 46, 33 Pac. 234. It is not difficult to see a reason for such a bar. At the time of the passage of this act, Utah territory had been settled for a comparatively short time. The utmost informality characterized all transactions respecting land. The rights which were recognized were frequently evidenced by loose memoranda, and prior to 1870 no statute provided for the record of instruments pertaining to land, nor for the effect of a record, if made. It was essential to the prosperity of the community that the title to land should be rescued from such uncertainty, and the statute of February 17, 1869, was the remedy prescribed for this evil. It may shock the public conscience that a trustee should benefit by a failure to perform his duty; but that was the lesser of the two evils, and, in the judgment of the legislature, the public good required an end to uncertainty in titles. In any event, the legislature did not see fit to exempt trustees from the benefit of the statute, nor the owners of equitable estates from its bar; and the duty of the court is to declare the law, and not to make it. "Jus dicere, et non jus dare." Appellants, having failed to file the required statement, are precluded from recovering any estate in the premises created by the Cronyn deed, and adverse to the feesimple estate conveyed to Lizzie D. Wilson by the mayor of Salt Lake City.

We are also of the opinion that the respondents are innocent purchasers for a valnable consideration, and without notice of appellants' claim, and that notice thereof was not imputed to them by reason of the record of such deed in the mortgage record, nor by the recital thereof in the statement filed by Lizzie D. Wilson with the clerk of the probate court. That a deed recorded in the mortgage record, and conversely a mortgage recorded in a deed record, is not constructive notice, has been frequently decided, and rests on the reasonable presumption that an intending purchaser will not look in such a book for such an instrument. Neslin v. Wells, 104 U. S. 428; Luch's Appeal, 44 Pa. St. 519; Colomer v. Morgan, 13 La. Ann. 202. And it might be further said that the Cronyn deed. being outside of the direct chain of title from the United States, would not have given constructive notice, even if properly recorded. Nor could knowledge of Lizzie D. Wilson's declaratory statement be imputed to a purchaser. It is ordinarily true that, if any deed in the chain of title depends for its validity on another instrument or instruments, a purchaser by mesne conveyance under such deed

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must take notice of an instrument or instruments which authorize it, and therefore of the recitals of such instruments. But this rule is subject to the manifest exception that, where a patent for land is issued by the regular officers of the United States, a purchaser from the patentee may presume the regularity of the preliminary steps which culminated in the patent, and need not, at his peril. investigate those steps. The title under the mayor's deed, in this case, does not differ in principle from title directly from the United States. In both cases, title results from a judicial investigation conducted by public officers acting under the obligations of their oaths, and a purchaser under such deed could presume that the jurisdiction of such officers had been rightfully exercised. It is unnecessary to decide what, if any, estate appellants took under the Cronyn deed. The judgment is affirmed.

MINER, BARTCH, and SMITH, JJ., concur.

STAHN v. HALL et al.

(Supreme Court of Utah. July 27, 1894.)

ACTION TO REFORM DEED—EVIDENCE—REVIEW ON APPEAL—CONFLICTING EVIDENCE
—NOTICE.

. In an action to set aside a deed as to land alleged to have been conveyed by mutual mistake, option contracts, in pursuance of which the deed was made, which contain a description of the land plaintiff alleged was intended to be conveyed, and which contain no description of the land in suit, are competent to show that such land was not intended to be conveyed.

conveyed.

2. Though there is a conflict in the evidence, a judgment will not be disturbed, where the complaint is substantially sustained.

3. Though the defendants, who were not made grantees in the deed, but who subsequently purchased from the grantees an interest in the land described therein, had no actual knowledge of the mistake, they are still chargeable with actual notice of plaintiff's equities in the land in suit, where plaintiff was in actual possession of it at the time they made the purchase.

Appeal from district court, fourth district; before Justice J. A. Miner.

Action by Emil Stahn against C. D. Hall and others to reform a deed. From a judgment for plaintiff, defendants appeal. Afterned

James N. Kimball, for appellants. John E. Bagley and Maloney & Perkins, for respondent.

BARTCH, J. The plaintiff claims that, in a certain warranty deed made and executed by him and his wife on the 2d day of May, 1890, to the defendants H. B. Westover, George J. Kelly, and C. D. Hall, there was inserted in the description therein, among several other parcels of land, a certain parcel. by mutual mistake; that there was no intention on the part of the grantor to convey, nor on the part of the grantees to purchase.

the parcel of land so erroneously included in the description of the other lands contained in the deed. The defendants refusing to reconvey, he brought this action to reform the deed, and asked that it be set aside and held for naught, so far as the land so erroneously conveyed is concerned. The case was tried before a referee, and upon judgment being rendered in his favor, and a motion for a new trial having been denied by the court, the defendants appealed. The defendants Ille and McMillan were not named as grantees in the deed, but it is claimed they were parties to the original transaction, and had full knowledge of the land which was intended to be conveyed, and in a short time thereafter their interest therein was evidenced by deeds from the other defendants. Among other facts, the referee found, substantially, that when the deed of May 2, 1890, was executed and delivered, neither of the defendants knew that the land in controversy was described therein, nor intended it to be a part of the land conveyed; that the mistake of so including it was mutual between the plaintiff and the defendants; that the deed was made in pursuance of, and based wholly on, certain optional contracts made between the plaintiff and the defendant Westover, neither of which contained a description of the land in controversy; that the plaintiff continued in the possession of the land in question, and did not know of the mistake until a few days before bringing this suit; that it was through the mistake, inadvertence, and oversight of one Nelson, who prepared the deed, that the land in controversy was included; that, while the deed was made to the grantees therein named, yet Mc-Millan was an original purchaser, defendant Westover having taken title in his name in trust for McMillan, who had full and actual notice thereby of the equities of the plaintiff: that, when defendant Ille purchased his interest in the land conveyed, the plaintiff was in the actual possession of the land in controversy, and was cutting lucerne therefrom, and had a fence and haystacks thereon; that the plaintiff never received any consideration for the land in question from the defendants.

The first contention of counsel for the appellants is that the court erred in admitting in evidence the optional contracts mentioned in the findings of fact, and it is insisted that the land in question is not referred to in either of these contracts. It is evident that these contracts were not introduced in evidence for the purpose of making any reference to the land in question, but for that of showing the intent of the parties as to what land should be conveyed by the plaintiff. It is apparent from the record, and the referee so found, that these contracts constituted the basis of the whole transaction, and the fact that the land in question was not referred to in either of them, while the land to be conveyed was properly referred to in each of them, if not a strong inference, is at least a circumstance tending to show, that it was not intended to be conveyed by deed. For such purpose the contracts were admissible, because if the land in question was not intended to be conveyed, and yet was described in the deed, the inference would naturally be that it was so described by mistake or inadvertence. They were written instruments calculated to aid the court in arriving at the real intent of the parties, and were therefore admissible. Pom. Eq. Jur. § 859. There are a number of other points made on the admissibility of testimony, but we think none of them are sufficient to disturb the judgment.

The further point is also made that the evidence is insufficient to justify the findings of the referee. While there appears to be some conflict in the evidence, yet it seems clear and certain therefrom that the material allegations of the complaint are substantially sus-The findings of fact having been tained. adopted by the court, and the referee having heard the evidence, and having had an opportunity to observe the several witnesses while on the stand, and notice their conduct and bearing, this court will not disturb the conclusions reached, in the absence of a clear showing that there is a mistake or oversight which materially affects the substantial rights of the appellants. Mining Co. v. Haws, 7 Utah, 515, 27 Pac. 695; Wells v. Wells. 7 Utah, 68, 24 Pac. 752; Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah, 31, 33 Pac. 229. It is clear that, under the circumstances of this case, the defendants named as grantees in the deed were chargeable with notice of the equities of the plaintiff; and, even if it were conceded that defendants McMillan and Ille had no actual knowledge of the mistake in the deed at the time of their purchases, they are still chargeable with actual notice of the plaintiff's equities, because the plaintiff at that time was in the actual possession of the land in controversy, and such possession was actual notice to all the world. These defendants therefore purchased at their peril, for it is not shown that they sought the plaintiff, to ascertain the actual state of the See Live-Stock Co. v. Dixon (decided at this term) 37 Pac. 573; Toland v. Corey, 6 Utah, 392, 24 Pac. 190. It is evident from the facts shown that the land in question was conveyed by mistake, and that the plaintiff is entitled to equitable relief. There appears to be no reversible error in the record. The judgment is affirmed.

MERRITT, C. J., and SMITH, J., concur.

UTAH NAT. BANK OF OGDEN v. BEARDSLEY.

(Supreme Court of Utah. July 27, 1894.)

JUDGMENT—REVIVAL IN FAVOR OF PURCHASER AT
EXECUTION SALE OF PERSONAL PROPERTY.

1. Comp. Laws 1888, § 3450, provides that if the purchaser "of property" at an officer's sale fail to recover "possession," because of ir-

regularity in the sale, or if the property was not subject to execution and sale, the court must revive the original judgment for the amount paid, with interest, and such judgment shall have the same force as an original judgment. *Held*, that the latter clause of such section applies to sales of personal as well as real property.

property.

2. The operation of such statute is not affected by Civ. Code, §§ 577, 581, which require that, where personal property sold on execution is capable of manual delivery, it must be present at the sale, and the officer must deliver it

to the purchaser.

Appeal from district court, fourth district; before Justice J. A. Miner.

Action by the Utah National Bank of Ogden against Mills H. Beardsley, in which there was a judgment for plaintiff, on which an execution was issued, and certain personal property sold thereunder at sheriff's sale to John Broom. Such property not being subject to execution sale, Broom moved to revive such judgment in his favor for the amount of the purchase money paid by him, under Comp. Laws 1888, § 3450. Broom afterwards died, and the administratrix of his estate was substituted in his stead. From a judgment in favor of such administratrix, defendant appeals. Affirmed.

Ogden Hiles and Sutherland & Howat, for appellant. Kimball & Gilbert, for respondent.

BARTCH, J. This is a proceeding by motion of the administratrix of the estate of John Broom, deceased, a purchaser of certain personal property at a sale under an execution issued out of the district court, to revive the judgment in her favor, under the provisions of section 3450, Comp. Laws Utah 1888. Upon the hearing of the cause the court rendered judgment in favor of the administratrix, and against the defendant, Beardsley. for the sum of \$9,568.37 and costs, and ordered that the former judgment of the court, rendered in favor of the plaintiff and against the defendant herein, be revived, as prayed for. From this judgment the defendant appealed to this court.

It appears from the record that, at the time the property in question was purchased at the execution sale by John Broom, the deceased, one J. C. Armstrong, held a mortgage against the same, as security for a note, in the sum of \$8,000, executed and delivered to him by the defendant, and that the officer who conducted the sale under the execution. neither before nor after such sale, paid to Armstrong the mortgage debt, or offered to pay the same, or made any tender thereof. Afterwards, and while the property was in the possession of Broom, Armstrong brought suit to foreclose the mortgage, and Broom was impleaded with Beardsley in the foreclosure suit. In this suit the lien of the mortgage was held valid, and on appeal the judgment was affirmed by the supreme court of this territory, and of the United States. The property, having in the meantime been placed into the hands of a receiver, was again sold under execution upon the judgment in the foreclosure suit. Broom, having thus lost the possession of the property, then instituted these proceedings to revive the judgment in the original suit, and upon his death the administratrix of his estate was substituted as petitioner herein. Under this state of facts, it is insisted by counsel for appellant that the court erred in rendering the judgment appealed from, and referred to above.

The section of the statute under which these proceedings were instituted, as stated above, reads as follows: "If the purchaser of real property sold on execution, or his successors in interest, be evicted therefrom in consequence of irregularities in the proceedings concerning the sale, or of the reversal or discharge of the judgment, he may recover the price paid with interest, from the judgment creditor. If the purchaser of property at an officer's sale or his successor in interest fail to recover possession in consequence of irregularity in the proceedings concerning the sale, or because the property sold was not subject to execution and sale, the court having jurisdiction thereof, must after notice, and on motion of such party in interest, or his attorney, revive the original judgment in the name of the petitioner for the amount paid by such purchaser at the sale, with interest thereon, from the time of payment at the same rate that the original judgment bore; and the judgment so revived has the same force and effect as would an original judgment of the date of the revival, and no more." Counsel for appellant insists that this whole section applies to sales of real estate, and is not applicable to sales of personal property, because the revival is provided for only where the purchaser fails to obtain possession, and that no purchaser at an execution sale of personal property can ever fail to obtain possession, because, under sections 577 and 581 of the Code of Civil Procedure, where such property is capable of manual delivery, it must be present at the sale, and the officer making the sale must deliver the property sold to the purchaser. We are not inclined to adopt this view of the law. The first sentence of the section above quoted is, by its terms, confined to real property: but in the second sentence there is a departure from the language used in the first, and the word "property" is employed, instead of "real property." The word "property" is frequently used in our law relating to the execution of the judgment in civil actions as a general term denoting both real and personal property, and it is so defined in section 2997, Comp. Laws Utah 1888. We are of the opinion that such is its meaning, as used in the second sentence of the section under consideration; and we are also of the opinion that the word "possession," as used in that sentence, means a possession coupled with a right of property, and not a mere naked possession, such as might be acquired under a void sale. The statute is remedial in its character, and should receive a liberal interpretation. Cross v. Zane, 47 Cal. 602. The law in question being applicable to sales of personal property, as we think it is, the petition in this case appears to state a case within the statute. There having been no payment or tender of payment of the mortgage, which was a valid lien, before sale, the property was not subject to execution. Comp. Laws Utah 1888, § 2806. Nor does the rule of caveat emptor apply in such a case as is shown by this record. Nor do sections 577 and 581, above referred to, affect the operation of section 3450. The judgment is affirmed.

MERRITT, C. J., concurs.

TORONTO v. SALT LAKE COUNTY.
(Supreme Court of Utah. July 27, 1894.)
COUNTY TREASURER—COMPENSATION—REDUCTION
AFTER SERVICES ARE RENDERED—REMEDY.

1. School Laws 1890, § 82, as amended, provides that the county treasurer shall hold the special school fund, and shall receive such compensation as the county court may determine, to be paid on the warrant of the county superintendent. Held that, where such treasurer applied to the county court to fix his compensation, and such court, during his term, fixed his salary at \$500 per annum, the court could not, after his term expired, reduce the amount to \$500 for his entire term of 28 months.

2. Where the county court refused, on the treasurer's application, to appropriate more than \$500 to pay his claim, an action against the county for such salary, and not mandamus against the county superintendent to compel him to issue a warrant for the amount claimed was the proper remedy.

Appeal from district court, third district; before Justice Samuel A. Merritt.

Action by Joseph B. Toronto against Salt Lake county to recover a balance due him for services as county treasurer of such county. From a judgment for plaintiff, defendant appeals. Affirmed.

Walter Murphy, for appellant. Williams, Van Cott & Sutherland, for respondent.

SMITH. J. The plaintiff brings this action to recover \$1,166.66, which he claims to be due him as extra compensation for official services rendered as county treasurer of defendant county. The claim for compensation is based upon section 82 of the school law of 1890, which is as follows: "The county treasurer shall receive and hold as a special school fund, subject to the orders of the county superintendent all district school moneys from whatever source received and keep a separate account thereof, and when the same is apportioned to the school district shall open and keep a separate account with each district. He shall, on or before the first day of August in each year, make a report," etc. "The county treasurer shall re-

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ceive such compensation out of the county school fund as the county court may determine for the services rendered by him in pursuance of this act." By a subsequent amendment of this section, it was provided that such compensation should be paid upon the warrant of the county superintendent of schools. After this law was in force, plaintiff was elected county treasurer, and entered upon the discharge of his duties September 1, 1890, and continued performing his duties to December 31, 1892,—a period of 28 months. Shortly after he qualified, plaintiff made application to the county court to fix his compensation as provided in this statute. Some time afterwards, and during his term of office, such compensation was fixed at \$500 per annum. No part of it, however, was paid to plaintiff up to the time that he retired from office, on March 13, 1893; and after his term of office had expired, he having in the meanwhile asked an order of the county court appropriating the sum of \$1,-166.66 from the school fund in payment of his compensation, the county court, upon its own motion, made an order allowing \$500 as full compensation for the two years and four months that plaintiff had served as county treasurer. The plaintiff claims that his right to compensation had become vested under the order fixing the salary at \$500 per year, and that the subsequent order of the county court, allowing him \$500 in full payment of all compensation for his term of office of two years and four months, was without jurisdiction and void, and this is the principal question involved in this appeal. Judgment in the court below was rendered upon the pleadings, on motion of plaintiff, in his favor, for the full amount claimed, and from that judgment the county appealed.

It is contended by the appellant county that there is no contract relation between the government and a public officer; that the right of a public officer to compensation is not a contract right. Many authorities are cited by the appellant to sustain this proposition, and the proposition, that is necessarily a part of it, that a public officer can never recover upon a quantum merult. We think this position is correct, in a case to which it applies. The difficulty is that this case does not come within the rule; a different rule obtaining where, as in this case, an officer has already performed the services for which he claims compensation, provided the compensation has been fixed by the proper authority at the time the services were rendered. The plaintiff asked the county court to fix his compensation at or shortly after the time of his qualification. For some reason, not explained, there was considerable delay in making the order, but it was finally made, and made during his term of office, and upon his petition. We think that the true rule in such case is stated in the case of Givens v. Daviess Co. (Mo. Sup.) 17 S. W. 998, where the court say: "Every day he [the officer] held the office, the law vested in him the right to a due proportion of the salary as at that time fixed; and consequently an order changing the compensation could not have a retrospective operation, and divest him of what was his already." That case was exactly like the one at bar. It must be observed that, when the county court undertook to reduce the plaintiff's compensation for 28 months' services, he had already fully completed his term of office, and his compensation, whatever it was, was completely earned; and, as we hold, his right to such compensation was completely vested. A vested right is a title, legal and equitable, to the present and future enjoyment of property, or to the present enjoyment of a demand or a legal exemption from a demand made by another. With this definition before us, it is difficult to see why the plaintiff. when his term of office is completed, and his services entirely rendered, did not have a complete vested right to the present and future enjoyment of the compensation attached to his office by law at the time he held it and performed the services. It is true that an officer has no property in the prospective compensation attached to his office, whether it be in the shape of salary or fees for services yet to be rendered. But we think, both upon principle and authority, he has a complete vested right of property in the compensation fixed by law for services rendered, and that this right is one that cannot be taken away, as was attempted in this case, by an order made after his term of office had expired.

This determines the principal question in the case against the appellant, and there remains but one more matter that we need consider. It is claimed by the appellant that in any event the plaintiff cannot maintain this action against the county; that his remedy is by mandamus against the county superintendent of schools, to compel him to issue the warrant for the amount claimed. This contention can hardly be sustained. It is made upon the ground that the salary is payable out of a particular fund, and not out of the general county revenue. The difficulty in the present case is that there has been no appropriation made by the county court of any part of the school fund to pay this claim, except the sum of \$500, and the county court refuses to appropriate any additional sum. The claim has been presented to the county court, and in part rejected. In our opinion, this is the proper practice. Claims against the county funds, of whatever nature they may be, should be presented to the county court to be passed upon by that body; and its allowance of the claim is a sufficient authority to the proper ministerial officer-the county superintendent of schools, in this case—to draw his warrant on the treasurer for the payment of the claim. Without such allowance, it is difficult to see what check there would be upon the superintendent in making out these war-

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rants for compensation. It is true the salary was fixed at \$500 per annum, but there must be some board or body-some authority somewhere-to determine whether or not the claimant has performed the services that entitle him to the compensation fixed by law. We think in this case the county court is that body, and has the authority; that it was its duty to make this allowance, and certify it to the county superintendent as his authority for issuing the warrant. We find no error in the judgment of the court below, and it is affirmed, with costs to respondent,

MINER and BARTCH, JJ., concur.

WHITEHILL ▼. LOWE et al.¹

(Supreme Court of Utah. July 27, 1894.) SPECIFIC PERFORMANCE - UNCERTAINTY OF CON--Pleading - Misjoinder-Limitations-TRACT NEW PROMISE.

1. A verbal agreement with owners of property under which plaintiff is to procure a company to operate it, "upon a basis the details of which were to be thereafter agreed upon," cannot be enforced, for uncertainty.

2. A verbal contract by which M. was to raise money to operate certain property, but which fixed no time therefor, nor the amount to be raised, and which required M. to place the property with the company to be so organized, without showing how he was to get title to it, and to give plaintiff half the profits accruing from the transaction, cannot be enforced, for from the transaction, cannot be enforced, for uncertainty.

3. In an action to compel the transfer to plaintiff of half the shares given one M. for organizing a company, the joinder of two officers of the company as individuals is improper where no fraud is charged against them or the company, and where they were not parties to any of the contracts.

4. A verbal agreement based on a prior agreement barred by the statute of limitations is within 2 Comp. Laws 1888, § 3165, providing that such promise must be in writing, signed by the party to be charged thereby.

Appeal from district court, third district; before Justice C. S. Zane.

Action by William H. Whitehill against William Lowe, administrator of the estate of George A. Meears, deceased, and others, to compel defendants to transfer to plaintiff certain shares in defendant the Meears Mining Company. From a judgment for defendants, plaintiff appeals. Affirmed.

Gerald G. P. Jackson, for appellant. Thomas Adams and Marshall & Royle, for respondents.

MINER, J. This action was brought by appellant, by bill in equity, in the third judicial district court of the territory of Utah, upon the 3d day of October, 1892, to compel the transfer of certain shares of mining stock. The plaintiff, by his complaint, alleged a verbal agreement, in 1883, with the owners of a certain mining property situated in Park City, Summit county, territory of

Utah, and more particularly in the Uintah mining district, in said county and territory, which property was known at that time (1883-84) as the Morgan group of mines, by which agreement he (the appellant) was to secure and bring about the incorporation of a company to operate the property; that, in accordance with the terms of that agreement, the appellant introduced the owners of said property to the defendant and respondent Meears, who verbally agreed with the plaintiff to share with him in any benefits and profits that might accrue from the transaction. In consequence of the agreement with Meears and the introduction of the owners of the aforesaid property to him, the owners of that property contracted in February, 1884, to convey it to the said Meears, for the purpose of incorporating a company to operate the mines, and the performance of the conditions of this last agreement was guarantied by the firm of Walker Bros., a partnership of capitalists, of which the defendant J. R. Walker was a member; that thereafter, for a number of years, there was considerable litigation touching the title to said property, the contract to convey to Meears was in abeyance, and the conditions as to the incorporating a company to operate the property were not complied with or executed until the termination of the legal proceedings, on or about the 15th day of October, 1800, when the incorporation now known as the Meears Mining Company was formed, to operate the property for which the defendant Meears had obtained the contract to convey from the owners thereof. The plaintiff further alleged that the contract for conveyance obtained from the owners of the property had been obtained and procured by said Meears in his own name, to the exclusion of the plaintiff, without the knowledge of the plaintiff, and during the absence of the plaintiff from the territory of Utah; that, after the said incorporation, the defendant Meears had been assigned 31,625 shares of the capital stock of said incorporation for services in promoting the incorporation, which shares Meears retained in his own name, and has not transferred to the plaintiff onehalf thereof, for which transfer the plaintiff brought this action, claiming said stock on account of services and expenses by him rendered in litigation, etc. The defendants demurred to the bill. The court below sustained the demurrer, and dismissed the action. The plaintiff gave notice that he would stand by his bill, and subsequently gave notice of appeal, and now appeals to this court from the judgment and order of the court below, sustaining the demurrer and dismissing the action, and relies upon the following errors for reversal: (1) The court erred in sustaining the demurrer upon the ground that "said complaint does not state facts sufficient to constitute a cause of action." (2) The court erred in sustaining the demurrer upon the ground "that there is a mis-

Rehearing denied.

joinder of parties defendant, in this: that said Joseph R. Walker and Samuel F. Walker, as individuals and as officers of said Meears Mining Company, and said Meears Mining Company, are joined as defendants in said action with said defendant Meears, when there is no privity of contract between them and said plaintiff, nor are they or either of them subject to, or in any wise responsible for, or interested in, said alleged agreement of said plaintiff and said defendant Meears." (3) The court erred in sustaining the demurrer upon the ground "that two causes of action have been improperly united and joined in one count in said complaint, and not separately stated as independent causes of action, to wit: First, a cause of action upon an alleged agreement with defendant Meears, based upon an alleged agreement with the said owners of said mining claims, set out in said complaint; second, a cause of action upon an alleged agreement with defendant Meears, made after the execution of, and based upon, the written contract set out in said complaint." (4) The court erred in sustaining the demurrer upon the ground "that the complaint is ambiguous, unintelligible, and uncertain, in this, to wit: Because it cannot be determined from said complaint upon which of said causes of action mentioned in subdivision three of this demurrer plaintiff is relying, or whether or not plaintiff is relying upon both of them." (5) The court erred in sustaining the demurrer upon the ground "that, as to the first agreement set up in said complaint between plaintiff and defendant Meears, the same is barred by the provisions of subdivision one of section 196 of the Code of Civil Procedure, and as to the agreement founded upon, or growing out of, or a part of, the contract in writing set out in said complaint, the same is barred by subdivision one of section 196 and section 194 of the Code of Civil Procedure."

It is claimed by the respondents' attorney that the complaint attempts to set up five different contracts or agreements, made at different times, and most of them between different parties-First, a verbal agreement, made in 1883, between plaintiff, on the one part, and Morgan and others, owners of the Morgan group of mines, as the other party; second, a verbal agreement between plaintiff and defendant Meears, made between October, 1883, and February, 1884; third, a written agreement or contract made between Morgan and others, owners of the Morgan group of mines, of the one part, and George A. Meears, of the other part, May 24, 1884; fourth, verbal statements of Meears, acknowledging having violated or broken verbal agreement number two above referred to, and that he would protect plaintiff's interest in said written contract, made August, 1884; fifth, agreement and articles of incorporation of the Meears Mining Company, October, 1890. The complaint was filed to obtain a specific performance of all of these alleged agreements, contracts, and arrangements referred to, but under a claim that they all relate to one continuous contract, verbal at first, but eventually reduced to writing, and merged in the final consummation of the incorporation. If specific performance cannot be had under the rules of law, or if the plaintiff has no such interest therein to the subject-matter or as to the parties referred to, then it may be said that the plaintiff has stated no cause of action. In order to specifically enforce a contract, it must be upon a reasonable consideration. must be reasonably certain as to its subjectmatter, its stipulations, its purposes, its parties, and the circumstances under which it was made. It must be, in general, mutual in its obligations; it must be free from any fraud, misrepresentation, mistake, or illegality. * * * The contract must be fair. equal, and just in its terms and circumstances." 3 Pom. Eq. Jur. p. 447. The description of the subject-matter should be so definite as that it may give with reasonable certainty what the party contracting imagines himself to be contracting for, and that the court may from it ascertain what it is. It should not only express the names of the parties, the subject-matter, the price, but all material terms. "It may, however, be laid down that the court will carry out an agreement framed in general terms, where the law will supply the details; but, if any details are to be supplied in modes which cannot be adopted by the court, there is then no concluded agreement capable of being enforced." Fry. Spec. Perf. side pages 90, 92, 93, 98, \$\frac{4}{3}, 203, 208, 211, 221; Colson v. Thompson, 2 Wheat.

Now, testing said first and second verbal contracts by these rules of law, were either of these contracts certain, definite, and complete? The first contract, between plaintiff and Morgan, upon its face, shows the uncertainty and incompleteness in the foundation and basis thereof when it says that it is to be carried out "upon a basis the details of which were to be thereafter agreed upon." Further, it does not appear what kind of company was to be organized, whether it was to be a copartnership, a joint-stock company, or a corporation; neither does it appear upon what terms or under what rules and regulations this company was to be organized, or who were to be parties thereto, or their respective interests, or how the working capital should be raised, or who should furnish it, nor the extent, character, or location of the work to be done on the claims, nor when any of these things were to be done. The second verbal contract is between plaintiff and Meears alone, and, besides this, is subject to most of the objections to the first contract. Meears is to raise the necessary money to work and develop the property, but no time is fixed; no amount of

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money or character of work stated; and Meears is to place the mining property with the company he is to organize,-property which belonged to other parties,-but it does not appear how he is to get control of, or title to, the property he is so to place. All these mat-These two verbal conters are indefinite. tracts appear to be uncertain, indefinite, and incomplete. Meears was to do all the work, furnish all the money, buy the mines, complete the organization, and, as it turned out, attend to and pay the expenses of six years' litigation, and give the plaintiff one-half of all proceeds in return for an introduction to Morgan by the plaintiff, and the recommendation that followed such introduction. It can hardly be said that the contract was certain, fair, and just.

It does not appear from the complaint that any demand was made by the plaintiff upon the defendants, or either of them, for the stock claimed by him in the corporation, or that the defendants, or either of them. ever refused to deliver the same to him. Dodge v. Clark, 17 Cal. 586; 2 Estee, Pl. & Pr. § 2875. Walker Bros. are made parties defendants, and are sued as individuals. No fraud or misfeasance is charged against them or against the corporation. They were not parties to nor principals to any of the contracts. They were improperly joined as individual parties to the controversy. Thomp. Liab. Off. p. 352; 2 Comp. Laws 1888, \$ 3219.

Plaintiff's cause of action is based upon two verbal agreements. The first was between the plaintiff and the owners of the mine. The second agreement was made between the plaintiff and Meears. Meears and plaintiff were the only parties interested in said agreement who are parties to this action. This action was brought October 14, 1892. The plaintiff alleges in his complaint that Meears had violated said verbal agreement in May, 1884, by entering into the written contract with the owners of the Morgan group of mines in his own name, instead of the joint names of himself and Meears, as was agreed; thereupon the right of action accrued to him in 1884, and is barred under the statutes of limitations (section 3145, 2 Comp. Laws 1888). To avoid this statute, plaintiff alleges another verbal agreement between himself and Meears, in August, 1884, based upon no consideration, except it may be the first verbal agreement, to the effect that Meears would protect the plaintiff's interest in said agreement the same as if his name appeared in the writing. This agreement being verbal, it comes within the provisions of section 3165, 2 Comp. Laws 1888, which reads as follows: "No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operations of this title, unless the same is contained in some writing, signed by the party to be charged thereby." The statute seems to have run against all the verbal agreements to which plaintiff was a party.

We think the demurrer was well taken, and that the order and judgment of the third district court should be affirmed, with costs.

MERRITT, C.J., and BARTCH and SMI'IH, JJ., concur.

RUFFATI v. SOCIETE ANONYME DES MINES DE LEXINGTON et al.1

(Supreme Court of Utah. July 27, 1894.)

Action on Contract - Joinder of Parties not BOUND - PAROL MINING LEASE - VALIDITY WRONGFUL OUSTER - VERIFICATION OF PLEAD-INGS.

1. In an action for breach of contract, one defendant cannot complain that his codefendant is not bound by such contract.

2. Evidence that plaintiff, at defendant's direction, worked in a specified portion of a mine only; that his time was not kept; that he was paid no wages; that he did a large amount of dead work before discovering ore, and then began stoping it out as rapidly as possible,—is sufficient to sustain a finding that he was put in possession of that portion of the mine as lessee, and not as a laborer.

3. It is no defense, to an action by a lessee of a mine to recover damages for wrongful

see of a mine to recover damages for wrongful ouster, that up to that time he had not put in sufficient timbers, where no injury has oc-

curred by reason thereof.

4. The trial court may allow an amended complaint to be verified, though the original was not.

5. A parol lease of a mine is valid, where the lessee enters thereunder, and expends la-bor and money in preparations for mining.

Appeal from district court, third district: before Justice G. W. Bartch.

Action by Joseph Ruffati against the Société Anonyme des Mines de Lexington and another to recover damages for breach of contract. There was a judgment for plaintiff against the company, which appealed. Affirmed.

Marshall & Royle, for appellant. Richard B. Shepard, H. O. Shepard, A. N. Sherry, and J. M. Bowman, for respondent.

SMITH, J. This is an action commenced by the plaintiff to recover the sum of \$15,-998.66 from the defendants. The jury returned a verdict for \$5,000 against the corporation commonly known as the Lexington Mining Company, its exact title being the Société Anonyme des Mines de Lexington, a corporation organized under the laws of France. The action is upon a contract for damages arising from a breach of it by the defendants. In substance the complaint is that in December, 1890, the plaintiff and the defendants, to wit, the mining company and one Lavagnino, made a contract by which the plaintiff leased and undertook to work certain mining grounds in a portion of what is known as the "Old Telegraph Mine," in Salt Lake county; that the lease was for the period of three months, expiring on the 10th day of

¹ Rehearing denied.

March, 1801; that by the terms of the lease the plaintiff should work the portion of the mine assigned to him for that purpose, should mine and remove the ore therefrom at his own cost, and deliver the same, when thus mined, to the defendants at the usual place in said mine for shipment and sale; that the defendants were to ship and sell the ore, after thus mined and delivered, without any cost or charge to the plaintiff, and out of the proceeds of the sale of the ore was first to be paid the cost of shipping and sampling the same, and the net proceeds were to be divided, one-third to the defendants, and twothirds to the plaintiff. It is also claimed that under this lease the plaintiff worked for 58 days, and discovered a large and rich body of ore, and that he had extracted ore, and delivered to the defendants, of the value of \$10,-000, after deducting the expenses of shipping and sampling the same, and that he had in sight, ready to be mined and broken down, on the day when he was ousted, to wit, the fifty-eighth day of his lease, about 300 tons of ore, of the value of \$100 per ton net, and that within the remaining twenty-eight days of his lease the plaintiff could have mined and removed from said mine 140 tons of such ore; that his profit on such 140 tons would have been \$9,332, or two-thirds of the net value of the same. The suit is to recover two-thirds of the \$10,000 worth of ore which he alleges he had mined and delivered to the defendants, and two-thirds of the profit he would have made if he had been permitted to work during the remainder of his term. It is also alleged that without cause he was ousted wrongfully by the defendants on the fifty-eighth day of the term. In the answer it was alleged that the defendant Lavagnino was merely agent or manager for the defendant the Lexington Mining Company, and this appeared to be established by the proof, and the jury rendered their verdict against one, only, of the defendants, to wit, the mining company. The case was tried to a jury, the defendants having denied the allegations of the complaint, and the jury rendered a verdict, as above stated, against the mining company alone, for \$5,000. Motion for a new trial was made and overruled, and an appeal taken from the judgment and order denying a new trial.

The first matter complained of by the appellant is that the evidence is insufficient to justify the verdict. Several particulars are specified. They may be grouped briefly as follows: (1) There is no evidence to show that the two defendants were the owners of the mine; (2) there is no evidence to show that as such owners they made a lease to the plaintiff; (3) there is no evidence to show that the defendants, or either of them, made a lease of the mine, or any part of it, to the plaintiff; (4) that defendants, or either of them, put plaintiff in the possession thereof; (5) there is no evidence to show that plaintiff did his work in a proper or minerlike

manner; and (6) there is no evidence to show that plaintiff confined himself to any specified part of the mine.

As to the first specification, we do not deem it necessary to enter into a discussion. Plaintiff sued the mining company and Lavagnino, and alleged that he had a contract with them. It appeared that his contract was actually made, if made at all, with Lavagnino, and it also appeared quite clearly on the trial that Lavagnino was merely an agent for the other defendant. In suit upon a contract, where the evidence warrants it, we think it is universally held that a recovery may be had against one or the other, or both, of the defendants who are sued upon the contract. It is no ground of complaint on the part of the mining company, if it, in fact, was bound by the contract, that the plaintiff saw fit to sue some one else who was not bound, in connection with it, to recover damages for a breach.

The second specification of insufficiencythat there is no evidence that the owner made a lease to the plaintiff—is one which was much discussed at the hearing in this court. An examination of the evidence shows that the testimony is squarely conflicting. The plaintiff testified fully and completely to a contract substantially as alleged in his complaint. Lavagnino admitted on his examination that he put the plaintiff to work; that he did not make any written contract with him, and he made no verbal contract that he could work in any part of the mine, or any specified time. He does admit that there was an agreement of some kind between himself and the plaintiff, Ruffati, by which the plaintiff was to go to work in the mine without wages, and upon some kind of an arrangement, which he does not very clearly specify, by which plaintiff was to get his pay for work out of the ore that he extracted. He claims that he was to have the right to discharge plaintiff at any time, so that he could have the mine absolutely free from any engagement with anybody. It seems that prior to December, 1890, Lavagnino, as manager for the mining company, had been operating the mine in a regular way. At about that time he discharged all of the men in his employ, but immediately allowed a large number of them to go to work under different kinds of contracts, which Lavagnino terms "tribute contracts." Among others who had been at work for the company was the plaintiff, and he took a contract. About this there seems to be no question. As to exactly the nature of it the testimony is squarely conflicting. The jury unquestionably believed the plaintiff, and, in the light of all the testimony, we would not be warranted in saying that they did not do right in believing him in preference to the witnesses against him.

The observations made upon this specification answer the third, which is that there is no evidence to show that either of the parties made a lease of the mine or of any part of it.

The fourth specification is that there is no evidence to show that plaintiff was put in possession of any part of the mine. Now, upon this the testimony is undisputed that the plaintiff took possession of a certain portion of the mine, went to work and worked 58 days in that particular place, discovered an ore body after about 16 to 20 days' work, and from that time on to the time he was turned out was busily engaged, both by himself and other men working with him, in extracting ore from this ore body. All of this appears to have been known at least to Lavagnino, and it is not denied by him, and the plaintiff swears that Lavagnino pointed out to him just where he should go to work, at a point described by him as running from the switch up to the raise that the company had made in the old work that was there. This description seems to have been understood by all the witnesses, and the locality seems to be sufficiently fixed by the description. It appears that a good many other men who had been formerly employed in the mine were given leases in different portions of the mine; for instance, it appears that one Pronatt had a lease in the same way in the "Gallery," so-called, and one Ozella had a lease on the "Grecian Bend," and others had leases at different places. After the plaintiff had been at work for about 20 days, doing dead work,-that is, running through barren rock,-he discovered a body of ore of considerable extent and very rich. After he had been working upon this ore for a period of some 58 days, including the time spent doing dead work, Lavagnino came to him, and told him he had made money enough, and that he must quit, and did compel him to quit,-both him and the men who were employed by him. Lavagnino took possession of the ore he had already mined, and also of that that was yet standing in the mine. The plaintiff received no benefit at all, and has received absolutely nothing for the work which he did there, either by himself or the men who worked for him. From these facts it would appear that the jury were warranted in concluding that the plaintiff was put into the exclusive possession of a portion of the mine, and that he was not there merely as an employe of the defendant. His time was not kept by anybody. He was paid wages by no one. He worked in a specific place, and in only one place. He did a large amount of dead work before he made any discovery, and, when he discovered the ore body, began stoping it out as rapidly as possible. All this would indicate that he was in possession as lessee, and not as a mere laborer under the defendant; and in this particular the evidence was sufficient to sustain the verdict.

The fifth specification of the insufficiency of the evidence is that there is no proof that the plaintiff did his work in a proper or minerlike manner. It may be said, in answer to this specification, that there is as much evidence that the work was done in a proper manner as that it was done in an improper manner. The exact condition of the ground in charge of the plaintiff is given in the testimony, and there is no testimony of any particularly skilled miner, or persons acquainted with that business, as to any improper mining. It was claimed by Lavagnino that there was not sufficient timber in that portion of the mine where plaintiff was working, and that he should have put in more timber. This was denied by plaintiff; but in any event it is evident that plaintiff was proceeding with the work at the time he was stopped, and up to that time no injury had occurred because of the lack of timbers, and, the defendants having wrongfully ousted him, we would not be warranted in holding that he forfeited all of his rights under this lease simply because up to that time he had not put in sufficient timbers, even if it be admitted that the mine required more timber. This seems to have been the chief cause of complaint, as we gather from the testimony on the trial. We are of the opinion that in this particular the facts proven were sufficient to warrant the ver-

The sixth specification does not require any discussion, because we have already stated that the plaintiff, after he discovered the body of ore, does not appear to have worked anywhere else, and it would have been very remarkable indeed if he had left it after discovering it, and gone into some other portion of the mine to work.

The first error of law complained of was that the court permitted the plaintiff to verify the amended complaint, and the original complaint was not verified. We think the trial court had discretion to allow the amended complaint to be verified, and that there was no abuse of discretion in permitting it. See, upon this question, the cases of Railroad Co. v. Wilson, 10 Kan. 112; Case v. Edson, 40 Kan. 161, 19 Pac. 635; Johnson v. Jones, 2 Neb. 126; Buell v. Beckwith, 59 Cal. 480. We think there was no error in permitting the amended complaint to be verified.

Several errors are assigned upon the giving of the instructions, no less than 10 errors being assigned in regard to this matter. The charge of the court we have examined with care, and we feel inclined to insert it bodily in this opinion, were it not for the length of the charge. The substance of the entire charge, however, is embraced in the eighth subdivision of it, which is as follows: "The court instructs the jury, as a matter of law, that a parol lease to enter upon mineral land or into a mine, and mine the same for a specifled share of the mineral raised for a definite time, and an entry under such lease, and expenditure of labor and money in running drifts and other preparations for mining, under said lease, gives to the lessee a valid, subsisting interest in the real estate which the lessor cannot terminate, unless said lessee has forfeited, for some reason, his lease to work said mine." The other instructions, which go at great length into matters of detail, really hinge upon the propositions stated in this eighth subdivision. The jury were told, in effect, that a verbal lease for three months was valid; that if the plaintiff entered under it, expended labor and money, and took out ore and exposed other ore which he might have taken out, and was then wrongfully dispossessed by the defendants, and the ore which he had raised was appropriated by the defendants, and he was prevented from extracting any more, then he was entitled to recover the proportion which, according to the contract, would belong to him, of the ore which he had actually raised, and any damages which he might have sustained by reason of the termination of his lease before his full term had expired. This is the substance of the entire charge, and a most careful examination has convinced us that it was correct as a statement of the law applicable to this case. The only objection that can possibly be found to it is that it rather inclined to emphasize the testimony in favor of the defendants, rather than that in favor of the plaintiff. There seems to have been no exception taken, at the time of the trial, to any part of the charge, but there was a stipulation, verbally made in open court, that exceptions might be taken afterwards to any part of the charge given, or the refusal to give any part requested. We are very doubtful of the propriety of this practice in any case. It is due to the trial court to call its attention to any misstatement of the law or inaccuracy of expression in giving instructions to a jury at the time they are given, and before the jury have returned their verdict, so that the court may have an opportunity to correct them without the hazard of a new trial being incurred. It is not the parties alone who are interested in having the verdict final in the case. It is against public policy to have continued rehearings in the same action. Frequently slight errors or inaccuracies may occur in the charge of the court to the jury, which, if mentioned at the time, and the court's attention directed to them, would be corrected readily by the trial court. Every one of the objections to the charge in this case are of this character. We think the better practice would be to require of the attorneys that they specify what objections they have to the charge of the court, as given, at the time the charge is given. See Black v. City of Lewiston (Idaho) 13 Pac. 80, and the cases there cited. Upon the whole record in this case we are satisfied that the finding of the jury was a just and righteous one, and that the trial was had according to the forms of law, and without any material error prejudicial to the defendants. It appears reasonably clear from the testimony in the record that the plaintiff was simply a fortunate lessee, who by good luck discovered a rich body of ore, and that when the defendant company, through its manager, ascertained this fact, it immediately proceeded to deprive him of his possession of the mining ground, and of any opportunity to extract more ore, and also proceeded to appropriate the ore he had actually extracted, and refused to pay him anything whatever for the labor he had done, or on account of the ore he had extracted. Under such circumstances it is not surprising that an average jury should find the defendant responsible for the wrong it had done the plaintiff, and they assessed the damages according to what the proof seemed to warrant; and in fact we may say, in passing, there is no complaint in the argument of counsel, or in the brief filed in this court, or in the specification of errors, that the verdict is excessive. The judgment is affirmed, with costs to the respondent.

MERRITT, C. J., and MINER, J., concur.

CARNAHAN v. GUSTINE et al.

(Supreme Court of Oklahoma. Sept. 8, 1894.)

ATTACHMENT — MOTION TO DISCHARGE — WHEN PROPER—REVIEW OF ORDER.

1. A motion to discharge an attachment is a proper proceeding, under sections 4118 and 4119, St. 1893, and such proceeding should succeed or fail upon the truth or falsity of the attachment affidavit.

2. In order to determine the facts upon the allegations of the attachment affidavit, it is proper, and usually necessary, to introduce evidence, either oral or by affidavit, which, if sufficient, should sustain the attachment; but, unless all the evidence in the court below is brought up, no part of it can be considered. Conner v. Commissioners, 20 Kan. 575; Dodge v. Oatis, 27 Kan. 762; Smith v. Gill, 10 Kan. 74; O'Brien v. Creitz, Id. 202; McIntosh v. Commissioners, 13 Kan. 171.

3. If the petition does not state a cause of action against the defendant, the court, in the absence of amendment of the petition, or if it is incapable of amendment, is justified in dissolving an attachment against the property of such defendant. Quinlan v. Danford, 28 Kan. 507.

4. As a general rule the court may not inquire into the merits of the original cause of action. Yet it may inquire into the alleged existence of the grounds of attachment set forth in the affidavit, and, if this incidentally refers to some of the allegations of the petition, this does not compel it to refuse consideration of the motion or suspend decision until the final trial of the cause. Bundrem v. Denn, 25 Kan. 430. The trial then proceeds upon the merits, as though no action on the motion had been taken. Id. 435.

(Syllabus by the Court.)

Error from district court, "O" county; before Justice John H. Burford.

Action in attachment by E. M. Carnahan against A. Gustine & Co., and E. Gustine. There was a judgment sustaining a motion to dissolve the attachment, and plaintiff brings error. Affirmed.

Beauchamp & Rush, for plaintiff in error. Elliott, Wood & Dodson, for defendants in error.

SCOTT, J. This is an action for the recovery of damages in the sum of \$5,000, as the result of an alleged malicious prosecution. The petition was filed in the district court of "O" county on the 18th day of January, 1894. On the same date the attachment affidavit was filed, which reads as "E. M. Carnahan, being duly sworn, says: That he is the plaintiff in the above-entitled action in the said court against the defendants in the above-entitled action. That said plaintiff is about to commence the above-entitled action in the said court against the said defendants for the recovery of five thousand and eighty-two and 50-100 dollars. That said defendants are justly indebted to said plaintiff in said sum for damages, and that the nature of said plaintiff's said claim is as follows: Upon the 29th day of December, 1893, the defendants, unlawfully, maliciously, and without cause, caused this plaintiff to be arrested upon the charge of feloniously embezzling the property of defendants A. Gustine & Co., from which he has been fully discharged and acquitted, by which said false arrest said plaintiff was - dollars. That damaged in the sum of ---said claim is just, is due, and is wholly un-That said affiant believes that said plaintiff ought to recover of said defendants in said action said sum of five thousand and eighty-two and 50-100 dollars. That said defendants, and each of them, is a nonresident of the territory of Oklahoma, and that the claim about to be sued for in the aboveentitled action arose wholly within the limits of the territory of Oklahoma. That defendant is about to convert a part of his property into money for the purpose of placing it beyond the reach of his creditors; has property which he conceals; has rights in action which he conceals; has assigned, removed, and disposed of a part of his property with intent to hinder, delay, and defraud his creditors. And further afflant saith not."

The affidavit was subscribed and sworn to in the usual manner. Bond was given, and an order of attachment issued, commanding the officer to attach all the property of the defendant within the county of "O," not exempt from execution, or sufficient thereof, to satisfy the amount prayed for in the complaint. Property in the amount of \$1,710.66 was attached under the order. On the 23d day of March, 1894, the defendants filed a motion to dissolve the attachment, and for the discharge of the attached property, which, omitting caption, reads as follows: "Now come the defendants in said above-entitled action, by Elliott, Wood & Dodson, their attorneys, and move the court to dissolve the attachment issued in said above-entitled cause, and to discharge the property attached therein under said writ of attachment, and, for grounds of said motion, say: (1) That no bond for costs, or security therefor, or poverty affidavit, was filed in said court at the commencement of said action, as provided by law. (2) That the plaintiff in said action is, and was at the commencement thereof, nonresident of the territory of Oklahoma. (3) That said claim sued on in said action was not at the commencement of said action, and is not now, and never has been, just, due, and unpaid, but is founded wholly upon a tort. (4) That said defendants were not at the filing of said affidavit for attachment, nor at any time since, and are not now, nonresidents of the territory of Oklahoma, but have been at all times since, and for a number of days prior to, the filing of the affidavit for attachment, and are now, residents of the county of "O." in the territory of Oklahoma. (5) That the defendants were not at the issuance of said writ of attachment and the filing of the affidavit therefor, and at no time since have they or either of them been, nor are they now, about to convert their property or any part thereof into money for the purpose of placing it beyond the reach of their creditors. (6) That at no time prior to the issuance of said writ of attachment, nor since, nor have they now, any property which they conceal. (7) That at no time prior to the issuance of said writ of attachment, at said time, nor since, nor have they now, any rights in action which they conceal. That at the time of the filing said affidavit for attachment, and no time prior thereto, nor at any time since, have they been, nor are they now, about to assign, remove, and dispose of any part of their property with intent to hinder, delay, and defraud their creditors, or any of them. (9) That at no time prior to the issuance of said writ of attachment, nor at any time since, have they assigned, removed, and disposed of any part of their property with intent to hinder, delay, and defraud their creditors, or any of them. (10) That all of the grounds set forth in the affidavit for attachment are, and were at the time of the making and filing thereof, false and wholly untrue. Wherefore, said defendants move the court to dissolve the attachment levied in said above-entitled action, and to discharge the property in said action attached from the lien and levy of attachment, and that they have their costs in this behalf, and such other and further relief as may seem to the court just and equitable."

The motion was verified, and the issues thus raised as to the truth of the allegations of the attachment affidavit; and after hearing the evidence in the case, only a portion of which is embraced in the record (or at least it is not shown that the evidence presented is all the evidence submitted on the hearing), the court rendered the following judgment: "Now, on this 23d day of March,

the same being one of the regular judicial days of the district court of the second judicial district, sitting in and for the county of 'O,' territory of Oklahoma, the above-entitled cause coming on for hearing on the motion of defendants to dissolve the attachment in said above-entitled cause, and to discharge the property levied upon in said attachment,the plaintiff being present in person and by Beauchamp & Rush, his attorneys, and the defendants being present in person and by Elliott, Woods & Dodson, attorneys, and the court after hearing the evidence introduced and offered by plaintiff and defendants,the court finds that the allegations of plaintiff's affidavit for attachment, that the defendants are nonresidents of the territory of Oklahoma are true, and that E. Gustine and A. Gustine were each, at the time of the filing of said affidavit for attachment, nonresidents of the territory of Oklahoma; and the court further finds from the evidence that plaintiff has no cause of action against the defendants A. Gustine, A. Gustine & Co.; and the court further finds that the said motion should be sustained as to A. Gustine and A. Gustine & Co., and overruled as to E. Gustine. And it is by the court hereby ordered, adjudged, and decreed that the motion to dissolve the attachment be, and the same is hereby, sustained as to A. Gustine and A. Gustine & Co., and that said motion be, and the same is hereby, overruled as to E. Gustine, and that all the property levied upon in said attachment, belonging to and the property of A. Gustine and A. Gustine & Co., being all the property levied upon in said attachment, except lot eleven (11) in block No. fifty-two (52), with the building thereon, in the town of North Enid, in the county of 'O,' territory of Oklahoma, be, and the same is hereby, discharged from the levy of said attachment; and the sheriff of the county of 'O,' territory of Oklahoma, is hereby ordered to immediately release said personal property from said attachment: and the lot eleven (11) in block fifty-two (52), with the building thereon, in the town of North Enid, in the county of 'O,' territory of Oklahoma, be not discharged from the levy of said attachment, but held until the further order and judgment of the court; and that A. Gustine and A. Gustine & Co. have and recover from the plaintiff the costs of the discharging of said property discharged, and all costs made in the attachment as to said property discharged, and the discharge thereof, taxed at \$---. To all of which rulings, orders, and judgments of the court the plaintiff objects and excepts, and asks time to file a petition in error, and to appeal said cause to the supreme court, from the order dissolving said attachment and discharging said property from said attachment. Whereupon, the plaintiff is given twenty days from this 23d day of March to perfect a writ of error to the supreme court in said cause, said order dissolving said attachment and discharging said property to be suspended: provided, that within ten days from this date said plaintiff make and execute a good and sufficient bond, with sureties to be approved by the court, in the sum of one thousand dollars (\$1,000), conditioned that within the time given he will make and file a petition in error in said supreme court, and appeal said cause in good faith for review in said court in said time, and that he will pay all the damages that the defendants may sustain by reason of withholding and keeping said property, in case the order of this court should be by said supreme court affirmed. In case said bond as above provided is not made, executed, and approved within the ten days above specified, then the property discharged shall immediately be, by the sheriff aforesaid, released. And to which order the plaintiff excepts. This March 23, 1894. [Signed] John H. Burford, Judge."

From this judgment plaintiff brings error. charging ten specific grounds of error, but in his argument only relies upon two, which may be stated as follows: First. That the court erred in refusing to sustain the attachment against A. Gustine and A. Gustine & Co. for the reason that it found from the evidence that the plaintiff had no cause of action against the defendants A. Gustine and A. Gustine & Co.; the question being upon the dissolution of the attachment, as to whether the court could, upon motion to dissolve, inquire into the merits of the main action. Second. That at the time of the dissolution of the attachment the court required the plaintiff in error to give a bond pending the proceedings in the supreme court, conditioned that he pay to A. Gustine and A. Gustine & Co. all sums of money to which they were entitled by reason of any damages that they might sustain, resulting from the prosecution of his petition in error.

The second proposition involves no question affecting the substantial merits of the case. It is simply a question of procedure that may be allowed by the supreme or trial court, or by any justice of the supreme court, under the law; in many instances, largely a matter of discretion. We hardly think this a proper question for consideration as an assignment of error, especially when it appears that no injury has been done to the plaintiff, and unless he has been injured he cannot be heard to complain.

The first proposition is one that this court should settle clearly at this time, without evasion, as it is squarely involved in this case. The record shows that the cause came up in the court below on a motion to dissolve the attachment and to discharge the attached property. This is a proper proceeding, under sections 4118, 4119, p. 803, of the Statutes of 1893, and such proceeding must succeed or fail upon the truth or falsity of the allegations of the attachment affidavit. In the motion to dissolve, the defendants in error denied under oath, specifically, each and every

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allegation set out and contained in the affidavit of attachment, and on the issues thus joined the court heard testimony and determined the controversy, as shown by the judgment. This question is so well settled, both by statute and reported cases, that it is unnecessary to cite authorities. In order to determine the facts upon the allegations of the attachment affidavit, it is proper, and asually necessary, to introduce evidence, either oral or by affidavit, which, if sufficient, should sustain the attachment. Conner v. Commissioners, 20 Kan. 575. We are not able to state what the evidence in this case proves, for the record does not show that all the testimony is before us; and, without all the testimony, it is a well settled rule that no part of it can be considered. Smith v. Gill, 10 Kan. 74; Gallober v. Mitchell, Id. 75; Clark v. Hall, Id. 80; O'Brien v. Creitz, Id. 202; Insurance Co. v. Duffey, 2 Kan. 348; Cooper v. Armstrong, 4 Kan. 30; McGrew v. Armstrong, 5 Kan. 284; City of Topeka v. Tuttle, Id. 323; Hale v. Bridge Co., 8 Kan. 466; Turner v. Hale, Id. 38; McIntosh v. Commissioners, 13 Kan. 171.

That part of the judgment which we presume was excepted to by the plaintiff in error reads as follows: "The court further finds from the evidence that the plaintiff has no cause of action against the defendants A. Gustine and A. Gustine & Co.; and the court further finds that said motion should be sustained as to A. Gustine and A. Gustine & Co., and overruled as to E. Gustine. And it is by the court hereby ordered, adjudged, and decreed that the motion to dissolve the attachment be, and the same is hereby, sustained as to A. Gustine and A. Gustine & Co., and that said motion be, and the same is hereby, overruled as to E. Gustine." While it would appear, on the first reading of the judgment, that the court had inquired into the question as to whether a cause of action existed, yet it is clearly our opinion that it was the intention of the court to pass only upon the testimony introduced on the motion to discharge the attached property. This is evident from the fact that the motion was sustained, and the failure of the judgment to embrace an order dismissing the main action. We are satisfied that the court simply meant to render judgment in the attachment proceedings; otherwise, the journal entry would have directed a dismissal of the original cause of action. The finding of the court must necessarily have been based upon the testimony introduced, and, as before stated, all the testimony not being before us, we cannot consider the question as to whether the court erred in its conclusions therefrom.

If the petition does not state a cause of action against a defendant, the court, in the absence of an amendment of the petition, or if it is incapable of amendment, is justified in dissolving an attachment issued against the property of such defendant. Quinlan v. Danford, 28 Kan. 507.

The allegations of the petition and the attachment affidavit must be the same in substance. The claim set up in the affidavit must be the same cause of action pleaded in the petition, and the debt sued on in the petition must be the same debt sworn to in the affidavit. An attachment is obtained for the eventual satisfaction of the demand of the creditor, and if the creditor has no demand to satisfy he is not entitled to an attachment. Quinlan v. Danford, supra.

The attachment affidavit, as well as stating the nature of the plaintiff's claim, must state that the claim is just, due, and remains unpaid, and that the plaintiff believes he should recover. If the allegations of the attachment affidavit be disputed by counter affidavits, then it becomes necessary for the court, upon hearing the motion to dissolve, to take testimony on the disputed questions, in order that it may have a full and complete knowledge of the controversy, so as to do equal and exact justice between the parties. The authorities show conclusively that the petition and affidavit must show a cause of action. The testimony taken on a hearing of the cause on motion should show the same thing. If the plaintiff has no cause of action, as shown by the testimony, how can his claim be either just or due? If he has no cause of action, he cannot recover; and, if he cannot recover, nothing is due him, and his claim is not just.

The plaintiff in error contends that the court had no right, upon the hearing, to enter into the merits of the case, and inquire into the original cause of action. This, as a general rule, is correct. Yet the court may inquire into the alleged existence of the grounds of attachment set forth in the affidavit, and, if such inquiry incidentally refers to some of the allegations of the petition, this does not compel it to refuse consideration of the motion or suspend decision until the final trial of the cause. Bundrem v. Denn, 25 Kan. 430. If the testimony introduced upon the hearing of the motion to dissolve does not sustain the allegations of the affidavit, then the motion must be sustained and the attached property discharged. The attachment proceedings are merely ancillary to the main cause of action, and the motion to dissolve does not interfere with the regular trial of the cause. The trial proceeds the same upon the merits of the case as though no action upon the motion had been taken. Bundrem v. Denn, Id. 435.

We think that, where the testimony disclosed that the property of the defendants is wrongfully held, it is the duty of the court to discharge the property from such attachment. This may frequently appear from the pleadings and process, or it may be necessary to hear testimony as stated.

The question as to the right of the plaintiff in error to proceed in attachment against the defendants' property,—the cause of action being founded on a tort,—is not raised

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by his brief; but, if it were, a discussion of the question is unnecessary, as we have determined that the attachment was rightfully discharged on other grounds. The court may have had this point in view when judgment of dissolution was rendered, but it appears that the findings were from the evidence only, so that it is not likely that this is true.

In our determination of this case, we have confined ourselves to the Kansas rule, since the adoption of the Kansas Code carries with it the construction given it by the supreme court of that state, and should thus be the rule in this court. We have carefully examined the Kansas authorities cited by the plaintiff in error, as well as all the authorities in that state on the proposition in controversy in this case, and find that they clearly sustain the rule as laid down in this opinion. The judgment of the lower court should be affirmed, and it will be so ordered. All the justices concurring.

In re McMASTER.

(Supreme Court of Oklahoma. April 10, 1894.) HABEAS CORPUS-WHO MAY ISSUE WRIT -- WHEN PROCESS OF SUPREME COURT — WHEN JUDGE OF SUPREME COURT CANNOT GRANT.

1. A writ of habeas corpus may be issued by a judge of the district court, or by any judge of the supreme court, or, by order of any judge of the supreme court, by the clerk thereof; or it may be issued, by order of the district court or the supreme court, by the

clerk thereof.

2. When a writ of habeas corpus is issued by the clerk of the supreme court by order of any of the judges, it is then the process of the supreme court; and the supreme court may recall the same, and arrest an order made in the

case, and remand the prisoner.

3. Section 699, c. 66, p. 881 (general section 4578), Laws Okl. 1893, provides: "No court or judge shall inquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following: * * * Third. For any contempt cases following: " " Third. For any contempt of any court, officer or body having authority to commit. " " " Held, a judge of the supreme court may not release a petitioner who is held in custody under a commitment issued upon a judgment holding him guilty of a contempt of the district court, the district court having had the jurisdiction of the subject-matter of the proceeding and of the defendant. ter of the proceeding and of the defendant.

(Syllabus by the Court.)

Petition by Frank McMaster for a writ of habeas corpus, for the purpose of obtaining his discharge from the custody of the sheriff of Oklahoma county, Okl. T., to which he was committed for contempt of court. writ was granted by Burford, associate justice, and the territory moves to quash the writ and remand petitioner. Motion granted.

E. B. Green and S. L. Overstreet, for petitioner. C. A. Galbraith, Atty. Gen., J. H. Woods, Co. Atty., Huger Wilkinson, and Green & Strong, for respondent.

BIERER, J. This case is an application for a writ of habeas corpus that was presented to the Honorable John H. Burford, associate justice of the supreme court of Oklahoma territory, asking the discharge of Frank Mc-Master, who was held under the process of the district court of Oklahoma county, Okl. T., issued upon the judgment of the district court of Oklahoma county, holding the said Frank McMaster in contempt of the court by reason of a certain petition filed by the said Frank McMaster in the probate court of Oklahoma county, Okl. T., setting up, among other things, certain charges against the Honorable Henry W. Scott, judge of the third judicial district. Among other matters stated in this petition are the following, referring to an order made by the Honorable Henry W. Scott, judge of said district court: "That said last order aforesaid was issued willfully and corruptly by said Henry W. Scott; because of an immoral and dishonest conspiracy between the said Henry W. Scott, judge, and other parties, to prevent the disclosure of dishonest official acts of said Scott and his co-conspirators, as officials of the territory of Oklahoma; that said Henry W. Scott has willfully, corruptly, and dishonestly conspired with other parties to prosecute and injure said plaintiffs, to destroy their business, and prevent the legal and proper use of their own property; that said writs and restraining orders against said plaintiffs were issued in pursuit and by reason of said conspiracy, and without legal right against plaintiffs, and to prevent them from publishing the illegal, dishonest, and unfair acts of said conspirators; and that in all of said proceedings, hearings, and trials aforesaid the said Henry W. Scott, judge, has been insolent, tyrannical, and unfair in his treatment of plaintiffs, and shown the grossest prejudices against their interest. By reason of all the said acts, the plaintiffs have been damaged in the sum of nine hundred dollars: wherefore they pray judgment in the sum of nine hundred dollars, and costs herein. Frank McMaster, Attorney for Plaintiff." A complaint was filed in the district court, charging a commission of a contempt of the district court, against Frank McMaster, in filing this petition. When that came up for hearing, certain other proceedings were had in the district court of Oklahoma county as to the contempt of the district court committed at that time by the petitioner, and, among other things in said cause, the district court found: "The court further finds that the said defendant, Frank McMaster, willfully, maliciously, unlawfully, and corruptly, on the 2d day of April, A. D. 1894, in the presence of the court, in open court, then in session, in the presenting his defense as set forth in the answer of said defendant, Frank McMaster, and the argument of the said Frank McMaster delivered in open court at said time and place, was insolent, boisterous, contemptuous, anarchistic, and defiant in the presenta-

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tion of the same, and that he falled to show respect, in any sense of the term, to the court before which he was arraigned, and used and employed language wholly unbecoming an attorney and counselor and an officer of the court, for which the court has entered an order suspending him from practice." In this same proceeding, Frank Mc-Master was adjudged guilty of the commission of a contempt of the district court of Oklahoma county, and the sentence imposed upon him for such unlawful act was that he be committed to the jail of Oklahoma county, for the period of six months, and pay a fine in the sum of \$500. He was committed upon this judgment. Thereafter, this application for a writ of habeas corpus was made to Hon. John H. Burford, associate justice of the supreme court of the territory of Oklahoma; and this judgment and these findings we have read and referred to were made a part of the return of the officer to this writ. The Honorable John H. Burford, associate justice, on the return of the writ, after hearing the demurrer to the return and overruling it, made an order continuing the matter until the 21st day of April, 1894, and ordered in the meantime, practically, that the judgment of the district court of Oklahoma county so made, and upon the commitment upon which the said Frank McMaster was held, should be suspended, and he be, practically, given his liberty, without a hearing, and without a determination upon the writ of habeas corpus. An application is now made to this court, by the territory, for a modification of that order of the Honorable John H. Burford, associate justice, and to that application the objection is raised (and that is the only matter that is now presented) that the supreme court of the territory of Oklahoma has no jurisdiction to consider that matter, the matter being a proceeding pending entirely before the Honorable John H. Burford, as associate justice of the supreme court of the territory of Oklahoma.

A part of section 9 of the organic act of this territory provides: "The said supreme and district courts of said territory, and the respective judges thereof, shall and may grant writs of mandamus and habeas corpus in all cases authorized by law." Section 690 of the Code of Civil Procedure, under the habeas corpus act, provides: "Writs of habeas corpus may be granted by any court of record in term time, or by a judge of any such court, either in term or vacation, and upon application the writ shall be granted without delay." Section 697 provides: "The court or judge, if satisfied of the truth of the allegation of sickness or infirmity, may proceed to decide on the return, or the hearing may be adjourned," among other matters contained in said section. Section 698 provides: "The court or judge shall thereupon proceed in a summary way to hear and determine the cause; and if no legal cause be shown for the restraint or for the continuance thereof, shall discharge the party." Section 699 provides: "No court or judge shall inquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following: First, upon process issued by any court or judge of the United States, or where such court or judge has exclusive jurisdiction; or, second, upon any process issued on any final judgment of a court of competent jurisdiction; or, third, for any contempt of court, officer or body having authority to commit; but an order of commitment as for a contempt, upon proceedings to enforce the remedy of a party, is not included in any of the foregoing specifications; fourth, upon a warrant or commitment issued from the district court, or any other court of competent jurisdiction, upon an indictment or information." Section 710 provides: "All writs and other process, authorized by the provisions of this article, shall be issued by the clerk of the court, and, except summons, sealed with the seal of such court and shall be served and returned forthwith, unless the court or judge shall specify a particular time for any such return. And no writ or other process shall be disregarded for any defect therein, if enough is shown to notify the officer or person of the purport of the process. Amendments may be allowed, and temporary commitments, when necessary."

It is the view of the court in this case that, under the organic act and the statutes upon this question, a writ of habeas corpus may be issued by a judge of the district court, or by any judge of the supreme court; or it may be issued, by the order of the judges, by the clerk of the court; or it may be issued, by order of the district court or supreme court. by the clerk thereof. In this case the writ of habeas corpus might have been issued by Hon. John H. Burford, not in the supreme court, but by him alone, as a judge of the supreme court, and there would then be no proceedings pending in the supreme court. In this case it is issued by Hon. John H. Burford, in the supreme court; and the writ issued is a writ issuing out of the supreme court, and not issuing from Hon. John H. Burford in his separate capacity, independently from the supreme court. It is proper for us to say at this time that the court considers this a very nice question, indeed, and one about which lawyers and judges may very properly differ. Different views may be taken upon this question of jurisdiction, and of the respective jurisdictions, and as to whether or not the jurisdiction which may be exercised by a judge of the supreme court is absolutely distinct from that which may be exercised by the court itself. We think, however, in this case, that the process of the supreme court of the territory is called in requisition. We think that whatever doubt there may be in the matter in this most extreme case should be resolved in behalf of

good government for the people of Oklahoma territory, and for the proper carrying out of the judicial proceedings.

The records here show a most scandalous state of affairs: They show on the part of a citizen of the territory of Oklahoma an absolute disregard for the highest and best offices that exist in our territory. They show a state of affairs which, if permitted to exist and continue, means nothing but an "enlightened and intelligent anarchy," if it might be expressed in that way; and we believe there is no question whatever at this time that the court, in the absence of precedents to guide and enlighten us in this matter, should place the balance of judgment on that side which will uphold the institutions of government in our territory, and not permit the highest and most sacred of all our institutions of government to be thus disregarded and trampled in the dust. Under the findings of the district court, no other judgment than that of contempt could possibly be rendered. If such things may be done, and the offending party be immediately discharged from an imprisonment ordered in pursuance of that judgment, then we are at sea, without rudder and without compass, and may only expect our courts, our institutions of the highest character, and which we should require to be held sacred, to be broken down by whomsoever may please. In this case, also, we think that an order which amounts to a temporary release from imprisonment cannot be sanctioned by this court, under section 699 of the Code of Civil Procedure, and that part which refers to this case, in which it states that no party shall be released upon any process for the commission of any contempt of any court, officer, or body having authority to commit; and before the last statement is the one that they shall not be released upon any process issued upon any final judgment of a court of competent juris-

We hold that the process of the supreme court of this territory is invoked in this matter; that this is a writ issuing out of this court; and that the court has the power. the right, and therefrom is evolved the court's duty, to control its own process, and to arrest its own mandate, when evident and manifest wrong will be done if that arresting hand is not placed upon the writ about to be issued. The petitioner being held in custody under a commitment issued upon a judgment that the petitioner was guilty of a contempt of the district court of Oklahoma county, and the court having the jurisdiction of the subject-matter of the proceeding and of the defendant, under section 699, c. 66 (general section 4578), Laws Okl. 1893, a judge of the supreme court would have no right to release from such impris-We cannot assent to the doctrine at this time that the supreme court of this territory would be powerless to act in a case where it might appear that parties committing high offenses against the law could be discharged, in apparent want of consideration, at least, of this section of the statute. For these reasons, we hold that the court has jurisdiction in this matter; and, that being the only question raised, we sustain the motion of the territory, and order the party recommitted to the jailer and sheriff of Oklahoma county, in pursuance of the judgment of the district court there.

DALE, C. J. I will say in addition to what Justice BIERER has said that this case seemed to require of the court an expression of approval or confidence in the acts of the district judge of Oklahoma county, and that, so far as we could, we have felt it to be our duty to maintain the dignity and the authority of the district court of Oklahoma county. We each feel that we have the same interest in maintaining the dignity and high standing of the different courts of this territory as we do of our own. I find some difficulty in coming to the conclusion, but, as Justice BIERER has expressed it, those doubts have resolved themselves in favor of the maintenance of our courts and the respect which we think is due to those courts. We agree that, under the organic act, the judges of the supreme court may exercise independent jurisdiction, but they must so Each member cannot, in the exercise of independent jurisdiction, act as the arm of the court, and use the process of this supreme court, and still maintain the independent character of the act. I might further state that this same question was before the supreme court in the matter of the mandamus proceeding issued by Judge SCOTT, as an associate justice of the supreme court, in the case of Territory v. Quien. The question was presented to me at that time as to the power of the court to arrest its own process, and I acted in that instance upon the theory that, where the process of the court was invoked by one of its arms, that gave the court jurisdiction. In that instance the court modified the order of Judge SCOTT. who had granted a peremptory writ of mandamus, and made it an alternative writ. This decision had the sanction of Judge BURFORD and a majority of the court. We felt that the supreme court should, in the exercise of the powers reposed in the court, where process issued out of the court, and where it was sought to use the court, or an arm of the court, for the mere purpose of carrying into effect a judgment which the majority of the court might think ought not to be carried into effect, that the court should arrest that process; and we so acted in that case. This is in entire harmony with the decision in that case, and with the action of the court in that case, and we have that precedent to guide us now. I concur in the statements made by Justice BIERER as to the gravity of the case now before us, and as to the necessity of the court acting in this

matter, and resolving all doubts in favor of the legality and proper course of our proceedings.

SCOTT and BUR-McATEE, J., concurs. FORD, JJ., not sitting.

(2 Okl. 460)

SCHOOL DIST. No. 74, KINGFISHER COUNTY, v. LONG, County Clerk.

(Supreme Court of Oklahoma. Sept. 7, 1894.) SCHOOL DISTRICT - CAPACITY TO SUE - SCHOOL BOARD - POWER TO ANNEX ADJOINING TERRI-TORY.

1. A school district has an interest in the subject-matter, and capacity to sue, in an action brought to restrain the county clerk from tak-ing from the tax roll of such school district property which properly belongs to such school dis-

trict for taxation.

2. Under an act of the legislature which provides that territory outside of the limits of the city, but adjoining thereto, may be attached to such city for school purposes upon application to the board of education of said city by a majority of the electors of such adjacent territory, it is not necessary that the lands attached, as described by the survey, should lie next to or contiguous to the city limits, but lands which lie adjacent to the city limits, but lands which lie adjacent to the city limits but join and are a part of the entire limits, but join and are a part of the entire body of lands which are attached to such city for school purposes, may be attached.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John H. Burford.

Action of mandamus by School Dist. No. 74, Kingfisher county, Okl. T., against W. C. Long, county clerk of such county. From a judgment sustaining a demurrer to the petition, plaintiff appeals. Affirmed.

Burwell & Burwell, for appellant. Roberts & Brownlee, for appellee.

BIERER, J. The plaintiff in error, school district No. 74, Kingfisher county, Okl. T., brought this action of mandamus in the district court of Kingfisher county, against W. C. Long, county clerk of Kingfisher county, to enjoin him from transferring certain specified tracts of real estate mentioned in the petition, and the personal property belonging to certain parties residing on said lands, from the tax roll of plaintiff's school district, and from removing said lands and personal property of the residents thereon from the tax rolls, so that the same might be relieved of the school tax assessed in said district. The petition, in substance, alleged that the plaintiff is a public corporation, under the school laws in Kingfisher county. That the defendant is the county clerk of Kingfisher county. That on the 2d day of October, 1893, the board of education of the city of Kingfisher, in Kingfisher county, Okl. T., at a meeting of said board, made an order and resolution as follows: "Kingfisher, Oklahoma Territory, Oct. 2, 1893. The school board of Kingfisher city, having been petitioned, as provided by law, to attach the

following described territory to Kingfisher school district for school purposes, and we, said school board, finding that said petition is true, hereby order the same attached for school purposes, to wit: N. E. 4 of 16-7; S. E. 4 of 9-16-7; S. 2 of N. E. 4, 9-16-7; S. 2 See. 3-16-7; Sec. 10-16-7; W. 2, N. W. 4, 11-16-7; S. W. 4, 11-16-7; and W. 2, 14-16-7,—as shown by said petition, now on file in the office of school board of Kingfisher city. P. Wickmiller, Sec." That the said lands mentioned in this resolution had prior to that been a part of said school district No. 74, Kingfisher county, and that none of said lands adjoined the limits of Kingfisher city. That the track of the Chicago, Kansas & Nebraska Railway Company extends across part of said lands. That the plaintiff had levied a tax on said lands, with the other lands in its school district, for school purposes; and that the county clerk, in pursuance to the order of the board of education of the city of Kingfisher, was about to proceed, and would, unless restrained, proceed, to transfer said lands for taxation from the rolls of said plaintiff school district to the school district of the city of Kingfisher; and that thereby plaintiff will be greatly and irreparably injured; and that plaintiff has no adequate remedy at law. To this petition a demurrer was interposed, and sustained by the court, to which plaintiff excepted, and brings the case here for review on appeal. The demurrer is in four paragraphs, but contains but two statutory grounds for demurrer -First, that the plaintiff has no legal capacity to sue; and, second, that the petition does not state facts sufficient to constitute a cause of action.

The plaintiff did have legal capacity to sue. It was a school district, under the provisions of article 2 of chapter 73 of the school laws of Oklahoma of 1893. It was a corporation organized for the public purpose of providing public schools in its district. It had power to sue and be sued. It had power to protect the revenues of said school district. and prevent the disposition thereof by any wrongful conductof any person, corporation, or individual. It had an interest in maintaining the schools of said district, which could only be done by a protection of the revenue of said district. The revenue for the carrying on of the schools of said district could only be raised by taxation. Legal capacity to sue is power or authority in the individual or corporation to maintain an action for the redress of the particular injury claimed to have been committed, and not the ultimate right to recover in the action itself. Legal capacity to sue does not depend upon the ultimate right to recover, but if the party suing has a right to redress of the wrong alleged to have been committed, admitting that the wrong was committed, then he has legal capacity to sue. If the order made by the board of education of the city of Kingfisher was void, and was made without jurisdic-

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tion to make it, and the county clerk, upon the authority of such void order, is about to do an official act detrimental to the well-being and existence of plaintiff school district, then the plaintiff has an interest in the subject-matter, and has legal capacity to bring this action. Commissioners v. Bailey. 11 Kan. 631; Commissioners of Marion Co. v. Commissioners of Harvey Co., 26 Kan. 181; City of Zanesville v. Richards, 5 Ohio St. 590. The cases of School Dist. No. 57 v. Board of Ed. of City of Emporia, 16 Kan. 536, and School Dist. No. 8 v. Gibbs (Kan.) 85 Pac. 222, are cited by the defendant in error as opposed to this view of the law. These authorities, however, do not touch the question. The first one held that an act which empowers a board of education of a city of the second class to attach to such cities for school purposes adjacent territory, upon the application of the electors of said territory, is constitutional, and that no notice to the school district to which such territory previously belonged was necessary; the second, that a school district cannot by injunction restrain the collection of taxes on land detached from its territory, and included in a newly-formed school district, nor restrain the school district officers of such newly-created district from acting as such, nor control the action of the county superintendent in the discharge of his official duties in relation thereto. In neither of these cases was it held that the injured school district would not have capacity to sue if the action detaching its territory was void, and that property properly belonging to its school district was being improperly removed from it for a taxable purpose, by action of the county clerk.

The real and substantial question in this case is as to whether or not the board of education of the city of Kingfisher, a city of the first class, had power and authority to attach these lands described in plaintiff's complaint, and which particular tracts of land are alleged not to adjoin the city limits of the city of Kingfisher, to such city for school purposes. Section 2, art. 7, c. 73, Laws Okl. 1893, provides: "Sec. 2. Territory outside the limits of any city, town or village but adjourning thereto, may be attached to such city, town or village for school purposes upon application to the board of education of such city by a majority of the electors of such adjacent territory, and upon such application being made to the board of education they shall, if they deem it proper and to the best interests of the schools of said city and the territory seeking to be attached. issue an order attaching such territory to such city for school purposes, and to enter the same upon their journal; and such territory shall, from the date of such order, be and compose a part of such city for school purposes only; and the taxable property of such adjacent territory shall be subject to taxation, and shall bear its full proportion of

all expenses incurred in the erection of school buildings and in maintaining the schools of such city. Whenever the territory so attached shall have attained a population equal to that of any one ward of such city, or whenever the taxable property of such attached territory shall equal that of any one ward of such city. such attached territory shall be entitled to elect two members of the board of education, who shall be elected at the same time that the other members of the board are elected, by the qualified electors of such territory, at an election to be held at such place as the board of education may designate." The petition alleges that these particular tracts of land do not adjoin the city limits, but we presume that they are a part of the entire territory which has been by order or orders of the board of education of the city of Kingfisher attached to the city of Kingfisher for school purposes. There is no allegation in the petition that those lands are not a part of such entire territory which does adjoin the city limits. There is no allegation that there are any lands between those lands and the city of Kingfisher which have not been attached to the city of Kingfisher for school purposes, or that those are tracts disconnected from other portions of this entire school district of the city of Kingfisher. The presumptions are in favor of the proper action of public officers; and, there being no allegation that these lands do not adjoin other lands which do adjoin the city limits of the city of Kingfisher, we presume that these lands are a part of the entire territory attached to the city of Kingfisher for school purposes.

The proposition, tersely put, is as to whether, under this statute, particular tracts of land which do not actually adjoin the city limits of a city in this territory can be attached to such city for school purposes. is contended by appellant that they cannot. He contends that the word "adjourning," in this statute, was meant to be "adjoining," and that the tracts of land which can be attached to the city for school purposes must adjoin-that is, lie contiguous to-such limits. The formation of this word indicates that the word intended to be used by the legislature was "adjoining;" but, admitting that the proper word is "adjoining," does that pre-clude the city of Kingfisher from attaching tracts of land that are not adjoining the city to the city for school purposes under this statute? We think not. The statute says that "territory" outside of the city limits, but adjoining thereto, upon application to the board of education of a city by a majority of the electors of the adjacent territory, may be attached for school purposes. Construing the word "adjourning" to mean "adjoining," the words "adjoining" and "adjacent," referring to the outside territory, are both used in this section of the statute. and used in connection with the same subject-matter, and, while there is a difference

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in the meaning of the words when carefully considered, this difference was not a part of the intention of the legislature when this statute was passed. The word "adjoining" was used once, the word "adjacent" twice, both in connection with the same thought, purpose, and idea, in the same connection, and were evidently used intending to convey the same meaning; and, in the construction of statutes, the intention of the legislature. as may be gathered from the entire enactment, must be taken to be the law. Territory v. Clark (Okl.) 35 Pac. 882. We think, in passing this statute, the legislature meant that territory lying contiguous to and in contact with the city limits of a city, but parts of which might not actually touch the city limits, might be attached to the city limits for school purposes. This purpose is gathered from these two words when their technical meaning is taken and considered together, and used with reference to the purpose and scope of these enactments. legislature meant that territory adjoining and adjacent-that is, contiguous to and near by-the city limits of the city of Kingfisher might be attached to it for school purposes. This did not mean that the particular tracts of land should actually adjoin the city limits. The word "territory" is too comprehensive to gather from this enactment such a meaning. Had the legislature meant that the scope of the earth's surface which could be attached to the city for school purposes outside of the city itself should be confined to the tracts of land described as forties, quarter sections, or sections, as different subdivisions of sections are known, such intention could have been easily expressed in words that bear such meaning. The word "territory," however, shows no such intention. There is no limit fixed to the lands which might be attached to the city for school purposes, except such as might be included within a territory defined by the proper exercise of the discretion of a school board, acting upon a petition signed "by a majority of the electors of the adjacent territory." This very prerequisite, that the territory must be attached upon application of a majority of the electors, indicates that tracts of land lying next to the city limits were not the limit of territory that might be attached to the city for school purposes. Had such been the intention, the provision would evidently have been that the territory might be attached upon application of the owner of or resident upon the particular tract of land that did lie contiguous to the city limits. The legislature did not intend this. It intended that, taking the entire territory together, composed of the tracts adjoining the city and those further out, but adjacent thereto, such territory might be attached when a majority of the electors of such entire body is willing that such territory, composed of all of such lands. should be attached.

If the plaintiff's construction of this stat-

ute is a correct one, what land is it that may be attached to the city for school purposes? Is it the 40-acre tracts, the quarter sections, or the sections that lie contiguous to the city limits that are to be attached? There is nothing with that construction placed upon the statute that in any way fixes what lands are to be attached. This view of the matter in itself indicates that the conclusion we arrive at is the only logical one that can follow the language of this statute. The construction of the plaintiff placed upon this act would be a limitation of this legislative enactment, not warranted either by the language or the purpose of the enactment. Section 1 of the same article and chapter of the statute as that of section 2 referred to provides that every city of the first class shall constitute a separate school district. Without the provision of section 2, then, the school district of the city would be composed only of the territory within the city limits. This section 2 was passed primarily for the benefit of those persons who live beyond the city limits, but who preferred to be residents of the school district with the city. The motion by the people of the outside territory to become a part of the school district of the city must be made by the people thereof, and no action can be taken by the officers of the city school district until application is made to its board of education by a majority of the electors of the adjacent territory. If they consider that better school facilities will be afforded to their children in the city school than may be had in the country schools, or if they so desire for any other reason, they may ask that the outside territory be attached to the city for school purposes, the only limitation being that it must be adjoining and adjacent to the city. If the residents of the land comprised within a strip a quarter of a mile wide may ask for the benefits afforded by the city school under this statute, why may not those of the next quarter, or the next, or the next, continuing on to any limit applied for by a majority of the electors, and which the board of education may deem "proper and for the best interests of the schools of said territory and the territory seeking to be attached"? The purpose was to benefit the people of the outlying territory and of the city, which benefit could be arrived at by the application first made by the people of the outlying territory. The legislature has placed no limitation upon that territory, excepting such as might be placed by the people themselves, by their petition or application, to be finally passed on by the board of education of such city. The defining of school districts is a legislative matter. The legislature may do it in the manner they have by this statute, if they so desire. The petition did not, therefore, affirmatively show that the action of the board of education of the city of Kingfisher was improper or unlawful, and, if it is not unlawful, the county clerk had a right to proceed to do his duty in accordance therewith, and no cause of action was stated in the petition. The demurrer was therefore properly sustained. The judgment of the court below is affirmed, with costs against the appellant. All the justices concurred.

BURFORD, J., not sitting.

MULHALL v. McVAY.

(Supreme Court of Oklahoma. Sept. 7, 1894.)

REPLEVIN BOND—CONSTRUCTION—ACTION FOR BREACH—WHEN LIES.

1. Where a statutory bond is given in a replevin action, the provisions of the statute enter into, and become a part of, the bond.

2. Where an action is brought on a repleving a replayin action is bond given by a plaintiff in a replayin action.

2. Where an action is brought on a replevin bond given by a plaintiff in a replevin action, and which was to the effect that the plaintiff shall duly prosecute his action, and pay all costs and damages which may be awarded against him; and where the statute concerning such bond provided: "No suit shall be instituted on the undertaking * * * before an execution, issued on a judgment in favor of the defendant in the action, shall have been returned that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county" (Code Civ. Proc. Neb. § 1045); and where the action was brought after the failure on the part of the plaintiff to duly prosecute his replevin action, but before any judgment was rendered against the plaintiff in the replevin action for damages,—held, that an action does not lie on such bond until execution is returned unsatisfied upon a judgment for damages in favor of the defendant in such replevin action.

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice B. B. Green.

Action by Levi McVay against Zack Mulhall on a replevin bond. There was a judgment for plaintiff, and defendant appeals. Reversed.

S. L. Overstreet, for appellant. H. R. Thurston and S. S. Lawrence, for appellee.

BIERER, J. This action was commenced in the county court of First county (now Logan), in September, 1890, to recover damages alleged to have accrued to Levi McVay, the plaintiff in the action, on account of a breach of a replevin bond given by Frank J. Seely, who was plaintiff in the replevin action brought in the justice's court against Levi McVay, and which bond is as follows: "Territory of Oklahoma, First County. Before S. M. Decker, a Justice of the Peace in and for the City of Guthrie, in said County and Territory. Frank J. Seely, Plaintiff, vs. Levi McVay, Defendant. Territory of Oklahoma, First County-ss.: Whereas, an affidavit has been filed in the above-entitled case this day, for the recovery of divers goods and chattels, now, we, the undersigned, residents of said county, bind ourselves to defendant, McVay, in the sum of \$160, that the plaintiff, Frank J. Seely, shall duly prosecute said action, and

pay all costs and damages which may be awarded against him, and, if the property therein be delivered to him, that he will deliver the same to defendant, if a return thereof be adjudged. Zack Mulhall." The action was by legislative enactment transferred to the district court, and was there tried by the court, without a jury, upon an amended complaint; and at the request of the defendant, Mulhall, special findings of fact and conclusions of law were made by the trial court, which defendant in error, in his brief, states contain substantially the facts set out in the plaintiff's amended petition.

The findings of fact and conclusions of law are as follows: "Findings of Fact: First. This action was originally commenced in the probate court of Logan county, Oklahoma territory, on the 19th day of September, 1890, and, after trial had, was duly transferred to this court, by appeal, for trial de novo. Second. On the ——— day of ———, 1890, the plaintiff, Levi McVay, was the owner of the mare mentioned and described in his amended petition herein, which mare was then sound and in good condition, and of the value of one hundred and fifty dollars. Third. On - day of ----, 1890, one Frank J. Seely commenced an action in replevin against the plaintiff, Levi McVay, for the recovery of said mare, which action was commenced before S. M. Decker, a justice of the peace of Guthrie, Logan county, Oklahoma territory. In such action said Seely executed a replevin bond, with the defendant herein, Zack Mulhall, as surety, which bond is the one mentioned in plaintiff's, McVay's, amended petition, and sued on in this action. Such replevin action, first commenced before S. M. Decker, J. P., was afterwards duly transferred, by change of venue, to C. A. Markland, a justice of the peace of Guthrie, Logan county, Oklahoma territory, which J. P. court, on the 26th day of July, 1890, rendered a judgment in said cause, in the words and figures following, to wit: 'It is therefore by me considered, ordered, and adjudged that the defendant have restitution of the property described in said complaint, and that said plaintiff pay the costs herein expended, and hereof let writ of restitution issue. Writ of restitution issued this 26th day of July, 1890, and handed to T. Lille, constable. C. A. Markland, Justice of the Peace.' That said writ of restitution was a writ commanding the constable to take possession of the mare in controversy, and to deliver her to the said defendant, Levi McVay. Said constable, T. Lille, executed said writ by taking possession of said mare, and delivering her to the defendant, Levi McVay. Afterwards, on the day of July, 1890, an execution was issued on said judgment for the costs in the case, which execution was signed by said C. A. Markland, J. P., and placed in the hands of a constable, and afterwards returned by said constable unsatisfied. writ of restitution and said execution were

all, and the only writs of any nature whatever, that were issued on said judgment. Said judgment was not in the alternative, but was only for the recovery of the property, as hereinbefore quoted. Fourth. At the date of the rendition of the judgment by C. A. Markland, J. P., in said replevin action of Frank J. Seely v. Levi McVay, the mare in controversy in that action, and mentioned and described in plaintiff's amended petition herein, was in Zack Mulhall's pasture, in Logan county, Oklahoma territory, and as sound and in as good condition as when taken from the possession of Levi McVay by the writ of replevin in said replevin action. Fifth. At the time said mare was delivered to Levi Mc-Vay by Constable T. Lille, under said writ of restitution, said mare was sick, sore, unsound, and in a damaged condition, being damaged in value to the extent of ninety dollars. Sixth. Levi McVay accepted the possession of said mare from Constable T. Lille, but protested against doing so, on account of her damaged condition. Seventh. Levi McVay kept said mare until the month of September. 1892, during which time he doctored and cared for her, and improved her condition, and in the month of September, 1892, sold her for one hundred and fifty dollars, at which time she was sound, and in as good condition as when taken from his possession under the writ of replevin in said action of Frank J. Seely v. Levi McVay. Eighth. The above and foregoing are all the facts deducible from the evidence given in this cause. E. B. Green, Judge. Upon the foregoing findings of fact, the court holds that the plaintiff is entitled to recover, as against the defendant, the sum of ninety dollars, damages and costs of suit; and defendant excepts. E. B. Green, Judge."

A large number of questions of law are urged in the brief of plaintiff in error for the reversal of this judgment, all of which seem to have been saved by numerous motions and demurrers in the court below. The primary and principal one, and the one which lies at the very threshold of plaintiff's right to recover in this action, and the one which in this case is exclusive of all others, is as to whether plaintiff below, Levi McVay, can maintain an action upon this replevin bond given by Frank J. Seeley in the replevin action in the justice's court, and signed by Zack Mulhall, without having first reduced his claim for damages to judgment against Frank J. Seeley, and having an execution returned thereon unsatisfied. This bond was given under section 1037 of the Code of Civil Procedure before Justices of the Peace of the State of Nebraska, in force in this territory in 1890, at the time this action was brought; and section 1045 of the same Code provides as follows: "No suit shall be instituted on the undertaking given under section one thousand and thirty-seven, before an execution, issued on a judgment in favor of the defendant in the action, shall have been returned.

that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county." The findings of fact show that the damage which accrued to the mare in controversy in the replevin action accrued after the judgment was rendered in the justice's court in favor of the defendant in that action, plaintiff in the action below, for a return of the property; and there is no finding of fact that the plaintiff's claim for damages which accrued after the determination of the replevin action was ever reduced to judgment against the plaintiff, Seely. In fact, there is no contention by the plaintiff below, either in his pleadings or in his brief here, that this claim for damages ever was reduced to judgment against Seely before the bringing of this action against the surety on the replevin bond, but it is admitted that it was not. This replevin bond is a statutory bond, given in a judicial proceeding, and this section 1045. referred to, from the Nebraska statutes, enters into and forms a part of this bond. Cutler v. Roberts, 7 Neb. 4. This statutory provision is one of the conditions of this bond, as much so as if it had been incorporated in the bond itself. In the case of Hershiser v. Jordan, 25 Neb. 275, 41 N. W. 147, which was an action on a replevin bond to recover against the surety the appraised value of the property, as determined in the replevin action, the supreme court of Nebraska, in construing the section of the Civil Code which contains a provision identical with this of the Justices' Code, held that although it was shown that the plaintiff in the replevin action whose action had been defeated was a nonresident of the county, and absent therefrom, and that he had no property whatever in the county which would be subject to execution for the payment of the amount found as the value of the property, as no execution had issued upon this judgment the plaintiff cannot maintain his action on the bond. The court, in passing upon the case, said: "Section 196 of the Code provides 'that no suit shall be instituted on the undertaking given under section one hundred and eighty-six, before an execution issued on a judgment in favor of the defendant in the action shall have been returned. that sufficient property whereon to levy and make the amount of such judgment cannot be found in the county.' It will be seen that the statute makes the issuing of an execution and the return thereof unsatisfied, in whole or in part, a condition precedent to the right to bring an action on an undertaking to satisfy a judgment in favor of the defendant. This is a statutory requirement, which the court has no authority to waive. The practice pointed out in the Code is simple and easily complied with; and until the return of an execution unsatisfied, in whole or in part, an action will not lie on the undertaking." It is true that that case arose where judgment had been had against the party

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plaintiff in the replevin action upon a trial, and the only thing omitted as required by the statute was an execution on the judgment. But that does not render the case different in principle from the one at bar; and, if that decision is good law,—and we think it is,-then it absolutely precludes the defendant in error here from bringing his action against the surety upon a replevin bond until he has first reduced his claim for damages, whatever it is, growing out of the subjectmatter of the original replevin action, to judgment against the principal, and had execution issued thereon and returned unsatisfied. The statute is very broad and comprehensive in its terms. It is that no suit shall be instituted upon the undertaking until after an execution on a judgment in favor of the party who is defendant in the replevin action shall have been returned unsatisfied. It is not that a suit shall not be instituted until an execution upon the judgment in the replevin action shall have been returned unsatisfied, as the defendant in error considers the law to be, but it is, no suit shall be instituted until execution has first been issued upon a judgment in favor of the defendant in the replevin action. It was evidently intended that the liability, whatever it was, for which redress could be had against the surety on the replevin bond, must first be established against the plaintiff in the replevin suit; and then, if that was not collected by execution, recourse could be had on the replevin bond. The surety on such a replevin bond, under such a statute, had an opportunity to pay the claim as established by judgment in a judicial proceeding before recourse can be had upon his bond. contract of the party signing the replevin bond for the plaintiff in that action is a pure suretyship, and one wherein, by the express contract of the parties, the surety is not liable until by process of law, by judgment and execution, the party in whose favor the bond is given has not been able to collect his claim off of the principal for whom the bond is The right of a party to bring an action against the surety before procuring judgment and process against his principal depends upon the contract of the parties. Brandt on Suretyship and Guaranty (section 97) says: "Whether a surety or a guarantor becomes liable to suit immediately upon the default of, and before any steps are taken against, the principal, depends in every case upon the terms of his contract. When, by the terms of the contract, the obligation of the surety or guarantor is the same as that of the principal, then, as soon as the principal is in default, the surety or guarantor is likewise in default, and may be sued immediately, and before any proceedings are had against the principal."

The express terms of the contract between the parties in the case at bar (the statute, as we have shown, entering into and becoming a part of the contract), were that the surety should not be held liable until proceedings of a certain specific kind were first had against the principal, resulting in a failure to collect the demand of the party for which the security is given. The particular procedure being specified by the contract of the parties, the courts cannot say that any other will suffice. Under a condition of this bond, as contained in section 1045 of the Nebraska statute referred to, the surety, Mulhall, was at no time in default until the damages had first been fixed by judgment against Seely, and until there was a failure to collect the same by execution. The defendant in error contends that one of the conditions of this bond is that the plaintiff in the replevin action should effectually prosecute his suit, and that this is one of the separate conditions of this bond, for a breach of which an action will lie against the surety, and that, the plaintiff, Seely, in the replevin action, having failed to successfully prosecute his action, recourse may be had immediately against the surety on the replevin bond, and cites a number of authorities from Missouri, Iowa, Indiana, California, and Illinois to sustain his proposition. The proposition would be correctly stated, and the authorities directly in point, if it were not for this particular provision of the Nebraska statute contained in section 1045. If it were not for the provisions of that section, then we would promptly agree with the contention of defendant in error, and hold that the suit would lie for a breach of one of the conditions of the replevin bond by plantiff's failure to successfully prosecute the action. examination of all the authorities cited by defendant in error reveals the fact that there was in those cases no statute like this provision of ours referred to. It was simply a question as to whether the bond was forfeited by plaintiff's failure to successfully prosecute the action, not as to whether anything additional was required in order to make the default complete. Taking the condition of this bond, together with the condition in the statute, which is a part of it, there must be a failure to prosecute the action successfully, and there must be a failure to pay the damages awarded, after execution had, and no property of the party against whom judgment is rendered out of which the amount can be made. In the cases referred to, there was but one condition; in the case at bar, there are both. In the cases referred to, the only and sole condition of the bond is broken; in the case at bar but one of the necessary conditions have been violated. Therefore, the action in this case was prematurely brought. question decided is decisive of this case, and renders it necessary to reverse the judgment of the court below, and it is entirely unnecessary to decide the numerous other questions presented by the briefs of the parties. If the parties perform their contract, these

questions will never arise, and it is entirely unnecessary to anticipate them by a decision now. The judgment of the court below will be reversed, with costs to the defendant in error. All of the justices concurring.

GRAND OPERA-HOUSE CO. et al. v. McGUIRE.

(Supreme Court of Montana. July 14, 1894.) MECHANICS' LIENS - PRIORITIES - MORTGAGE ON LAND -ERRONEOUS DESCRIPTION-FORECLOSURE OF LIEN—RIGHTS OF PURCHASER—REMOVAL OF Buildings-Counsel Fees.

1. A finding by the trial court that a mortgage which erroneously described the premises intended to be covered thereby took precedence of a mechanic's lien subsequently precedence of a mechanic's lien subsequently arising will not be disturbed when, so far as appears, the error in description must have been palpable to any one furnishing labor and materials on the property, and there is nothing to show that the finding was not based on evidence of actual knowledge by the lienors as to the property intended to be covered by the as to the propery intended to be covered by the

mortgage.
2. Under Comp. St. c. 82, § 1376, providing that liens for labor or materials shall attach to the buildings or improvements for which the materials were furnished or work done, in preference to any prior lien or incumbrance, and that any person enforcing such lien may have such building or improvement sold under execution, and the purchaser may remove the same within a resemble time thereafter. execution, and the purchaser may remove the same within a reasonable time thereafter, a purchaser on foreclosure of such a lien may, as against the holder of a prior mortgage on the land, remain in possession of the land till the mortgage is foreclosed, and does not by so doing lose his right to remove the building or improvement from the land. improvement from the land.

3. The fact that the decree foreclosing the

lien made no provision for the removal of the

building from the land does not affect the right of removal.

4. A building purchased on the foreclosure of a mechanic's lien thereon cannot be removed before the expiration of the time of redemption.

5. The fact that a building is of brick and stone, the removal of which would cause great loss, does not affect the statutory right of one claiming under a lien thereon to remove it.

6. The testimony of an attorney stating for what compensation a competent lawyer could be procured to conduct a certain action for his own client is admissible to show the value of an attorney's services in conducting such an action.

Appeal from district court, Lewis and Clarke county; Horace R. Buck, Judge.

Action against the Grand Opera-House Company to foreclose a mortgage. Judgment for plaintiff, and McGuire, a claimant under a mechanic's lien, appeals. Reversed.

Wm. Scallon, for appellant. Forbis & Forbis, for respondents.

HARWOOD, J. As regards the point relating to the reformation of the mortgage, we find no ground to disturb the finding and holding of the trial court to the effect that appellant's lien claim ought not to apply precedent to the mortgage on the east 171/2 feet of lot 16, which the building covered. It appears the building covered the west onehalf of lot 14, all of lot 15, and the east 171/2

feet of lot 16. The mortgage was executed, delivered, and recorded in September, 1888, prior to the commencement of the building through which the lien rights accrued, and correctly described said land, except as to the 171/2 feet of lot 16. As to that, the word "west" was inserted by mistake, as alleged, in the original mortgage, instead of the word "east," as the parties had agreed and intended. Thereafter, in the month of February, 1889, upon discovery of this mistake, as appears, the parties to the mortgage executed and caused to be recorded an instrument setting forth said mistake, providing and covenanting therein that the original mortgage was corrected thereby in the particular mentioned, by substituting the word "east" for the word "west," as written in the original mortgage, in respect to the 171/2 feet of lot But in the meantime the erection of the opera house on said premises had been commenced. The facts relative to the alleged mistake, and the reformation thereof by the parties to the mortgage, are set forth in the complaint, accompanied with a prayer that the mortgage, as voluntarily reformed by the parties thereto, be held precedent to the lien claim of appellant accruing through furnishing labor or material for said building, in so far as it related to the 171/2 feet of the east side of said lot 16, as well as the rest of said premises. Appellant, by answer, contested plaintiff's right to such relief, but does not deny the facts alleged in regard to said mistake and the voluntary correction thereof by the parties. The evidence introduced on the trial in relation to this point in controversy is not here for our review. So far as shown, this mistake was so circumstanced as to be quite palpable to any one coming into such relation to the property as the parties to this action afterwards sustained. Besides, there may have been legitimately shown in evidence facts and circumstances in reference to the knowledge and understanding of the parties contracting to erect the building or furnish material therefor which would have aided the trial court in reaching the conclusion that those who became lien claimants were in no wise misled to their injury by reason of said mistake. In short, it may have been shown that the lien claimants understood, as well as the proprietor contracting for the erection of said building, that the mortgage covered the premises on which the same was erected. It was certainly pertinent to show in evidence the relations and understanding of the parties in reference to this subject. We do not hold that such a correction in a mortgage would, under all circumstances, be sustained as against liens having their inception prior to the correction; but in this case, as the same is here presented, there is no showing to warrant our disturbing the finding and ruling of the trial court on that point.

The main question presented for our determination by this appeal relates to the ascertainment and determination of the rights of a lien claimant in and to the improvement alone, as against the holder of a prior existing mortgage on the land whereon the improvement was erected, and as to the right of severance of the improvement from the land by the lien claimant, as against the right of such prior mortgagee, under the provisions of our statute in that regard.

Having passed beyond the point as to correction of said mistake in the mortgage, we have here a case wherein plaintiff is mortgagee of the premises, under a mortgage executed and delivered to secure payment of \$17,000 and interest, evidenced by promissory note, which mortgage was recorded prior to the commencement of the improvement on the same premises. After execution, delivery, and recording of the mortgage, the mortgagor undertook the erection of an opera house on said premises, of large dimensions, involving great cost. Through the construction of said building, certain claims arose in favor of parties furnishing labor and material therefor, which claims, by compliance with the provisions of the statute, were applied as liens thereon. These liens were in due course foreclosed by action against the proprietor of said premises and building, in which action, however, plaintiff, as holder of the prior mortgage, was not joined as a party. Under a decree foreclosing such liens, all right, title, and interest of the mortgagor and proprietor in the premises-both building and land-were sold, and purchased by such lien claimants, through which sale, after several redemptions by lien claimants, in order of succession, appellant succeeded to the rights of such lienors and their certificates of sale under their foreclosure decrees, respectively, and, by virtue thereof, obtained deed of all right, title, and interest of the proprietor in and to the premises, subject, of course, to the mortgage existing on the land prior to the accruing of the lien claims through the erection of said improvement. Thereafter, this action was instituted by said mortgagee to foreclose its mortgage, wherein appellant, being made a party, by his answer sets up the acquirement of title by foreclosure and sale of the improvement and of the proprietor's interest in the land, to enforce said liens, and seeks to have the mortgage restricted, by decree foreclosing it, to the land alone, and make available to appellant said improvement as security for payment of labor and material involved in the erection thereof. The trial court held defendant's right and title in said premises, acquired through said liens, both as to the improvement as well as the land, subsequent and subject to the mortgage of respondent. Appellant complains of this as being contrary to the provisions of the statute applicable to the facts shown by the pleadings and findings, and by this appeal brings into consid-

eration the question whether the decree of the trial court, in view of the provisions of the statute on the subject and the facts shown, has properly adjusted and preserved the rights of these parties in and to said premises. In short, the question is whether, ander such conditions, the holder of the deed obtained through sale of the proprietor's interest in the premises under foreclosure of the lien on the building, as well as all right, title, and interest of the proprietor in the land, may, as against the holder of the prior mortgage, when such mortgage is foreclosed, be allowed to sever the improvement from the land.

At this point it is well to bring into view the statute bearing upon this subject. The liens through which appellant claims the entire right to said building, precedent to any right or claim of the mortgagee therein, are provided for by chapter 82, Comp. St., to protect those furnishing material or labor for erection of improvements on land; and, touching the point here under consideration, it is provided in that statute that the lien shall extend to the entire interest of the proprietor to the extent of one acre of land, if outside of a city or town, and, if within a city or town, to the entire lot on which the improvement is made; and section 1375 provides that, when the interest owned in such land by the proprietor "is only a lease-hold interest, the forfeiture of such lease for the non-payment of rent, or non-compliance with any of the other stipulations therein, shall not forfeit or impair such liens so far as concerns the buildings, erections and improvements thereon put by such owner or proprietor charged with such lien, but such building, erection or improvement may be sold to satisfy said lien, and be removed within twenty days after the sale thereof, by the purchaser." This section, although not the one particularly relied on by appellant, is pointed to as showing that the tendency and spirit of the law is to hold the improvements subject to the lien, even to severance from the soil, if need be, as against rights therein superior to the right of the proprietor who caused the improvement to be made, in order to secure payment for the labor or material used in the erection thereof. But section 1376 is particularly relied on by appellant, and reads as follows: "The liens aforesaid, for work, shall attach to the buildings, erections or improvements for which they were furnished, or the work was done, in preference to any prior lien or incumbrance. or mortgage upon the land upon which said buildings, erections or improvements have been erected or put; and any person enforcing such lien may have such building, erection or improvement, sold under execution and the purchaser may remove the same within a reasonable time thereafter." This provision subjects the improvements to the claim of the lienor to secure payment for the labor or material used in the erection of the

improvement by right superior to that of the prior mortgagee. Respondents do not dispute that such is the plain intendment of the statute, but contend that in this case the lien claimants lost the right of severance of the improvement, by not claiming the same, and having provision made therefor in the foreclosure and sale of the property under said liens, and thus availing themselves of such right by removal of the building, "within a reasonable time," which should have been fixed, as respondents contend, by the decree foreclosing said liens. In their foreclosure proceedings, the lien claimants sought no such provisions, and none were made. Under their foreclosure proceedings, they sold the property, both the building and the proprietor's interest in the land, together; and the purchaser thereof allowed the building to remain on said lots for some three years, until the mortgage existing prior to the inception of the liens was brought forward for foreclosure. Thereby, as respondents contend, the lien claimants lost their right of severance and removal of the improvement from the premises. But, with careful consideration of the conditions involved, and the law upon the subject, we are unable to find ground to maintain respondents' view. By provision of the statute under consideration, the improvement, and all right and estate therein, appear to be held aloof from the prior mortgage on the land for protection of the laborer, mechanic, and material man, until their just claims for labor and material used in the erection and improvement are satisfied; and, to make this provision available to the lienor, the right of removal of the improvement "within a reasonable time" after sale is given. The law not only thus provides, but also attaches such lien to the proprietor's interest in the land. prietor has a right of redemption and right of occupancy of the premises until those rights are cut off by foreclosure of the mortgage. The lien claimant, in such a case, by foreclosure and sale, disposes of, and the purchaser succeeds to, not only the improvement, with right given by statute to sever and remove the same from the land, but also to the right of the proprietor in the land and his right of occupancy thereof, subject, of course, to the mortgage existing thereon prior to the lien. Therefore, having succeeded to the rights of the proprietor in the premises, the lienor would seem to be entitled to remain in possession, with the improvement, until the prior mortgagee, by foreclosure, cuts off that right of possession of the land. By virtue of statutory provision, a lienor's right to the improvement is superior to that of the prior mortgagee, with right of severance and removal of the improvement from the land. But the lien claimant, through foreclosure and sale under his lien, having obtained, not only a right to the building, with right to sever and remove it if not redeemed from such sale under the lien, but

having also acquired all right and interest of the proprietor in the land, subject to the prior mortgage, and consequently a right of possession of the land until that right of possession is cut off by foreclosure of the mortgage, it would seem that there is no ground to require such purchaser under the lien to move out of possession, with the improvement, until his right of possession is cut off by foreclosure of the prior mortgage. If he is required to straightway remove the building, he would still be at liberty to return and occupy the premises, because he has the proprietor's right of possession and use of the land until the prior mortgage is foreclosed. We are satisfied that the lienor in such a case ought not to remove the building until the period for redemption allowed by law to the proprietor, as well as the mortgagee (who, as to the improvement, may undoubtedly claim that all the proprietor's estate therein inures to his mortgage, subject to the lien claim), has expired. But, after that period for redemption expires, how do the parties stand in relation to the premises? The purchaser under the lien foreclosure has acquired right to the improvement, with right to sever the same from the land, as between himself and the prior mortgagee, and also has acquired the right of possession of the proprietor in the land, until cut off by foreclosure of the mortgage. Considering these rights and relations of such parties, it would seem reasonably to follow that, until the right of possession of the purchaser is cut off through foreclosure proceedings, he has the proprietor's right of redemption, and ought to be allowed to stay there with his building, and redeem from the sale under the mortgage, if he can, and thus avoid removal of the building under such lien; but, if he does not see fit to take advantage of the right of redemption from the mortgage, his possession ought to give way at the point where the proprietor's right of possession would have ceased; and, his right to the building being superior to the prior mortgage, it would seem that the reasonable time within which the purchaser under the lien foreclosure should remove the building would be prior to the time when he must yield possession of the land to the mortgagee under his foreclosure proceedings. We find no other reasonable solution of the problem presented by this case, and this seems to be entirely reasonable and just, and in conformity with the provisions of the statute and the rights of the parties in the premises.

There was some argument questioning the policy of allowing the removal of a building in such a case, where the removal—as, for instance, of a brick or stone building—would involve great loss. It is a right given by statute which is here being enforced, and, although there would be some loss and expense attending the removal of such improvements, there can be no doubt that the material prepared for use in building

would be of considerable value. Even if there is some loss involved in the removal. is not justice better subserved by allowing the improvement to be taken to satisfy unpaid demands for labor and material used in the erection thereof, than that the same should go without recompense, and the improvement fall to the prior mortgagee, without satisfaction for the labor and material used in the erection thereof? In such a case there is preserved to the mortgagee all that his mortgage covered when the same was given. He, therefore, can hardly find ground for complaint. He also, as one interested in the property, is allowed the privilege to redeem from the lien claim and the foreclosure and sale thereunder, and hold the improvement subject to his mortgage. Moreover, the circumstances give him another advan-He may at last buy the improvement from the purchaser, under the lien, very likely for a price far below its actual value, on account of the loss and expense attending its removal. But the demands of justice would seem to point in the very direction marked out by statute in such a case, by providing that the lien claimant shall not be compelled to relinquish the improvement to the prior mortgagee or proprietor without recompense.

Appellant urges the further point that the counsel fees awarded for prosecuting the action to foreclose the mortgage are greater than the evidence warranted, and that the manner of inquiry pursued in adducing testimony on that point is not proper. The amount awarded is below 5 per cent. of the demand secured by the mortgage. The testimony was to the effect that double the amount allowed would be reasonable. This testimony was elicited by counsel stating to witness, who was shown to be an attorney at law of ability and experience, the character of the case at bar, the amount involved, etc., and thereupon the witness stated what would be a reasonable fee to allow counsel for prosecuting the action. We agree with appellant's counsel that in such an inquiry it would be proper to ask the witness for what compensation a competent lawyer could be procured to prosecute such an action on behalf of his own client. But this might be done on cross-examination, and the court put into possession of testimony elicited from that point of view. This does not appear to have been done, nor was any testimony of that character excluded, so far as shown by the record. We also concur in the argument of appellant's counsel that in such cases courts should see to it that no exorbitant compensation is awarded to fall upon an already heavily burdened debtor, or upon redemptioners of the property in question. At the same time, it is proper to consider that able counsel called upon to so shape proceedings in court that good title may be thereby acquired to property of great value should receive compensation adequate to

such services. In this case the property is admitted to be of great value, and therefore great care and skill would naturally be desired to avoid loss by reason of defect in the proceedings, and the compensation adequate to that character of service and ability is no doubt proper. It is worthy of observation that the mortgage loan involved in this case, in cold cash, would, in the period of six months, accrue, by way of interest at stipulated rate, as much as the counsel were awarded for services in these proceedings. Altogether, we do not consider that in this case the award exceeded what would be just and proper, in view of the amount involved, and the fact that the case has gone to the appellate court, and must return for further proceedings in the trial court.

The judgment must be modified so as to provide in favor of appellant or his representatives the privilege of removing said improvement in case he does not see fit to redeem the premises from the mortgage incumbrance resting upon the land, and that such right of removal must be exercised within the time allowed by law for such redemption, and in such manner and with such care as to work no unnecessary injury to said land or other appurtenances thereunto belonging, to the end that the purchaser under the mortgage foreclosure may be let into possession, as provided by law. An order will therefore be entered reversing the judgment, with directions to the trial court to set aside the former sale, and proceed in the case according to the views herein expressed. Reversed.

PEMBERTON, C. J., and DE WITT, J., concur.

(20 Colo. 186)

PEOPLE ex rel. CITY OF DENVER v. UNION PAC. RY. CO. SAME v. UNION PAC., D. & G. RY. CO. SAME v. BURLINGTON & C. RY. CO. SAME v. DENVER & R. G. RY. CO.

(Supreme Court of Colorado. June 18, 1894.)
RAILROAD COMPANIES—BRIDGE OVER CITY STREET
—MANDAMUS TO COMPEL CONSTRUCTION.

1. The legislature may authorize a city to compel a railway company which has laid its tracks across a street, when public necessity requires it, to bridge the tracks at its own expense.

2. A petition for mandamus to compel railway companies to bridge their tracks across a street sufficiently shows the necessity for the bridge when it appears therefrom that the street at the point to be bridged is crossed by 22 tracks, that trains are "continually" crossing over them, that the point is in a populous part of the city, and that the street is one of only four connecting a part of the city having a population of 20,000 with another part having a population of 80,000, and the plat filed with the petition shows that the nearest of the other three streets is several blocks away.

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¹ Rehearing denied September 17, 1894

3. In order to compel railroad companies to bridge a street over their tracks, it is not necessary that the part of the street bridged should be abandoned to the use of the companies when by so doing extended territory would be rendered inaccessible.

4. Where the tracks of several railroad companies over a city street are contiguous, they may be compelled to bridge the same according to plans prepared by the city, provided they are feasible and adequate.

Error to district court, Arapahoe county. Petitions for writs of mandamus by the people of the state of Colorado, on the relation of the city of Denver, against the Union Pacific, Denver & Gulf Railway Company, the Union Pacific Railway Company, the Burlington & Colorado Railway Company, and the Denver & Rio Grande Railway Company. The proceedings were dismissed, and petitioner brings error. Reversed.

Mandamus to compel certain railroad corporations to construct a viaduct over their tracks on Nineteenth street, in the city of Denver. In the district court the proceedings were dismissed for insufficiency of the petitions. Petitioner brings error. Concurrent actions were brought by the city against each railroad company having tracks intersecting or extending along Nineteenth street, in the city of Denver. The facts are identical in each case, and in this court the actions were consolidated, under No. 2,884, for the purpose of argument and determination. The actions were all brought to enforce the provisions of the following ordinance of the city of Denver:

"Section 1. Whereas, the construction and operation of a great number of railroad tracks that intersect and extend along Nineteenth street, in the city of Denver, has and does impede travel upon said street to a great extent, and has made the said Nineteenth street dangerous for public travel thereon as a highway:

"Sec. 2. Therefore all railroad companies the tracks of which intersect or extend along Nineteenth street, in the city of Denver, are hereby required to construct at their own expense a good and sufficient viaduct, of the width of fifty feet, over and across their said tracks, at a height of twenty-two feet in the clear above such tracks. Where the distance between any two of said railroad tracks is not sufficient to permit an approach to the viaduct over each track from the ground, to be made at a grade of not to exceed seven per cent., then the railroad company owning each of such tracks shall build such viaduct at said height to a point midway between said tracks, and in such manner as to make the same one continuous viaduct over such tracks. They are also hereby required to construct, at their own expense, good and sufficient approaches to such viaduct or viaducts, at a grade of not to exceed seven per cent.; and such railroad companies, their successors and assigns, shall thereafter, at their own expense, keep and maintain said viaduct or viaducts and the approaches thereto in a good state of re-Said viaduct or viaducts to be constructed entirely of iron or steel crossbeams and supports set on substantial stone foundations; the longitudinal joists between such crossbeams to be of iron, steel, or wood, and the floor to be of wood. Such viaduct or viaducts, and the approaches thereto, shall be set in said Nineteenth street so as to leave an equal distance of said street unoccupied on each side of the same. The said viaduct or viaducts to be constructed with a roadway thirty-eight feet in width for vehicles, and with sideways six feet in width upon each side of such roadway for foot passengers. The said approaches shall be constructed of good and substantial stone abutments and stone and earth approaches, or said approaches may be constructed of the same material as the said viaduct, or partly of each. The width of said approaches to be thirtyeight feet in the clear from the street until the same reaches a height of at least twelve feet above the street, and for that distance the approaches shall be used only as a roadway, and from that point until they meet the viaduct the approaches shall be of the same width as the viaduct, with the roadway and sideways to conform thereto. At the point on said approaches where the sideways begin, there shall be constructed stairways of iron or wood leading to the sidewalk below on Nineteenth street. Said viaduct or viaducts and approaches on the outside thereof shall have good and substantial iron or steel railings.

"Sec. 3. The work of constructing said viaduct or viaducts and approaches thereto shall be commenced in good faith within sixty days after the passage of this ordinance, and shall be actively continued thereafter until said viaduct or viaducts be completed and ready for travel, which shall not be later than six months after the passage of the said ordinance.

"Sec. 4. Upon the completion of such viaduct or viaducts and approaches, the railroad companies whose tracks run under the same shall not be required to keep either flagman or gateman at the crossings of their tracks with said Nineteenth street.

"Sec. 5. Upon the completion of such viaduct or viaducts, any of the railroad companies aiding in the construction of such viaduct or viaducts shall have the privilege of constructing across said Nineteenth street, under said viaduct or viaducts, such new railroad tracks as may be necessary, without any special permission of the city council first had and obtained."

Authority to pass the foregoing ordinance is claimed under the following provisions of the charter of the city of Denver, to be found on page 127 of the Acts of 1889:

"The city council shall have power by ordinance: * * * Sec. 46. To regulate the use of locomotive engines, to direct and control the location of cable and other railroad

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tracks, and to require railroad companies to construct, at their own expense, such bridges and their approaches, tunnels, or other conveniences at public crossings, and such viaducts and their approaches over their tracks, where the same cross or extend along public highways or streets, and to put such streets in such condition and state of repair, as not to interfere with the free and proper use of such street or crossing, as the city council may deem necessary, and, where viaduct or viaducts cross the tracks of several railroad companies, to compel them to build their proportion of a continuous viaduct or viaducts over said tracks with their approaches, and to regulate the rates of speed of all railroad trains within the city limits, and their stops at street crossings."

J. F. Shafroth, F. A. Williams, and A. B. Seaman, for plaintiff in error. Teller & Orahood and Walcott & Vaile, for defendants in error.

HAYT, C. J. (after stating the facts). The duty of railroad and other companies crossing highways to relieve the danger and inconvenience of such crossings has been long recognized under the common law. In State v. St. Paul, M. & M. Ry. Co., 35 Minn. 131, 28 N. W. 3, this rule is stated as follows: "The common-law rule is that, where a person or corporation is given the right to build a railroad or make a canal across a public highway, this gives them no right to destroy it as a thoroughfare, but they are bound to restore or unite the highway at their own expense, by some reasonably safe and convenient means of passage, although the statute contains no express provision to that effect. This duty includes the doing of whatever is necessary to be done to restore the highway to such condition; as, for instance, in case of a bridge, the approaches or lateral embankments, without which the bridge itself would be useless. This duty is founded upon the equitable principle that it was their act, done in pursuit of their own advantage, which rendered this work necessary, and therefore they, and not the public, should be burdened with its expense." The following cases are cited in support of the foregoing rule: King v. Inhabitants of Lindsey, 14 East, 317; King v. Kerrison, 3 Maule & S. 526; Leopard v. Canal Co., 1 Gill, 222; Northern Cent. Ry. Co. v. Mayor, etc., of Baltimore, 46 Md. 425; Eyler v. Commissioners, 49 Md. 257; In re Trenton Water-Power Co., 20 N. J. Law, 659; People v. Chicago & A. R. Co., 67 Ill. 118; Queen v Inhabitants of the Isle of Ely, 15 Q. B. 827; Paducah, etc., R. Co. v. Com., 80 Ky. 147. The statute and ordinance relied upon in support of the present actions are evidently not for the purpose of curtailing the duty imposed by the common law, but rather for the purpose of making the duty explicit and free from doubt.

Although it may have been optional with the railroad companies in the first instance all hours of the day and night; "that the

to have laid their tracks at the street grade. or above or below such grade, the duty to leave the public a reasonably safe and free passage was the same in each instance; and there can be no doubt that the duty is a continuing one, and that the legislature has ample power and authority to require such changes from time to time as the public safety or convenience may reasonably require. A railroad with a single track crossing at grade may inconvenience the public but little, while by increasing the number of tracks and trains, to meet the requirements of a growing population and enlarged traffic, the inconvenience and hazard may be increased to such an extent as to practically deprive the public of any beneficial use of the street. In the case of Com. v. New Bedford Bridge, 2 Gray, 339, it was held, under an act of the legislature authorizing the erection of a bridge over a navigable river. "with two suitable draws, which should be at least thirty feet wide," that the duty of the corporation was not discharged by making the draws 30 feet in width, this being adequate for the accommodation of commerce by the vessels in use at the time the bridge was constructed, but that the duty was a continuing one, requiring the corporation to enlarge the draws from time to time, as the same should become necessary, by reason of the larger size or change in model of vessels navigating the river. Likewise, in Cooke v. Railroad Co., 133 Mass. 185, it was held, in an action for personal injuries resulting from an insufficient bridge maintained over its tracks by the railroad company, that it was bound to provide a bridge suitable for the increased travel, and that even if the bridge was adequate for the purpose when built, and an increased use rendered it inadequate, the corporation must alter the bridge. The authorities are believed to be uniform to the effect that, when railroad companies lay their tracks across public streets, such occupation of the street is subject to the condition that they will do whatever a reasonable public necessity may require to maintain the street as a highway, and that this duty is a continuing one, enlarging from time to time, as changed conditions render the mode adopted inadequate. Com. v. New Bedford Bridge, supra; Maltby v. Railway Co., 52 Mich. 108, 17 N. W. 717; State v. St. Paul, M. & M. Ry. Co., 35 Minn. 131, 28 N. W. 3; Id., 38 Minn. 246, 36 N. W. 870; State v. Minneapolis & St. L. Ry. Co., 39 Minn. 219, 39 N. W. 153.

The foregoing principles are conceded by counsel in this case, but it is argued that the petitions do not show a reasonable public necessity for the proposed viaduct. This contention is not borne out by the record. From this it appears that Nineteenth street is intersected by 22 tracks that would be spanned

said Nineteenth street, between said Wazee and Central streets, is situated in a populous part of the city of Denver, and is one of the most important thoroughfares connecting North Denver, which has a population of some twenty thousand people, with what is known as East Denver, having a population of about eighty thousand people; that only four streets connect said North Denver with said East Denver; that, in addition to the tracks of defendants which extend across said Nineteenth street, there are also a large number of tracks which have been constructed across said Nineteenth street by divers other railroad companies, against whom proceedings in mandamus are concurrently brought herewith to compel the performance of the same duty; that, ever since the year 1889, the passing of said trains on the various railroad tracks crossing the said part of Nineteenth street became so constant that it interfered with and impeded to such an extent the public travel on said Nineteenth street that, in order to restore said highway to a reasonably safe and passable condition, it became necessary that a viaduct should be constructed over and across said tracks in Nineteenth street, together with suitable and convenient methods of approach to the same; * * * that the defendants and other railroad companies, though said necessity for said viaduct still exists, and the same is necessary for the safety of the public in the use of the said Nineteenth street, have refused and neglected to begin the construction of the same; * * * that without said viaduct said Nineteenth street, at said crossings, is unsafe for public travel and public use, by reason of said railroad tracks crossing the same, and by reason of the constant running and operation of engines, cars, and trains over and across the same by defendant." It would seem that the necessity for the proposed viaduct is made plain by the foregoing averments, but counsel base an argument upon the allegation to be found in the petition that only four streets connect North Denver with East Denver. The claim is that the petition should have shown that the other three streets could not be conveniently utilized for the accommodation of the public in passing between the two sections of the city named. We do not think this claim is well founded, particularly in view of the fact that it appears from the plat which is filed as a part of the petition that of the other three streets the one nearest Nineteenth street is several blocks away from that thoroughfare.

The only other ground relied upon by the defendants to overthrow the application of the petitioner for a writ of mandamus is stated as follows: "That it appears from the petition herein, and from the ordinance therein set forth, that it is proposed by the petitioner to continue and maintain Nineteenth street at a grade as a public thoroughfare across the tracks of these defendants, and

at the same time to compel these defendants to construct a new and different thoroughfare over and across the tracks of these defendants without compensation therefor." The argument in support of this objection is founded upon the principle that, if a burden is to be imposed, it must be imposed in such a manner as not to inflict upon the defendants unnecessary costs and expenses; and to this end it is urged that, as a condition precedent to the right of the city to compel the erection of a viaduct over the railroad tracks. a new grade for Nineteenth street must be established above, corresponding with the grade of the proposed viaduct, and the street below entirely given over to the use of the defendants, or vacated. We think the argument unsound when applied to the case as now presented. It is apparent from the plat, which is made a part of the petition and relied upon by counsel representing all parties, that to entirely vacate Nineteenth street at the surface would be to deprive a large number of people and an extended territory from access by teams to either East or North Denver, while, by the ordinance enacted, care has been taken to provide for the accommodation of the public in such a manner as to inconvenience the least possible number of people, and at the same time to make the burden of constructing the viaduct as light as possible. The cost of a viaduct the full width of the street would certainly be much more than one of the width required by this ordinance. In State v. St. Paul, M. & M. Ry. Co., supra, the action was brought at the relation of the city of Minneapolis, to compel the defendants to build certain bridges over their tracks and approaches to the same. One of the defendants objected to the plan proposed by the city, and, in lieu thereof, proposed another and different plan, which it was willing to accept; but, the court being of the opinion that the plan proposed by the relator was suitable, appropriate, and adequate for the purpose. the writ of mandamus was ordered accordingly. In that case the plan included a bridge over contiguous tracks of two railway companies, and it was apparent that they could not agree upon a plan. In this case there are four defendants, and, if it were left to them to determine the character of the structure to be erected, at is not at all probable that any plan would meet with the approval of all. Hence the advisability of having a plan prepared by the city in the first instance; and, in case the plan proposed is found feasible and adequate for the purpose, the erection of the viaduct in accordance therewith may be enforced, provided a reasonable necessity therefor is shown to exist. What we have hereinbefore said is predicated entirely upon the allegations of the petitions and their sufficiency. Upon these we conclude, upon principle and authority, that the petitions are sufficient in form and substance; hence the motion to quash should

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have been overruled, and the defendants required to answer. It is not for us to anticipate the character of the answers that may be interposed. When the case is fully presented, by proper pleadings and proofs, it will be for the trial court, upon the facts and circumstances as they then appear, and the law applicable thereto, to determine whether or not the city is entitled to the relief sought by these actions. The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion. Reversed.

(20 Colo, 51)

WILLIAMS v. WILLIAMS.

(Supreme Court of Colorado. May 7, 1894.) HUSBAND AND WIFE-ALIENATING HUSBAND'S AF-FECTIONS-EVIDENCE-DAMAGES.

1. Husbands and wives are equal the law, in respect to the conjugal affection and society which each owes to the other. The wife may maintain an action for damages against one who wrongfully induces and pro-cures her husband to abandon her or send her

away.

2. In an action for enticing away a husband or wife, it is sufficient to allege in the complaint the ultimate facts, without a statement of the arts made use of to accomplish the

illegal purpose.

8. In determining whether the declarations of a person not a party are, or are not, com-petent evidence in a particular case, the na-ture of the issue, and the special circumstances under which the declarations were made, must be taken into consideration.

4. Whenever it is proper to prove the do-

ing of an act by a certain person, the declarations of such person, accompanying the act and having reference thereto, are admissible in evidence as explanatory of the act itself. Thus, in an action by a wife for enticing away her husband, it is proper to admit in evidence the declarations of the husband, having reference to his separation or contemplated separation from his wife, for the purpose of showing what caused such separation, though his mere declarations are not admissible to show what defendant's conduct really was.

5. In an action for enticing away a husband, an instruction to the effect that if the conduct of the defendant was unjustifiable, and actually caused the injury complained of, then malice in law is implied from such conduct, is not technically accurate, as an abstract proposition. Such rule ignores the distinction between the intentional commission of a wrongful act and the doing of a wrongful act through mere error of judgment, and also the dis-tinction between a grievous wrong and a mere nominal trespass.

6. In general, malice may be implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse. The very essence of malice is a disposition or willingness to do a wrongful act greatly injurious to another.

7. The relation of parent and child may excuse much partiality by one for the other, but such relation does not excuse gross injustice deliberately perpetrated against the rights of others.

8. An instruction technically erroneous does not furnish ground for reversal, if the jury are not misled, or if, as a whole, the case is fairly presented to them, and especially if their verdict is obviously correct. In reviewing a charge, it is to be considered as a whole, the actual matters in control of the case is a cont in reference to the actual matters in controversy. If, when thus considered, it is clear that the jury were not led to a wrong conclu-sion, the judgment will not be reversed merely on the ground that the charge contains some proposition not technically accurate in the abstract

9. In the act restoring exemplary damages, the words, "wrong done to the person," are not restricted to physical or bodily injuries. These words, construed with the entire language of the act, include injuries affecting the mind and sensibilities of the individual.

10. In an action for articles.

10. In an action for enticing away a husband or wife, no absolute rule as to the measure of damages can be laid down. Where the right of recovery is clear the court will not disturb a verdict on the ground that it is too much or too little, unless it is grossly disproportionate to the rights of the parties, as shown by the evidence.

On Rehearing.

1. Under the statute providing for exemplary damages, the damages claimed being essentially unliquidated, and there being no definite limit to the exemplary damages allowable, except that they be reasonable, the common-law practice may be followed in declaring for and awarding such damages

2. It is not necessarily erroneous for a trial court to omit to charge upon every point of a case, or to omit to give a correct instruction of its own motion upon every point upon which an incorrect instruction is prayed.

(Syllabus by the Court.)

Appeal from district court, Arapahoe county.

Action by Kate Williams against Elizabeth M. Williams for alienating the affections of her husband, and causing him to separate from and desert her. The defendant was Verdict and judgthe husband's mother. ment for plaintiff in the sum of \$12,500. De-

fendant appeals. Affirmed.

The complaint, omitting the formal parts, is as follows: "On or about the 9th day of July, 1888, in the state of New York, the plaintiff was lawfully married to one Edward L. Williams, who is the son of defendant. That at all times since said marriage the said Edward L. Williams and the plaintiff have been, and now are, husband and wife. That by reason of said marriage the plaintiff became and was entitled to the support, company, and society of her said husband. That from and after the time of said marriage, and until the interference on the part of defendant hereinafter set forth, the said Edward L. Williams was deeply attached to his said wife, the plaintiff; and the plaintiff and her said husband lived happily together as husband and wife, and but for the wrongful and malicious acts of the defendant, hereinafter set forth, would have continued so to live together. That shortly after the said marriage the said defendant, conceiving and harboring an intense dislike of the plaintiff, wrongfully and maliciously sought to prejudice the mind of said Edward L. Williams against the plaintiff, and alienate his aff-ctions from her, and has ever since sought and endeavored, by subtle contrivances, by coaxing and threats of disinheriting the

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said Edward L. Williams, to entice him to separate himself from the plaintiff, and to leave and desert her. Plaintiff further alleges that on or about the ---- day of -1889, the plaintiff and her said husband were by said defendant persuaded and induced to leave their home, in the state of New York, where they had resided up to said date, and where plaintiff had friends and acquaintances, and to come to the city of Denver, in the state of Colorado, where the plaintiff was an entire stranger; that a few days prior to their said departure from New York the defendant, in pursuance of her said design to alienate the affections of the said Edward L. Williams from the plaintiff, and to entice him to leave the plaintiff, and with a view of having the plaintiff, as well as her said husband, more completely in the power of defendant, fraudulently induced and procured him to turn over and transfer to her, the said defendant, all, or nearly all, of his property, consisting of stocks, bonds, securities, etc., of the value of about twenty-five thousand dollars (\$25,000); that shortly after their arrival in Denver the plaintiff and her said husband were joined by the defendant; that said defendant, upon her arrival in Denver, continued, and has at all times since continued, her endeavors to alienate the affections of the said Edward I. Williams from the plaintiff, and to induce and entice him to leave the plaintiff; plaintiff avers and alleges that said defendant has, by her said arts and contrivances, by threats made to the said Edward L. Williams, and by misrepresenting the plaintiff to him, wrongfully and maliciously alienated the affections of her said husband from the plaintiff, and has wrongfully and maliciously enticed him to separate himself from her, whereby the plaintiff has been deprived of the society, comfort, and support of her said husband, by reason of which the plaintiff has been damaged in the sum of fifty thousand dollars (\$50,000). Wherefore, plaintiff demands judgment," etc. The answer admits the marriage of the plaintiff, Kate Williams, with the defendant's son, Edward L. Williams, but denies all the charges of fraud and wrongdoing alleged against defendant. The statute providing for exemplary damages in certain cases is as follows: "That in all civil actions in which damages shall be assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damarges sustained by such party, award him reasonable exemplary damages." Sess. Laws 1889, p. 64.

Morrison & Kohn and C. S. Thomas, for appellant. Lipscomb & Hodges, for appellee.

ELLIOTT, J. (after stating the facts). 1. A question is raised in limine which goes to the very foundation of this action. The question is whether a wife, as a matter of law, can have any right of action against one who induces her husband to abandon and forsake her. It is conceded that the husband may have a right of action against one who entices away his wife, but it is urged that, by reason of the legal unity of husband and wife, no such right of action exists in her favor. It is true there are some decisions to that effect, but they are neither numerous nor convincing. The case of Logan v. Logan, 77 Ind. 558, was rendered by a divided court, two of the five judges dissenting. Subsequently, a contrary opinion was rendered by the same court. See Haynes v. Nowlin, 129 Ind. 581, 29 N. E. 389. The case of Van Arnam v. Ayers, 67 Barb. 544, was expressly overruled in the case of Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17. The view urged in behalf of defendant, it is said, logically results from the doctrine of coverture, which, according to the ancient common law, precluded the wife from bringing and maintaining suits in her own name. That doctrine often resulted in the rankest injustice to married women. By sundry legislative acts. dating from an early period, the disabilities of coverture have been gradually removed in Colorado, and these acts have been so liberally construed by the courts that controversies respecting the status of married women have practically disappeared from our jurisprudence. Rev. St. 1868, p. 455; Gen. St. 1883, §§ 2267, 2268; 2 Mills' Ann. St. 1891, §§ 3008, 3009; Code, § 6; Wells v. Caywood, 3 Colo. 487; De Votie v. McGerr, 15 Colo. 469, 24 Pac. 923; Knight v. Lawrence, 19 Colo. -, 36 Pac. 242. Mr. Justice Blackstone, who wrote 150 years ago, gave as a reason for denying the wife's right of action in cases of this kind the following: "The inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury." 3 Bl. Comm. 142. This language seems strange in the present age, however familiar it may have been during the last century. The following from decisions rendered within the last five years show the modern American doctrine upon this subject: In Warren v. Warren, 89 Mich. 127, 50 N. W. 842, it is said: "The wife is entitled to the society, protection, and support of her husband as certainly, under the law, and by moral right, as he is to her society and services in his household." In Foot v. Card, 58 Conn. 1, 18 Atl. 1027, it is said: "So far forth as the husband is concerned, from time immemorial the law has regarded his right to the conjugal affection and society of his wife as a valuable property, and has compelled the man who has injured it to make compensation. Whatever inequalities of right as to property may re-

sult from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society. The husband owes to the wife all that the wife owes to him. Upon principle, this right in the wife is equally valuable to her, as property, as is that of the husband to him. Her right being the same as his in kind, degree, and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to A further discussion of this question is unnecessary. We regard it well established, both upon reason and authority, that a wife may maintain an action for damages against one who wrongfully induces and procures her husband to abandon her or send her away. See, in addition to the foregoing, the cases cited in Bennett v. Bennett, supra; also, Seaver v. Adams (N. H.) 19 Atl. 776, and Westlake v. Westlake, 34 Ohio St. 621.

2. It is contended that the complaint does not state facts sufficient to constitute a cause of action. In an action for enticing away a wife, it has recently been decided by this court that it is sufficient "to allege in the complaint the ultimate facts, without a statement of the arts made use of to accomplish the illegal purpose." See French v. Deane (Colo. Sup.) 36 Pac. 609, and the cases there cited. The complaint in this action is sufficient in law, and the evidence was such that this court cannot properly disturb the verdict and judgment unless it be found that error was committed by the trial court affecting the substantial rights of defendant. From the evidence it appears that plaintiff was married to Edward L. Williams, son of defendant. Elizabeth M. Williams, in the city of New York, in July, 1888. Plaintiff was then about 26 years old, her husband being about a year younger than herself. They had been acquainted for some years previous, but their marriage was kept a secret from defendant and her family until the following year, July, 1889. The evidence shows that defendant was much displeased with her son's marriage when she learned of it, and that she sought to bring about a separation of the young people. Failing in this, she prevailed upon them to go west. The evidence further shows that, a few days before they started west, defendant procured a transfer to herself of her son's property, consisting of stocks and bonds of considerable value. Plaintiff and her husband arrived and located in Denver in August, 1889. For two or three months thereafter, correspondence was kept up between defendant and her son; and about November 15, 1889, defendant herself arrived in Denver, and took board and lodging at the same house with plaintiff and her husband. The evidence is undisputed that within a fortnight after defendant's arrival she was actively and persistently endeavoring to secure her son's separation from plaintiff, and in this she was successful. Early in Decem-

ber she and her son went back to New York together, leaving plaintiff behind, and thus defendant successfully accomplished the separation of the husband and wife.

3. It is claimed that the court erred in admitting in evidence certain declarations made to plaintiff by her husband, against defendant's objections. The declarations of a person not a party to a suit are not, except under special or peculiar circumstances, competent evidence. Such is the general rule. But in determining whether such declarations are, or are not, admissible in a particular case, the nature of the issue, and the special circumstances under which the declarations were made, must be taken into consideration. In this case, while the husband of plaintiff was not a party to the suit, yet the action directly involved, not only his mother's conduct, but his own conduct in respect to his wife. The precise issue was whether defendant had wrongfully and maliciously induced her son to separate himself from and abandon plaintiff, as his wife, thus depriving her of the society, comfort, and support of her husband. From the character of the issue, therefore, it was not only proper to show the declarations and acts of defendant in respect to her son's marriage, including her efforts to secure a separation of the young married couple, but it was also necessary to show the effect of the mother's conduct upon the son. The state of Edward's mind towards his wife, in consequence of his mother's conduct, and the way in which his mother's conduct caused him to treat his wife, were all involved in the issue.

4. It is a familiar rule that, whenever it is proper to prove the doing of an act by a certain person, the declarations of such person. accompanying the act and having reference thereto, are admissible in evidence as explanatory of the act itself. In this case it was shown that defendant took an active part in her son's affairs with reference to his property, his residence, and particularly with reference to his relations to his wife. It was proper, therefore, that his declarations concerning such conduct on his mother's part, and having reference to his separation or contemplated separation from his wife, should be submitted to the jury, for the purpose of enabling them, in connection with other evidence, to determine the cause or motive which prompted his separation from his wife. The trial court, in admitting such declarations, expressly limited them to such purpose. 1 Phil. Ev. 185-187; Baker v. Baker, 16 Abb. N. C. 302; 1 Greenl. Ev. §§ 108, 123; Rawson v. Haigh, 2 Bing. 99-104; Sessions v. Little, 9 N. H. 271; Tenney v. Evans, 14 N. H. 350. The evidence unquestionably shows a disposition and effort on the part of defendant to cause a separation between her son and plaintiff, from the time when defendant first learned of their marriage, in July, until their mas seems sear.

1st of December of the same year.

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A son-in-law of defendant, who lived with her in Brooklyn, was called as a witness for defendant, and, testifying concerning his first meeting with plaintiff, said: "I tried, of course, to shield the family all I could. knew this marriage was very distasteful to them, but I talked with her [the plaintiff], and tried to see if there was some way in which the matter could be settled amicably: but she would not listen to reason, and put forward every objection to every suggestion that I made." Defendant testified to a conversation between herself and plaintiff at their first meeting, in which plaintiff requested defendant to ask her son if he would not go away with plaintiff and live with her, as she [plaintiff] thought they could get along and be happy. Defendant replied: "I told her I would see. I could not make up my mind then, and she left and went away." Defendant testified that shortly afterwards she told plaintiff that, if she (plaintiff) had a father's house, she (plaintiff) should go to it, and that plaintiff said she did not know what to do. Defendant further testified: "I had them [Edward's stocks and bonds] transferred to me-every one of them-myself. I went to each one of the places, and had them made over to me." Defendant testified that she finally made arrangements for her son and plaintiff to go west, and that they did so. Defendant was asked: "What condition of things did you find when you came here [to Denver], so far as the relations of your son and daughter were concerned? A. They seemed to be getting along very well together. I didn't see anything amiss,-nothing before me,-until it came up about the little trouble that she would not allow him to go out to play cards; and we had some little words about it, and I told her what I thought of her, and what she had promised to do when she left Cresson [a place in the east], and had not done, and that sort of thing, and she got very angry about it." Again, defendant testified: "Well, for a few days we done very well, and went out riding together, and got a horse and buggy, and she drove me around Denver. We went to church together, and everything was very pleasant until this came up about my son's wanting to go to Keeney's and play cards, and she objected. I said [to Edward]. 'If you say you want to go, I should go,' and he did go. I said to her [plaintiff] that she made a pretty fool of herself, going to Mr. Keeney's office, demanding the key of my son's desk to get letters out, and she says, I will do it again.' I says, 'No, you won't, for you will not get a chance to do it again.' That was the answer I made her. Q. What happened after that? A. Well, I told her, from the letters I had been getting, I thought they better separate; that I didn't see how they could live together, and live pleasantly; that they better be apart. I am sure it would be a great deal better for her, and for him and for me, that they should have a separation.

And she said no, she would not have it. I told her that he did not wish to live with her, and there was no law in the land that could compel a man to live with a woman, if he didn't wish to, as long as he has paid her board. And he never refused to pay her board; always has been willing. And she sald I brought her out here to leave her, and I said we hadn't done any such a thing; I would not do that to anybody; that I should pay her way back to New York, or take her to her father's,-either one. And she said she would not go to her father's. I said, 'We will pay your way back to Brooklyn.' I then offered her a hundred dollars if she would give him a separation, and she said no, she would not. And the reason I offered that was thinking she would accept some sum. If she had said two or three thousand dollars, I would have given it to her, and been done with her right away, but she didn't say she would accept anything. Q. You offered money to get an offer from her? A. Yes, that was the idea. She would not accept it. I told her, all right, she might get her lawyer, and I would get mine, and we would draw up papers for a separation. She got very angry about it. She has a very high temper. So, the next day,-I think it was the next day after this conversation that I went down to Mr. Keeney's office,-I told her to get a lawyer; she had friends to advise her where to go. And she said she had no friends. I told her to go to her boarding house, and they could give her advice what to do. And she started out for a lawyer, and we got our lawyer; and there was a separation talked of, and I said I would allow her three dollars a week after her separation. * * I offered her \$100, thinking she would accept some certain sum. If she had said, 'I will take a thousand,' or two thousand, or three, I would have given it to her. Q. Then that offer of \$100 was merely a bait, wasn't it? A. Yes, and she didn't accept it. Then I said, 'I think you better have a separation.' • • • Q. Didn't you say to her that she was hanging around after him was the reason he married her? A. J said I heard she had. Q. She then cried? A. Of course; she can do that any time. you know; throw up her hands and go off in a faint at any time. Q. You didn't think that was enough to make her cry? A. No. sir. Q. The proposition of a hundred dollars in exchange for her husband? A. I don't mean that. She could have said what sum she wanted."

The testimony of plaintiff was very strong against defendant, and tended to place defendant in a very unfavorable light, as a disturber and destroyer of plaintiff's conjugal rights. Plaintiff testified that while she and her husband were in Chicago, on their way to Denver, he came to her, and laid his head on her shoulder, and cried, and said "Kate, ma says I must leave you when we get to Denver." Plaintiff further testified

that when they got to Denver they got along very well together, except sometimes when Edward would get a letter from his mother; that Edward said to plaintiff his mother advised her (plaintiff) to go to California, or to her sister's in Nevada; that again he said his mother wished him to come home, as she wanted him to live with her (defendant), and that "I should go to my sister's, and remain there, and not go back to Ne v York." Plaintiff also testified that Edward came home one night, and cried all night, and never slept, and kept plaintiff awake also, and said his mother wished plaintiff to go away,—that was about two weeks before his mother arrived,-and Edward said that "I should go to my sister's, and he return home." Plaintiff also testified that, the night before his mother came, her husband laid his head on her shoulder, and cried, and said, "Oh, Kate! mother is coming out to take me away." Plaintiff also testified to the following conversation between herself, her husband, and defendant, as occurring in Denver a short time after the mother's arrival: Plaintiff said to her husband, "'Eddie, Mrs. Thompson is to come to play cards to-night.' He says, 'I am going out to-night.' I says, 'Can't you put it over until to-morrow night?' Mrs. Williams heard me speaking to him, and called him, and says, 'Eddie, what is she saying to you?' and he told her, and she says: 'If you want to go out, you go. If you want to go to the theater, or play cards with the Keeneys, you go and do so. She has no right to interfere with your outside pleasures." Plaintiff further testified that some days after defendant's arrival she called plaintiff to her room, and said, "'Now, Kate, I have consulted a lawyer on what we were speaking of last week; and I will give you a hundred dollars if you get Eddie a divorce, or allow him to get one.' And I would not agree to that, and I says, 'we are living happy, and I don't see why we should separate.' She says: 'If you don't do that, I will give you three dollars to live on, for a separation, and you must take that and live in Denver; otherwise, I will leave you here in Denver without friends or money. But you must not come back to New York. You can go either to your sister, or remain here, but I don't want to lay eyes on you again.' Then I said my husband hadn't spoken to me about this, and I should see him. She says: 'You can't see him. He may be on the train now, going to the end of the world, where you will never lay eyes on him.' And I cried, and I says, 'I will see him.' And I started down, and she got there ahead of me, and called him out. I says, 'I want to see you in private.' She says: 'No, you can't. Tell him in my presence. I have control of this matter.' And Eddie says, 'Yes. let her speak to me.' And she says, 'No, she cannot.' Also, she says that 'I came out here for that purpose, and I am not going back and leave you together.' And I asked to go to New York, where I had friends, and I would have the matter settled there. She says, 'No, I came out here, and whatever business I have to transact I will do it right here." Plaintiff further testified that defendant took her to the office of her lawyers; that defendant's lawyers would have nothing to with the case unless plaintiff was first represented; that defendant said, "'Let her go and get a lawyer,' and I said I didn't feel like it, and didn't know where to go and get one; and then I asked my husband to go with me, and she says: 'He can't go. Go alone.' Then defendant's lawyer said, 'Yes, let her husband go with her.' And he did, and on the way I asked him, and says, To you want to separate from me now?' He says: 'Well, Kate, you know ma has got all my money, and will not give it to me until I do. But don't you worry, and keep quiet, and when I get it back from her I will come and live with you again." That was on the way to the office of plaintiff's lawyers. Plaintiff testified that about that time defendant said to her son, "'I will leave you right here without a cent;" if he would not leave me he should not get one cent of the money; 'Not one red cent shall he have of it.' Q. What did your husband say during that time? A. Nothing. He sat there, and said not a word at the time." Plaintiff's testimony, as above stated, was not contradicted as to any important matter, except that defendant testified that she offered to pay plaintiff's way back to her father's, and that plaintiff said she would not go to her father's. Other than this, the testimony of the parties was substantially alike, varying only on minor and immaterial points.

Under the issue to be determined, and in connection with the testimony introduced, it was, in our opinion, proper to admit in evidence the declarations of Edward, for the purpose of showing what influenced his conduct in separating from his wife. It is true his mere declarations were not admissible to show what his mother's conduct was, nor was it, of itself alone, material how bad his mother's conduct was towards plaintiff; for, no matter how bad her conduct was, she could not properly be held liable in this action unless the effect of her conduct was such as to cause Edward to become estranged from and desert his wife. From the record it clearly appears that the trial court was careful to place the declarations of the husband upon this ground. Thus limited, it was not error to admit proof of his declarations.

5. The assignments of error on account of instructions given, modified, and refused are numerous, but only one instruction is seriously complained of in argument upon this appeal. It reads as follows: "The court instructs you that the term 'malice,' as used in these instructions, does not mean such conduct as must necessarily proceed from a spiteful, malignant, or revengeful disposition, but such conduct as occasioned injury to the plaintiff. If you find from the evi-

dence that the conduct of the defendant was unjustifiable, and actually caused the injury which plaintiff complained of, then malice in law is implied from such conduct." As an abstract proposition, this instruction is not technically accurate in all respects. By its terms it declares that the conduct of defendant, if unjustifiable and actually injurious to plaintiff, is to be held malicious on the part of defendant. The rule thus stated ignores the distinction between the intentional commission of a wrongful act and the doing of a wrongful act through mere error of judgment, and also the distinction between a grievous wrong and a mere nominal trespass.

6. The term "malice" is variously used, according to the nature of the litigation in which it is sought to be established. In legal parlance, malice may be actual or implied, and in general it may be implied whenever there is a deliberate intention to do a grievous wrong without legal justification or excuse. In civil controversies the very essence of malice is a disposition or willingness to do a wrongful act greatly injurious to another. This idea is not fully conveyed by the instruction as given. Bish. Cr. Law, § 429. We are not prepared to say that the foregoing instruction furnishes ground for the reversal of this judgment. The evidence, much of which has been heretofore stated, fully establishes the fact that defendant was intentionally active and persistent in her interference with plaintiff's marital relations. She treated her son and his wife in the most imperious and dictatorial manner. The jury were certainly warranted in finding defendant's conduct grossly unjustifiable. Her conduct being unjustifiable, it was manifestly so willful and deliberate that, as a reasonable person, she must be held to have known that she was thereby committing a grievous wrong to plaintiff without justification or reasonable excuse.

7. It is true the relation of parent and child may sometimes be held to excuse some partiality by one for the other, but such relation does not excuse gross injustice deliberately perpetrated against the rights of others. Besides, Edward was no mere child. He was a man of mature years (25) when he married plaintiff. He married her after an acquaintance of several years. That he married without his mother's consent or knowledge, and kept the marriage a secret from her for a year, furnished no stronger reason for the mother's interference than she would have had if he had married the same person openly. Neither did the mere disparity of a year between the ages of Edward and his wife furnish any ground for the mother to act as though her son had been wrongfully invelgled by undue influence into a marriage with an adventuress. Plaintiff had been a country girl,—the daughter of a farmer living about a hundred miles from the city. The evidence discloses no aggravating circumstances to justify the mother in attempting to procure a separation between husband and wife, even though the husband was her own son. The separation of husbands and wives for insufficient causes is a growing evil in this country. It threatens destruction to the family relation, which is the very foundation of civilized society, and the only sure support of good government. The institution of marriage is believed by many to be of Divine origin. The truly good and wise, whatever their religious belief, acknowledge the marriage relation to be in accordance with natural laws, and essential to the preservation and happiness of the human race. It follows that, to avoid the evils arising from the too-frequent separation of husbands and wives, the courts, as guardians of the public welfare, should at all times enforce, as far as our laws will permit, the Scriptural injunction, "What, therefore, God hath joined together, let not man put asunder."

8. If the instruction complained of had advised the jury that, to render defendant liable, her conduct must have been intentionally or willfully unjustifiable, it would have been more accurate; but as the evidence clearly showed that her conduct was not only unjustifiable, but willfully and intentionally so, the instruction does not furnish ground for reversal. Mackey v. People, 2 Colo. 13; Dyer v. McPhee, 6 Colo. 175. It is said by a standard author: "Instructions faulty, or technically erroneous, will not work a reversal of the judgment, if the jury were not misled, or if, as a whole, the case was fairly presented to them, and especially if their verdict is obviously correct." 2 Thomp. Trials, § 2401. In McBride v. Thompson, 8 Ala. 650, it was held: "A charge to the jury must be considered in reference to the facts in the cause; and, if thus applied, it is correct, the judgment will not be reversed, though, as a universal proposition, it may be erroneous."

9. It is assigned for error that the court allowed the jury to award exemplary damages. The cause of action in this case arose after the taking effect of the act restoring exemplary damages. Sess. Laws 1889, p. 64. But it is insisted that the injury complained of was not a wrong done to the person of plaintiff. As we have seen, any one who wrongfully induces a husband to desert and abandon his wife commits an actionable injury against the wife. Such injury is a wrong done to the wife as an individual.-as a person. The statute does not specify that the wrong shall be a physical or bodily injury. On the contrary, it allows exemplary damages when "the injury complained of shall be attended by circumstances of fraud. malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings." These words clearly import wrongs and injuries other than mere bodily wounds or pecuniary losses. They include as well injuries affecting the mind and sensibilities of the individual, which are often more grievous and painful than mere material injuries. The whole language of the act, construed together, forbids that the words "wrong done to the person" should be restricted to physical or bodily injuries. In Bennett v. Bennett, supra, it is said: "'An injury to the person,' within the meaning of the law, includes certain acts which do not involve physical contact with the person injured. * * * The Code of Civil Procedure, in defining 'personal injury,' includes under that head libel, slander, 'or other actionable injury to the person.' Section 3343, subd. 9." The court did not err in charging the jury that if they should find from the evidence that the conduct of defendant was attended by circumstances of malice or insult, or showed a wanton and reckless disregard of plaintiff's rights and feelings, then they might, in addition to the actual damages sustained by her, also award her reasonable exemplary damages. The charge, as a whole, fairly presented the issue and the law applicable to the matters in controversy, as disclosed by the evidence. Considering the nature of the evidence, the jury could not have been misled by the instructions as given.

10. The damages were not excessive. Indeed, in one view, they were scarcely more than compensatory. Plaintiff testified that her husband transferred stocks and bonds to his mother, before leaving for the west, of the value of about \$25,000. Defendant would not testify positively that these bonds were not of the value of \$19,000 or \$20,000, but said she did not think they were of that value; that her son owed her \$8,000 or \$10,000; and that the residue of the property was transferred to her for "safe-keeping." These figures were not controlling as a basis for the verdict, though they were proper to be taken into consideration. In cases of this kind no absolute rule as to the measure of damages can be laid down, and where the right of recovery is clear the court will not disturb a verdict on the ground that it is too much or too little, unless it is grossly disproportionate to the rights of the parties, as shown by the evidence. Wood's Mayne, Dam. §§ 795-798.

The remaining assignments of error require no discussion. The verdict cannot properly be disturbed by an appellate court, and the judgment of the district court is accordingly affirmed. Affirmed.

On Rehearing.

1. It is urged for the first time upon this application for a rehearing that exemplary damages are not recoverable in this action, because not specially declared for. The argument is that in this state, since the decision of Murphy v. Hobbs, 7 Colo. 541, 5 Pac. 119, exemplary damages are not allowable except upon statutory authority, and

that statutory damages must always be specially declared for. Where a statute expressly provides for the recovery of damages equal to twice or three times the actual damages, as in case of waste, or wrongful levy upon exempt property, the better practice is to declare specially upon the statute for the statutory damages. In such case the value of the property furnishes a definite standard by which the damages may be measured. But where the damages claimed are essentially unliquidated, as in case of injury to the character, rights, or feelings of another, and the statute does not specify any definite limit to the exemplary damages allowable, except that they be reasonable, the common-law practice may be followed in declaring for and awarding such damages. Thus tested the complaint states facts sufficient in substance to support a verdict for exemplary Moreover, while the complaint damages. does not contain the precise statutory words upon which exemplary damages are allowable, it does contain words of like import. Race v. Oldridge, 90 Ill. 250; Reed v. Northfield, 13 Pick. 94; Day v. Woodworth, 13 How. 369; Wymond v. Amsbury, 2 Colo. 213; Hallack v. Stockdale, 14 Colo. 198, 23 Pac. 340.

2. It is further urged that the trial court refused to give to the jury the following instruction: "The court instructs the jury that the plaintiff must prove her entire case by legal evidence, and that the admissions of her husband, made to her and testified to by her, they will entirely disregard in considering their verdict." This request to charge was contrary to the law applicable to the issues and the evidence, as ruled at the trial. See former opinion. If defendant desired a written instruction in accordance with the oral ruling of the trial court, specifying the purpose for which the husband's declarations to his wife were competent as evidence, such instruction should have been requested at the proper time. We cannot accede to the view that it is necessarily erroneous for a trial court to omit to charge upon every point of a case, or to omit to give a correct instruction of its own motion upon every point upon which an incorrect instruction is prayed. Few trial records could stand such a test. It is true the Code provides that "the court shall give such instructions upon the law to the jury as may be necessary;" but it is evident that this was not intended to supersede the diligence of parties or their counsel, since the same section also provides the manner in which parties shall prepare such special instructions as they may desire to have given. Code, § 187. In the present case it is evident the jury understood the purpose for which the declarations of the husband were admitted, and that no special instruction upon that point was really necessary.

3. It is earnestly insisted that this is not a case where a verdict should be upheld upon the evidence notwithstanding an erroneous

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instruction; and in this case it is again urged that it was inconsistent for the wife to commence suit against the mother-in-law, charging her with causing the husband's abandonment and desertion, and at the same time to commence a suit against the husband, charging him with cruelty. This argument has but little force. The evidence shows the mother to have been grossly in fault for causing her son to abandon and forsake his wife, but this misconduct did not necessarily excuse the son for yielding to his mother's dictation. The divorce case was reviewed by the court of appeals. See Williams v. Williams, 1 Colo. App. 284, 28 Pac. 726, where Mr. Justice Bissell, speaking of the identical transactions involved in this case, uses the following language: "It would be an idle thing to detail what took place after his mother, Mrs. Williams, arrived in Denver. It was a cruel, bitter, unholy persecution. A weak, vacillating, purposeless son was controlled by a dominating woman, to the end that the tie which bound him might be severed." These remarks of the learned judge were not called to our attention until our former opinion was announced, but they fully confirm the view we then expressed. Upon further consideration of the evidence and circumstances of the case, we feel constrained to say that the jury were bound, under the evidence, to find a verdict in favor of plaintiff. Moreover, the evidence, without substantial conflict, shows defendant's conduct to have been, not only grossly unjustiflable, but willfully and intentionally so. It certainly shows on the part of defendant a wanton and reckless disregard of plaintiff's rights and feelings, and thus fully establishes the foundation for exemplary damages under the statute. See French v. Deane, 19 Colo. ---, 36 Pac. 611. The verdict is obviously correct, and though the instruction complained of is erroneous, as an abstract proposition of law, it should not, as was said in our former opinion, work a reversal of the judgment.

The remaining matters urged in favor of a rehearing require no discussion. The petition must be denied. Rehearing denied.

JOCKHECK et al. v. BOARD OF COM'RS OF SHAWNEE COUNTY et al.

(Supreme Court of Kansas. Sept. 19, 1804.) STATUTES-TITLE -COUNTY-SEAT SITE - CONDEM-NATION-HOMESTEAD-EMINENT DOMAIN - PUB-LIC USE—WHAT CONSTITUTES — FINDING AS TO NECESSITY—WHEN REVIEWED.

1. Chapter 110, Sess. Laws 1889, is not unconstitutional upon the ground that it contains two subjects, which are not expressed in the title; the condemnation of sites for county buildings and the condemnation of additional ground necessary for the protection of such buildings being germane and connected with the same subject.

2. When a board of county commissioners.

2. When a board of county commissioners desires to purchase or otherwise obtain certain

lots as a suitable site for a courthouse, which lots as a suitable site for a courthouse, which have been declared by them as necessary for that purpose, requests the owner to submit to them a proposition in writing stating his price therefor, and such owner informs the commissioners in writing that he "will accept for the property \$16,500," which is an excessive and extortionate price, and the commissioners determine the price demanded is unsatisfactory and unreasonable they may proceed, under the and unreasonable, they may proceed, under the provisions of chapter 110, Sess. Laws 1889, to

obtain the condemnation of such lots.

3. Chapter 110, Sess. Laws 1889, authorizes the condemnation of a suitable site for a courthouse, and also authorizes the condemnation of additional ground necessary for the protection of such a public building. This statute is ample authority to authorize the condemnation of ground for a part of such a site. The power to condemn ground for a suitshe site includes the power to condemn ground for a part of a site where the county is the owner of lots or ground which, added to the lots or ground to be condemned, will make a suitable site for a courthouse.

4. Under the superior or sovereign power of eminent domain, a homestead occupied by a

feminent domain, a homestead occupied by a family as a residence may be taken and appropriated for public use without the consent of the owner, if full compensation is paid.

5. Private property taken and appropriated as a suitable site, or a part of a site, for a courthouse, under the provisions of chapter 110, Sess. Laws 1889, is taken for public use.

6. Where a county owns six lots, which the county commissioners propose to use as a site, or a part of a site, for a courthouse, and they determine that additional ground, adjoining thereto, consisting of three lots, is necessary to make such site a suitable one for a courthouse, and the judge of the district court, to whom an application is presented for the appointment of appraisers to condemn such lots or additional ground, also determines that the lots are necessary for a suitable site for a courthouse, and subsequently, in an action, the district court, upon a re-examination of all of the proceedings for condemnation, decides that the processity visited for the condemnation. the proceedings for condemnation, decides that the necessity existed for the condemnation of the lots for a suitable site for a courthouse, held, that this court, in reviewing the latter action, will not interfere by declaring that no such necessity existed.

(Syllabus by the Court.)

Error from district court, Shawnee county. Action by Carl Jockheck and Helena Schafer against the board of county commissioners of Shawnee county, Kan., and F. L. Stevenson, for an injunction. There was an order denying a temporary injunction, and a judgment for defendants, and plaintiffs bring error. Affirmed.

"In 1868, one J.A. Schafer became the owner of lots 127, 129, and 131 Van Buren street, in the city of Topeka, Shawnee county, and occupied and used the same with his family as a homestead from the time he purchased said lots until the time of his death, which took place in 1872. That the said J. A. Schafer died intestate, leaving Rosa Schafer, his widow, and Helena Schafer, his daughter, who was then less than one year old, as his only heirs at law. That Rosa Schafer and her said daughter continued to occupy said lots as their homestead until 1874, at which time Rosa Schafer married Carl Jockheck, one of the plaintiffs in this case, and that Carl Jockheck and Rosa Jockheck, his

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wife, and said Helena Schafer, his stepdaughter, continued to occupy said premises as their homestead from that time continuously until the death of the said Rosa Jockheck, in 1887. Said Rosa Jockheck died intestate, leaving as her only heirs at law said Carl Jockheck, her husband, and said Helena Schafer, her daughter, who continued to occupy said premises as their only residence from that time to the present, and are still so occupying said premises, together with a servant girl who has been living with them for the ten years last past. That on the 11th day of May, 1894, the board of county commissioners of Shawnee county, in writing, requested the said Carl Jockheck and Helena Schafer to state to the board what they would take for said lots, a copy of which is hereto attached, marked 'A.' That on the 21st day of May, 1894, said Carl Jockheck and Helena Schafer, in response to said request, said that they would take the sum of \$16,500 for said lots, and submitted said proposition in writing, a copy of which is hereto attached, marked 'B.' That said board did not inform said Carl Jockheck and Helena Schafer whether they would accept said proposition or not; nor did said board, or any one for them, have any further communication with said Carl Jockheck and Helena Schafer with regard to the purchase of said lots; nor was there any other offer of any kind whatever made by said board to said Carl Jockheck and Helena Schafer for said lots; nor did said board inform said Carl Jockheck and Helena Schafer that it deemed the price put on said lots as unreasonable or unsatisfactory; nor was there any other or further effort of any kind or character made to purchase said lots; but said board placed an order on its record of proceedings on the 22d day of May, the day after said price was submitted to them, in the absence of these plaintiffs, and of which they had no knowledge whatever, except as they learned of such proceedings in the daily papers, a copy of which order is hereto attached, marked 'C.' That, on the 23d day of May, the said board made an application to the judge of the district court for the appointment of appraisers to condemn said lots. The petition and the order appointing said appraisers, the order of the court, and the report of appraisers are copied in full and set forth in the petition. That these plaintiffs had no knowledge of said application or order until after the same had been obtained. That said appraisers so appointed made their report on the 26th day of May, which was filed on said day, a copy of which report is fully set forth in the petition in this action. That on the 6th day of June, 1894, the amount of money assessed by said appraisers was deposited by said board with the county treasurer of Shawnee county, for the use and benefit of Carl Jockheck and Helena Schafer. That on the ---- day of June, 1894, said Carl Jockheck and Helena Schafer filed their appeal bond, and took an appeal from the award of said appraisers; and that afterwards, and before the commencement of this suit, to wit, on the 11th day of June, 1894, said appeal was by them dismissed, and at the time of the commencement of this suit no appeal was pending. That the county of Shawnee owned ground for a courthouse site which had been purchased in September, 1884. That said site consisted of six lots, being a piece of ground 150 feet square. That there were other sites in the city of Topeka suitable for courthouse purposes which could have been obtained by purchase or otherwise, but which the board made no effort whatever to obtain. That said board never sought or inquired with reference to any other site than the one they proceeded to condemn, and which joined the site they already owned. That said board, on the 20th day of September, 1893, provided for submitting a proposition for plans, etc., for a courthouse, a copy of its record of which matter, marked 'Exhibit A,' is hereto attached. That on the 3d day of October, 1893, said board made an order, a copy of which, marked 'Exhibit B,' is hereto attached. That on the 4th day of January, 1894, the said board entered into a contract to build said courthouse with the defendant F. L. Stevenson. That the dimension of said proposed courthouse is 173 by 93 feet, which includes porticos, steps, and approaches. A copy of said contract is hereto attached, marked 'Exhibit C,' and is made a part hereof. That said contractor, by virtue of his contract with said board, was about to take possession of the plaintiffs' said property against their consent, at the time this action was commenced. The proposed courthouse is intended to be built partly on the six lots already owned by the county, and partly on the lots in controversy, which were in fact condemned as a part of a courthouse site."

The foregoing and the six exhibits hereto attached are the agreed facts herein.

The Exhibits A, B, and C are as follows: "A.

"Topeka, Kansas, May 11th, 1894. Carl Jockheck, Esq., and Others, Owners of Lots Numbered 127, 129, 131, Van Buren Street. Topeka, Kansas: By action of the board had October 3, 1893, and recorded at page 335 of Journal D, the board found that, in the erection of a new courthouse, it would become necessary for the county to obtain title to lots numbered 127, 129, and 131, Van Buren street, city of Topeka, as additional ground on which to erect said courthouse. The board of county commissioners, therefore, acting for the county, respectfully ask that you submit to the board a proposition, in writing, stating the price at which you will convey same to the county by full, unincumbered, in fee absolute; the payment to be made in cash, on presentation of deed accompanied by usual abstract, with certificate of county attorney as to sufficiency of con-

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veyance and character of title. By order of the board. J. Lee Knight, Chairman. Attest: C. T. McCabe [Seal], County Clerk."

"Topeka, Kansas, May 21, '94. To the Honorable Board of County Commissioners of Shawnee County, Kansas-Gentlemen: Your communication of the 11th inst., in which you inform us that, in the erection of a new courthouse, it will become necessary for the county to obtain title to lots numbered 127, 129, and 181 on Van Buren street, city of Topeka, etc., has been received; and, in answer to your request that we submit to your honorable board a proposition, in writing, stating the price at which we will convey the same to the county by full, unincumbered title, in fee absolute, payments to be made in cash, and deed accompanied by usual abstract, with certificate of county attorney as to the sufficiency of conveyance and character of title, we respectfully reply, stating that, in view of the improvements upon said property, the value of other property adjacent, and all the circumstances attending the location, we will take as compensation for said property the sum of sixteen thousand five hundred (\$16,500.00) dollars, upon the terms indicated in your letter of inquiry. Very respectfully, yours, Helena Schafer. Carl Jockheck."

"C. "Proceedings of May 22d. Courthouse Site. Now comes on for hearing the proposition of Helena Schafer and Carl Jockheck to sell to the county lots numbered one hundred and twenty-seven (127), one hundred and twentynine (129), and one hundred and thirty-one (131) on Van Buren street, city of Topeka, as additional ground for the courthouse site. for sixteen thousand five hundred (\$16,500.00) dollars; and, it appearing to the board that such sum of sixteen thousand five hundred (\$16,500.00) dollars is an unreasonable and unsatisfactory price for said lots, it is by the board ordered that such proposition of said Helena Schafer and Carl Jockheck be, and the same is hereby, rejected. It is further ordered that the county attorney be ordered to commence a suit to condemn said lots under section sixteen hundred and thirty-nine (1639), Gen. Stat. of 1889, in district court, Shawnee county."

The other exhibits are omitted.

This action was commenced in the court below on the 11th day of June, 1894, to restrain and forever enjoin the board of commissioners of the county of Shawnee and F. L. Stevenson, their agents, servants, and employés, from taking possession of the land heretofore described, or in any way interfering with the plaintiffs' use or occupancy of the same; and, also, that the said defendants, upon the final hearing of said action, be forever barred from setting up any right, title, or claim to the property, and that they pay all costs. Upon the 22d day of June, 1894, the motion of plaintiffs for a prelim-

inary injunction against the defendants, as prayed for, was heard and determined upon the petition and the agreed statement of facts signed by the parties. After argument and full consideration thereof, the court found in favor of the defendants, and against the plaintiffs, and refused the temporary injunction. Thereupon the plaintiffs announced in open court that they elected to stand upon their petition and the facts as agreed to as upon final trial, and gave notice of appeal. The court then rendered judgment in favor of the defendants, and against the plaintiffs, for costs. The plaintiffs excepted to the rulings and decision of the court in denying their motion for temporary injunction, and also in giving judgment in favor of the defendants against themselves. The plaintiffs bring the case here.

Vance & Campbell and W. C. Webb, for plaintiffs in error. H. C. Safford, for defendants in error.

HORTON, C. J. (after stating the facts). Section 1, c. 110, Sess. Laws 1889, provides "that when the board of county commissioners of any county in this state cannot, by purchase or otherwise, obtain a suitable site for a court house, jail, or other county building, or obtain additional ground necessary for the protection of any court house, or other county building at a reasonable or satisfactory price, said board of county commissioners may apply to the judge of the district court of the district in which the county is situated, asking for the condemnation of such site or additional ground to such site, describing the same." Gen. St. 1889, pars. 1639-1642. On May 11, 1894, the county commissioners of Shawnee county notified, in writing, Carl Jockheck and Helena Schafer, the plaintiffs, "that, in the erection of a new courthouse, it would be necessary for the county to obtain title to lots one hundred and twenty-seven, one hundred and twenty-nine, and one hundred and thirty-one on Van Buren street, in the city of Topeka, as additional ground upon which to erect the same," and requested "that they submit to the board a proposition, in writing, stating what price they would convey the same to the county in fee absolute." On May 11, 1894, the plaintiffs informed the county commissioners, in writing, that they would accept for the property \$16,500. At a meeting of the county commissioners, on May 22, 1894, it was determined that the price demanded for the lots "was unsatisfactory and unreasonable." After the county commissioners could not obtain, by purchase or otherwise, the lots belonging to the plaintiffs as a part of the site for the courthouse, proceedings were had under the provisions of the statute for their condemnation. Sess. Laws 1889, c. 110; Gen. St. 1889, pars. 1639-1642. On the 6th of June, 1894, the amount of the award made by the appraisers was deposited with the county treasurer for the owners of the lots. The county commissioners then attempted to take possession of the lots, and this action was instituted on the 11th day of June, 1894, to prevent them from taking possession or in any way interfering with the plaintiffs' use and occupancy of the same.

1. It appears from the record that the plaintiffs, within 10 days from the filing of the report of the appraisers, appealed from the award, as permitted by the provisions of the statute. This appeal was taken after the plaintiffs had knowledge of all of the proceedings of the county commissioners in condemning the lots. The appeal enabled the plaintiffs merely to litigate the question as to the amount of damages which they should recover, and nothing else. It did not and could not disturb the condemnation of the lots. Railroad Co. v. Martin, 29 Kan. 750. After the appeal was perfected, the plaintiffs, before commencing this action, dismissed the same. It is doubtful whether the plaintiffs, having fully recognized all of the proceedings of condemnation by their appeal to determine the amount of damages for the taking of the lots, can now be heard to question such proceedings. This, however, we need not decide. If, after having chosen to appeal, they had continued to pursue that remedy, it is clear they could not have instituted this action. Reisner v. Strong, 24 Kan. 410. Clearly, all irregularities, if any, in the proceedings of the condemnation, have been waived. The only important question for our consideration is whether the county commissioners had authority under the statute to condemn the lots as a site for the courthouse, or as additional ground to such site.

2. It is clearly apparent from the record that the county commissioners could not obtain the lots, by purchase, or otherwise, at a reasonable or satisfactory price. The plaintiffs demanded for the same \$16,500. The appraisers allowed \$9,000. The appeal from the award of the appraisers having been dismissed, it must be assumed that the award allowed full compensation for the lots. The price, therefore, demanded by the plaintiffs, was not only excessive, but extortionate. If the statute authorizes, as we think it does, the condemnation of any lots for a site, or a part of a site, for a courthouse, then, upon the record before us, proper proceedings were taken by the county commissioners for the condemnation of the lots in dispute.

3. It is insisted that the statute does not authorize the condemnation of any ground for a part of a site, unless the additional ground is necessary for the protection of the courthouse. It is urged that "the statute places a limitation to condemn additional ground. Having given the power to condemn a site, it then defines when and under what circumstances additional ground can be condemned, and that excludes the condemnation of additional ground for any other purpose."

It appears that prior to September, 1893, the county of Shawnee was the owner of lots 133, 135, 137, 139, 141, and 143, on the northwest corner of Fifth and Van Buren streets, opposite the county jail, and that the lots, with additional ground, were a suitable site for the courthouse. On the 20th of September, 1893, the county commissioners, having under consideration the advisability of submitting a proposition to the voters of Shawnee county to build a new courthouse, ordered, for the information of the public, plans to be made and printed for distribution throughout the county, with estimates for the cost of a courthouse to be constructed upon the northwest corner of Fifth street and Van Buren street, on the lots owned by the county, together with additional ground adjoining thereto, to be obtained, if necessary, through condemnation proceedings. On the 3d of October, 1893, the board determined that three lots, or 75 feet, fronting on Van Buren street, adjoining the lots owned by the county, were necessary in connection with the other lots for a suitable site for the courthouse. These lots, so fronting on Van Buren street, were the lots 127, 129, and 131 referred to in the petition. Subsequently, upon application made to the judge of the district court of Shawnee county, three disinterested freeholders were appointed to appraise and condemn these lots as the site, or as a part of the site, for the courthouse. The statute authorizing the condemnation of ground for a suitable site for a courthouse is ample authority to condemn ground for a part of a site. The greater includes the less. The statute not only gives authority to condemn a suitable site for a courthouse, but also adds that additional ground necessary for the protection of a courthouse may be condemned. Evidently, the statute intended that after a site had been selected, if a courthouse was erected. or was being erected, and additional ground was necessary for the protection thereof, which could not be obtained, by purchase or otherwise, at a reasonable and satisfactory price, then the additional ground could be condemned. In this case the county owned several lots. It was not of sufficient extent for a suitable site for a courthouse. Other lots or ground were needed to make the site suitable. Because the county owns a part of a site which, with additional ground, may become a suitable site, it is not thereby prevented from obtaining, under proceedings of condemnation, other lots or ground to complete the site. Such a construction of the statute would necessarily defeat its purpose in some cases.

4. It is next insisted that the lots in dispute constitute the homestead of the plaintiffs, being occupied by them as a residence; and, therefore, that they are exempt from being taken or condemned, under the provisions of said chapter 110. Judge Cooley defines the power of eminent domain as "the rightful authority, which exists in ev-

ery sovereighty, to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand." Wap. Proc. Rem. par. 242: "The right which belongs to the society or to the sovereign of disposing, in case of necessity and for the public safety, of all the wealth contained in the state, is called the eminent domain." Lewis says: "That eminent domain is not of the nature of any estate or interest in property, reserved or otherwise acquired, but simply a power to appropriate individual property as the public necessities require, and which pertains to sovereignty as a necessary, constant, and inextinguishable attribute." Lewis, Em. Dom. (Ed. 1888) p. 9, § 3. The state has been in existence over 30 years, and during all of that time the power of eminent domain has been exercised over homesteads in the laying out of highways and locating railroads. The right to take a homestead under the power of eminent domain has never before been seriously questioned in the courts. As this power is an incident of sovereignty, and, by all the decisions, its existence "is indispensable and incontestable" in every state, it cannot be possible that it was destroyed by the constitution, unless there is an explicit provision prohibiting its exercise. No such provision exists in the fundamental law. Section 9, art. 15, ordaining that a homestead shall be exempt from a forced sale under any process of law, except for taxes, purchase money, or improvements thereon, does not, in our opinion, have application. Said section does not destroy or limit this power. In this state a homestead may consist of 160 acres of farming land, or of 1 acre within the limits of an incorporated town or city; and, if homesteads cannot be appropriated for public use against the consent of the owners, then within the improved and thickly-settled portions of the state the power of eminent domain would have little or no operation. The laying out and construction of public highways and railroads would almost cease, unless excessive or extortionate prices were paid for rights of way. In Railroad Co. v. Anderson, 42 Kan. 297, 21 Pac. 1059, the writer of this said: "In my opinion, condemnation proceedings may be commenced and carried on against the owner of the homestead. The power of the state to appropriate the property is unquestioned, but the right of the owner to be paid for it is secured by the constitution. The power of the state is subject to no restrictions but that of making compensation."

5. Further, it is insisted that the legislature has no power to pass an act authorizing the taking of private property for a courthouse site. "The necessity, expediency, or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general public poli-

cy, and belong to the legislative department of the government." Lewis, Em. Dom. § 162. The legislature, in providing for the condemnation of private property, must determine, in the first instance, whether the use for which it is to be condemned is a public one. But this determination is not final. Whether a particular use is public or not is a question for the judiciary. "But property taken for public buildings of all kinds. such as courthouses, jails, public schools, markets, almshouses, and the like, is taken for public use. The right has been questioned in some decisions, but never denied in any decided case." Lewis, Em. Dom. § 174; Cooley, Const. Lim. (6th Ed.) c. 15, p. 655. In this particular case, whether the requisite necessity existed to authorize the taking of the plaintiffs' lots was determined by the commissioners of Shawnee county and by the judge of the district court of that county, when he passed upon the application presented to him for the appointment of appraisers to make the condemnation. Subsequently, in this action, the district court of Shawnee county re-examined the proceedings for the condemnation, and, in refusing the injunction prayed for, affirmed that the requisite necessity existed for the taking of the lots. Under all of these circumstances, this court will not interfere by declaring that no such necessity existed for this compulsory mode to procure or complete the site for the courthouse.

6. Finally, it is urged that chapter 110 is unconstitutional, because it is alleged that it contains two subjects, which are not expressed in the title. This is not tenable. The condemnation of sites for county buildings and additional ground necessary for the protection of such buildings is germane and connected with the same subject.

The judgment of the district court will be affirmed. All the justices concurring.

HUBBARD v. ALAMO IRRIGATING & MANUF'G CO.

(Supreme Court of Kansas. June 9, 1894.) Concurring opinion. For principal opinion, see 36 Pac. 1053.

HORTON, C. J. I think that the principle announced in Peak v. Ellicott, 30 Kan. 156, 1 Pac. 499, and Ellicott v. Barnes, 31 Kan. 170, 1 Pac. 767, ought not to be extended. In Peak v. Ellicott, supra, it was observed that "Wherever a fiduciary relationship exists, and money coming from the trust lies in the hands of the person standing in that relationship, it can be followed by the principal, and separated from any money of the wrongdoer." If Lord had real estate at the time of his death, which was acquired before the sale of any of the bonds referred to in the petition, no trust can be impressed thereon to repay the Alamo Company for any of the

proceeds of the bonds received by Lord in his lifetime. District Tp. of Eureka v. Farmers' Bank v. Fontanelle (Iowa) 55 N. W. 342; McClure v. Board (Colo.) 34 Pac. 763. In order to establish a trust, it must be shown that the estate in the hands of the administrator has been actually augmented by the trust fund; otherwise, the rights of the company are not superior to those of the general creditors of the estate. If a trust is to be established, it must be on the ground that the proceeds of the bonds not paid over at the death of Lord have increased his estate, and that such increase came into the hands of the administrator.

DUNCAN v. HAWN et al. (No. 18,176.)
(Supreme Court of California. Sept. 5, 1894.)
THRESHER'S LIEN—ASSIGNMENT OF DEBT—
EFFECT.

Where a lien has been acquired under St. 1885, p. 109, by person performing work in or about a threshing machine while engaged in threshing, the same passes by the assignment of the debt under which it was acquired.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by George O. Duncan against C. H. Hawn and others to foreclose a lien on a threshing machine. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

Geo. E. Church, for appellants. W. D. Grady and James Gallagher, for respondent.

VAN FLEET, J. An act of the legislature entitled "An act to secure the wages of persons employed as laborers on threshing machines" (St. 1885, p. 109) provides:

"Section 1. Every person performing work or labor of any kind in, with, about or upon any threshing machine, the engine, horse-power, wagons or appurtenances thereof, while engaged in threshing, shall have a lien upon the same to the extent of the value of his services.

"Sec. 2. The lien herein given shall extend for ten days after the person has ceased such work or labor.

"Sec. 3. If judgment shall be recovered in any action to recover for said services for work or labor performed, and said property shall be sold, the proceeds of such sale shall be distributed pro rata to all judgment creditors, who have within ten days begun suits to recover judgments for the amount due them for such work.

"Sec. 4. The lien shall expire unless a suit to recover the amount of the claim is brought within ten days after the party ceases work."

Plaintiff, as assignee of the claims of certain laborers who had performed work of the character provided for in the act with the threshing machine of the defendants, brought this action with the 10-days limitation to enforce and foreclose a lien for the value of said labor. The court below gave judgment

sustaining plaintiff's right to the lien, and directing a sale of the property for its satisfaction. The defendants appeal.

The material question involved in the appeal is whether the lien given by the statute passes by the assignment of the obligation it is given to secure, it being conceded that the assignments were sufficient in form to convey any rights which could pass ander the There is a conflict in authority from law. other states as to whether statutory liens of the class created by the act in question pass by assignment of the debt; some of the authorities holding that it is strictly a personal right, and dies unless asserted in the hands of the one for whose benefit it is primarily given; while other cases hold in effect that, being given as security for the performance of the obligation, it becomes an incident which follows it upon assignment. Whatever may be the rule in other states, in the absence of statutory regulation it would seem that the Code solves the question here presented. Section 2909 of the Civil Code, speaking on the subject of liens in general, declares that "a lien is to be deemed accessory to the act for the performance of which it is security;" and section 1084 of the same Code, relating to the effect of transfer, provides that "the transfer of a thing transfers also all its incidents, unless expressly except-The language of section 2909 may be taken as referring to perfected and subsisting liens. It is to be observed that the statute under consideration does not give a mere right to establish a lien, but by its terms ipso facto on the cessation of work there results by operation of the statute a perfected and established lien, which subsists for a period of 10 days, without the filing of notice or other affirmative act by the laborer. Under the rule above declared, this lien becomes an incident of the primary obligation,—the debt due the laborer,—the right to which must be held to pass by assignment of the latter, unless there is something in the act creating it which takes it out of this general rule prescribed by the Code. We find no such limitation in the act. It neither in terms nor by implication tends to restrict the right to enforce the lien to the laborer. Its primary purpose is the benefit and protection of the laborer in securing his hire, and it is obvious that this purpose would be largely destroyed by any such restriction. As suggested by the supreme court of Maine in speaking of a similar lien: "The object of the statute giving the lien is to make certain the payment for the labor: * * * and it would detract much from the benefit designed to be conferred to hold that the laborer must necessarily personally incur all the delay and expense that not unfrequently arise from the tedious litigation which follows an effort to enforce a lien of this sort, at the peril of losing it altogether." Murphy v. Adams, 71 Me. 118. In that case, as here, the court were passing upon the question of the assign-

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ability of a lien of this character, and it is there further said: "The claims of laborers secured by statute lien stand substantially in this respect upon the same footing as those of mechanics. The weight of authority and reasoning is in favor of the assignability of the lien of a mechanic, and the right of his assignee to assert his claim in the same manner and to the same extent as the mechanic could." Indeed, independently of the provisions of our Code, we should be strongly inclined to the conclusion above expressed. The conflict upon the subject has doubtless largely arisen from a failure to distinguish between common-law liens, to the existence of which possession, actual or constructive, is necessary, and those liens of purely statutory origin which had no existence at common law. In the case of Rogers v. Hotel Co., 4 Neb. 57, the court, in discussing a lien given by the statute, point out this distinction, say-"Liens of this kind are clearly defined and regulated in the civil law, but were unknown to the common law. The proceeding is entirely statutory. * * * At common law, the assignment of a chose in action was entirely prohibited. * * * Section 30 of the Code of Civil Procedure provides that the assignee of a thing in action may maintain an action thereon in his own behalf, or the name of the assignor. * * * An action of this kind can be maintained by the assignee, unless the lien is strictly personal, so that it is lost the moment it is transferred. * * * Its continuance in no sense depends on retaining possession of the property. It is as complete and ample security for the payment of the debt as a mortgage of the same interest. It depends on no contingency for its continuance during the time prescribed by the statute." In Kerr v. Moore, 54 Miss. 288, speaking of a laborer's lien under the agricultural lien law, the court said: "The lien given by law to the laborer for his wages has been properly likened to that of a mechanic or material man for what is due him. * * * The decided weight of authority and reasoning, according to our view, is in favor of the assignability of the lien of a mechanic, and the right of his assignee to assert his claim and enforce the lien in the same manner and to the same extent that the mechanic could. This view was sustained by the following authorities: Iaege v. Bossieux, 15 Grat. 83; Tuttle v. Howe, 14 Minn. 150 (Gil. 113); Skyrme v. Mining Co., 8 Nev. 219; Davis v. Bilsland, 18 Wall. 659; Ritter v. Stevenson. 7 Cal. 388; Phil. Mech. Liens, \$ 55. * * * This view better accords with the general policy of our law, and the spirit and purpose of the act which gives the laborer a lien, than the contrary view." Liens which are not merely declaratory of the common law do not require possession to support them. They have the same operation without possession, and the same efficacy as common-law liens have with possession, and the assignment of the claim carries with it the right to the lien. If

the existence of the lien does not depend upon possession, it may be assigned. 1 Jones, Liens, §§ 104, 990. The cases relied upon by appellants do not support their contention. In Mills v. Land Co., 97 Cal. 254, 32 Pac. 169, the court simply hold that the mere right of a laborer or material man to create a lien under the mechanics' lien law is a personal right, which cannot be assigned. This is obviously correct, since, until perfected by filing proper notice, it is a mere inchoate right, personal to the individual, which he may choose to perfect or not at his pleasure, and which until perfected has no tangible existence as property, and, of course, as such, is not the subject of transfer. In Rollin v. Cross, 45 N. Y. 771, the plaintiff filed a lien for the amount of all the work done and materials furnished, both by Pick, the original contractor, before assignment, and by himself, as assignee of the contract, and the court held that the statute did not authorize a lien to be perfected by other than the one to whom the right is given by the statute. The Iowa cases are to the same effect. But the assignability of the liens of mechanics and material men, given under our statute, when duly perfected, has been sustained in this state since an early date. In Brock v. Bruce, 5 Cal. 280, it was held that the mechanic's lien law created a sort of mortgage or security, which follows the original debt or obligation; and in Ritter v. Stevenson, 7 Cal. 388, the rule applicable to the assignment of mortgage liens by assignment of the note or debt was applied to assignments of mechanics' liens. The lien under consideration, being a perfected security, is within the reason of the rule laid down in these cases. The respondent having received the assignment of the demands, and commenced his action during the life of the liens, the latter passed by the assignment, and he is entitled to enforce them. Judgment affirmed.

We concur: BEATTY, C. J.; McFAR-LAND, J.; DE HAVEN, J.; FITZGERALD, J.; GAROUTTE, J.

PEOPLE v. HAMILTON. (No. 21,060.)
(Supreme Court of California. Aug. 2, 1894.)
COUNTY CLERK — ACCOUNTING TO SUCCESSOR IN OFFICE—ADVANCE COSTS — CRIMINAL APPEAL—RES JUDICATA.

1. The clerk of San Diego county being ex officio clerk of the district court, had power, in actions in such court, to collect advance costs under St. 1875-76, p. 586, providing that the clerk of the district court might demand and receive from the parties to an action certain sums to cover costs.

2. Where a county clerk, acting in his official capacity, and under color of his office as clerk of the superior court, collects advance costs contrary to law, he must, at the end of his term, turn over to the county treasurer, and not to his own successor in office, the amount thereof remaining in his hands.

3. A decision on an appeal which involves

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only the sufficiency of the information, and the jurisdiction of the court, is not res judicata on an appeal presenting the question whether the offense charged is within the statute under which the indictment was found.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

M. D. Hamilton was convicted of refusing to turn over to his successor, as county clerk, a sum of money collected in his official capacity, and appeals. Reversed.

Eugene Daney, J. L. Copeland, and E. W. Hendrick, for appellant. M. L. Ward, for the People.

SEARLS, C. The defendant, M. D. Hamilton, was county clerk of the county of San Diego for two years next prior to January 5, 1891, when his term of office expired and he was succeeded in said office by one W. M. Gassaway. He was informed against by the district attorney, under section 424 of the Penal Code, for the crime of omitting and refusing to pay over to his successor, the said Gassaway, county clerk, upon demand, the sum of \$4,422.36, public money alleged to have been received by him in his official capacity as county clerk, etc. Defendant entered a plea of not guilty to the information, and upon a trial was convicted, and sentenced to two years' confinement in the state prison at San Quentin. At the proper time he moved for a new trial, which was denied, and this appeal is prosecuted from the judgment, and from the order denying a new trial.

Section 424 of the Penal Code, upon which the prosecution is based, so far as applicable to the case in hand, is as follows: "Each officer of this state, or of any county, town or district of this state, and every other person charged with the receipt, safe keeping, transfer or disbursement of public moneys. who either * * * (9) willfully omits to transfer the same when such transfer is required by law; or, (10) willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same; is punishable by imprisonment in the state prison not less than one nor more than ten years, and is disqualified from holding any office in this state." The contention of counsel for appellant is that the verdict is contrary to law and evidence. Their position may be epitomized thus: (1) The money in question was not public money. (2) There was and is no law requiring a county clerk. upon the expiration of his term of office, to transfer to his successor in office public money in his hands. (3) The successor in office of defendant was not authorized by law to receive the money in question, and there was no duty imposed by law upon defendant to pay over to his successor such money.

It appears that the money which it is alleged the defendant failed to account for to his successor in the office of county clerk was received by said defendant, while county clerk, as deposits from litigants, to cover anticipated costs in cases pending in the superior court of the county of San Diego; and it is contended there was not at that time any law which authorized the defendant, as county clerk, to demand or receive such deposits, and therefore, being illegally collected, no duty devolved upon him, under the law, to pay the same to his successor in office; that such money belonged to litigants, and should have been returned to them, or if received under color of office, and not claimed by such litigants, it should have been paid to the county treasurer. On March 31, 1876, a fee bill was passed by the legislature for the county of San Diego. St. 1875-76, p. 586. By section 3 of that act the clerk of the district court was authorized to demand and receive from the plaintiff in each case, at the commencement of an action, a sum of not exceeding \$10, to cover costs, and from the defendant the sum of \$3, etc. The statute then provided as follows: "Any excess of fees advanced by either party, on the determination of the action, shall be returned by the clerk to the party who advanced them, on demand." It seems to be conceded that under the county government act of 1885, as amended up to 1889, and during the period of defendant's incumbency of the office of county clerk, viz. from January, 1889, to January, 1891, the county of San Diego was a county of the thirty-first class. The amendments of March 16, 1889, to the county government act, fixed the salary of the county clerk and of other officers in counties of the thirty-first class, but made no provision as to the fees to be collected, and did not provide for a deposit to cover fees, except in three classes of counties, of which the thirty-first is not one. St. 1889, p. 232. There was nothing in the county government act, up to 1891, which repealed or was inconsistent with the fee bill of 1876, supra, and our attention is not called to any other statute bearing upon the question. county clerks were ex officio clerks of the district court, in their respective counties, under our former constitution, and under the constitution of 1879 the county clerks are ex officio clerks of the courts of record in and for their respective counties. Section 14 of Article 22 also provides that all laws in force at the adoption of the constitution, not inconsistent therewith, should remain in force until altered or repealed, and section 11 of the same article provides as follows: "All laws relative to the present judicial system of this state shall be applicable to the judicial system created by this constitution until changed by legislature." The fee bill of 1876, applicable to the county of San Diego so far as it provided for the fees to,be paid to the clerk of the district court, and the de-

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posit to be made with him at the commencement of each suit therein, etc., was a law relating to the judicial system of the state, and was not only kept in force by the constitution of 1879, but made applicable to the courts organized thereunder. The conclusion is therefore reached that the defendant, as county clerk of the county of San Diego, was authorized, under the act of March 31, 1876, to demand and receive the deposits in question for the purposes and subject to the disposition therein and by law provided.

We are also of opinion the deposits were received by the clerk in his official capacity, and under color of his office as clerk of the superior court, and, if not used in the payment of fees accruing in the cases in which they were deposited, or demanded by the depositors, should have been paid over by defendant to their proper custodian. People v. Van Ness, 79 Cal. 85, 21 Pac. 554, it appeared that the defendant, as commissioner of immigration for the port of San Francisco, had, under color of his office, illegally collected certain fees for administering oaths to ship captains, for which there was no authority of law, and this court held that "the money, having been collected under color of office, should have been paid into the state treasury, and did not belong, in any view, to Van Ness, and he had no right to retain it. * * * It really belonged to the shipmasters of whom it was collected; but the state, in whose name and by whose authority it was pretended to have been collected, was the proper custodian of such moneys."

The next question involved relates to the duty of the defendant to turn over to his successor in office the money in question. The gravamen of the charge in the information is that it was the duty of the defendant, imposed by law, to transfer the money in question to his successor in office: that he willfully, fraudulently, and feloniously neglected and refused to transfer or pay the same to his successor, etc. We have searched in vain for any law making it the duty of the defendant to pay over public moneys in his hands to his successor in office. Section 16 of article 11 of the constitution makes it the duty of officers to deposit with the county treasurer, to the credit of the county, all moneys, assessments, and taxes belonging to or collected for the county. Yarnell v. City of Los Angeles, 87 Cal. 603, 25 Pac. 767. Section 70 of the county government act provides that the county treasurer "must receive all moneys belonging to the county, and all other moneys by law directed to be paid to him, safely keep the same," etc. Section 165 of the same act provides that "all salaried officers of the several counties of this state shall charge and collect for the use of their respective counties, and pay into the county treasury on the first Monday in each month, the fees now or hereafter allowed by law in all cases, except the percentage hereinbefore allowed such officers, and excepting also such fees as are a charge against the county." The county clerk of San Diego county was a salaried officer, and received no fees to his own use. Section 167 of the same act provided for a statement and affidavit upon payment to the treasurer. Under section 1014 of the Political Code, it becomes the duty of the county clerk, in common with other public officers, to surrender and deliver to his successor the possession of all books and papers pertaining to his office, or in his custody by virtue of his office; and if he willfully and unlawfully withholds any records, papers, documents, or other writings from his successor in office, he is, under section 76 of the Penal Code, guilty of a felony. The clerk is not a financial custodian of public moneys, except as to fees, etc., collected or received by him to the use of the county, and for which it is his duty to account with the treasurer on the first Monday of each month. No statute is pointed out or suggested, under which it is made his duty, at any time or under any circumstances, to pay over public money in his hands to his successor in office. The most that can be said is that the law ought to have provided, in cases like the present, for paying to the successor in the office of county clerk such sums of money placed on deposit as security for fees as have not been exhausted in payment for services rendered: but the answer is that, however desirable, there was no such law up to the date of the expiration of defendant's term of office, viz. January 5, 1891. The amendments to the county government act since the last-named date, and which, in many of the counties at least, provide for or obviate the difficulties of the present case, need not concern us at

It follows that defendant's successor in the office of county clerk was not the custodian of the moneys alleged to have been collected by the defendant as aforesaid during his term of office, and to neglect or refuse to pay to him the moneys in question constituted no violation of law, and the motion of counsel for defendant to advise an acquittal should have been granted; and as the court refused at the request of defendant to charge the jury that there was no law requiring the defendant to turn over to his successor in office the money in question, and as it did instruct that "the county clerk was the legal custodian of such funds, and the defendant, as such county clerk, was bound by law to pay over the same to his successor, and the latter was and is entitled to demand and receive the same," the verdict is against law and evidence. Defendant could not, under the information, be convicted for a failure to pay these moneys to the county treasurer, for the reasons: (1) He was not charged in the information with any neglect or refusal so to do. (2) There is no evidence of any such refusal, but, on the contrary,

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there is some uncontradicted evidence in the record that the county treasurer refused to receive such money on the ground that the fees had not been earned, and did not belong to the county.

The court below, on motion of defendant, arrested the judgment in this case, whereupon an appeal was taken to this court, and the action of the court below was reversed. The case is not reported, but may be found in 32 Pac. 526. It is claimed by counsel for the people that the very question presented here was involved in that appeal, and that, as the court held the information sufficient, it became and is the law of the case, and, even if "wrong becomes res adjudicata and final." I do not so understand the ruling. The opinion in that case, after referring to the objections made to the information, and commenting upon them, uses the following language: "Respondent further contends that, if the facts hereinbefore referred to were insufficiently pleaded, still the information does not state sufficient facts, because there was no law authorizing the clerk to receive deposits from litigants, and that, therefore, deposits received by him were illegally collected, and belonged to the depositors. But this question is not before us. This appeal involves only the sufficiency of the information and the jurisdiction of the court, while this contention assumes facts which may have been given in evidence, but which could not properly be considered upon this appeal if they were. The allegation that defendant received these moneys in his official capacity was sufficient, without referring, by title or otherwise, either to the statute under which the information was drawn, or to any statute which created a right, duty, or obligation, the antecedent existence of which may constitute a factor more or less intimately connected with the offense. As to all these the general conclusion of the information 'Contra formam statnti.' is sufficient." If the legality of the deposits with defendant was not in question, by parity of reasoning the legality of the demand and refusal to pay over the deposits by defendant to his successor was not involved. Besides, that question was not, so far as appears from the opinion, either raised or decided. It is not doubted but that a ruling by the appellate court upon a point disfinctly made upon a previous appeal is, in all subsequent proceedings in the same case, a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves. Phelan v. San Francisco, 20 Cal. 40; Davidson v. Dallas, 15 Cal. 75. But this rule does not apply to points not made or passed upon the former appeal (Anderson v. Hancock, 64 Cal. 455, 2 Pac. 31), or to new points presented on a second appeal (Ehrlich v. Ewald, 66 Cal. 98, 4 Pac. 1062), or to questions of fact (Mitchell v. Davis, 23 Cal. 381; Sneed v. Osborn, 25 Cal., at page 629). It follows that the points

made here are not concluded by the decision on the former appeal. The judgment and order appealed from should be reversed, and, as no conviction can be had under the information, the court below should be directed to dismiss the cause.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to dismiss the cause.

(106 Cal. 173)

PEOPLE v. ROYCE. (No. 21,08L)1 (Supreme Court of California. Aug. 14, 1894.) EMBREZEEMENT—EVIDENCE—SUFFICIENCY—HARM-LESS EREOR — SOLDIERS' HOME — DRAFT FOR MONEY APPROPRIATED BY CONGRESS-VALIDITY

1. On the trial of R. for embezzling part of the proceeds of a draft for \$10.350, drawn by the board of managers of the National Home for Disabled Soldiers on the assistant treasurer of the United States, payable to the order of M., governor of California, while defendant was treasurer of the Veterans' Home Associawas treasurer of the veterans from association, a corporation organized under the laws of such state, M.'s private secretary testified that M. received a draft for such association; that he forwarded it to R.; that he had not seen it since; that it was received from the seen it since; that it was received from the National Soldiers' Home Association; and that it was No. 71.228, on the assistant treasurer of the United States for \$10,350, for the Yountville Soldiers' Home, signed by such assistant treasurer, indorsed by M. The president of a certain bank testified that the draft was deposited by R., and the entries of its description were made in the bank's books, and that on the same day it was sent to the bank's correspondent in the city and state of New York, and he had not seen it since. Held, that it was not error to permit such president to state also on whom such draft was drawn, against objections that it did not appear that the draft ever reached New York or was beyond the jurisdiction of the court. the jurisdiction of the court.

the jurisdiction of the court.

2. It was shown that, at the time of the alleged embezzlement, defendant was treasurer of the Soldiers' Home Association; that such association had established its home at Yountville; and that there was no other home for soldiers there. H. teetified that the draft was for the Veterans' Home Association, and in his letter transmitting it to defendant called it the "Yountville Soldiers' Home," while defendant signed the acknowledgment of its refendant signed the acknowledgment of its re-ceipt as "Treasurer Veterans" Home of Cal-ifornia." A witness testified that in the ledger of the Veterans' Home Association, under the date on which the draft was cashed, there was in his handwriting an entry of \$10,310.35; that he got the information from which the entry that was made from defendant; and that "the amount he gave me as the statement of that warrant was \$10.310.35." The president of the bank testified that the only indorsements it kept were "R., Treasurer of Yountville Soldiers' Home, and M." Held, that it was not error to permit such president to also state the amount paid to defendant for such draft, against an objection that there was no evidence that the draft was the property of the Veterans' Home Association.

3. On such trial, a question arose as to a check drawn by defendant on the bank in which such draft was deposited, which the bank claimed had been returned to him. The was made from defendant; and that

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state then called on defendant to produce the check, but the demand was not pressed, and the court did not require defendant to produce

it. Held that, if such demand was erroneous, defendant was not prejudiced.

4. Act Cong. Aug. 27, 1888 (25 Stat. 450), "to provide aid to state or territorial homes for the support of disabled soldiers and sailors," after making an appropriation for such purpose, provides that payments to states and territories shall be made quarterly by the board of managers of the National Home to the officers of the states and territories estillad officers of the states and territories entitled, duly authorized to receive them. By Act Cal. March 19, 1889, the home of the Veterans' Home Association, located at Yountville, Napa county, was recognized and declared to be a "state home for the support and maintenance of disabled soldiers and sailors," and to be under the exclusive management of the state of disabled soldiers and sailors," and to be under the exclusive management of the state, "by the board of directors of said association, who are hereby constituted a state board of directors for that purpose;" and the state treasurer was authorized to receive any and all money to which such home may be entitled under such act of congress. Held, that such draft was not void and of no value, on the ground that the money appropriated by congress, when paid, becomes the state's money, and goes into its treasury, and that it is impossible for such corporation to acquire any right to such money. right to such money.

5. Nor does the fact that such draft was drawn to the order of the governor, instead of the state treasurer, as required by the act of congress appropriating the money, aid de-fendant; since defendant received the draft as such treasurer, and received the entire proceeds, and is estopped to deny the validity of the draft, or that the money belonged to the

association.

6. The facts that defendant was only required to report to the association at stated periods, and that the time for reporting the receipt of the money alleged to have been embezzled had not arrived, do not prevent the state from showing by positive proof that defendant has embezzled it.

7. It was not necessary for the state to show that, before the finding of the indictment, defendant did not pay over all moneys received by him as treasurer of such association; nor to show what disposition he made of it after appropriating it.

Department 2. Appeal from superior court. city and county of San Francisco; J. M. Seawell, Judge.

C. E. K. Royce was convicted of embezzlement, and appeals. Affirmed.

Reddy, Campbell & Metson, for appellant. Atty. Gen. Hart, for the People.

PER CURIAM. The indictment charged that appellant was treasurer of the Veterans' Home Association, a corporation organized and existing under the laws of this state; and that on the 24th day of February, 1893, he embezzled the sum of \$2,050, the property of said association, which came to his hands by virtue of his trust as such treasurer. The facts, as claimed by the prosecution, were that a certain draft drawn by the board of managers of the National Home for Disabled Volunteer Soldiers upon the assistant treasurer of the United States, at the city of New York, payable to the order of H. H. Markham, governor of the state of California, for the sum of \$10,350, came to the hands of the defendant, as such treasurer, on the 21st day of February, 1893; that on that day he procured the Crocker-Woolworth National Bank, in San Francisco, to cash the draft, the proceeds of which he caused to be deposited to his individual account in said bank, the amount alleged to have been embezzled being part of said proceeds. The errors complained of are based upon rulings upon questions of evidence, and upon instructions to the jury.

M. R. Higgins, a witness for the prosecution, testified as follows: "I am the private secretary of Governor Markham. On or about the month of February of this year, Governor Markham received a draft for the Veterans' Home Association, which afterwards came into my hands. I don't know where that draft is now. Q. What dld you do with that draft? A. I forwarded it to Mr. Royce, the treasurer of the Yountville Soldiers' Home, or the Veterans' Home Association of California, or whatever the name is. I forwarded it on the 20th of February, 1893, and think I have Mr. Royce's receipt for it, dated February 21, 1893. I have not seen the draft since. It was received from the National Soldiers' Home Association, through General Franklin, at Hartford, Conn., to whom the governor receipted for it. The draft was No. 71,228, on the assistant treasurer of the United States, for \$10,350, for the Yountville Soldiers' Home, for 414 members, from October 1, 1892, to December 31, 1892, three months, at one hundred dollars per annum, no pensions retained, signed by the assistant treasurer of the United States (I don't know his name), indorsed by H. H. Markham." William H. Crocker. president of the Crocker-Woolworth National Bank, a witness for the prosecution, testified: "Q. Do you remember whether the bank cashed the draft to Colonel Royce? A. Yes, sir; I do. That was on the 21st of February, of this year. That draft was deposited by Mr. Royce. The entries of the description of the draft were made in our books, and that day sent for credit to our New York correspondent, the National Park Bank. 1 have not seen the draft since. Q. Now, on whom was that draft drawn?" Counsel for defendant objected to any description of the draft being given, because it did not appear that it was beyond the jurisdiction of the court. The witness, in reply to the court, said he meant the city of New York and state of New York. Counsel then added to his objection that it is not proved that it ever reached the state of New York. objection was properly overruled. Conceding that the evidence did not show that the draft was in the state of New York, it did show that it was not in the possession of the witness, and this was sufficient for the purposes for which the evidence was intended. The defendant was not charged with embezzling the draft, but with embezzling certain moneys which he received, being the

proceeds of a draft transmitted to him by Mr. Higgins; and the evidence called for was for the purpose of identifying the draft cashed by the bank as the same draft the defendant had that day received from Mr. Higgins. The object of the evidence was not to determine a contract liability created by the writing, and involving a construction of its very language, though it might have furnished evidence that the association was the owner of the proceeds. This, however, was sufficiently shown by other testimony afterwards given, but which will now be noticed as an illustration of the point under discussion. Mr. Higgins, resuming, testified: "I sent that check to Mr. Royce, by direction of Governor Markham, as his private secretary, and wrote a letter accompanying the draft. Copy of letter offered in evidence, and is in the words and figures following, to wit: 'February 20, 1893. Colonel C. E. K. Royce, Crocker Building, San Francisco-Dear Sir: I am directed by the governor to inclose you check No. 71,228, of assistant treasurer of the United States, for \$10,350, for Yountville Soldiers' Home, for 414 members, from October first, 1892, to December thirty-first, 1892, three months, at \$100 per annum. No pensions retained. Yours, very truly, M. R. Higgins, Private Secretary. The witness: To that letter I received the following reply: 'San Francisco, February 21, 1893. W. R. Higgins, Esq., Private Secretary, Sacramento, Cal.—Dear Sir: I have the honor to acknowledge receipt of check No. 71,228, on assistant treasurer of the United States, for \$10,350, indorsed by H. H. Markham, governor of the state of California, for the Veterans' Home of California. Very truly yours, C. E. K. Royce, Treasurer Veterans' Home of California.'" It will here be seen that defendant's letter to Mr. Higgins is an admission that as treasurer of the Veterans' Home of California he received the draft described by Mr. Higgins in his letter of transmission, and that he received it for the purposes named; and oral evidence tending to identify that as the draft delivered to the bank is primary and admissible.

In Com. v. Morrill, 99 Mass. 544, it was said: "The law generally requires the production of the highest evidence of which a thing is capable; and evidence is to be excluded which supposes still higher evidence behind in the possession or power of the party. But the rule is far from universal. For example, it does not require that a supposed writer shall be called to prove his own handwriting, or that a person whose identity is to be proved shall be produced in court. The same is true in respect to an animal or any other object the identity of which is to be proved." In the case above cited, a valise had been stolen, and was shipped by express from Massachusetts to Chicago. The express agent attached a tag to the valise marked "B. Anthony, Chicago, Ill.," as requested by the defendant. The valise was

found in Chicago by a detective, who removed the tag, but at the time of the trial did not find it, and oral evidence was admitted of the writing upon the tag. An excep-tion was reserved. The supreme court said: "In the present case the tag referred to was not a document, but an object to be identified. The words written upon it served to identify it; and the court are of opinion that oral evidence was admissible for this purpose, and that it was not necessary to produce the tag. An inspection of the tag, with the written direction upon it, might have been more satisfactory to the jry than an oral description of it, and therefore might be regarded as the stronger evidence; but the strength of evidence and the admissibility of evidence are different matters." In Singleton v. Barrett, 2 Cromp. & J. 368, Lord Lyndhurst said: "If a person give a receipt, you may prove the payment by parol. I have no doubt that what a party says admitting a debt is evidence, notwithstanding the promise to pay is reduced into writing." supreme court of the United States said: "It cannot be laid down as a universal rule that, where written evidence of a fact exists, all parol evidence of the same fact must be excluded. Suppose the defendant had written a letter to the plaintiff acknowledging the receipt of money; it certainly could not be pretended that the production of this letter would be indispensable, and exclude all parol evidence of the advance." Keene v. Meade, 3 Pet. 7. In the case at bar, suppose that Mr. Higgins, instead of sending the draft to the defendant by mail, had personally handed it to him, and, having taken his written acknowledgment showing that he received it as treasurer, and the amount of it, had gone with him to the bank, and there saw him hand the same draft to Mr. Crocker, and obtain credit for the amount of it; could there be any question that such evidence would be competent to prove the identity of the draft delivered to defendant with the one discounted? If so, it was competent for Mr. Crocker to identify it by giving a description of it.

It is also contended that the court erred in overruling defendant's objection to the question, "What was the amount paid to Col. Royce for that draft?" for the reason that "there was no evidence that the draft belonged to, or was the property of, the Veterans' Home Association;" and this because defendant's receipt to Mr. Higgins was signed, "Treasurer Veterans' Home of California." This, it is said, is not the name of the corporation, and shows that the draft did not belong to the Veterans' Home Association. Mr. Crocker also testified: "The only indorsements that we kept were 'C. E. K. Royce, Treasurer Yountville Soldiers' Home,' and 'H. H. Markham.'" It was shown that, at the time of this transaction, the defendant was treasurer of the Veterans' Home Association; that the association had established its home at Yountville; and that there was no other home for soldiers at Yountville. Mr. Higgins, in his oral testimony, said the draft was for the "Veterans' Home Association," and in his letter transmitting the draft to the defendant called it the "Yountville Soldiers' Home;" while the defendant signed the acknowledgment of its receipt as "Treasurer Veterans' Home of California." But, if this evidence could create any doubt that these names were each used to designate the same association, the testimony of Mr. Horton that in the ledger of the Veterans' Home Association, under date of February 21st, in the handwriting of the witness, there is an entry of \$10,310.35; that he got the information from which the entry was made from defendant; and that "the amount he gave me as the statement of that warrant was \$10,310.35,"-sufficiently shows that he received it as the treasurer of the Veteran's Home Association.

It may be here stated that the proceeds of the draft, including a premium of \$10.35, credited to defendant by the Crocker-Woolworth Bank, were \$10,360.35, and that defendant deposited to the account of the association in the First National Bank his check on the first-named bank for \$8,310.35, leaving unaccounted for the amount charged in the indictment. Upon the trial, a question arose as to a check drawn by defendant upon the Crocker-Woolworth National Bank which the bank claimed had been returned The prosecution then called to defendant. upon the defendant to produce the check. Counsel for defendant objected, and took an exception to the district attorney calling upon the defendant to produce evidence against himself. In 3 Russ. Crimes (9th Ed.) p. 233, it is said: "It has been solemnly determined that notice may be given to the defendant in a criminal prosecution to produce a paper in his possession, and, in case he neglects to produce it, other evidence may be given of it." The defendant, however, was not required to produce the check. It is argued, however, that such a demand is liable to prejudice the defendant; and McGinnis v. State, 24 Ind. 503, is cited. In that case the defendant was charged with stealing a United States treasury note, of the denomination of \$10. Upon appeal, it was assigned for error "that the court erred in admitting parol evidence of the contents of the United States treasury note alleged to have been stolen, no foundation having been laid for such proof, and no notice served upon the defendant to produce the note." It was held that the court could not compel the defendant in a criminal prosecution to produce an instrument in writing, in his possession, to be used against him, but that parol evidence may be given of the contents without such notice having been given. The question whether it would be error to make such demand was not before the court. In the case at bar the demand was not pressed, and we do not see how the defendant was prejudiced, even if

It be conceded that such demand constituted error. The exception was to the demand of the district attorney, and not to any action of the court. If the court had directed the defendant to produce the check, or if the district attorney had commented to the jury upon the defendant's failure to produce the check, a different question would have been presented.

It is also contended that the court erred in refusing to give the following instruction, requested by the defendant: "The court instructs you, as matter of law, that the draft or check, referred to in the evidence as No. 71,228 was void and of no value, and not the subject of embezzlement." The same question was made upon the introduction of evidence, where it was said that the draft was void because "issued without any authority of law." The draft in question was drawn by the board of managers of the National Home, under section 2 of an act of congress entitled "An act to provide aid to state or territorial homes for the support of disabled soldiers and sailors of the United States," approved August 27, 1888 (25 Stat. 450). This act, after making an appropriation for that purpose, further provided: "And payments to the states and territories under it shall be made quarterly by the said board of managers of the National Home * * * to the officers of the respective states or territories entitled, duly authorized to re-ceive such payments. * * *" By an act approved March 19, 1889, the home of the Veterans' Home Association, located at Yountville, Napa county, was recognized and declared to be a "state home for the support and maintenance of disabled soldiers and sailors of the United States," and to be under the exclusive management of the state, "through and by the board of directors of said association, who are hereby constituted a state board of directors for that purpose;" and the state treasurer was authorized and empowered to receive any and all money to which said home may be entitled under said act of congress. It is argued by appellant that this money, "when paid, becomes the money of the state, and goes into its treasury:" that "it is impossible for this corporation to acquire any right to any of the money appropriated by said act of congress." think it clear that the act of 1889, above cited, creates the corporation a state agency for the management of the home, and the disbursement of all moneys appropriated for its support, whether by the state or the United States, or donated by individuals or societies. The act does not destroy or impair the existence or powers of the corporation. The state is limited by the act to the one specified mode of control. viz. "through and by the board of directors of said association;" and section 4 provides that "this act shall in no wise affect the title to the property of the association." It is not necessary to decide the question

whether the association is the absolute owner of moneys coming to its hands, either from the state or the United States. It is authorized to receive moneys for a specified use or purpose. Conceding that it is a trustee of such moneys, its title as such trustee is quite sufficient to support an indictment for the larceny or embezzlement of the same.

It is contended, however, that money cannot be drawn from the treasury of the United States otherwise than in the manner provided by law; and the draft, having been drawn to the order of the governor, instead of the state treasurer, was void, and the United States lost nothing,—that is, that the money remained the property of the United States; that the Veterans' Home Association was not entitled to it, and its treasurer had not authority to receive the draft or obtain money upon it; and therefore the United States, though the owner of the money, could maintain no action against the association to recover it, nor could the association recover it from the defendant. The argument is ingenious, but does not aid the appellant. Whether the government was bound to recognize and pay the draft we need not consider. If the government had reclaimed the draft while it was in defendant's possession, upon the ground that it was issued without authority, it would have been a good defense to this prosecution. It was not so reclaimed, but defendant received the draft as the treasurer of the association, and received the entire proceeds; and, having received it as such treasurer, he is estopped from saying that it was not a valid draft, or that the proceeds were not the moneys of the association. If the draft was void upon its face, as contended by counsel, the defendant should not have received it; but having received it in the name and on behalf of the association, and having received the full amount of money specified in it, he cannot escape responsibility by saying either that the association was not entitled to the money. or that he was not authorized to receive it as treasurer. In Ex parte Hedley, 31 Cal. 108, it was held that if an agent obtains the money of his principal in the capacity of agent, but in a manner not authorized by the agency, he may commit embezzlement of it; and in People v. Treadwell, 69 Cal. 226, 10 Pac. 502, the defendant was the agent of Hanneke to receive money upon a claim which Hanneke held against Quinn, and received money from Quinn as such agent Afterwards Hanneke assigned the claim to Wise, and the defendant, without informing Quinn of the assignment, continued to receive payments, receipting therefor in the name of Hanneke; and it was held that he was estopped in law from denying that the money received after the assignment he received as the agent of Hanneke. The court there quoted from Bish. Cr. Law, § 397 (in 8th Ed., vol. 2, § 364): "In reason, whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled, he should be held to be such on his trial for the embezzlement.

* * * When a man has received a thing of another under the claim of agency, he cannot turn round and tell the principal, asking for the thing: "Sir, I was not your agent in taking it, but a deceiver and a scoundrel." People v. Treadwell, 69 Cal. 235, 10 Pac. 502. See, also, People v. Gallagher, 100 Cal. 470, 471, 35 Pac. 80.

What we have said disposes of the defendant's requests numbered 1, 2, 3, 4, 5, and 7. Other instructions requested by defendant seem to be based upon the theory that the defendant was only required to report to the association at stated periods; that the time for reporting the receipt of this money had not arrived; and that until he had failed to account for it, or to pay it over to his successor, it could not be shown that he had embezzled it; and that in the meantime he might keep it in any safe place he saw fit. It is said in support of these propositions that the jury should know what the defendant's duties were before proceeding to determine whether he had violated his duties or his trust. There are doubtless many cases where an embezzlement can only be proved through the failure of the agent to account for or pay over the money received, but that goes only to the evidence, and not to the fact of the embezzlement, which may be proved by other evidence long before the period for accounting arrives, and before his successor could be elected or qualified. People v. Tomlinson, 66 Cal. 344, 5 Pac. 509, only decides a question of evidence, viz. that the refusal of the agent to pay over the money of his principal, when demanded by a person not authorized to receive it, is not evidence of embezzlement. Non constat that he may have in fact embezzled it before the demand, and that it was capable of other and positive proof.

The twenty-first request was properly refused. It asked the court to instruct the jury that there was no evidence that the defendant did not, prior to the finding of the indictment, pay over all moneys received by him as treasurer of the association. If the defendant, on the 24th day of February, emhezzled and converted to his own use the moneys of the association, how could it affect his guilt in the eye of the law if he afterwards repented and restored the money? The court correctly charged the jury that: "When proof has been made to the satisfaction of the jury that the defendant did fraudulently appropriate to his own use the moneys of said corporation, contrary to his trust as its treasurer, it is not necessary for the prosecution to show further what disposition has been made of the money by the defendant after such fraudulent appropriation."

It is further contended that the court erred in not granting defendant's motion for a

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new trial, upon the ground that the verdict is contrary to law, because the court refused to instruct the jury "that the treasurer was authorized only to receive moneys appropriated or contributed to the objects of the association; and that the treasurer was not authorized, and it was no part of his trust, to receive money to which the assoclation had no right or title; and that, if the defendant received money to which the association had no right, title, or claim, it could not be an act done by virtue of his trust." Here, again, the appellant's theory is that the money belonged to the state, and not to the association. This contention cannot be sustained. The act of congress imposed no restriction upon the state as to the channel or agency through which the money should be applied to the purposes designated in the act. It required no appropriation by the state legislature before the money could be used in support of the home. The money was appropriated by congress, and could not be diverted by the state. The veterans in the home were the beneficiaries of the fund from the moment it left the United States treasury, and the state itself could not divert it; and, as the inmates of the home could only receive it through the agency of the association, the association was entitled to its custody and use for the purpose for which it was appropriated, and such custody and use required and constituted ownership. The language of the act of the legislature of March, 1889, is: "The state treasurer is hereby authorized and empowered to receive any and all moneys to which said home may be entitled under the act of congress, the state thereby treating it as the property of the home, and recognizing the fact that the state is the mere conduit through which it is transmitted to the association.'

We find no error which would justify a reversal, and the judgment and order appealed from are affirmed.

102 Cal. 597

LACEY v. PORTER. (No. 19,325.) (Supreme Court of California. Aug. 24, 1894.) MALICIOUS PROSECUTION—SUFFICIENCY OF EVI-DENCE-PROVINCE OF JURY.

1. Plaintiff was, at defendant's instance, arrested for threatening to euter on land in which defendant was interested, and detain the same by force. Plaintiff was a member of a society formed to take possession of the land, and a surveyor had been employed by the so-ciety to survey the land, and had surveyed a portion of it. *Held*, that the testimony of the surveyor as to acts and declarations of members of the society, in plaintiff's absence, regarding the intention of the society to take possession of the land, was admissible.

2. In an action for malicious prosecution, the credibility of witnesses, and the questions of malice, motives, and intention should be left to the jury only where the evidence for plaintiff is sufficient to support a verdict in his favor.

3. The question of malice is one of fact, and that of probable cause one of law.

4. In an action for causing plaintiff's ar-rest for threatening to enter on land and detain the same by force and violence, evidence that, when arrested, plaintiff was a member of a society the purpose of which was to take possession of the land; that plaintiff, with 14 other men and a team loaded with lumber, was going on the land when stopped by defendant; and that one of the party told defendant he might as well yield, as they had 300 or 400 men, and would go on the land,—showed probable cause for plaintiff's arrest.

5. Taking the advice of counsel before

causing a person's arrest on a criminal charge tends to show good faith; and where the facts are fully stated to counsel, and his advice is acted on in good faith, there can be no recovery for malicious prosecution.

6. Where, in an action for malicious prosecution, probable cause is shown, no amount of malice will entitle plaintiff to recover.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Action by James Lacey against George K. Porter for malicious prosecution. Judgment was rendered in favor of defendant, and plaintiff appeals. Affirmed.

Adams & Mitchell, for appellant. Graves, O'Melveny & Shankland (S. M. White, of counsel), for respondent.

HAYNES, C. On October 13, 1891, defendant, Porter, made complaint against the plaintiff, Lacey, charging him with threatening to enter upon and detain by force and violence the lands of the Porter Land & Water Company, a corporation, in which Porter was a large stockholder. Upon this complaint, the justice of the peace issued a warrant, and Lacey was arrested the same day; but, being unable to give bail that evening, was committed to jail, where he remained 17 hours. He was afterwards examined before the justice, and discharged, and thereupon brought this action against Porter for malicious prosecution. A jury trial was had, and, at the conclusion of the evidence, the defendant moved the court to instruct the jury to render a verdict for the defendant. The instruction was given, and a verdict returned in compliance with the instruction, upon which judgment was entered. Plaintiff moved for a new trial, and this appeal is from the judgment and the order denying said motion. No complaint was made by plaintiff other than that the prosecution was malicious and without probable cause; and these questions, he contends, should have been submitted to the jury. Some questions arising upon the admission of evidence are also made.

The lands of the Porter Land & Water Company, above mentioned, are part of the Mexican grant known as the "Rancho Ex-Mission de San Fernando." This grant was confirmed by the United States, and a patent therefor was issued in 1873, and was duly recorded in the recorder's office in Los Angeles county in 1876. The south half of the grant (generally known as the "Van Nuys Tract") is owned by the Los Angeles Farm-

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ing & Milling Company. The lands of the Porter Land & Water Company are in the north half of the grant, and adjoin the Van Nuys tract. Other portions of the north half are held by individuals, among whom are Hubbard and Wright, who also own a tract the south boundary of which is the Van Nuys tract, and all held under titles derived by mesne conveyances from the patentee. At and prior to the time of the arrest, the plaintiff was a member of an organization called the "San Fernando Protective Association," which then had a membership variously stated at from 200 to 400 men. This organization had a written constitution, and all the officers usually had by voluntary associations, including a treasurer, to whom all moneys were to be paid over by the secretary, and who disbursed the same on orders drawn by the association. The membership fee was \$15, upon the payment of which a person was entitled to a membership certificate. The dues were \$5 per quarter. The object of the association, as stated in the preamble to the constitution, was "to have the title to certain portions of the lands of the San Fernando valley declared invalid, and open to settlement and entry as public lands;" or, as stated by the plaintiff in his testimony: "I think the association was for the purpose of jumping the land." Each member was restricted to 160 acres; but, if he desired more, he was required to pay to the secretary \$25 for each additional 160 acres he might select. The land referred to in the preamble above quoted, and in the testimony of the plaintiff, was the said Mexican grant so confirmed and patented by the United States. Prior to the arrest of the plaintiff, the association had employed a surveyor, named Grove, who surveyed and subdivided the south half of the grant; and it, or a large portion of it, was allotted to members of the association, in individual parcels of 160 acres each; and, on and prior to October 8th, 50 or 60 houses or shanties had been erected and occupied by members of the association on that part of the grant.

The character of the entry upon and occupation of these lands is not doubtful. It was the unlawful and forcible entry by large numbers of persons, organized and banded together for that purpose, upon the peaceable and actual possession of another, whose title was evidenced by the patent of the United States, as was well known to the association. Nor were these lands wild and unimproved, but for many years, certainly for 15 or 20 years, had been regularly cultivated, and at the time of entry the stubble of the preceding harvest was upon the ground. The purposes of the association, however, were not confined to the south half of the grant. Whether the occupation of the south half before any open attempt to enter upon the north half was because of that part having been first surveyed, or whether it was for the better protection of the invaders

by the proximity of their locations, it is not essential to inquire. On October 7, 1891, Shaffer, a member of the association, having made a selection of land on the north side from a map, went with two other members to find it, and on that occasion met Mr. Wright, one of the owners of the Hubbard & Wright tract, with whom they had some words. On the next day, Grove, the surveyor, with about 15 men (among whom were Shaffer, with a load of lumber, and the plaintiff), came to the south line of section 26, part of which section belonged to Hubbard & Wright and part to the Porter Land & Water Company, where they were met by Mr. Wilson, the superintendent of the Porter Land & Water Company, and Mr. Wright, who stopped them. Grove, who did the talking for the crowd, said they had come to settle on section 26; that they might as well let them go on there peaceably; that they were going on there anyhow; that he had 300 or 400 men belonging to the league, and had plenty of money back of them. The talk continued until between sundown and dark, when the crowd turned back. The next morning, Grove and the plaintiff, with several others, came again to the line. Plaintiff was head chainman. They had surveyed up to the line, and had gone about a half chain over, when Wilson, for the Porter Land & Water Company, forbade them going over the line, and pulled up a pin that had been stuck north of the line, and threw it back across the line. Plaintiff then went back across the line and said: "I ain't a bit afraid of you. I'll give you a pointer on that." Grove said (but not in the presence of plaintiff) that, if he had given the word the day before, his men would have gone on the land too quick, and that they (Wright and Wilson) would not have been anywhere; that his men were all armed; that they were coming again on Monday, and they might just as well let them go there and settle; that they considered it government land, and they calculated to go on it. The defendant, Porter, consulted the district attorney, and for that purpose visited his office two or three times, and was advised by him that he had a legal remedy, and directed the assistant district attorney to prepare a form of complaint to be used by defendant to procure warrants for the arrest of plaintiff and others, and such form was prepared, and was used to procure plaintiff's arrest. Grove, the surveyor, and several others, were included in the same complaint. Other facts, so far as material to be noticed, will be referred to in the examination of the points made by appellant.

The errors relied upon by appellant are (as stated in his brief):

1. "The admission of testimony showing the acts and declarations (made without the hearing of appellant), by members of the protective association and others, of the intention of the association to take possession of respondent's land, no conspiracy having been shown." The constitution of the association was put in evidence by the plaintiff, and he admitted that he was a member, and that the object of the association was to "jump the land." Grove, it is true, was not a member of the association, but was its employé, aiding and assisting it, and having full knowledge of its existence and purposes; and all the statements and acts, whether of Grove or of the members of the association, were made and done while they were engaged in the accomplishment of the common design. Appellant was not only a member of the association, but was actively participating in what was being done, and it was not necessary to the admissibility of the declarations of the others that he should have been present and within hearing, even if he had been on trial upon the charge made against him.

2. It is further insisted that the court erred in "taking from the jury the questions of the credibility of witnesses, malice, motives, intention, and belief of respondent, and what facts the evidence established." The general rule undoubtedly is that these questions should be submitted to the jury where evidence is conflicting; but it is equally well settled that the court may within certain limits control the verdict, either by such an instruction as was here given, or by setting it aside, and granting a new trial, either upon motion of the defeated party or upon its own motion. To justify the court in directing a verdict, it is not necessary that there should be no conflict in the evidence; but, where the evidence is such that it is clearly insufficient to support a verdict in favor of the party against whom the direction is given, the instruction is proper, unless the circumstances of the case indicate that upon another trial the evidence may be materially different, in which case the facts should be submitted to the jury in order that a new trial may be had. But in either case the decision of the court below will be sustained, unless the appellate court can clearly see that its conclusion is wrong upon the facts. "In an action for malicious prosecution, the burden is on the plaintiff to show affirmatively that there was a want of probable cause.' Grant v. Moore, 29 Cal. 656; Emerson v. Skaggs, 52 Cal. 247. "Actions for malicious prosecution have never been favored in law, although they have always been readily upheld when the proper elements therefor have been presented. They are sustained, however, only when it is shown that the prosecution was in fact actuated by malice, and that the party instigating it had no reasonable ground for causing the prosecution." Ball v. Rawles, 93 Cal. 228, 28 Pac. 937. Malice is a question of fact; but what facts and circumstances amount to probable cause is a pure question of law, though whether such facts and circumstances exist is a question of fact. Id., 93 Cal. 227, 28 Pac. 937; Stone v. Crocker, 24 Pick. 84. The facts of the organization and purposes of the San Fernando Protective Association, that the Van Nuys tract had largely been occupied by members of the association acting in concert, that the purpose was also to occupy that part of the original grant then belonging to the Porter Land & Water Company, that Shaffer, accompanied by about 15 men, among whom were plaintiff and the surveyor, Grove, with a four-horse team loaded with lumber, were proceeding to go upon the land, when taken with the statements of Grove that the owners might as well yield peaceably, that he had 300 or 400 men, and would go on the land, all of which was shown without substantial contradiction, and all, except the statements of Grove last above referred to, by the testimony of the plaintiff, render it too plain for argument that defendant had probable cause for the arrest of plaintiff. It does not matter that no threat to occupy defendant's land was made by plaintiff personally, nor that he had already selected a quarter section on the other part of the tract. The occupation of the Van Nuys tract, in the manner described, with any movement towards the occupation of the other part of the grant with large numbers of men, was a threat to occupy it forcibly. Why should 15 men accompany one wagon load of lumber if the entry was intended to be lawful and peaceable? If the facts, as they existed, were such as to constitute probable cause, and the defendant acted thereon in good faith, it is not necessary to show that he consulted counsel. Taking the advice of counsel, however, tends to show good faith and honest motives and the absence of malice; and where the facts upon which a criminal complaint is based are fully stated to counsel, and his advice is acted upon in good faith, the plaintiff cannot recover. Ball v. Rawles, 93 Cal. 235, 28 Pac. 937. But, if probable cause is found to exist, no amount of malice will entitle plaintiff to recover; for, though malice is inferred from want of probable cause, still where probable cause does exist, malice, even affirmatively shown, will not entitle the plaintiff to a verdict. Thompson v. Rubber Co., 56 Conn. 493, 16 Att. 554. The circumstances relied upon by appellant to show malice on the part of defendant are insufficient for that purpose; but, as it is clear that probable cause for the arrest was shown, it is not necessary to discuss them. We think the instruction to find for defendant was right, and that the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and or der appealed from are affirmed. 103 Cal. 624

JEFFERSON et al. v. HEWITT et ux. (No. 19.406.)

(Supreme Court of California. Aug. 31, 1894.)

Review on Appeal — Evidence of Agency —

Promissory Notes—Conditions — Failure of
Consideration—Void Issue of Stock.

1. Findings of fact by the trial court upon conflicting evidence will not be reviewed on

appeal.

2. The secretary of a corporation is acting as its agent where he solicits a stock subscription, turns over to the company a note given therefor, whereupon the president delivers the stock certificate to the purchaser, and such actions are thereafter ratified by the board.

3. Under Civ. Code, § 359, prohibiting the issue of stock except for money paid, labor done, or property actually received, a stock certificate issued in exchange for a note conditioned upon the completion of the road in a given time is void, and such note is without consideration.

4. The condition upon which a note is payable need not be incorporated therein.

Commissioners' decision. Department 1. Appeal from superior court of Orange county; J. W. Towner, Judge.

Action by Amos E. Jefferson and others against R. E. Hewitt and wife. There was a judgment for defendants, from which, and from an order denying a new trial, plaintiffs appeal. Affirmed.

Houghton, Silent & Campbell, for appellants. James Scarborough and Ray Billingsly, for respondents.

BELCHER, C. This action was brought by the assignees of a nonnegotiable note to recover from the makers the amount alleged to be due thereon. The note was for \$5,000, dated July 14, 1888, and payable four months after date, and was given to the Santa Ana, Fairview & Pacific Railroad Company in payment for 50 shares of stock in that company. On the first trial, judgment was given for the defendants, and the plaintiffs appealed. The judgment was reversed, and the cause remanded for a new trial (95 Cal. 535, 30 Pac. 772), the court, among other things, saying: "The construction of the road to the ocean was no part of the consideration of the note. The findings negative the averment of the answer that the note was given 'upon the express condition' that the railroad should be completed within ninety days. The matters relied upon, to be available as a defense, must be shown to have been a condition agreed upon by the parties." When the case went back to the court below the defendants filed an amended answer, in which, after making certain denials, they set up two affirmative defenses. In the first of these defenses, it is alleged that on July 14, 1888, defendants agreed with the Santa Ana, Fairview & Pacific Railroad Company to take 50 shares of its capital stock, and to deliver to said company their promise in writing to pay therefor the sum of \$5,000, and in pursuance thereof did on the same day deliver the note set out in the complaint, but that said agreement to take said stock, and the performance of said written promise, were by the agreement of the parties thereto at the same time made conditional upon the construction and completion of the railroad of said company from Fairview, its terminus at that time, to the Pacific ocean, before the maturity of said note, to wit, within 60 or 90 days, and that it was expressly agreed by and between said parties, at the time of the delivery of said note, that if said railroad should not be so constructed and completed within said period the defendants would not have to pay said note, or any part thereof; that said condition was not performed, and the road was not constructed in whole or in part from Fairview to the Pacific ocean, within said period, or at all, and no part thereof has yet been built; that about September 10, 1888, defendants notified said company that said condition had not been performed, and no steps had been taken to comply with it, and thereafter, about November 15, 1888, and again about January 15, 1890, the said condition being still unperformed, they tendered to the officials of said company the said stock, and demanded the return of said note, which return was refused; "and defendants hereby renew the tender of said stock, and deposit the certificate for the same herewith in court, and demand the return of their promise in writing." In the second defense it is alleged that the same agreement was made as that set up in the first defense, but that said agreement and note were made upon the sole consideration of the promise and agreement of the company that it would complete its road from Fairview to the Pacific ocean before the maturity of said note, to wit, within 60 or 90 days from its date: that the company failed to so complete its road, or any part thereof, and by reason of such failure the consideration for said agreement to take stock and for said note had wholly failed; and the tendering back of the stock is then alleged in the same terms as before. The case was again tried, and the court found the facts as to the said agreement and note to be as alleged in the answer, and gave judgment for defendants, from which, and from an order denying a new trial, the plaintiffs appeal.

In support of the appeal the principal contention is that the findings were not justified by the evidence. This contention cannot, in our opinion, be sustained. The negotiations for the sale and purchase of the stock were all between Dr. J. G. Bailey, who was then the secretary and a director and stockholder of the company, and the defendants, and they were the only witnesses as to the terms of the agreement. The testimony of the defendants was clearly sufficient to justify and sustain the findings, and the most that can be said is that some conflict was raised by

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the testimony of Dr. Bailey. That, however, was a matter for solution by the trial court, and its determination cannot be reviewed on appeal.

It is also contended that, whatever the agreement between Dr. Bailey and the defendants may have been, the company was not bound by it, for the reason that he was not acting as its agent, and had no power to sell the stock, either conditionally or uncon-"The comditionally. And counsel say: pany would have been bound if it were true that Bailey was its agent in the transaction, having authority to bind it; but he is neither shown to have been its agent, nor to have had any authority whatever to act for it in the matter." Whether this is so or not must be determined from the evidence. The material facts shown by the evidence are, in substance, as follows: As already stated, Dr. Bailey was the acting secretary and a director of the company, and all the negotiations for the sale of the stock to defendants were had between him and them. There was some unsold stock of the company, and Bailey and the other members of the board had talked a good many times about disposing of it, and he and they had tried to sell stock to others. Bailey went to the defendants, and solicited and urged them to take the stock, and during the negotiations told them that he had the privilege or power to dispose of a part of the stock to his friends. He took the note to the company on the day he received it, and a few days later the president of the company, Mr. Buck, took the certificate of stock to Hewitt's house, and offered it to him. Hewitt then asked Buck if it was true that the company was going to continue the road on from Fairview to the beach within 60 or 90 days, as agreed and stated to him by Dr. Bailey, and Buck said, "The road is going right on, notwithstanding any reports to the contrary." Hewitt then took the certificate, and he says, "I thought I might just as well have the certificate of stock, although I was negotiating for stock as completed from Fairview to the beach." In September following, Hewitt wrote a letter to the board of directors of the company, and delivered it to Mr. Catts, its then secretary, stating: "I hereby beg leave to tender to you my stock in your company, issued to me on or about the 17th day of July last, and to the amount of five thousand dollars (\$5,-000). And I further ask you to cancel my note, given for the sum of five thousand dollars (\$5,000) for the said stock. My reason for this step is that the conditions and representations upon which the said stock was issued to me have not in any manner been fulfilled or carried into effect by your company." On the 8th of October following the directors of the company passed a resolution reading as follows: "Resolved, that the issue of certificate number 20, for fifty shares of the capital stock of this corporation, to R. E. Hewitt, on the 14th day of July, 1888, by the officers of this corporation, and the acceptance by them on behalf of this corporation of a certain promissory note made by R. E. Hewitt and Allie A. Hewitt, his wife, dated 14th day of July, 1888, for the sum of five thousand dollars, and given in payment in full for said shares of stock, be now by this board approved and ratified." These facts very clearly show, as we think, that Bailey, in making the agreement with the defendants in regard to the stock and the note, was acting as the agent of the company, with actual or ostensible authority to do so, and not as the agent of defendants; and it must be assumed that when he delivered the note to the company he notified its officers of the conditions agreed upon as to its payment. At any rate it was his duty to do so, and there is no evidence tending to show that he did not perform that duty. But, whether he did perform it or not, the company was bound by his action, since notice to an agent is constructive notice to the principal, and the rule applies to corporations as well as individuals. Civ. Code, § 2332; Bierce v. Hotel Co., 31 Cal. 165; 1 Mor. Priv. Corp. (2d Ed.) §§ 540b, 540c.

The point is made that when the defendants received the certificate of stock they became liable to pay for it, and the condition agreed upon as to payment, if made, was rendered vold, leaving the obligation to pay in full force. In support of this position, counsel cite section 359 of the Civil Code, which provides that "no corporation shall issue stock or bonds except for money paid, labor done, or property actually received." But if that section has any bearing on the case, it seems to us, it must be construed to render void the certificate, and not the condition as to payment, and hence that the note was made without any consideration.

The objection that the condition, to be valid, should have been incorporated in the note, cannot be sustained. The facts of the case in this regard are very similar to those in Billings v. Everett, 52 Cal. 661. There it appeared that defendant gave plaintiff's assignor a note due August 1, 1875, with the oral agreement that the note should not be paid unless a certain water ditch, from which a certain number of acres of defendant's land could be irrigated, should be completed at the time fixed for the payment of the note: and, the ditch not being completed at the time fixed, it was held that there was a failure of consideration for the note, in whole or in part.

Looking at the whole case, we see no valid ground for reversal, and therefore advise that the judgment and order appealed from be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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108 Cal. 646

ADAMS v. BURBANK. (No. 19,324.)
(Supreme Court of California. Sept. 1, 1894.)
RESCISSION OF CONTRACT—QUANTUM MERUIT—
SET-OFF.

1. Where one who has contracted with another to build a house wrongfully ousts the contractor, and prevents him from completing the work, the latter may treat the contract as

rescinded, and can recover on quantum meruit.
2. In such an action the contract is admissible in evidence as proof of the value of the work, but is not conclusive on that point.
3. Where a contractor for the erection of a

3. Where a contractor for the erection of a building gives to a material man an order on the owner, who owes him enough to pay the same, but refuses to do so, the owner, in an action by the contractor for the work done, cannot set off the cost of a mechanic's lien filed by the material man.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Action by J. F. Adams against David Burbank for work done and material furnished. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

Brousseau & Thomas, for appellant. J. L. Murphey, for respondent.

SEARLS, C. This action was brought by J. F. Adams, the respondent, to recover from appellant the sum of \$4,744.64, with interest and costs, for work, labor, and services performed and materials furnished in the construction of a brick building in the city of Los Angeles. It is conceded by the pleadings that on the 1st day of June, 1891, plaintiff and defendant entered into a written agreement by the terms of which the former was to furnish the material, labor, and work, as specified in certain specifications and shown by the plans, for a brick building to be erected for defendant on Broadway and First streets, in the city of Los Angeles, for which plaintiff was to receive \$9.75 per 1,000 as per wall measure of 21 bricks to the foot, etc., to be paid by defendant at the rate of 75 per cent. as the work progressed; the estimates of the superintendent to be taken for the value of the work done, and his certificate to be given therefor; the residue to be paid upon the completion and acceptance of the work, and upon the plaintiff furnishing releases from all material men, or receipts for all material used and for all labor performed to the satisfaction of defendant. The specifications are made a part of the contract, which was filed with the recorder of the county. Plaintiff entered upon the construction of the building, furnished the materials, laid the foundation, built the first story and a small portion of the second story of said building, when, some time in July, 1891, he ceased work upon the same, leaving certain materials, such as brick, mortar, tools, and appliances for the work, and defendant finished the construction, using the material on hand, etc. At the time plaintiff ceased work there was due from him, for

materials furnished by sundry parties, as follows: To the Inglewood Brick Company, for brick, \$401.50; to H. S. Hudspeth, for sand, \$37. Plaintiff, a few days after ceasing work on the building, gave orders for these claims upon the defendant, which he refused to pay; and they thereafter filed liens on the property for the several amounts due them, and prior to the trial of this action suits had been brought to foreclose said liens. Prior to the trial the action to foreclose the Hudspeth lien was dismissed. There was also a further lien filed upon the property to secure the sum of \$30.45 due James L. Tucker for hauling brick for the Inglewood Brick Company to the building, but for which plaintiff was not personally liable, said brick company having contracted with him to deliver the brick; and the amount of Tucker's bill was included in the \$401.50 due said company, and in the order given them on defendant. The foregoing facts are either admitted, or proven without material conflict.

As to the disputed facts, concerning which there was a substantial conflict in the testimony, it may be said that, in support of the verdict in favor of plaintiff, we are authorized to assume as proven the facts which there is substantial evidence to uphold. Upon this theory it must be said: (1) Plaintiff was proceeding to construct the building of the material and in the manner substantially as provided for in the contract, save as changed by orders of defendant's superintendent. (2) That without cause, and in violation of the contract, defendant took possession of the building, ousted the plaintiff therefrom, and refused to permit him to complete the same in consonance with the contract, and appropriated to his own use the material on hand and provided to be used therein, or in the construction thereof. (3) The labor performed by plaintiff and the material furnished by him, estimated at a fair valuation, are in excess of the verdict found in his favor. (4) Defendant agreed to pay the orders drawn upon him by plaintiff in favor of the brick company and of Hudspeth; and there was at that time in his hands, and due plaintiff, a sum of money greatly in excess of the sum of \$438.50 called for by said orders, and that he refused to pay the same, or any part thereof.

The complaint contained three counts: The first, upon the contract; the second, upon a quantum meruit for services and for the materials furnished; and the third, for the value of materials left upon the premises, and converted by the defendant. The court at the trial, ruled the plaintiff to an election as between the first and second counts, and he elected to go to trial upon the second and third counts. The theory of plaintiff was that defendant having violated the contract, and prevented his completion of the work, he was entitled to treat such contract as rescinded, and to recover, as for work performed and materials furnished at the re-

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quest of defendant, the reasonable value thereof. This theory is correct; and while the contract was offered in evidence, and was admissible as proof of the value of material furnished and services rendered, it was by no means conclusive on that point, and was to be taken with the other evidence in arriving at such values.

The instructions asked by defendant and refused by the court, numbered from 1 to 12, both inclusive, were properly refused. They one and all involved, in different forms, the theory that plaintiff was bound by the contract price agreed upon for the work, or that the payments therefor were only due and payable in the manner and upon the terms provided by such contract, or that plaintiff could not recover if he had permitted liens to be filed upon the property on account of materials purchased by him, and for which he was liable, and had not paid the same as provided in the contract. Had the contract been adhered to, and the work completed under it, the result sought by these instructions would have followed; but if defendant violated it, and refused to allow plaintiff to consummate the work, he could not hold plaintiff to its terms, and at the same time refuse to perform his own obligations under the same agreement.

The court properly instructed the jury, at the request of defendant, that he, the said defendant, was not personally liable for the debts of the plaintiff, as contractor, to persons furnishing materials to him, and was not under obligation to the plaintiff to pay his debts to the material men, etc.

The court further instructed the jury, in substance, that they should offset the liens to the amount of \$438, but not the costs and expenses thereof, provided plaintiff had given orders therefor, and that the defendant was indebted to plaintiff at the time in a sum in excess thereof. This was correct. If the money was due to the plaintiff from defendant, the orders given to the parties who later became lien holders operated as an assignment by plaintiff of his demand, pro tanto, and if defendant refused to pay the orders he should not be permitted to recover from plaintiff the costs and expenses incurred by reason of his refusal.

It is not perceived that Tucker was entitled to a lien. He did not perform labor upon the building, or furnish materials therefor, but was employed by the brick men to haul brick for them, and had no connection with the contractor, who owed him no liability. His position is not different from that of laborers who made the brick. If it, however, be conceded that he was entitled to a lien, as we must presume that, under the instructions of the court, defendant received a credit of \$438 on account of the liens, and as the Hudspeth claim for \$37 had been dismissed before trial, and defendant was not therefore bound to pay it, he is still a gainer if he pays the Tucker claim of \$30.

The instructions given on behalf of plaintiff, taken together, contain a fair exposition of the law applicable to the case. To take up and answer in detail the objections made to them would take much space, and elucidate no principle of importance. The objections to evidence, so far as they involve any doubt as to the propriety of the action of the court, are not of sufficient importance to warrant a reversal, even if well founded. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

108 Cal. 670 SEFTON v. PRENTICE et al. (No. 19.899.) (Supreme Court of California. Sept. 1, 1894.) CONSTRUCTION OF CONTRACT-TRESPASS.

1. An agreement to deliver at a certain place a quantity of water, "through and from a pipe, flume, or conduit," does not authorize the person to whom the delivery is to be made to cut at such place a hole in the pipe through which the water flows, and permanently attach thereto a pipe leading to his own premises.

2. It is no excuse for a trespass that no property was injured thereby.

property was injured thereby.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by J. W. Sefton against W. B. Prentice and Julia V. Stewart for an injunction and damages. Judgment was rendered for plaintiff, and defendants appeal. Reversed.

V. E. Shaw and Gibson & Titus, for appellants. E. W. Britt, for respondent.

McFARLAND, J. This action is somewhat difficult to classify. Its purpose is to obtain an injunction to prevent defendants from preventing plaintiff from attaching a water pipe to a certain water pipe of defendants. Judgment went for plaintiff, and defendants appeal from the judgment, and from an order denying their motion for a new trial. The decision of the case rests upon the respective rights of the parties under a certain written contract made by appellants on March 24, 1891, with one Fred. T. Hill. At that time appellants contemplated building some kind of a conduit to carry water from the large ditch of the San Diego Flume Company to Spring Valley, where they owned lands. This contemplated conduit was to run near to and past a point called "Patterson's Corner," which was about 21/2 miles distant from the flume of the said San Diego Flume Company. Hill (as trustee) owned a part of lot 9, Ex-Mission rancho, consisting of about 300 acres of land, lying south of and most of it lower in elevation than said Patterson's corner. Appellants at that time had not determined what kind of a conduit they would construct for the purpose of carrying said water. Under these circumstances they and Hill entered into said contract, which provided, generally, that appellants would deliver to Hill, his executors, etc., and "assigns," at said Patterson's corner, for 25 years, such amount of water as Hill would purchase and furnish from the said San Diego Company's flume, not exceeding 10 miner's inches, in consideration of \$1,000, which, it is admitted, was paid. Appellants were to begin to deliver the water within six months of the date of the contract. Within that time the said conduit was completed. and, when completed, it consisted of an open flume for about two-thirds of its length, beginning at the flume of the San Diego Company, and the remaining one-third consisted of an iron pipe, about 500 feet thereof next to the flume being 6 inches in diameter, and the rest, to and past said Patterson's corner, being 4 inches in diameter. The point at which the pipe commences is about 170 feet in elevation above said Patterson's corner: and it is continued over a hill to lands of appellants, and by force of the pressure water is carried to appellants' said lands, and also to lands of other persons to whom appellants furnish water. When it was completed, Hill was not prepared to use the water on the land on said lot 9, Ex-Mission rancho, and no request was made for the water mentioned in said contract until the month of April, 1893. At this last-named date the respondent herein, Sefton, was the owner of land lying easterly and about 3,000 feet distant from said Patterson's corner, and about 75 feet higher in elevation; and he also owned two miner's inches of water flowing in the said San Diego Company's flume, with the right to take the same from said flume. laid an iron pipe from his land to or near Patterson's corner; and claiming that, by certain assignments, he had acquired all of Hill's interest in said contract, he demanded of appellants that they allow him to attach his pipe to theirs, so that by the pressure in appellants' pipe the two inches of water would be carried over the elevation to respondent's said land. This appellants refused to do, but they offered to furnish and turn out to him the two inches of water at Patterson's corner. Respondent then commenced the present action, and by the judgment of the court appellants were enjoined, or rather commanded, to allow respondent to attach his pipe to theirs, and furnish him the said pressure.

We pass over the preliminary points made by appellants; that is, whether the word "assigns" in the contract was not intended in the limited sense of meaning only the successors of Hill in the land in said lot 9; whether the attempted assignment of a certain alleged "receiver" was valid; and whether, under any view, injunction was the proper remedy. Assuming none of these points to be well taken, we are satisfied that, under the contract, neither Hill nor any of his successors or assigns had the right to cut a hole in appellants' pipe, attach another pipe to it hermetically, or use the pressure which it afforded. None of these things were covenanted for in the contract upon which respondent bases his right of action. The contract simply provides that appellants "will deliver to the party of the second part [Hill], his executors," etc., the amount of water before mentioned "near F. E. Patterson's northwest corner, in section 29," etc. The words of the contract upon which re-"Said waspondent mostly relies are these: ter to be delivered through and from a pipe, flume, or conduit, to be constructed" by appellants; and great stress is laid upon the word "from" by respondent and the court below. "Every word of the contract," it is argued, "must be given some force and meaning." Of course, in construing a writing, every word which, taken in connection with the other language used, has a distinctive meaning, and in any way qualifies the context, must be considered. But the makers of conveyances and contracts, as well as the makers of laws, are sometimes tautological, and needlessly repeat an idea in different words and phrases. The contract under consideration would be the same if the word "from" were not in it. No water running in appellants' pipe could possibly be delivered at Patterson's corner, in any manner whatever, without being taken from said pipe; otherwise it would inevitably run past said point. The word "from" simply expresses the general idea of separation. Some of its definitions given by Webster are: "Out of the neighborhood of;" "leaving behind;" "out of;" "the antithesis and correlative of to." By the contract, appellants were to construct some kind of a conduit,any kind that they might choose,-and, through it, to carry and deliver to Hill at Patterson's corner a certain amount of water: but they did not contract to deliver to Hill any part of the conduit itself. "Conduit" is a general word, which applies to any channel or structure by which flowing water can be conducted from one point to another. It includes a ditch, flume, pipe, or any kind of aqueduct. Appellants chose to use a pipe as part of their conduit; but they did not agree to give Hill possession of any part of the pipe, for the purpose of cutting a hole in it and permanently occupying it by his attached pipe, or for any other purpose; and there is not a word in the contract about the furnishing of any "pressure." The contract to deliver the water, no doubt, included such delivery as would give Hill a reasonable opportunity of taking possession of the water delivered; but to sanction the claims of respondent in the premises would be for the court to make a contract for the parties different from that which they made for themselves.

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It is contended that the attachment of respondent's pipe to that of appellants would not injure the latter. There is considerable evidence that it would be an injury to appellants; but a man has no right to commit a trespass upon the property of another because, in the opinion of the trespasser or of a court, it would do the owner of the property no harm. Neither is it of any consequence that, after the pipe of appellants had been constructed, they furnished water through connecting pipes to a few persons other than respondent. They had the right, of course, to make such a contract with another person if they chose to do so; but they made no such contract with Hill or his as-

The foregoing views are determinative of the appeal adversely to respondent; and, as they cover the merits of the whole case, it is not necessary to notice in detail the various specific points made by appellants. The case was decided in the court below upon the theory that, under the written contract between Hill and the appellants, the latter are compelled to allow the assigns of Hill to permanently attach a pipe to the pipe of appellants; and this, in our opinion, is not a correct construction of said contract. Judgment and order reversed.

We concur: FITZGERALD, J.; DE HA-VEN, J.

103 Cal. 652

WESTMINSTER SCHOOL SKELLY DIST. OF ORANGE COUNTY (MOR-

RISON, Intervener). (No. 19,342.) (Supreme Court of California. Sept. 1, 1894.) SCHOOL DISTRICTS-LIABILITY TO GARNISHMENT-VOLUNTARY PAYMENT TO SHERIFF.

1. A school district is not subject to garnishment under Code Civ. Proc. § 542, authorizing the garnishment of any person indebted to a judgment debtor.

2. Though not subject to garnishment, payment by a school district to the sheriff of an amount garnished is a discharge, under Code Civ. Proc. § 716, authorizing any person indebted to a judgment debtor to pay the amount to the sheriff.

to the sheriff.

3. Payment of the amount due to the sheriff, after issuance of execution, but before de-livery to the sheriff, is a discharge, under Code Civ. Proc. § 716, providing that a person indebted to a judgment debtor may pay the debt to the sheriff after issuance of execution, and before its return.

Commissioners' decision. Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge.

Action by F. F. Skelly against Westminster school district of Orange county (J. W. Morrison, intervener). There was a judgment for defendant, from which, and an order denying a new trial, plaintiff and intervener appeal. Affirmed.

Victor Montgomery, for appellant. F. O. Daniel, for intervener. James G. Scarborough, for respondent.

TEMPLE, C. This action was brought to recover \$394 alleged to be due for work and materials performed and furnished in the building of a schoolhouse. It is alleged that the claim has been allowed to the extent of \$350. The defendant, in its answer, denies that the value of the services and materials exceeded \$350, and, as to that sum, pleads payment as follows: That on the 6th day of April, 1892, the Newport Wharf & Lumber Company, a corporation, commenced an action against the plaintiff to recover \$545.05, and had summons and a writ of attachment issued on the same day, which said writ of attachment was on that day duly served on the defendant. That thereafter such proceedings were had that on the 11th day of May, 1892, a judgment by default was duly given and made by the clerk of said court in favor of said corporation, against said Skelly, for \$549.39 and costs; that on the 6th day of July, 1892, an execution was issued in said action against the property of said Skelly, and July 11, 1892; the sheriff served upon the defendant a copy of the execution, with a notice that by virtue of said writ he levied upon all the moneys, goods, credits, effects, debts due and owing. or any personal property in its possession or under its control, belonging to said defendant therein, and at the same time demanded payment of such debt, or delivery of such personal property. Thereupon, in pursuance of said notice and demand, and before the return of said writ, the defendant paid to said sheriff the amount of said debt due from said defendant to the plaintiff, and took his receipt for the same. The court found for the defendant, and the findings of fact follow closely the language of the answer.

The intervener avers in his complaint of intervention that he is a creditor of this plaintiff, and on the 6th day of April, 1891, commenced an action against this plaintiff to recover the sum of \$218.85; that on the same day a summons and writ of attachment were duly issued in said action and served on this plaintiff (defendant in that action). That on the same day the writ of attachment was served on this defendant by delivering to it a copy, with the notice required by the statute; that April 12th judgment was duly entered against said Skelly in favor of the intervener, and April 15, 1892, execution was issued upon the judgment, by virtue of which the constable having the writ levied upon the debt due from defendant to Skelly May 13, 1892; that after the claim of the defendant had been allowed. to the extent of \$350, the constable made due demand for the amount of the execution, but defendant refused to pay the same, or any part thereof. The execution was thereafter returned wholly unsatisfied.

The defendant and the intervener, it will be seen, both claim that the admitted debt to the plaintiff has been levied upon under

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attachment and execution. The plaintiff contends that a school district is not subject to such process. Subdivision 5, § 542, Code Civ. Proc., reads as follows: "(5) Debts and credits and other personal property not capable of manual delivery must be attached by leaving with the person owing such debts, or having in his possession or under his control such credits and other personal property, or with his agent, a copy of the writ and a notice that the debts owing by him to the defendant, or the credits and other personal property in his possession or under his control belonging to the defendant, are attached in pursuance of such writ" question is whether a school district is a 'person," within the meaning of this section. Mayrhofer v. Board of Ed., 89 Cal. 110, 26 Pac. 646, was a case in which it was sought to foreclose a mechanic's lien upon a public schoolhouse. The constitution provides that laborers of every class, and material men, should have a lien upon the property upon which they have bestowed labor or furnished materials, and the legislature was required to provide by law for the speedy enforcement of the liens. The legislature, by law, provided that such persons should have liens for the labor or material used in the construction of any building or other structure. The language is general, and, in its usual sense, would include a schoolhouse, for that is a building and a structure. But it was held that the statute did not apply to public buildings. The rule is that the state is not bound by general words in a statute which would operate to trench upon its sovereign rights, or injuriously affect its capacity to perform its functions, or establish a right against it. In Savings Bank v. U. S., 19 Wall. 239, it is said: "The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him (the king) in the least, if they tend to restrain or diminish any of his rights or interests. * * * The rule thus settled respecting the British crown is equally applicable to this government, and it has been applied frequently in the different states, and practically in the federal courts." In People v. Herkimer, 15 Am. Dec. 382, some illustrations of the application of the rule are given. The state is not bound by a statute of limitations, unless it is expressly so provided, nor by a statute limiting a time during which a judgment shall be a lien (Com. v. Baldwin, 1 Watts, 54); an act abolishing imprisonment for debt (People v. Rossiter, 4 Cow. 143); insolvent law (U. S. v. Wilson, 8 Wheat. 253), etc. Rules of procedure generally do apply. But this principle does not go to the extent of holding that, where a right of action is given, it authorizes a suit against the state.

The special phase of this question, as applicable to garnishment, is discussed in Divine v. Harvie, 7 T. B. Mon. 439, and in a note to that case (18 Am. Dec. 194) the author-

ities upon the subject are collected and discussed. That was a creditor's bill founded upon a statute of Kentucky authorizing the court of chancery, upon return of an execution nulla bona, to subject to the satisfaction of the judgment any chose in action, etc., belonging to the judgment debtor. was said that this act did not include a claim of the debtor against the state. was pointed out that such a proceeding might cause great detriment to the state, and then the auditor and treasurer were not authorized to determine for the state the right of the attaching creditor to apply the debt to the satisfaction of the judgment. That receives illustration in this case. claims that the officers of the school district have paid the claim of one of his alleged creditors without right, and when there was no valid levy or judgment. The law has not given these officers the authority to determine these questions at the peril of the district. Merwin v. City of Chicago, 45 Ill. 133, was a case in which, an attachment having been sued out against one Nicolson, the city of Chicago was summoned as garnishee. On motion the city was discharged without having answered, and an appeal was taken. The court said: "The question has been often before the American courts, and, although the decisions are not uniform, in a large majority of the cases it has been neid the writ would not lie. The reason given for these decisions is uniformly the same, and is substantially that given by this court in the case in 25 Ill. [595, City of Chicago v. Hasley]. It must be decided as a question of public policy. These municipal corporations are in the exercise of governmental powers, to a very large extent. They control pecuniary interests of great magnitude, and vast numbers of human beings who are more dependent on the municipal for the security of life and property than they are on either the state or the federal government. To permit the great public duties of this corporation to be imperfectly performed, in order that individuals may the better collect their private debts, would be to pervert the great objects of its creation. * * * We understand, however, the counsel for the appellant to concede that money due municipal officers. agents, or contractors is not liable to garnishment; but it is insisted, if the city had been required to answer, the alleged indebtedness in the present case would not have fallen in either of these classes. But in our opinion the city should not be subjected to this species of litigation, no matter what may be the character of its indebtedness. If we hold it must answer in all these cases, and the exemption from liability be allowed to depend in each case upon the character of the indebtedness, we still leave it liable to a vast amount of litigation in which it has no interest, and obliged to spend the money of the people and the time of its officials in the management of matters wholly foreign to

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the object of its creation." The annotator above cited reaches the same conclusion, after citing numerous cases. If such be the rule as to municipal corporations, a fortiori such must be the rule as to school districts. A distinction exists between municipal corporations, which are generally called into existence with the consent of the inhabitants, for local and private advantage, and counties, school districts, and other political divisions, which are created for state purposes. Dill. Mun. Corp. § 23. "The school district or road district is invested by general enactments, operating throughout the state, with a corporate character, the better to perform, within and for the locality, its special function, which is indicated by its name. It is but an instrumentality of the state, and the state incorporates it that it may the more effectually discharge its appointed duty. So with counties. They are involuntary civil or political divisions of the state, created by general laws to aid in the administration of the government." Id. § 25. They are quasi corporations, of the most limited powers known to the laws. The trustees have special powers, and cannot exceed the limits. They are special agents, without general power to represent the district. In this state, for many purposes, the supervisors represent the district; and, in others, the county superintendent. They may be sued, it is true, but this does not enlarge the scope of their powers. On the other hand, some of the powers of a city may be considered private, as they are for the special advantage of the municipality, as distinct from the general public. School districts, being, like counties, political subdivisions of the state, can be sued only by permission of the state. Their funds are all devoted by statute to specific purposes. A garnishment may be regarded as a suit brought in the name of, and on behalf of, one who claims to be a creditor. question to be determined may be whether the defendant in the process is a creditor. If subject to the writ, the corporation will be required to respond, and submit to a determination of the question. The determination will not bind the alleged creditor.

In accordance with the current of authority, and with principle, I think it must be held that a school district cannot be gar-But the same reasoning does not tend to show that when the school district has paid the amount of the debt to the sheriff, while the sheriff had in his hands an execution issued upon a valid judgment against the creditor of the district, such payment may not be valid. Section 716, Code Civ. Proc., in no way trenches upon the sovereignty of the state, nor does it impose upon any officer of the state any duties which can embarrass his performance of official duties. The fact that the word "person" occurs in this section, and also in the provisions in regard to garnishment, does not show that unless one applies the other cannot. No

doubt the school district is a person, within the Code definition. The decision is not placed upon the ground that the language is not sufficiently broad to include the political divisions of the state, but because laws made primarily to provide for individual rights will not be presumed to include the state when the effect might be to authorize a suit against the state, or embarrass it in the discharge of its functions. Nothing of this kind would result if the officers should voluntarily, acting under section 716, pay the debt. The officers, of course, still take some risks. If no such debt existed against the corporation, or if, for any reason, the execution were invalid, loss might fall upon the officers making the payment. Their only authority in the premises is the section under discussion, and they must be sure that all the necessary conditions exist to justify their action.

It is contended that the demurrer to the second defense should have been sustained. The point is that the judgment upon which the execution was issued is not well pleaded. It is averred that judgment by default was "duly given and made by the clerk of said court." It is not a case in which the pleader was taking advantage of the statutory mode of pleading in lieu of setting out the procedure in detail. There is a sufficient detail of the procedure in the answer, and the averment substantially sets out that default was entered by the clerk, and thereupon judgment entered by him. This the statute authorizes. At all events, as the functions of the clerk are well known, and he is a mere ministerial officer of the court, the inaccuracy could have misled no one.

I do not think the affidavits in regard to newly-discovered testimony entitle appellant to a new trial. It seems that an execution was issued on the 6th, but was retained by the attorney of the Newport Wharf & Lumber Company. The attorney had evidently informed the sheriff of the fact, and he commenced his efforts to find property as though he actually had it in his hands. An order was procured from the school trustees, and a requisition from the school superintendent. Then, before the money was paid, the sheriff took the execution, and received the money from the treasurer. This was a literal compliance with the statute. No doubt both the sheriff and the attorney representing the creditor considered the execution as already delivered to the sheriff. The statute does not require that, however.

If the views herein expressed are correct, it is unnecessary to discuss the case of the intervener. I recommend that the judgment and order be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed. (4 Cal. Unrep. 749)

GOETZ v. GOLDBAUM. (No. 19,331.) (Supreme Court of California. Sept. 1, 1894.)

AGENCY-PLEADING-ESTOPPEL TO DENY.

1. A complaint on a contract executed by an agent may, without more, aver its execution by defendant, the principal; and, the agency appearing from the copy of the note set out, authority to execute it is implied, and need not be expressly alleged.

2 Ratification need not be expressly plead-

3. W., a merchant, and partner with plaintiff in a livery, failed, and transferred his property to his brother S., through whom he settled with most of his creditors, as he swore, with his own money. Business was done in S.'s name, but W. borrowed money from plaintiff for the business, bought out his interest in the stable, and gave him a note for the whole, signed, "S., per W." Plaintiff asked S. about the note, and S. said he would go and see about it, and went and taiked to W., but said nothing to plaintiff. Later he proposed to plaintiff to go into partnership with him and W., putting in the note as capital; and then he took over the business and property from W., paying him some cash, and assuming the debts, among which, at the time, he mentioned this. Held, that he was estopped to say that W. did not sign the note as his agent, and that he had not ratified it.

4. A promissory note, such as, under Civ. Code, § 2309, must be in writing, is a commercial note, not a mere nonnegotiable promise to pay, and the latter may be ratified orally.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by J. E. Goetz against Simon Goldbaum on a promissory note. Judgment for plaintiff. Defendant appeals. Affirmed.

Aitken & Smith, for appellant. Daney & Wright, for respondent.

TEMPLE, C. Defendant appeals from the judgment and an order refusing a new trial. The action is based upon a nonnegotiable promissory note, and in the complaint it is alleged that on the 5th day of October, 1891, defendant executed and delivered a promissory note in writing, in the words and figures following. The note is then set out at length, and is signed, "Simon Goldbaum, per Wm. G." There is no averment showing who Wm. G. was, or that he had authority to execute the note as the agent of defendant. The complaint was demurred to for insufficiency of facts, and as ambiguous, in that it appears that the note was executed by some person other than defendant, but does not show who such person was, or that he had authority to execute the note as agent. The same objection is also made on the ground of uncertainty. It is now contended that the complaint should set out the facts. and not conclusions, and that, if the fact be that the note was made through an agent, it should be so averred. St. John v. Griffith, 1 Abb. Pr., 39, is quoted, in which it is said: "The Code requires facts to be stated, not fiction; the facts of the case, and not the mere legal conclusion. Such a statement as l

that adopted by the plaintiff is not only admissible, but necessary." In that case it was averred that the act was done by the agent. That decision was by a subordinate court, and is not in accordance with better considered cases. The plaintiff is required to state the facts which constitute his cause of action. The constitutive fact here is plainly that defendant executed the note. Whether by an agent or in person is immaterial. If by an agent, such fact is not one which constitutes his cause of action.

But it is argued, inasmuch as it appears that the note was executed through an agent, the authority should appear. This point is answered by the case of Sherman v. Comstock, 2 McLean, 19, Fed. Cas. No. 12,764. In the declaration in that case it was averred that defendant made his note or check in the words and figures following: "Detroit, December 14, 1838. Cashier of the Michigan State Bank: Pay to Morgan and Clark, or bearer, \$674.96 thirty days from date. [Signed] Horace H. Comstock. By Joel Clemens." There was no further allegation as to agency. The declaration was demurred to on the ground that it did not appear that Clemens was authorized to act as agent for defendant. The court said: "As it regards the execution of the note by the defendant, it is sufficiently averred in the declaration. He signed it by Joel Clemens; and that Clemens was authorized to act in the premises appears, for that his act is alleged to be the act of his principal. The declaration might have contained an averment that Clemens was duly authorized to act as the attorney in fact of the defendant, but such averment is unnecessary."

Appellant next complains of the findings. He says that it is nowhere found that defendant executed the note; that, on the other hand, it is found that the note was executed by William Goldbaum, without authority to act as the agent of Simon; and that, in another finding, it is found that William Goldbaum did have implied authority to execute the note as the agent of Simon. In the first finding, it is found that William Goldbaum executed the note which is set out in the finding, pretending to act as the agent of Simon. The use of the word "pretending" is unfortunate, but the context plainly shows that the idea intended to be conveyed is that in executing the note, William claimed to be acting as the agent of Simon. The court then proceeds to state that William had no express authority; sets out facts from which it draws the conclusion that the act was ratifled and adopted by Simon as his act. The court did not find in direct terms that the defendant executed the note, but it found that it was executed by William, claiming to act as the agent of Simon, and that Simon ratified the act; in other words, adopted the instrument as his own. Ratification is in law the equivalent of a previous command. It is proof of due execution. This sugges-

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tion is also a sufficient answer to the objection that ratification should be pleaded. It is true the general rule is that estoppel should be pleaded when under the practice there has been an opportunity to plead it; but ratification is not estoppel, although there is often an element of estoppel in it. But the point is also made that the evidence does not justify the finding that there had been a ratification. It appears that prior to October, 1890, William Goldbaum had been carrying on a mercantile business at Oceanside, and had also been engaged in the livery business in partnership with plaintiff. In October, 1890, he failed, and was forced to transfer his property to his brother Simon, the defendant. He made a settlement with most of his creditors, and his brother Simon took a transfer of all the property, including William's interest in the stable, and paid or appeared to pay such debts of William as were then paid. I state the matter in this form because William testified that the money advanced by Simon really belonged to him (William). It was then arranged between William and Simon that William should continue the business in the name of Simon. Goods were to be purchased in the name of Simon, and all transactions were to be in his name. This was necessary, because William had not been able to settle with all of his creditors. The business was carried on in pursuance of this agreement for about one year before the note was given. During that time plaintiff had loaned to William \$300 to be used in his business. He then arranged to sell his half of the livery stable to William. The arrangement was made, and the note in question was given, for the \$300 which had been previously loaned, and for plaintiff's interest in the stable. Of course, plaintiff knew that the business was being carried on in the name of Simon Goldbaum, and, when he took the note, he asked William if he had authority from Simon to act for him, and was told by William that he had. Plaintiff testified that he knew the business was being conducted by William in the name of Simon, because William told him so. Some two weeks after getting the note, plaintiff went to San Luis Rey to ask Simon Goldbaum about the note. He showed Simon the note, and asked if it was all right. Mr. Goldbaum said: "I don't know what they are doing in town. I will go in this afternoon and see," Plaintiff re-plied, "Monday will do." Monday, Simon Goldbaum went to the store, and had a private talk with William. Plaintiff was there, but Simon said nothing to him about the The testimony of William Goldbaum shows that at that time Simon had a full explanation in regard to the note. Simon Goldbaum said nothing more about the note to plaintiff until November, 1892, when he proposed to plaintiff to go into partnership with himself and William, and said he could put the note in as a part of his capital. In January, 1893, a difference arose between William and Simon Goldbaum. The latter claimed the goods in the possession of William, and which constituted the stock in trade with which William was doing business in the name of Simon Goldbaum. controversy was settled, Simon Goldbaum taking the business and property, and paying William some \$1,700, besides assuming the indebtedness. While negotiations were progressing, a list of debts was produced, which did not contain the debt to plaintiff. Defendant called attention to the fact, and said: "The indebtedness must be more. It is best that we foot up the indebtedness, and make a settlement on that basis." And, again: "There is that Goetz note, too. Don't forget to put that in,—six hundred dollars. • • • I will have to pay that." For various reasons, appellant contends that this does not amount to ratification:

1. Because, he says, William did not, in the purchase of the interest of plaintiff in the livery stable, claim to act as agent, but in his own right. An act not done as agent cannot be ratified. The evidence shows very plainly that the parties to the transaction each understood that William Goldhaum, in making the trade, professed to be acting as the agent of his brother. The note is itself some evidence of that fact: and then plaintiff asked if he had authority to sign the note. Plaintiff knew that William Goldbaum was conducting business in his brother's name, but testified that he knew no more of it than others. Of course, he knew that the interest in the stable which had formerly belonged to William had been conveyed to Simon. The real question is, inasmuch as William really owned the business, although it was conducted in the name of his brother, is not the obligation his, although in the name of his brother? If Jones were to buy out Smith & Co., and were to continue the business on his own account, but in the name of Smith & Co., as to those who knew the facts Smith & Co. would be but an alias of Jones. It does not appear that plaintiff knew that all the property belonged to William, and it does appear that Simon Goldbaum claimed that it belonged to him. The reason why the business stood in the name of Simon was to avoid the creditors of William. It was a hiding of the goods, or they really belonged to Simon, with the understanding that William should somehow get the benefit of the business. Under the circumstances, I think Simon Goldbaum cannot be heard to say that William was not conducting the business as his agent, even as to those who did know

2. It is contended that the act of William in executing the note could only be ratified by a writing, because it is said a promissory note must be in writing. Civ. Code, § 2309. But waiving the point that the instrument set out in the complaint is conceded not to be a "promissory note," within the meaning

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of the Code, the contract is not one required by law to be in writing. Only when in writing, it is recognized by commercial law as a promissory note; but the contract is simply an agreement to pay money, which need not be in writing.

3. The facts do not show ratification. I think the facts are quite sufficient, and, furthermore, that, when Simon took the business subject to the payment of the debts, he was under obligation to pay the note. It was not required to be in the memorandum, because Simon Goldbaum recognized his liability on the note, and in effect so said at the time. There is evidence contradicting the testimony to which I have alluded. As the case is presented here, that is of no consequence.

Several objections were made to the introduction of evidence. After examination, I am satisfied that none of them were well taken. A discussion of them would serve no useful purpose. I recommend that the judgment and order be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

103 Cal. 641

MERCED SECURITY SAV. BANK v. CASACCIA et al. (No. 18,304.)

(Supreme Court of California. Sept. 1, 1894.)

MORTGAGES—COLLATERAL SECURITY—SEPARATE
ACTIONS.

Code Civ. Proc. § 726, providing that there can be but one action for the recovery of a debt secured by mortgage on real estate, does not prevent separate actions on mortgages given as collateral security only of a debt, or of an action on a mortgage given as security for a debt after action on one given as collateral security.

Commissioners' decision. Department 1. Appeal from superior court, Merced county; Joseph H. Budd, Judge.

Action by the Merced Security Savings Bank against A. R. Casaccia and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Frank H. Farrar, for appellants. T. C. Law, for respondent.

TEMPLE, C. This appeal is upon the judgment roll. The action was brought to foreclose a mortgage. The answer is a plea in bar. The court found, among other things, that on the 29th day of July, 1889, one Flanagan was indebted to plaintiff in the sum of \$1,032.07, and to defendant Casaccia in the sum of \$600. Casaccia then assumed the debt of Flanagan to plaintiff, and gave his note for the same, which was accepted by the bank. Casaccia at the same time took from Flanagan his note, secured by mortgage for \$1,682.07, which was then assigned

to plaintiff as collateral security for Casaccia's note of \$1,032.07. At the same time, Casaccia executed another note to the bank for \$400, secured by a mortgage upon land of his own. This was also intended as collateral security for the note for \$1,032.07 from Casaccia to the bank, and is the note and mortgage upon which this suit is brought. The condition then was this: The bank held Casaccia's note for \$1,032.07; as collateral to secure it, a note and mortgage for \$1,632.07, executed by Flanagan to Casaccia, and by him assigned to the bank; and a note of \$400, secured by mortgage executed by Casaccia to the bank. In May, 1893, the bank, as assignee of Casaccia, commenced an action to foreclose the Flanagan mortgage, but did not make Casaccia a party to that action. A decree of foreclosure was obtained, and the property sold; and, after paying costs, the sum of \$575 was left to be credited upon the debt of Casaccia to the bank, leaving \$808.78 still due.

Appellant claims that plaintiff should have brought suit upon the note for \$1,032.07 against Casaccia, and in the same action sought to foreclose the mortgage against Flanagan for \$1,632.07 and the mortgage involved in this suit for \$400, and that, not having done so, he has waived the security on the mortgage sued on in this action, and perhaps the right to sue on the note for \$1,032.07. This contention is based solely upon section 726, Code Civ. Proc., which provides that there can be but one action for the recovery of any debt secured by mortgage upon real estate. This statute is a limitation upon the rights which usually pertain to property, and the restriction will not be carried beyond the obvious import of the language used. Accordingly, it has been held that a judgment of foreclosure of a mortgage given to secure a promissory note does not bar the right, after sale and judgment for a deficiency, to a suit against an indorser of the note to recover such deficiency (Vandewater v. McRae, 27 Cal. 596); also, that after judgment of foreclosure and sale under a mortgage given by a nonresident of the state, upon whom personal service has not been obtained, a personal action may be brought to recover any deficiency remaining after sale of the mortgaged premises, although it was held that in such case the court had no jurisdiction in the foreclosure suit to enter a judgment for such deficiency. Blumberg v. Birch, 99 Cal. 416, 34 Pac. 102. It was said: "It is true that the personal judgment docketed against the defendant was vold, and also that, under the section of the Code cited. there can be but one action for the recovery of any debt or the enforcement of any right secured by mortgage upon real or personal property. It does not follow, however, that after the mortgage security is exhausted. leaving a deficiency which is no longer secured, no new action on the note can ever be maintained." The Code itself recognizes

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this view in section 533, where an attachment is authorized when the security has been lost. In these cases, when the personal action was instituted, the debt was not secured by mortgage. If the mortgagee had voluntarily released his mortgage, his debt would then be unsecured. Such a mortgagee, however, would not be entitled to his personal action. It would be an attempt on his part to evade the operation of the statute, while the other cases supposed would not be within the policy of the law, although two actions have been allowed upon a debt which was originally secured by a mortgage. The obvious purpose of the statute is to compel one who has taken a special lien to secure his debt to exhaust his security before having recourse to the general assets of the debtor. When he has done this, or when, without his fault, the security has been lost, the policy of the law does not prohibit a personal action.

The statute was complied with in the suit against Flanagan. The mortgage was not given to secure the principal debt of defendant to plaintiff. It was a collateral matter. The suit to foreclose it was not an action for the recovery of the principal debt. It was an act for the preservation of the security. To do this was a duty imposed upon plaintiff by the contract of hypothecation. That the plaintiff thereby received part payment of the note was an incidental matter. The suit to foreclose was not an action to recover that debt, but to preserve the security. A construction should not be given to a statute, if it can be avoided, which will lead to absurd results or to a conclusion plainly not contemplated by the legislature. In this case there were two mortgages, both taken as collateral security. Suppose the mortgages had been upon land situated in different counties, and that the debt secured by one would be barred by the statute of limitations before the debt secured by the other fell due. Plaintiff could not have included both in one suit to foreclose, because such suits must be brought in the county in which the land or some part of it is situated; and one debt would either not be due when suit was brought, or would be barred by the statute of limitations. Certainly, it was not intended to prohibit the ordinary transaction of putting up collaterals to secure an indebtedness, nor to limit such collaterals to mortgages which can be foreclosed in the same action. The plea in bar, therefore, is not good. There is some greater plausibility in claiming that the mortgage in suit was given to secure the principal debt than that such was the case with the Flanagan mortgage. The present note and mortgage were executed solely as security for the principal debt. There is no other consideration for the note, and it represents no other indebtedness. But, conceding that this mortgage is one given to secure the principal debt, no other action has been brought to recover the debt secured by it, and—if the concession be made—no other could be brought on that note until this security has been exhausted. I think the judgment should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

ORR v. KERN COUNTY. (No. 19,382.) (Supreme Court of California. Sept. 1, 1894.)

St. 1893, p. 810, § 7, providing that, in counties of the class to which K. county belongs, constables shall receive "such fees as are now or may hereafter be allowed by law," does not make any change in the existing law relating to fees of constables in that county.

Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by T. B. Orr against the county of Kern to recover constable's fees. Judgment was rendered for defendant, and plainting appeals. Affirmed.

Patten & Graham and R. J. Ashe, for appellant. J. W. Ahern and A. T. McCreery, for respondent.

DE HAVEN, J. The superior court drew the correct conclusion of law from the facts found, and the judgment must therefore be affirmed. Section 7 of the act of March 23, 1893 (St. 1893, p. 310), amending the act of March 31, 1891, establishing a uniform system of county governments, provides that, in counties of the class to which the county of Kern belongs, constables shall receive "such fees as are now or may hereafter be allowed by law." It is too plain to admit of argument that by this language the legislature meant to say that constables should, until otherwise enacted, continue to receive the same fees in the county of Kern as they were then allowed by law. In other words, it was not the intention of the amendatory act of March 23, 1893, to make any change whatever in the existing law relating to the fees of constables in that county. Judgment affirmed.

We concur: McFARLAND, J.; FITZGER-ALD, J.

JONES v. SANDERS. (No. 15,306.)
(Supreme Court of California. Sept. 1, 1894.)
NEW TRIAL—DEATH OF TRIAL JUDGE—AUTHORITY
OF SUCCESSOR—REVIEW ON APPEAL.

1. Where, after findings and judgment, a trial judge dies, his successor may review the findings and grant a new trial.

2. An order granting a new trial for insufficiency of evidence will not be reversed on appeal unless the trial court clearly abused its discretion.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by M. P. Jones against C. T. Sanders. There was a judgment for defendant, and, from an order granting a new trial, defendant appeals. Affirmed.

Atty. Gen. Hart, for appellant. W. S. Goodfellow, for respondent.

PER CURIAM. This action was brought in the superior court of the city and county of San Francisco, and the question involved was whether the plaintiff had a right to maintain a certain sewer across a lot owned by the defendant in that city. The case was tried before the late Judge Hoge, and the findings and judgment were in favor of the defendant. The plaintiff moved for a new trial upon the ground that the findings were not justified by the evidence, but, before the motion was heard, Judge Hoge died. Afterwards the motion was heard by another judge of the court, and granted, and from that order this appeal is prosecuted by the defendant.

It is claimed for appellant that, as Judge Hoge presided at the trial, his findings upon all the questions of fact should be treated as conclusive. We do not understand this to be the rule applicable to a case like this. It is true that this court will not review findings when there is a substantial conflict in the evidence, but it has been repeatedly held that, upon motion for a new trial, it is the duty of the trial court to examine the evidence, even though it be conflicting, and, if dissatisfied with the conclusions reached, to grant a new trial; and the rule is the same whether the motion is heard by the judge who tried the case, or by some other judge, whose only knowledge of the facts is obtained from the record. Macy v. Davila, 48 Cal. 646; Bauder v. Tyrrel, 59 Cal. 99; Blum v. Sunol, 63 Cal. 341; Wilson v. Railroad Co., 94 Cal. 166, 29 Pac. 861.

It is also claimed that the evidence without any substantial conflict was sufficient to justify and sustain the findings made by Judge Hoge, and that the order granting the new trial was therefore erroneous. But it is well settled that a motion for a new trial unon the ground of the insufficiency of the evidence to justify the verdict or other decision is addressed to the sound legal discretion of the trial court, and that an order granting a new trial on that ground will not be reversed on appeal unless it appears that there was a clear abuse of discretion. Pico v. Cohn, 67 Cal. 258, 7 Pac. 680; Breckinridge v. Crocker, 68 Cal. 403, 9 Pac. 426; Nally v. McDonald, 77 Cal. 284, 19 Pac. 418; Bjorman v. Redwood Co., 92 Cal. 500, 28 Pac. 591. Here we do not think any such abuse of discretion appears as would justify n reversal of the order. This being so, no good would be accomplished by a rehearsal of the facts; and any discussion of them for the purpose of indicating the results which should be reached on the new trial would be obiter dictum, and out of place. The order appealed from is affirmed.

PEOPLE ex rel. SANDERS v. JONES. (No. 15,388.)

(Supreme Court of California. Sept. 1, 1894.)

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by the people, etc., on the relation of C. T. Sanders, against M. P. Jones. There was a judgment for plaintiff, and from an order granting a new trial he appeals. Affirmed.

Atty. Gen. Hart, for appellant. W. S. Goodfellow, for respondent.

PER CURIAM. The questions arising on the appeal in this case are substantially the same as those considered in Jones v. Sanders (No. 15,30t, just decided) 37 Pac. 649. The action was brought to compel the removal of obstructions from an alleged public street, commonly known as "Touchard Street," in the city of San Francisco. The trial was before Judge Hoge, and the findings and judgment were against the defendant. A motion for new trial was made upon the grounds of the insufficiency of the evidence to justify the decision and of errors of law occurring at the trial, and, after the death of Judge Hoge, was heard and granted by another judge of the court. The appeal is by the people, from the order granting the defendant's motion. In support of the appeal the same points are made as in Jones v. Sanders, and what was said in deciding that case is applicable here. Upon the authority of the decision in that case, we think the order appealed from should be affirmed, and it is so ordered.

MARQUIS v. CITY OF SANTA ANA. (No. 19,380.)

(Supreme Court of California. Sept. 1, 1894.)

MUNICIPAL OFFICES—ABOLISHMENT — CHANGE OF
SALARY—REMEDY OF OFFICER.

- 1. An officer may sue a city for salary, even though he may be entitled to relief by writ of mandate.
- 2. Under the municipal government act (St. 1883, p. 251, § 755), providing that the assessor shall receive a compensation, to be fixed by ordinance, which shall not be increased or diminished during term of office, it cannot be changed during term of office by an ordinance accepting the provision of an act previously passed that the assessment by the county might be made the basis of municipal taxation, the act stipulating, however, that its provisions should not be in effect in any city till accepted by ordinance.

3. Right of an officer to salary is not affected by diminution or cessation of the duties of the office, the office itself remaining.

4. A city office created by the legislature cannot be abolished by the city.

5. The office of city assessor, created by the municipal government act (St. 1883, p. 251, § 752), is not abolished by the act of March 2, 1891, providing that the assessment by the county may be made the basis of municipal taxation, provided that it shall not be in force in any city till it, by ordinance, elects to avail itself thereof by a certain day "of each year."

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Department 1. Appeal from superior court, Orange county; J. W. Towner, Judge. Action by W. H. Marquis against the city

Action by W. H. Marquis against the city of Santa Ana for salary as assessor. Judgment for plaintiff. Defendant appeals. Affirmed.

West & Heathman, for appellant. Jas. G. Scarborough, for respondent.

HARRISON, J. The plaintiff was elected to the office of city assessor of the defendant on the 13th of April, 1891, and entered upon the duties of his office April 20, 1891. Previous to his election, viz. March 16, 1891, the salary of that office had been fixed by an ordinance of the city at \$375 per year, payable one-half thereof on the first Monday of July, and one-half thereof on the first Monday of September. March 2, 1891, the legislature passed an act (St. 1891, p. 22) providing that in cities in this state, excepting municipal corporations of the first, second, third, and fourth classes, and cities operating under a freeholders' charter, the assessment of property made by the county assessor might be made the basis of municipal taxation. The act, however, contained the following proviso: "Provided, however, that the provisions of this act shall not apply to or be in force in any city or municipal corporation until its board of trustees, common council, or other legislative body, shall have passed an ordinance electing to avail itself of the provisions of this act, and filed a certified copy of the same with the auditor of the county in which such municipal corporation or city is situated on or before the first Monday in March of each year." defendant is a municipal corporation of the fifth class, and on February 15, 1892, through its board of trustees passed an ordinance electing to avail itself of the provisions of the above act, and by the same ordinance repealed its former ordinance fixing the compensation of the city assessor. A copy of this ordinance was filed with the county auditor of Orange county, in which the city of Santa Ana is situated, on February 23, 1892. March 21, 1892, the defendant passed an ordinance repealing a prior ordinance providing for a street poll tax; so that all of the duties imposed upon the assessor by virtue of any city ordinance were taken After the passage of these ordinances, the plaintiff performed no duty as city assessor, except to make out the list of male persons over the age of 21 years residing within the limits of the city, required by section 787 of the municipal government act. The defendant refused to allow or pay to the plaintiff any salary for the second year of his incumbency of the office, and he thereupon brought this action. Judgment was rendered in his favor, and the defendant has appealed directly upon the judgment roll, including a bill of exceptions.

1. The objection that the court had no

jurisdiction in the matter, for the reason that the writ of mandate was the proper remedy, was properly disregarded. Even though it should be conceded that the plaintiff might have sought relief through a writ of mandate, he was also entitled to bring an action for the amount claimed by him.

2. Section 755 of the municipal government act (St. 1883, p. 251) provides: "The clerk, treasurer, assessor, marshal, city attorney and recorder shall severally receive at stated times a compensation to be fixed by ordinance by the board of trustees, which compensation shall not be increased or diminished after their election, or during their several terms of office." The power of the legislature to abolish the office of city treasurer, or to change the compensation of the officer, or its power to authorize the city to change his compensation during his term of office, is not presented in the present case, as the legislature has neither abolished the office, nor changed the compensation, nor given to the city the authority to make such change. As the power of the defendant to fix or change the salary of its officers rests entirely upon statute, the exercise of this power is subject to all the limitations contained in the statute. The plaintiff was elected to the office of city assessor after the adoption of the ordinance flxing the amount of his salary, and the limitation in the above section that his compensation shall not be increased or diminished during his term of office renders the act of the defendant repealing the ordinance fixing his salary nugatory. As the defendant could not directly, by express ordinance for that purpose, diminish the amount of his salary, the same result could not be accomplished by it indirectly, either by accepting the provisions of the act of March 2, 1891, or by doing away with the necessity for his services through its adoption of the ordinance abol-"he right of an ishing the street poll tax. officer to the salary fixed by law for that office is not impaired by any change that may be made in the duties of the office, or even by an entire cessation of those duties, so long as the office itself remains in exist-

3. It is urged by the appellant that its election to avail itself of the provisions of the act of March 2, 1891, had the effect to abolish the office of city assessor. As the office is, however, created by the legislature, it could not be directly abolished by the city; much less could its abolition be implied from any act that did not in terms purport to abolish it. The office is provided for in section 752 of the municipal government act, which has never been repealed; and the act of March 2, 1891, instead of sustaining the suggestion of an implied repeal of that section, expressly declares that its provisions shall not be given force in any city until it shall have passed an ordinance electing to avail itself thereof, on or before the first Monday in March of each year, thus implying that the office continues to exist. The duties of the city assessor are fixed by section 787 of the municipal government act; and while it may be conceded that the election by the defendant to avail itself of the provisions of the act of March 2, 1891, did away with the necessity for the performance by the assessor of any acts connected with the assessment of property, theretofore imposed upon him, so long as such election remained in force, it does not follow that the office of assessor was thereby abolished. Section 787 prescribes as one of the duties of this office that "the assessor shall during said term also make a list of all male persons residing within the limits of such city over the age of twenty-one years, and shall verify said list by his oath, and shall on or before the first Monday of August in each year deposit the same with the city clerk." It is urged by the defendant that, inasmuch as the only apparent object for which this list is to be made is to form the basis for collecting an annual street poll tax, the repeal of the ordinance providing for the street poll tax relieved the plaintiff from the duty of preparing this list. The statute, however, under which he holds his office, makes the preparation of this list one of his official duties: and we are not at liberty to assume that the only object of this requirement was to enable the city to collect a street poll tax, or that he would be justified in omitting this official duty prescribed by the statute, even though the city, by its ordinance, rendered his act in preparing it of no avail to it. The city had still the power to pass an ordinance imposing this tax, and might then avail itself of the list thus prepared; but, whether the duties have been increased or diminished, or entirely dispensed with, so long as the office remains, the salary affixed thereto is an incident of the office, and must be paid to the incumbent. We have, however, seen that the office has not been abolished; and the defendant does not contend that, if the office is still in existence, the respondent is not its incumbent. It follows that he is entitled to the salary attached to the office at the time of his election, and that the action of the court in holding this defense to be unavailing was correct. The judgment is affirmed.

We concur: GAROUTTE. J.: VAN FLEET, J.

(104 Cal. xvii; 4 Cal. Unrep. 758)

HORTON v. JACK et al. (No. 19,328.) (Supreme Court of California. Sept. 4, 1894.) EXECUTORS - CONVEYANCE FOR INDIVIDUAL DEBT -Conversion-Limitations

1. An action for conversion is within Code Civ. Proc. § 338, subd. 3, prescribing the lim-itation of an action for taking, detaining, or injuring goods or chattels.

2. One to whom an executrix conveys prop-

erty of the estate, in payment of her indi-

vidual debt, before distribution, and without authority of the probate court, is, on refusal to liable to the estate for conversion, return, liable to the estate for conversion, though the executrix was the sole legatee, and the property was the community property, and executrix was testator's widow.

3. In order to maintain such action, it is

not necessary to prove an indebtedness against the estate, and necessity of obtaining the property to satisfy it.

4. Though the person to whom an executrix conveys property belonging to the extractions the person to whom an executrix conveys property belonging to the estate does, as he agrees, have it applied on the claim of a bank against her individually, the bank is not jointly liable with him to the estate for the conversion of the property, it not being shown that he was acting for the bank in such manner as to bind it. the bank in such manner as to bind it.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by Joseph Horton, administrator with the will annexed of James A. Brown, deceased, against R. E. Jack and the First National Bank of San Luis Obispo. Judgment for defendants. Plaintiff appeals. Reversed as to defendant Jack.

M. C. Hester and Graves & Graves, for appellant. Wilcoxon & Bouldin and J. M. Wilcoxon, for respondent.

TEMPLE, C. This appeal is from the judgment, and from an order refusing a new trial. The complaint shows that James A. Brown died testate October 26, 1889, in the county of Santa Barbara, leaving his widow, Catherine J. Brown, his executrix; that said will was duly admitted to probate, the said Catherine J. appointed executrix, and that she duly qualified as such, and took possession of the property of the estate, consisting in part of certain personal property, which is specifically described in the complaint; that on the 15th day of April, 1890, while the said executrix was lawfully possessed of said property, as the property of the estate, defendants "wrongfully and without right took and carried away said personal property, and the whole thereof, and converted and disposed of the same to their own use." Said property was at the time of the value of \$6,000. Catherine J. Brown died April 17, 1892, not having closed the administration. Proper allegations follow, showing due appointment and qualification of plaintift as administrator with the will annexed. The complaint was demurred to for insufficiency of facts, and because it appeared from the complaint that the cause of action was barred by section 339, Code Civ. Proc. The demurrer was overruled, and defendants answered separately. The answer of the bank consists of denials. The answer of defendant Jack denies the conversion, the alleged value of the property, the official character of plaintiff; avers that Catherine J. Brown was paid the full value of the property, and that the cause of action is barred by section 339, Code Civ. Proc. The answer then proceeds with an averment that James A. Brown, by his will, bequeathed all his property to Catherine

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J. Brown, and appointed her executrix, with power to sell personal property without leave of court; that she qualified, and afterwards procured an order authorizing her to sell the personal property, including the property described in the complaint, at private sale; that she did, subsequently to the order, execute to Jack a bill of sale of the property, but did not deliver the same to him, but afterwards agreed with Jack that the property should be delivered to one Sandercock, to be by him sold, the proceeds, less expenses, to be paid to Jack for the bank, and to be applied to an indebtedness of said Catherine J. to it; that thereupon said Catherine J. appointed said Sandercock her agent, and delivered the property to him; that Sandercock sold the property as her agent, and, at her request, paid the money to the bank. The answer then proceeds with a plea in bar of plaintiff's claim.

Respondent raises a preliminary point, to the effect that plaintiff is entitled to no relief, because his complaint shows that his cause of action is barred by the statute of limitations, and the demurrer on this ground should have been sustained. If the demurrer were well taken, it would not follow that respondent could avail himself of the point on this appeal; but, waiving that, the point is not well taken. The question suggested is whether an action for the conversion of goods is barred by subdivision 8 of section 838, Code Civ. Proc. Respondent claims that such an action is not covered by that section, and is therefore included in section 339, and is barred in two years. The complaint shows that the suit was not commenced within two years after the alleged conversion. Subdivision 8, \$ 338, reads: "An action for taking, detaining, or injuring any goods or chattels, including actions for the recovery of specific personal property." Cooley defines "conversion" as follows: "Any distinct act of dominion wrongfully exerted over one's property, in denial of his right or inconsistent with it, is conversion." The author also quotes with approval from Liptrot v. Holmes, 1 Kelly, 381: "The action of trover being founded on a conjunct right of property and possession, any act of the defendant which negatives or is inconsistent with such right amounts in law to a conversion. It is not necessary to a conversion that there should be a manual taking of the thing in question by the defendant. It is not necessary that it should be shown that he has applied it to his own use. Does he exercise a dominion over it in exclusion or in defiance of the plaintiff's right? If he does, that is, in law, a conversion." While there may be cases, under this definition of "conversion," where there is no manual taking or corporal detention of the property, still I apprehend there is no case in which the plaintiff has not been actually deprived of his property, or is not entitled under the rules of law to consider himself deprived of it for the sake

of the remedy, and when a judgment for damages for the conversion has been paid the wrongdoer becomes the owner of the property. It has been wrongfully taken from the owner, although it is not necessary that the original taking be wrongful. The words in the statute are not used to indicate any particular form of action, but I think it applies to all those cases in which the person injured has a remedy in an action of claim and delivery, or for conversion. Certainly, one whose property has been wrongfully taken or detained may sue for conversion, if at the time he was entitled to the possession of it. I think the case falls within the provisions of section 338, and the cause of action was not barred.

The cause was tried by the court without a jury, and the court found for the defendant Jack, a nonsult having been entered as to the bank. Several findings of fact are excepted to as not sustained by the evidence. Among such findings are the following: (1) That the personal property was never delivered to Jack, although it is admitted that a bill of sale of the property was made and delivered to him; (2) that Sandercock, who took the property and sold it, was the agent of the executrix, and not the agent of Jack; and (3) that the proceeds of the property were paid to the executrix.

 It seems that Mrs. Brown was indebted. to the bank, of which Jack was president; that it was agreed between Jack and Mrs. Brown that the property should be conveyed to Jack as security, and immediately sold, and the proceeds paid on Mrs. Brown's personal indebtedness to the bank. In pursuance of this agreement an absolute bill of sale was executed, and Sandercock was selected to sell the property, with the consent of Mrs. Brown. Having delivered the bill of sale to Jack, and agreed upon Sandercock as a proper person to conduct the sale, Mrs. Brown prepared a letter to be handed by Sandercock to Bailey, her agent, and which was so delivered. It was as follows: "Mr. 8. P. Bailey-Dear Sir: I have made a bill of sale to Mr. Jack of the whole outfit. Mr. Sandercock, the bearer of the note, will consult you about the disposition of the outfit. If Mr. Sandercock cannot manage the disposition of the same without your help, then you will please go with him. Mr. Sandercock acts as Mr. Jack's agent and the entire disposition must be under Mr. Sandercock's control. C. J. Brown." Mr. Sandercock, also, at the same time, handed Bailey a letter from Mr. Jack, as follows: "Mr. Bailey-Dear Sir: This will introduce to you my friend, Mr. John G. Sandercock. I have bought of Mrs. J. A. Brown the whole grading outfit which belonged to the late J. A. Brown, and I send nim down to represent me in the premises, and to sell according to the general plan that you have arranged. You will therefore please deliver the whole business to my representative, Mr. Sandercock. I should be

pleased to have you accompany Mr. Sandercock, and assist him all in your power. Mrs. Brown's desire also is that you shall accompany Mr. S., and aid with your counsel and co-operation. Yours, truly, R. E. Jack." Bailey, acting for Mrs. Brown, had already arranged to ship the goods to Modesto for sale. They were then turned over to Sandercock, who shipped them to Modesto. Bailey accompanied him, but acted in entire subordination to Sandercock. The property was sold, and the proceeds sent by Sandercock to Jack, who applied them to the payment of Mrs. Brown's individual debt to the bank. At the trial Mr. Jack testified as "The understanding, as between follows: Mrs. Brown and Mr. Unangst and myself, was that he would put this property into my hands to be sold for her, and the amount applied on this bank indebtedness. We were then making advances after the property was sold, and the money paid into my hands. I placed it to the account of Mrs. Brown in the First National Bank, i. e. account to her during her lifetime for the moneys so received. I always accounted for them. They were applied to her account at her request." On cross-examination he testified: "Q. Did you ever have any account with Mrs. Brown as executrix of the estate of J. A. Brown? A. I told you yesterday I hadn't. * * * Q. Did you ever file a claim with her in a formal way, and have her approve it as administratrix or executrix of the estate? A. No. * * * Q. She never borrowed any money from your bank, did she? A. Yes; borrowed a great deal. Q. What was the amount of it? A. I don't know what amount it was. Q. Did she borrow herself? did she get the money? A. Yes." Mr. J. A. Brown had been engaged in certain work at Port Harford. After his death, Mrs. Brown continued the work on her own account, at a loss. small part of the indebtedness was that of Mr. Brown, which was never presented to the estate for allowance. Most of it was incurred by Mrs. Brown herself. From these extracts, I think it is evident that the findings, in the respects mentioned, are not sustained by the evidence. In the nature of things, there could not well be a substantial conflict upon these points.

The court also found that Jack had not converted the property to his own use. That he took the property, by the consent of Mrs. Brown, to sell, and to apply the proceeds to the payment of her individual debt to the bank, cannot be denied. Did it amount, under the circumstances, to a conversion? course, when Mrs. Brown conveyed the property to Jack in payment of her individual debt, she misappropriated it. She put it out of her power to hold the property as executrix for the estate, and subject to the orders of the court. It was a clear violation of her duty. It was a wasting of the estate which would constitute a devastavit. Ordinarily, no doubt, one who receives property under such circumstances in payment of an individual debt of the executrix to him may be treated by the successor of such executrix, after a demand and a refusal to deliver the property, as a wrongdoer. Respondent contends that such consequence cannot follow here, because the executrix was also sole legatee, and therefore had the power to sell and apply the property to her own use. The will does not in terms authorize the executrix to sell property without leave of the court. Nor, if it be conceded that all the property is by the will bequeathed to the widow, would that consequence follow. As legatee she could sell her interest subject to the administration. In the will the testator declared all his property community property. He then gave one dollar each to two brothers and three sisters. He then declares that he has executed deeds to his wife for his real estate, and deposited them in escrow, to be delivered to his wife upon his death. He then bequeaths his personal property to his wife, but directs that his wife "shall, by will or otherwise, cause any and all residue or remainder of my real estate and personal property remaining after her death to be distributed [to his brothers and sisters), but I wish her, my said wife, to be untrammeled in the use of said estate during the term of her natural life." Subsequently to the sale to Jack and by him, and the application of the proceeds, Mrs. Brown died. The sale to Jack was never confirmed by the probate court. There had, however, been made an order of sale which authorized the executrix to sell the personal property at private sale. No report was ever made to the probate court of any sales made through Sandercock, but the executrix reported to the court that she had, through mistake, sold the property in question to Jack to pay her individual debt. Thereupon, the probate court refused to confirm the sale. It does not appear whether or not there are debts outstanding against the estate, or whether the administrator with the will annexed has in his hands money or property with which to pay the expenses of administration. Nor does it appear when notice to creditors was published, or, indeed, whether such notice has been published at all. The construction of the will is a matter for the probate court, but I will assume that the will gave the property to Mrs. Brown absolutely, except that she was denied the power of testamentary disposition. One-half she did not take under the will, but it all was subject to the right of the personal representative to bave the custody during administration, and to the payment of the debts of the testator and the costs of administration. The executor undoubtedly has such title and right of possession as will authorize him to maintain an action for the conversion of the assets of the estate. Nor do I see how title derived from an heir or legatee can constitute a defense, or put the executor to the necessity of proving an indebtedness to satisfy which the property is necessary. The

vendee in such case may have rights which should be protected when the estate is finally distributed to the beneficiaries under the will. Pending the administration, however, the legatees have not the right of possession, and may be held for conversion if they wrongfully deprive the executor of the property. A contrary rule might lead to great trouble and loss. It may not be known whether there are creditors or not until nearly 10 months have elapsed. Yet the administrator is responsible to creditors for the preservation of the property. If the vendee of an heir had made way with property, and had become insolvent, the administrator could not defend himself on the ground that he had delivered the property to an heir; and, besides, it cannot always be known who are heirs or legatees until distribution. Power to declare the succession, to determine heirship, and to construe wills, is in the probate court. Courts in which suits of this character may be brought cannot determine such questions; and, if such defense may be made, it would lead to delay and expense. The policy of the law certainly is that estates should be quickly settled, and administrators should not be exposed to such litigation. Until distribution, the right of the representative should be absolute, in the interest of all concerned. A fair illustration of the possible evils of such a rule would be in the well-known Blythe estate. Suppose a "claimant" in that estate had property, and would not deliver it because there were sufficient assets without it? Would any court where such suit was brought against the claimant be compelled to determine the question of heirship? The right of a legatee differs a little from that of an heir. But there is no difference under the statute as to the right of a legatee to possession prior to distribution. Nor do I see that the fact that the property was community property can make a difference. The widow does not take her share of the common property as heir, but her title is subject to administration and payment of debts. Her title is no more absolute than that of an heir at law, and the administrator has the same right of possession. Respondent has not been able to cite an authority which will sustain the conclusion reached by the court. He cites, however, Hunt v. Hunt, 11 Nev. 442; Presby v. Powers, 81 Ill. 125; and Rutherford v. Thompson, 14 Or. 236, 12 Pac. 382. In Hunt v. Hunt, it was held that the widow was the devisee of the property, and that her deed conveyed title subject to administration, and that the title of the purchaser was good,-not as against the executor, but as against an heir at law. Presby v. Powers is a mis-citation. I have found no such case.1 In Rutherford v.

Cal.Rep. 35-37 P.--56

Thompson no such question was involved. A person, not the legal representative, and not an heir or legatee, had disposed of some of the property, and the question was how far the common-law doctrine applicable to executors de son tort obtained in Oregon. It is enough, however, in my opinion, to say that the legislature has given to the personal representative the custody of the property, and has made him responsible for it, and has also provided the mode in which he may be discharged of his responsibility. The power of the legislature over the subject is plenary, and the law recognizes no such exception as it is sought to establish in this case. As we have seen, the will contains no grant to the executrix of power to sell. The fact that the property was bequeathed to the same person who was named as executrix is not the equivalent of such power, nor does it make a case which comes within the decision in Re Delaney, 49 Cal. 85. I think, therefore, the court erred in holding that Jack did not convert the property to his own use.

The cause of action was not barred by the judgment rendered in the suit of R. E. Jack v. Catherine J. Brown. Mrs. Brown was not sued in her representative character, nor was any question raised in the case as to the right of Mrs. Brown to dispose of the property to Jack. The validity of the sale was not questioned. The action was brought to foreclose a mortgage given by Mrs. Brown upon real estate. No mention of this property was made in the complaint. In the answer it is averred that a portion of the debt was paid by the sale to him by Mrs. Brown of certain personal property. It is not shown in any way that it is the property involved in this action, but, conceding that it was, it is not claimed that it belonged to the estate. Having bought it as the property of Mrs. Brown, and sold it, and applied the proceeds to the payment of his debt, Jack could not then have refused to give her credit for it. Both parties, then, repudiated the title of the estate.

There was no error in granting the nonsuit as to the bank. Quite possibly, plaintiff could have shown that Jack was acting for the bank in such manner as to bind the bank, and render it jointly liable. I do not find such testimony in the record. I think the judgment of nonsuit in favor of the corporate defendant should be affirmed, but that the judgment and order in favor of defendant Jack should be reversed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment of nonsuit in favor of the corporate defendant is affirmed, and the judgment and order in favor of defendant Jack are reversed.

¹ Probably Presley v. Powers, 82 Ill. 125.

DOW v. NASON et al. (No. 19,329.) (Supreme Court of California. Sept. 3, 1894.) REVIEW ON APPEAL

The issue being whether a note was paid, a finding that it was paid will not be disturbed because the evidence leaves the matter somewhat in doubt.

Department 2. Appeal from superior court, San Diego county; George Puterbaugh, Judge.

Action by H. G. Dow against Arthur G. Nason and others on a promissory note. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

Trippet, Boone & Neale, for appellant. Casslus Carter and A. C. Younkin, for respondents.

PER CURIAM. The pleadings, findings, and briefs herein do not present the facts of this case with remarkable clearness. It appears, however, that the \$5,000 note made by Arthur G. Nason to H. W. Nason, which is the subject of this action, was pledged as security for the payment of certain other promissory notes, and the pivotal point in the case is whether or not these last notes were paid. The court found that they were not paid, and, while the evidence on the point leaves the matter somewhat in doubt. we do not think it so weak as to warrant us in saying that it does not support the finding; and, this being so, there is no ground for disturbing the judgment. Judgment affirmed.

4 Cal. Unrep. 755

JONES et al. v. LOS ANGELES & P. RY. CO. (No. 19,315.)

(Supreme Court of California. Sept. 3, 1894.) ACTION TO FORFEIT GRANT-BREACH OF CON-DITIONS-COMPLAINT-APPEAL.

1. Though a general demurrer to a complaint was overruled by consent, defendant may, on appeal from a default judgment after

may, on appeal from a default judgment after answer, question its sufficiency.

2. A complaint for forfeiture of a right of way granted on condition of the construction of the road on the line designated, continuous operation of the road when constructed, establishment of stations at points to be designated by plaintiff, and maintenance of the road in good condition, which alleges that the were not established, that the road stations on its completion was not operated continuously or at all, and that it has long since ceased to be operated, and has not been kept in good condition, but has been allowed to become wholly out of repair, and that there has been a total failure to comply the conditions, sufficiently states, as against a general demurrer, the completion of the road and breaches of the conditions.

Department 1. Appeal from superior court. Los Angeles county; J. W. McKinley, Judge. Action by John P. Jones and others against the Los Angeles & Pacific Railway Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Wells, Monroe & Lee, for appellant. Anderson & Anderson, for respondents.

PER CURIAM. This action was brought by plaintiffs to declare forfeited a certain right of way granted by them to the Los Angeles County Railroad Company, the predecessor in interest of the defendant, upon the ground that certain conditions subsequent attached to the grant had not been complied with. Defendant interposed a general demurrer to the complaint, which was overruled by consent, and an answer filed. The defendant did not appear at the trial, and plaintiffs had judgment, from which defendant appeals. The only question presented is as to the sufficiency of the complaint. The demurrer being general, the fact that it was overruled by consent is immaterial. One of the conditions of the grant of the easement was the erection and construction of the road on the line designated, and the operation of the road when constructed. The second condition was that the company should establish two stations on the line granted, the particular points of each of said stations to be selected by the parties of the first part (the plaintiffs herein). It is further provided in the agreement that, upon the completion of the road, it should be operated continuously and without interruption; and again, if the corporation should "at any time hereafter cease to operate said railroad, or fail or refuse to keep the same in good order and condition. * * * then the grant hereby made and all rights thereunder shall cease and determine." The complaint alleges breaches of the foregoing conditions, to the effect that said stations were not established nor the station houses built at the places mentioned, or at any place selected by the plaintiffs herein, or at any place at all; and as to the other conditions it is alleged "that neither the defendant nor the Los Angeles County Railroad Company, upon the completion of said railroad, operated the same continuously or without interruption, so as to accommodate the transportation of freight and passengers between the city of Los Angeles and the town of Santa Monica; but, on the contrary, said railroad has not been operated at all, and has never left or received passengers or freight in the usual manner of first-class railroad lines, or at all, at any such stations, and that the defendant has long ceased to operate said railroad, and has failed and refused to keep the same in good order and condition. but has allowed the same to become completely out of repair, and has altogether failed to comply with any of the conditions of said agreement." The complaint is not well drawn, but, in the absence of a special demurrer, we think it sufficient to state a cause of action. Taking its allegations together, it may be fairly construed as alleging the completion of the road; and, assuming that fact to be sufficiently stated, its remaining allegations are entirely sufficient in charging

breaches of various conditions of the agreement heretofore quoted. For the foregoing reasons, it is ordered that the judgment be affirmed.

(9 Wash. 508)

PETERSON et al. v. SAYWARD.

(Supreme Court of Washington. Sept. 4, 1894.) LOGGERS' LIENS -DESTRUCTION OF LOGS-ACTION FOR DAMAGES-PLEADING-PRACTICE.

1. An action for damages, under Gen. St. § 1694, for the destruction of logs on which plaintiff claims a lien, may be maintained without a prior determination in equity of the valid-

ity of such lien.

2. The complaint in an action for damages 2. The complaint in an action for damages, under Gen. St. § 1694, for the destruction of logs on which plaintiff claims a lien, need not aliege the value of the logs, if the amount of the lien is alleged, and damages asked in that sum. Hoyt, J., dissenting.

3. A separate action for damages, under Gen. St. § 1694, for the destruction of logs on which plaintiff claims a lien, may be maintained for a balance due after an action to enforce the lien as to an undestroyed portion of such logs is determined.

of such logs is determined.

4. All lien holders may join in an action for damages, under Gen. St. \$ 1604, for the destruction of logs on which they claim liens.

Appeal from superior court, Kitsap county; John C. Denney, Judge.

Action by Gust Peterson and others against W. P. Sayward. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

Battle & Shipley, for appellant. Burke, Shepard & Woods, for respondents.

DUNBAR, C. J. This was an action for damages, brought under section 1694 of the General Statutes, giving to the holders of liens on logs an action for damages against any person who shall injure or destroy logs. In this action the plaintiffs recovered a judgment of \$1,796 against the defendant for sawing up logs on which they had liens for wages. The plaintiffs were 16 loggers, who filed their liens for wages on a boom of logs they had just cut and rafted. logs were sold to defendant by the employer of the plaintiffs. Defendant immediately began to saw them into lumber without the plaintiffs' consent, and without making any provision for their liens. It is alleged, and the evidence shows, that he knew the logs were subject to liens for the wages of the plaintiffs, respondents herein. Plaintiffs then brought their action to restrain the sawing of the logs and to foreclose their tiens. In said action all the logs which remained unsawed were sold, and the proceeds were applied as part payment of the liens. Plaintiffs then brought their action for damages to recover the remainder of their liens still unsatisfied. The amended complaint on which the issues were formed alleges that each of the plaintiffs performed work on a certain boom of logs, and within the statutory time filed their lien notices, describing the logs, alleging that the logs were sold v.37p.no.11-42

to the defendant, who, without the consent of the plaintiffs, sawed them into lumber; that the defendant knew the logs were subject to liens; that the plaintiffs were damaged to the amount of their liens remaining unpaid,-praying for judgment accordingly. Defendant demurred to the complaint on the ground of insufficiency, and on the ground of defect of parties defendant. The demurrer was overruled. An amended answer was then filed, setting up as an affirmative defense and counterclaim the details of the foreclosure case previously brought by the plaintiffs, the issuing of the restraining order therein, the sale of the logs remaining unsawed, and asked for judgment against the plaintiffs for the value of the logs sold. Plaintiffs demurred to this counterclaim, and their demurrer was sustained.

The first objection that appellant raises is that the complaint does not state facts sufficient to constitute a cause of action. We think this contention cannot be sustained. This action is brought directly under the provisions of section 1694, which provides that "any person who shall injure, impair or destroy, or who shall render difficult, uncertain, or impossible of identification, any saw-logs spars, piles, or other timber upon which there is a lien as herein provided, without the express consent of the person entitled to such lien shall be liable to the lien holder for damages to the amount secured by his lien, which may be recovered by a civil action against such person." The amended complaint, it seems to us, states sufficient to bring it within the requirements of this section. Neither do we think the point is tenable that this action for damages cannot be maintained without a prior determination having been had in a court of equity of the validity of the plaintiffs' alleged liens. It seems to us that this would be entirely an unnecessary cost and expense to impose upon the litigants in this kind of a case. It has been the uniform practice of the courts in this state to determine first the validity of the lien. There is no good reason why this should not be done in the civil action for damages. because it would be a necessary determination in the case before damages could be awarded, and we think it is a much better practice to have these two questions determined in one than in two different suits. We do not think that there was either a misjoinder of parties plaintiff, or that the complaint fails to show the community of interest between the several parties. The amount of the plaintiffs' unpaid liens is alleged, and that is the amount that is asked for as damages. This is an action directly under section 1694, and when all the requirements of that section are met the complaint is sufficient, for the law declares that the person destroying the logs shall be liable in this action to the lien holder for the damages, to the amount secured by his lien. In this action the trial judge held that, as the amount secured by the plaintiffs' lien was in excess of the value of the logs sawed, the utmost they could recover was the value of the logs. The appellant's contention that two suits have been brought, when the matter in controversy could have been determined in one, is answered, it seems to us, by the act of the legislature in the lien act of 1893, which provided that the court might award damages for destruction of the logs in the action to enforce the lien, or that damages might be recovered in a separate action.

We think the respondents' demurrer to appellant's demand for offset was rightly sustained. The amount of the logs sold had been credited on the liens, and it played no further part in the proceedings. Whether or not appellant availed himself of the right remedy in his objection that there was a misjoinder of parties plaintiff, it is not necessary for us to discuss; for we think, under the general rules of pleading, and in accordance with the general practice in lien cases in this state, it was proper for all the plaintiffs to join in one action. Section 143 of the Code provides that "all persons interested in the cause of action, or necessary to the complete determination of the question involved, shall, unless otherwise provided by law, be joined as plaintiffs when their interest is in common with the party making the complaint, and as defendants when their interest is adverse to the plaintiff." Surely. these 16 plaintiffs were each interested, to the extent of his lien, in the subject of this action. If one had brought the action the others could have intervened, because they were interested in the cause of action, and if they had a standing as interveners they certainly would have a standing as original plaintiffs; and all of them having an interest in the determination of this case, especially under the ruling of the court that the judgment would be limited to the value of the logs destroyed, they were all proper parties to this one action. And in any event it would be to the interest of the appellant that all these rights should be adjudicated in one action, and he cannot be heard to complain of that which does not injure him. And if their right to recover is limited to the value of the logs sawed, if the actions were brought separately, the amount for which appellant was responsible might be exhausted before the last lienor had brought his action, and, if true, it would render his action, when brought, futile.

We have examined the instructions of the court, and think they were substantially correct. We think that there was sufficient testimony as to the value of the logs for the jury to act upon, and the amount due the respondents was sufficiently proven. All these questions were questions for the jury.

The point raised by the appellant, that the court had violated the provisions of the constitution in relation to commenting upon JJ., concur.

facts, we think, is not sustained by the record. There was no conflicting testimony on this proposition. The circumstances under which the instruction was given, and the conditions existing at that time, rendered it absolutely harmless. We think the judgment should be affirmed.

ANDERS and SOOTT, JJ., concur.

HOYT, J. (dissenting). In my opinion the amended complaint was defective, in that it did not state the value of the logs sawed by the defendant, and for that reason the demurrer thereto should have been sustained.

(9 Wash. 272)

McALLISTER et al. v. CITY OF TACOMA et al.

(Supreme Court of Washington. Sept. 8, 1894.)
On petition for rehearing. Denied.
For prior report, see 37 Pac. 447.

STILES, J. A very earnest petition for a rehearing has been filed in this case, with a view to obviating what was said in the opinion concerning the power of the board of public works to contract for repairs in addition to the contract for the improvement. Two cases are cited from New York, one of which-People v. Maher (Sup.) 9 N. Y. Supp. 94 seems to sustain the view taken by this court. The other,-Schenectady v. Trustees (Sup.) 21 N. Y. Supp. 147,—it is claimed, states a case like the one at bar, and holds to the contrary. The contract in that case was that the work should be done in such a manner that no repairs would be needed for five years, and that if any should be required the contractor would make them. This was held to be a mere guaranty of the quality of the work, and therefore not within People v. Maher, where the contract was precisely like the one before us. Both of these cases were decided in the third department of the supreme court of New York, but by different judges, and the latter does not undertake to deny the authority of the former. The principle adopted by us was right, and we adhere to it. The anxiety of counsel in this matter seems to be directed to a large body of warrants which have been issued in payment of other like improvements in the city of Tacoma where the contracts were made by the board in the same way, but where assessments are not due; but it is evident that the provisions of the act of March 9, 1893, on the subject of reassessments, have been overlooked, and that the anticipated danger is more fancied than real. Certainly, if that act can have any force, the actual value of any improvement made, where there was jurisdiction to make it at the expense of abutting property, can be reassessed. Petition denied.

DUNBAR, C. J., and ANDERS and SCOTT.

IJ., concur.

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STATE V. WHITEMAN.

(Supreme Court of Washington. July 17, 1894.)

Indictment for Larceny—Conversion of Trust Money—Venue.

1. An indictment for larceny, which alleges that defendant, at a certain time, was the assignee of certain persons, and intrusted by them with the care and safe-keeping of certain moneys, to an amount named, and did then and there, unlawfully, fraudulently, and feloniously, convert the said moneys to his own use, is sufficient.

2. In a programming for the large and the large a

2. In a prosecution for the larceny of trust moneys, evidence that all the transactions by which the moneys came into defendant's hands took place in a certain county, and that the duties of his trust should have been performed in such county, is at least prima facie proof

that the larceny occurred there.

Appeal from superior court, Pierce county; Emmett N. Parker, Judge.

Harry Whiteman was convicted of larceny, and appeals. Affirmed.

W. I. Agnew, for appellant. William H. Snell, Pros. Atty., for the State.

HOYT, J. The indictment upon which the defendant was convicted was in the following language: "Harry Whiteman is accused by the prosecuting attorney of the county of Pierce, state of Washington, by this information, of the crime of larceny, committed as follows: The said Harry Whiteman, on or about the 1st day of October, eighteen hundred and ninety-two, at the county of Pierce and state of Washington, and within one year prior to the filing of this information, being then and there a person, to wit, the duly-appointed assignee of Robert Rhodes and William Clark, copartners doing business as Rhodes & Clark, and as such assignee, then and there was intrusted by the said Robert Rhodes and William Clark, copartners as aforesaid, with the custody, care, and safe-keeping of certain moneys and funds of said copartnership aforesaid, to wit, two hundred and eighty-nine dollars and sixty cents, of the good and lawful money of the United States, of the then and there value of two hundred and eighty-nine dollars and sixty cents, of the moneys and funds of said copartnership aforesaid, and did then and there unlawfully, fraudulently, and feloniously convert the said two hundred and eightynine dollars and sixty cents to his own use, and did fail to account to the said copartnership or either of its members for the same, or any part thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Washington." Upon this appeal its sufficiency is attacked upon several grounds: First, that the nature of the fiduciary relation is not set out; second, that it is not charged that he received the moneys: third. that there is no allegation that he converted them to his own use with intent to defraud the owner thereof; and, fourth, that there

should have been such an allegation contained in the indictment as to show affirmatively the duty of the defendant to have paid over the moneys. There is some force in the criticisms of this indictment as above set forth, but when it is interpreted in the light of our statute, which declares that indictments shall be sufficient if the necessary facts are so stated that a man of common understanding can determine therefrom the offense with which he is charged, as interpreted by this court in numerous decisions, it must be held sufficient. It appears therefrom, by sufficiently direct allegations, that the money came into his hands as assignee, and that he had unlawfully and fraudulently converted the same to his own use; and these facts being charged, with the necessary allegations of time and place, it was impossible that the defendant should not have been given thereby sufficient information to enable him intelligently to prepare his defense.

It is further claimed on the part of the appellant that the conviction cannot stand by reason of the fact that there was no proof that the crime was committed in the county of Pierce. The proof upon that subject was simply that all of the transactions by which the money came into the possession of the defendant took place in the county of Pierce, and that all of his duties growing out of his trust should have been performed in said county. It did not appear affirmatively that at the time he actually converted the money to his own use, and disposed of it for his own benefit, he was in the county of Pierce, nor do we think this necessary. It would be a difficult matter, in almost all cases, for the state to show the exact location of the defendant at the time he appropriated the money to his own use; and when it is made to appear, as in this case, that his duty in reference to the money was confined to the county in which the prosecution is had, it is enough to at least prima facie establish the fact that the conversion was in the same county.

The other questions argued in the brief of the appellant grow out of errors alleged in the admission of testimony, and the claim that it did not appear therefrom that there had been any crime committed. We find it unnecessary to discuss the several propositions in regard thereto, for the reason that there was practically no dispute as to the fact that the defendant had appropriated certain of the moneys to his own use. was the testimony of two witnesses, entirely uncontradicted, as to his admissions in that regard, and his own testimony upon the stand was practically an admission of the same fact. Consequently, if there was any technical error as to the admission of some of the exhibits, it was not such as could injuriously affect the defendant, as his admissions alone were enough to authorize the jury to find that he had converted certain of the moneys to his own use. We find no error of

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sufficient magnitude to warrant us in reversing the judgment, and it must be affirmed.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur.

WHITING v. COLLIER.

(Supreme Court of Washington. July 17, 1894.)

CONSOLIDATION OF CITIES—JUSTICE OF THE PEACE -Right to Increased Salary.

A justice of the peace in a city of less than 5,000 inhabitants does not, by the subsequent incorporation therewith, under the same name, of another city, so as to make the combined population over 5,000, become a justice of the peace for a city of over 5,000 inhabitants, and articled the release provided by statute and entitled to the salary provided by statute for such justices.

Mandamus by P. F. Whiting, justice of the peace, against E. L. Collier, county auditor, to compel issue of warrant for salary. Judgment for defendant, and petitioner appeals. Affirmed.

Bruce, Brown & Rayburn, for appellant. Newman & Howard, for respondent.

HOYT, J. Appellant was an acting justice of the peace of the city of New Whatcom, which was a city of less than 5,000 inhabitants. This city and the city of Whatcom were afterwards consolidated into another city, also called New Whatcom, which, after such consolidation, contained more than 5,000 inhabitants. Appellant claims that, by reason of such consolidation he became a justice of the peace in a city of more than 5,000 inhabitants, and entitled to the benefit of the provisions of the act providing a salary for justices of the peace in cities having that population; and by this proceeding in mandamus he sought to compel the issuance by the auditor of the county of a warrant for the payment of his salary as such justice. The trial court refused the writ, and from the judgment dismissing the proceeding this appeal has been taken.

A preliminary question is presented as to the right of the appellant to require the auditor to issue the warrant without his claim having been first presented to the board of county commissioners for allowance or rejection, but the conclusion to which we have come as to the merits of the controversy between the appellant and the county will make it unnecessary that we should decide it. At the time the two cities were consolidated, there were, or might have been, two justices of the peace in each of them. If one of them was entitled to hold his office in the consolidated city for the whole thereof, all of them would be so entitled. But there is no provision in the statute authorizing more than two justices of the peace in such city, however it may have been constituted. It will follow that each of the four could not hold office therein; hence none of them could do The result of the consolidation was

either to legislate all of the justices out of office, or to retain them therein until the next election in the respective precincts bounded by the outlines of the former cities. ever of these results may be held to have happened upon the consolidation, the effect upon the rights of the appellant was the same. If he was legislated out of office, he, of course, is not entitled to a salary. If he was retained in office in a precinct within the boundaries of the city in which he was such justice before the consolidation, he is a justice of the peace of a precinct of less than 5,000 inhabitants, and for that reason is not entitled to the benefits of the statute. In our opinion, the trial court correctly determined the law of the case, and its judgment will be affirmed.

DUNBAR, C. J., and STILES, SCOTT, and ANDERS, JJ., concur.

LOVELL et ux. v. HOUSE OF THE GOOD SHEPHERD.

(Supreme Court of Washington. July 18, 1894.)

CUSTODY OF CHILD-RIGHTS OF PARENTS-CONTEST BY CORPORATION.

One who has no legal right to the cus-

1. One who has no legal right to the custody of a child cannot question the competency of the parents to care for it.

2. Before a parent can be deprived of the custody of a child, a case must be made out sufficiently strong to meet the condemnation of all decent and law-abiding people, regardless of religious belief or social standing.

3. The rule that a parent who surrenders to another the custody of a child of tender years cannot afterwards assert a claim to such custody is founded on the idea that by intimate intercourse the child and foster parent will form reciprocal affections, and does not will form reciprocal affections, and does not apply where the child is surrendered to a corporation.

Appeal from superior court, King county; J. W. Langley, Judge.

Application by John Lovell and wife for a writ of habeas corpus to obtain Maggie Lovell from the custody of the House of the Good Shepherd. The writ was dismissed, and petitioners appeal. Reversed.

Hays & Humphrey, for appellants. John Fairfield and Daniel T. Cross, for respondent.

DUNBAR, C. J. This case is brought to this court on appeal from an order of the superior court of King county to reverse and set aside the order of the judge of that court, sitting in equity, dismissing a writ of habeas corpus heretofore brought, and remanding the child, Maggie McGee, otherwise called Maggie Lovell, to the care of the respondent, House of the Good Shepherd, until the further order of the judge of the superior court of King county. About three years before the bringing of this action, said Maggie Lovell was left by her then widowed mother with the respondent, on an indefinite oral agreement. Soon after the mother demanded the child, but the respondent refused to give her up, and has ever since held her. On the 17th day of May, 1893, the appellants, Maggie Lovell's mother and stepfather, duly adopted the said Maggie, by order of the superior court of Pierce county, Wash. After the adoption of the said child, and before the bringing of this action, her custody was demanded by the appellants, but respondent refused to give her into their possession. Respondent is a corporation established, among other things, to care for and educate orphans and deserted children. The institution is incorporated under the laws of the state of Washington, and is conducted by the Sisters of the Roman Catholic faith, who devote their lives to this work.

It is alleged by the appellant that the court erred in permitting any evidence tending to show that appellant John Lovell was not a fit and proper person to have the care and custody of the child, because such evidence, if proper, should have been pleaded, and there was nothing in the pleadings to put the competency of the said Lovell in issue. Respondent insisted that, in proceedings of this character, courts are not restricted to the same stringent rules of evidence which govern them in trials by jury; that the exact truth should be sought out by all practicable means, and mere technicalities should be discountenanced and set aside. This is true in any case, and technicalities, under our Code, which tend to prevent the meritorious adjudication of the case, are not favored. But the object of rules of pleading is to elicit the exact truth, and it seems to us that no litigant can safely go to trial without knowing substantially the issues that are involved; and, if he is not informed by the pleadings, it becomes something more than a mere technical omission, which should be disregarded, but that the court, by compelling him to submit his cause on such pleadings, and without such information being furnished him, deprives him of a substantial right. Whether, however, we would reverse this case on this ground alone, we will not now decide, for it seems to us that on the merits of the case there was no showing made by the respondent, or any attempt to show any legal right which it had to the custody of the minor child; and, if it had no legal right to the custody of the child, it matters not whether the parents were competent custodians or not, so far as the respondent is concerned. Church, Hab. Corp. p. 591, § 454; Bustamento v. Analla, 1 N. M. 255. Under such circumstances the possession should be taken from it. and if, upon a proper petition, the appellants are found by the court to be incompetent, a proper guardian should be appointed to take control of the custody and education of the minor. This the law provides for, but it nowhere provides-nor would such a provision be practical—for the appointing of a corporation as the guardian of a minor child. This being true, there is no foundation for the claim of

the respondent, and the writ should have been enforced.

We have carefully examined the testimony in this case, and are not satisfied that such a showing is made out against the parents as ought to deprive them of the custody of their child. While it is true that the welfare of the child should be the first consideration of the court, yet the right of the parent is not to be disregarded; and it is assuming a grave responsibility to deprive parents of the care, control, custody, and education of their children because they do not come up to the standard of perfection that we have established for our own action in that respect. There is perhaps scarcely a day but that children may be seen who, in the ordinary estimation, are neglected, and of whom the popular verdict would declare that they would be better off, and stand a better chance of becoming useful members of society, if they were removed from the pernicious influence of their parents. Yet it would not do for that reason to interfere with the domestic relations, or to set up our particular standard for the guidance of families in There is such a diversity of religious and social opinion, and of social standing and of intellectual development and of moral responsibility, in society at large, that courts must exercise great charity and forbearance for the opinions, methods, and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or social standing, before a parent should be deprived of the comfort or custody of a child. It is doubtful, in our minds, if such a case is made out here. It is true that the appellant Mrs. Lovell has not been the most exemplary mother; that the care of her children has not been of that kind which would commend itself to many mothers. That she is a passionate woman, with an uncontrollable temper,-coarse, vulgar, and pugnacious,-is evident from the record. But if every coarse, vulgar, and passionate woman were deprived of the custody of her children, our orphan asylums would be filled to overflowing; and if every man who is given to brutalizing himself by the excessive use of intoxicants, and by other debasing habits, were to be deprived of the custody of his children, the said institutions would be found altogether inadequate. Even immorality of the mother is not always a sufficient reason for depriving her of the custody of her child. It is the universal holding of the courts, and in many states is made a provision of the statute, that the mother of an illegitimate child, in the absence of special reasons, is entitled to its custody, and of course the fact of its illegitimacy is proof of the mother's immorality. The maternal instinct can generally be relied upon to protect the child far better than strangers, who

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act simply from a cold and unsympathetic feeling of duty to society. Of course, when it becomes apparent that nature's appeal to the parental heart meets with no response, and a parent has become so brutalized and lost to the promptings of nature that she is willing to sacrifice either the physical or moral well-being of her children to the gratification of her own debased propensities or vicious habits, it becomes the imperative duty of the court to reach forth its hand for the protection of the children. But, as we have before said, we do not think the result in this case shows a necessity for judicial interference: and, even though it may appear that three years ago the mother was not a competent person to maintain control of this child, the difficulties then alleged to exist have now passed away. Hence, the necessity of separating the mother and child has ceased to exist.

It is also claimed by respondent that, when the mother placed the child in this institution, she promised that she should remain there until she was 18 years old, and that for that reason she is now estopped from demanding her custody. There are some cases which hold that, where a child of tender years is given by a parent to another person, the parent cannot afterwards assert his right to the control and custody of the child. But this rule is founded on the tender and humane idea that, by reason of the long and intimate intercourse between the child and the foster parent, a reciprocal affection has sprung up, which ought to be respected, and which it would be cruel and heartless to interfere with by a forced separation. But no such principle can apply here. The respondent in this case is a corporation. It is controlled and its business is done by officers who are constantly changing,-at least, who may be constantly changing. It is a universally accepted proposition that a corporation has no soul. It is not disturbed in any of its operations by sentiment, and cannot, therefore, be allowed to plead a sentimental wrong.

Under all the circumstances of the case, we think that the writ should have been sustained. The judgment will therefore be reversed and the cause remanded, with instructions to award the custody of the said Maggie Lovell to the appellants.

STILES and ANDERS, JJ., concur. HOYT, J., concurs in the result.

ALLEN v. GRIMES, State Auditor. (Supreme Court of Washington. July 18, 1894.)

STATE CAPITOL COMMISSION—COMPENSATION.

Laws 1893, p. 462, \$ 15, creates a fund to be known as the "State Capitol Building Fund," made up of money derived from lands granted to the state for public buildings at the

state capital, and provides that "no appropriation shall be made from any fund except the fund derived from the sale of lands granted for erecting public buildings at the state capital." Held, that a member of the state capitol commission is entitled to a warrant from the state auditor for the value of his services and expenses, though there is no fund to pay the same, but the warrant should provide that it is payable at such time as revenue from the sale of such lands is applicable to its payment.

Application by Joseph S. Allen for a writ of mandamus to compel L. R. Grimes, state auditor, to issue a warrant for the value of his services and expenses as a capitol commissioner. Writ granted.

Thomas Burke and Joseph S. Allen, for relator. James A. Haight, Asst. Atty. Gen., for respondent.

STILES, J. This was a proceeding to require the respondent, as state auditor, to issue a warrant in favor of the relator, upon the state capitol building fund, for services and expenses as a member of the state capitol commission. The respondent's refusal to issue the warrant is alleged to be based upon the fact that none of the lands granted to the state by the federal government for the erection of public buildings at the state capital have been sold, and that there is actually no money in said fund. The attorney general defends upon the ground that under the provisions of article 8 of the constitution the issuance of the warrant claimed would create a debt against the state, which would come within the class specified in the third section of the article named, to wit, for some single work or object which had not been provided for by the submission of the question of creating it to the people at a general election. By the enabling act, congress granted to the state 130,000 acres of land for the erection of public buildings at the state capital. grant, as we view it, was in the nature of a trust imposed upon the state to select the number of acres granted, and apply the proceeds of their sale to the purpose mentioned. In the prosecution of its trust the legislature, which is the executive hand of the trustee, the state, has provided, in the first place, for the selection and sale of the lands by the act. of March 9, 1893 (Laws, p. 186). The petition recites that upwards of 65,000 acres have been selected, and the selections have been approved by the duly-authorized agents of the United States, and that the appraised value of these lands is upwards of \$1,300,000. In further pursuance of the trust the legislature has provided for the erection of a state capitol building out of the funds to be derived from the sale of the lands mentioned, at a cost of not exceeding \$1,000,000. Act March 21, 1893 (Laws, p. 462). The latter act contains section 15, which is as follows: "In order to carry out the provisions of this act there is hereby created a fund to be known as the 'State Capitol Building Fund,' into which fund shall be paid the proceeds of all moneys derived from the sales of lands grant-

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ed to the state of Washington for the purpose of erecting public buildings at the state capital, from which fund there is hereby appropriated the sum of \$225,000 for the fiscal year ending March 31, 1894, and \$275,000 for the fiscal year ending March 31, 1895; provided, that no appropriation shall be made from any fund except the fund derived from the sale of lands granted for erecting public buildings at the state capital." It thus appears that the intention of the legislature is to limit all payments of money expended for the erection of a state capitol building to the money actually derived from the sale of the lands granted by the government; and to make the intention the more apparent the proviso to section 15 prohibits any appropriation—or, more properly, payment—from any other The idea of the creation of a debt against the state is, by the language used, expressly negatived. There is, under the law, absolutely no obligation resting upon the state to pay any sum whatever, and those who may receive the auditor's warrants will be limited in their rights to the requirement of the proper officers to perform their duties as prescribed by the statute. Even were the law such that the state could be sued upon an ordinary contract, the same as an individual, no cause of action could be stated against it by the holder of a warrant.

The object of the constitutional provisions mentioned was to insure economy in the management of the state's business affairs by taking away, even from the legislature, the power to create obligations on behalf of the state which would necessitate taxation to meet them. But in this case no such obligation is proposed, and no taxation can result from the erection of the proposed building. The state has received a liberal gratuity from the national government, in the shape of lands, the proceeds of which must be devoted to a specific purpose. It is now attempting to carry out the object of the grant, and the only question is whether the legislature has authorized the officers having the business of erecting a capitol building in hand to anticipate the revenues to be derived from the sale of lands. More than half of the lands having been selected, and the selections approved by the government, they have become the property of the state. An appraisement has been made which considerably exceeds the entire expense permitted for the proposed building. We are bound to presume that the officers to whom the duty of selling these lands is committed will perform their duty, and that, in due course of time, funds sufficient to meet all the demands arising from the erection of a capitol building will come into the possession of the state treasurer; and therefore the position of such warrants as may be issued before any funds of this class are actually in the treasury will be that which often occurs where public warrants are drawn upon a fund which has been provided for by law, but which is not yet realized. Under this condition of affairs, we see no valid objection to the auditor's issuing to the relator the warrant which he prays for, provided that it expresses upon its face the terms and conditions under which it is issued, viz. that it is drawn solely upon the state capitol building fund, and payable only as that fund may be accumulated from the sale of lands. Let the writ issue as prayed for.

DUNBAR, C. J., and ANDERS and HOYT. JJ., concur.

McKENZIE et al. v. WOODIN et al. (Supreme Court of Washington, July 18. 1894.)

STATE TIDE LANDS - RIGHT TO PREFERENCE AS PURCHASERS-"IMPROVERS."

1. Gen. St. § 2168, requires the board of tide-land appraisers to file a copy of their plat and record with the county auditor, and to deliver a copy to the state board of equalization. Section 2172 gives shore owners and improvers the preference right to purchase appraised tide lands, for 60 days following the "filing of the final appraisal thereof." Held, that the statute intended the appraisal to be filed with the state board of equalization, and that such filing is the "filing of the final appraisal," from which the 60 days begins to will

ing is the "fling of the final appraisal," from which the 60 days begins to run.

2. One who owns only the machinery in a sawmill erected on tide lands leased by him, and has the use, under a verbal license, of neighboring tide lands for the purpose of piling lumber, is not an "improver," within the meaning of the statute, so as to obtain the right to preference in purchasing the tide lands right to preference in purchasing the tide lands

held under such license.
3. The fact that the tide lands held under such verbal license are necessary to the enjoyment of those held under the lease does not the lessee any right to preference in purchasing them.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Special proceeding by Angus McKenzie and Timothy Glinn against the Fairhaven & Southern Railroad Company and W. A. Woodin to determine the right to purchase Judgment for defendants. tidal lands. Plaintiffs appeal. Reversed.

Newman & Howard, for appellants. I. N. Maxwell, for respondent W. A. Woodin.

STILES, J. This was a contest between an alleged improver of tide lands and one claiming the right to purchase tide lands lying in front of upland owned by him. Gen. St. § 2168, requires the local board of tideland appraisers to deposit one copy of their plat and record with the county auditor, and deliver one copy of the same to the state board of equalization. The auditor is required to file the documents deposited with him, but nothing is said as to what shall be done with those delivered to the state board. Gen. St. § 2172, gives to shore owners and improvers the preference right to purchase appraised tide lands for 60 days following the "filing of the final appraisal" thereof. Out of the uncertain meaning at

taching to the words "filing of the final appraisal" has grown the first wrong of which appellants complain, the court trying the contest having held that the period of 60 days mentioned commences to run from the date of the deposit with the auditor, and not from that of the delivery to the state board. The whole question depends upon what is intended by the law to be the duty of the state board in connection with these plats and appraisements. Respondent's contention is that, inasmuch as the board is not required to file them, the time at which it might assume to file would have no effect whatever on the matter of applications to purchase. But it seems to us that the reason of this contention is not with the respondent. The work of the local board of appraisers is subject to review on appeal to the state board by the prosecuting attorney of the county, and the period of 60 days within which he must appeal is fixed by Gen. St. § 2169, as the 60 days after the appraisement complained of has been filed with the state board. But, without this, every consideration of the orderly administration of business demands that all documents of a public character, upon which the rights of individuals may rest, should be treated with this formality. The state board could only act officially as an organized body, although the statute is silent as to the method of organization. It did organize, and it appointed a clerk; but, even if the clerk could be authorized to receive these papers as delivered to the board, it nowhere appears that any such authority was given him. On the contrary, the minutes of the board show that in this particular case, at least, the board did not treat the appraisement as delivered to it until, at a regular session, it formally received it, and directed it to be placed on file. The facts were, as the court found, that the report of the appraisers was deposited with the county auditor, and filed by him December 7, 1891. On December 10th a member of the local board gave the duplicate of the report to the secretary of state, a member of the state board. But there was no meeting of the board until January 7, 1892, and it was not until then that it in any wise recognized the existence of the report, and ordered it placed on file. In the meantime, and because of the absence of this appraisement from the records of the state board, the commissioner of public lands refused to accept any applications for purchase of tide lands covered by it. Appellants filed their application March 3, 1892, which was within the time prescribed by the statute. The "filing of the final appraisal," or the final filing of the appraisal, as the legislature most likely meant, was the date of the authorized filing by the state board, and not the other. Any other construction would make the law a trap, and cause unending confusion in the state land offices.

Upon the merits of this case, we shall pass on one point, and that involves the single question whether the respondent was an improver of tide lands, who, under the statute, is given a preference right to purchase. right of improvers, it is to be remembered, depends upon improvements made prior to March 26, 1890. The Fairhaven Land Company, by its lease, dated February 25, 1890, but acknowledged March 6th, let to one Frankenburger a tract of tide land known as "Block 10" in the town plat of Fairhaven, together with three other small parcels of tide land which it assumed to own, all of which lay to the south of Gambier street, as it has been extended across tide lands. At the time of the lease there was upon block 10 a sawmill, the machinery of which belonged to Frankenburger, and the lease provided for the removal of the machinery at the expiration of the term. Paragraph 4 of the lease read as follows: "During the term of this lease, and thereafter, the said I. Frankenburger hereby agrees to respect the rights and claims of the Fairhaven Land Company to the title to the said land, and its rights and claims therein as the owner of the shore in front of which the said lands are situated, and agrees to assert no claim of right in or to the said lands, or any part thereof, not granted by the terms of this contract. And should any right inure to the said I. Frankenburger under any laws now in force, or hereafter to be enacted, by reason of his having improvements upon the said lands, then the said improvements, for the purpose of acquiring title, shall be deemed to inure to the benefit of the Fairhaven Land Company, and shall, if necessary, be conveyed by the said Frankenburger to the said Fairhaven Land Company." On March 24, 1890, Frankenburger sold to appellants and others all the machinery in the sawmill, including everything connected with and used in working and running the same, by a bill of sale of personal property; and on the next day he executed to them an assignment of his lease, which was assented to by the Fairhaven Land Company, the assignees of the lease expressly covenanting to assume and carry into effect all of the terms and conditions of the lease. The tide lands applied for are entirely outside of the descriptions in the lease, being certain lots of open water lying to the north of Gambier street, which respondent claims are necessary for his convenient use of the sawmill as a place to secure logs in while awaiting the process of sawing up, and certain other lots which have been filled up with débris, and are used as a lumber yard. These lumber-yard lots had been filled up, and were used by Frankenburger, under an oral license from appellant McKenzle, who claimed them under a deed from the Fairhaven Land Company. There was no attempt on the part of Frankenburger to convey to respondent and his associates any right or title to any of the con-

tested ground. Respondent's entire claim is based on the theory that this ground is necessary to the enjoyment of his lease from the Fairhaven Land Company, and the evidence makes out a fairly reasonable showing in support of the alleged necessity. The difficulty is, however, that respondent does not show that on the 26th of March, 1890, he was the owner of any improvements on these lands, or on any lands in that vicinity. He was the owner of the machinery in the mill, but that was personal property,-not a part of the realty, by the terms of the agreement with the land company, and not an improvement, within the obvious meaning of the statute. He was the lessee of certain tide lands, but the statute does not prefer lessees. The contract precluded any application on his part for the purchase of the leased ground, and he is not applying for that ground. If the theory of necessity were to have a deciding weight, it would not have any reasonable effect in favor of respondent, because the proof tends to show that the disputed lands are necessary to the enjoyment of block 10, as realty, which respondent does not own. It may be that the tideland act would support an application of a sawmill owner for reasonable ground for lumber-yard and log-booming purposes; but it would certainly not sustain a lessee in making the application, since the moment the lease should terminate the mill ground and the yard and boom grounds would be separated, and the beneficial use of the area conceded by the state to the mill would be lost, and the purpose of the grant defeated. This result is illustrated in this case by the assignment of the lease made by respondent, which is in the record, and from which it appears that at the time of the hearing he had already severed the lands applied for from the mill property, and made its future use in connection with the mill impossible, without his consent, in case the title should be granted to him. We are of opinion that the respondent's application to purchase should have been refused, and that appellants' application should stand as uncontested, leaving it to the commissioner to determine their rights under the law. The judgment is reversed, and the cause remanded for a new judgment and certification in accordance with the statute. Appellants will not be allowed for 40 pages excessive brief.

DUNBAR, C. J., and SCOTT, ANDERS, and HOYT, JJ., concur.

(9 Wasth, 428)

SEARS v. WILLIAMS et al.²
(Supreme Court of Washington. July 19, 1894.)

CITY CONTRACTOR—ACTION ON BOND.

An action on a bond given to a city under Code, § 2415 (providing that when any

city shall contract for work which, if performed for an individual, would give him a right of lien, a bond shall be taken from the contractor, conditioned that he shall pay all laborers, and material men and all other debts incurred in carrying on the work), will not lie in favor of a person not a party to the bond, and who, at the time of its execution, had no relation to its subject-matter, where the work contracted for, being street grading, was not such as an individual would have a right of lien for. Dunbar, C. J., dissenting.

Appeal from superior court, Skagit county; Henry McBride, Judge.

Action by F. K. Sears, doing business as Sears & Co., against Billy Williams, William S. Caruthers, and others, to recover on a bond given to the city of Anacortes. Judgment was rendered for plaintiff, and defendants appeal. Reversed.

Wells & Joiner, D. M. Woodbury, and Million & Houser, for appellants. Allen & Powell, for respondent.

HOYT, J. Appellants and their joint defendants were sureties in a bond executed by Billy Williams, who had a contract with the city of Anacortes to grub and grade certain streets in said city. This bond was taken in pursuance of the provisions of section 2415, Gen. St., for the purpose of relieving said city from liability under the provisions of section 2416. The respondent brought sult against the sureties named in said bond to recover for materials furnished to said contractor in the carrying out of his contract. Trial was had, and a judgment rendered in his favor, from which this appeal is prosecuted.

That the provisions of section 2415 of the General Statutes are not applicable to street grading contracts was directly ruled by this court in the case of Clough v. City of Spokane, 7 Wash. 279, 84 Pac. 934. Hence, it was not necessary for the city to take the bond for the purpose of relieving itself of the liability imposed by the statute. It is claimed, however, that it was competent for the city to require such a bond as a condition precedent to awarding the contract, and that the bond, having been voluntarily entered into, and not being for an illegal purpose, should be enforced as a contract between the parties. This contention may well be conceded. and yet it will not follow that the respondent had any right to maintain an action thereon. If the bond was not one contemplated by the statute, it could derive no vitality therefrom. All the force it could have would be that of a contract voluntarily entered into by the parties. This being so, it must follow that while the bond may have been a good one as between the city and the obligors, by reason of its having been voluntarily entered into, it could not be enforced in favor of the respondent, who was in no sense a party thereto. So far as it was a contract between the city and the makers, it might be capable of enforcement, notwithstanding the fact that the state of Washington was

¹ For opinion on rehearing, see 38 Pac. 135.

named as the obligee, instead of the city. Under the strict rules which formerly prevailed, such a misnomer of the obligee would have been fatal; but, under the more liberal rule announced by many late cases, such might not be the effect of such misnomer if it appeared from all the circumstances that the bond was, in fact, executed for the benefit of the city. But this rule cannot be so far extended as to give the bond force in favor of one who at the time of its execution had no connection, direct or indirect, with the subject-matter to which it related. A common-law bond cannot be enforced excepting in favor of the obligee, or some one who at the time of its execution was the person for the benefit of whom it was executed. The respondent had no such connection with the execution of this bond as to entitle him to any relief under its provisions, nor had he any right to so rely upon it as to make available to him any rule as to the estoppel of the obligors. The bond not being a statutory one, the respondent, not having been a party thereto, cannot maintain an action thereon. The judgment will be reversed, and the cause remanded, with instructions to sustain the demurrer to the complaint.

STILES and ANDERS, JJ., concur. DUN-BAR, C. J., dissents.

UNITED STATES SAV., LOAN & BLDG. CO. v. JONES et al.

SAME v. UNDERWOOD et al.

(Supreme Court of Washington. July 26, 1894.)

MECHANICS' LIENS-NOTICE-SUFFICIENCY-AP-PEAL-STATEMENT OF FACTS.

1. A notice of mechanic's lien which states that the claimant agreed with the owner "to furnish the lumber material to be used in the construction, erection, and completion of" a certain hotel is too uncertain as to the amount of such material, when it appears that, when the contract was made, the hotel was partly constructed, and the contract was to furnish lumber to complete it.

2. Under a statute requiring a lien notice to

2. Under a statute requiring a lien notice to be filed within a specified time, stating the demand and the terms of the contract, such notice must be as definite in such particulars when the contract is with the owner as when

it is with a contractor or subcontractor.

3. In three actions,—one by a loan company to foreclose a mortgage, and one each by the F. land company and by U. & M. to enforce mechanica' liens,—consolidated and tried together before a referee, the loan company and U. & M. appealed from the decree entered. The statement of facts served on the land company contained only the evidence relating to its case; but the case of U. & M. was sent up as a part of the referee's report, by the clerk, as required by law, and was a part of the record. Held, that the statement of facts would not be stricken out, on motion of the land company, on the ground that the statement served on it did not contain much of the matter included in it as returned to the supreme court,

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Three actions, consolidated and tried together,—one by the United States Savings, Loan & Building Company against Emma Jones and others to foreclose a mortgage, one each by the Fairhaven Land Company and by Underwood & Minturn against Emma Jones and others to foreclose a mechanic's lien. From that part of the decree allowing part of the claim of the Fairhaven Land Company, the United States Savings. Loan & Building Company appeals. Reversed. From that part of the decree disallowing the claim of Underwood & Minturn, they appeal. Affirmed.

T. E. Cade and Bruce & Brown, for United States Savings, Loan & Building Company. Kerr & McCord, for Fairhaven Land Co. Lichtenberg, Shepard & Lyon, for Underwood & Minturn.

SCOTT, J. Separate actions were brought against the property in controversy herein, one being by the United States Savings, Loan & Building Company to foreclose a mortgage thereon, and one each by the Fairhaven Land Company and Underwood & Minturn to foreclose liens for materials furnished for the construction of a building thereon. The latter also included a claim for labor. The loan and building company appeals from the decree rendered in the consolidated cause, establishing the lien of the Fairhaven Land Company for a part of its claim; and Underwood & Minturn appeal from the decision rendered therein, holding their lien claim invalid.

A motion is made by the respondent the Fairhaven Land Company to strike the statement of facts, on the ground that the statement served upon them did not contain much of the matter included therein as returned to this court; the contention being that it only embraced so much of the record as is contained between pages 93 and 145 of the record, and that all of the remaining portions included between pages 1 to 93 and 145 to 210 were added thereafter, more than 60 days after the entry of the decree, and more than 30 days subsequent to the service upon respondent of the notice of filing the proposed statement of facts. It appears, however, that the first 93 pages of the record consist of the pleadings, journal entries, and part of the report of the referee, and the remaining part, which was added, contains the evidence embraced in the case made by Underwood & Minturn. All the evidence relating to the respondent's case is set forth in that part of the statement which was served. A certificate, regular in form, to the effect that the statement contains all the material facts, is appended to the statement and signed by the judge; and this certificate recites that the respondent was present at the time of the settlement; and, were it not for the fact that the parties had stipulated

that the parts aforesaid were added to the statement against the objection of the respondent, the respondent would be precluded from raising the question in consequence of the certificate not showing any objection at the time the statement was settled. However, we are of the opinion that the motion should be denied, as under the former appeal law, which was in force when these appeals were taken, the clerk was required to send up all of this additional matter in the transcript. The case of Underwood & Minturn was contained in, and was a part of, the report of the referee, and was on file in the cause, and was properly sent up for this reason. Owing to the conclusion to which we have arrived upon the merits regarding the claim of Underwood & Minturn, it is unnecessary to determine whether sending it up in this manner would be sufficient to bring their cause before the court, and the case otherwise, as affecting the respondent the Fairhaven Land Company, was duly settled and certified.

The appeal of the United States Savings, Loan & Building Company will be first considered. It is contended that the claim of the Fairhaven Land Company to a lien was insufficient, in that there is no sufficient statement of the terms and conditions of the contract or of the material furnished in the lien The part of said lien notice covering this point reads as follows: "That on or about the 15th day of April, 1891, the claimant above named, the Fairhaven Land Company, made and entered into a contract with Mrs. Emma Jones, through her husband and agent, Reginald Jones, he being the person having charge of the construction, erection, and completion of the said Silver Beach Hotel building, by the terms of which the claimant agreed to furnish the lumber material to be used in the construction, erection, and completion of said Silver Beach Hotel, for the contract and agreed price of \$567.30; and also agreed to furnish the lumber material to be used in the completion of the windmill and water tank above described, for the agreed price of \$4.50; and that said Emma Jones, by her husband and agent, Reginald Jones, promised to pay said amounts when said material was furnished, and on or before July 20, 1891, to said Fairhaven Land Co." The respondent contends that this lien notice should be sustained, on the ground that it is a claim for all the lumber material "to be used in the erection, construction, and completion of said Silver Beach Hotel;" and it might be that a notice of lien couched in such language might be sustained if it appeared that it covered all the lumber material used in the construction of the building. At the time this lien notice was offered in evidence, however, testimony had been introduced on the part of the lien claimant to show that, at the time the contract was entered into for the furnishing of this material, the hotel had, in fact, been partly construct-

ed; and the contract was, from the standpoint of the claimant, to furnish the lumber material necessary for the completion of the building only. And here an element of uncertainty enters into the matter. Such a description, covering all the lumber material used in the construction of the building, would be definite and certain, possibly, although it did not mention the particular amount used; but when the proof shows that it is intended to cover the lumber material used in the completion of a building which has been partly constructed, and is in process of construction, it becomes indefinite and uncertain, and fails to contain a sufficient statement of the terms and conditions of the contract as disclosed by the evidence. For that reason, the objections raised to its admission should have been sustained, and it is unnecessary to consider the further question raised, that the amount of the lien claimed in the notice was largely in excess of the lumber material which was furnished, many other items having been included therein which would not come under that description.

The claim of Underwood & Minturn was disallowed, on the ground that the lien notice filed by them was defective. The parts thereof in relation thereto are as follows: "(3) On April 10, 1891, Reginald Jones, as one of the reputed owners, and as agent of the other owner of the land, and as the person in charge of the construction of the building, entered into a contract with the lienors 'to furnish such material as should be ordered by said agent, and such labor as should be necessary to build into said building such material as should be required, so far as the lienors should be able to furnish the same.' (4) Pursuant to the contract, the lienors did furnish to Jones, to be used in the construction of the building, certain materials and labor, as one continuous running account, and as ordered by him, which was reasonably worth \$1,789.27, of which only \$172.99 has been paid in cash, and \$76.64 in goods returned." No attempt was made in this notice to describe the kind of material furnished, or to segregate the amount claimed for the material from the amount claimed for labor. It is urged by the appellants that this lien notice was good, and should be sustained, on the ground that it was founded upon a contract entered into between the claimants and the owner of the property; and the same argument is urged by the Fairhaven Land Company in support of its lien. Notices substantially like these have been held invalid by this court in cases where the lien was founded upon a contract entered into between the claimant and a contractor for the erection of the building. It is claimed that a more liberal rule should obtain when a contract is made by the owner of the premises, as the owner in such cases has actual knowledge of the claim. But the statute ' does not make the right to a lien rest upon the owner's knowledge of the contract or of what was done under it. The lien notice must be filed within the time specified, containing a statement of the demand and a statement of the terms and conditions of the contract. We have held that a statement of the demand requires something more than a statement of the amount claimed. If the right to a lien could be maintained because the owner had knowledge of the purchase of the materials in question, and of the furnishing of the labor, in consequence of having made the contract therefor, it might as well be sustained where the contract for the materials is made by a contractor for the erection of the building, if the owner of the premises had knowledge of the making of the contract and of its performance; for as it is the knowledge of the owner that this contention is based upon, rather than the manner of obtaining the knowledge, he might know in regard to the matter fully as well where the contract is made by another party in his presence, or where he was informed of it afterwards, as if he had made it himself. Furthermore, if the right to a lien is to depend upon the owner's knowledge, there would be no reason, it would seem, for requiring a lien notice to be filed at all as against him where he is informed as to the matters upon which the right to a lien is based; for the law does not require a mere idle thing to be done, and, if the only object of the notice is to inform the owner of the premises of the nature of the claim, it would be unnecessary where he already had that knowledge, independent of any such notice. Consequently, it cannot be sustained, for the statute requires a nodce to be filed as the foundation for the lien claim, and we see no room for making a distinction in cases where the contract for the material or the labor is made by the owner directly with the claimant, instead of being made by a "contractor" with a "subcontractor." The nature of the claim must be reasonably set forth in the notice. The statute requires the notice to be filed in all cases, and makes no distinction between cases where the contract is made directly with the owner and where it is made with another party. The notice must contain a statement of the demand, and a statement of the terms and conditions of the contract, in all cases, to comply with the statute.

We are aware that, in passing upon the sufficiency of lien notices in this respect, we have heretofore, in some cases, discussed the same from the standpoint of furnishing knowledge to the owner of the premises in cases where the contract was made by the contractor for the erection of the building with a subcontractor. This is the first time the question has been squarely presented upon a notice where the contract is alleged to have been made by the lien claimant with the owner; and, were it not for the requirements of the statute, it might well be that, where the owner has the knowledge independent of

the notice, a more liberal rule should obtain in construing the notice. But we see no escape from the proposition that by so holding we would logically be driven to hold in all cases where the owner has such knowledge, whether he made the contract or not, that the same rule should obtain, and to the extreme of holding that where the action is brought within the time during which a lien may be enforced, and to foreclose a lien for materials or labor for which a lien notice might have been filed, the suit could be maintained without the filing of any notice; for it would be but a mere idle ceremony to file a notice not containing the statutory requisites if it is to be sustained on the ground that the owner had knowledge of the matters involved aside from the notice. So far as we are advised, no court has gone to the extent of holding that the filing of the notice can be dispensed with. The right to a lien of this kind is a statutory one, and the legislature has prescribed the conditions therefor in the statute, one of which is that a notice must be given; and it would seem as though the same construction with reference to such notice must apply in all cases, regardless of the actual knowledge of the owner of the premises. It follows that the judgment of the lower court, establishing the lien claim of the Fairhaven Land Company, should be reversed, and affirmed as to the disallowance of the claim of Underwood & Minturn.

STILES and ANDERS, JJ., concur.

HOYT, J. I dissent from the conclusions as to the motion to dismiss, but concur as to the merits.

McKENZIE v. PUGET SOUND NAT. BANK OF SEATTLE.

(Supreme Court of Washington. July 26, 1894.)

STATUTE OF FRAUDS-PROMISE TO PAY DEBT OF ANOTHER-CONSIDERATION.

A promise by a creditor to whom a debtor has transferred all his property, to another creditor, to pay him the debt due him from the common debtor, in consideration of his forbearing to enforce his debt, is within the statute of frauds, though incidentally benefits result to the promisor thereby.

Appeal from superior court, King county; R. Osborn, Judge.

Action by D. A. McKenzie against the Puget Sound National Bank of Seattle. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Strudwick & Peters, for appellant. Carr & Preston and W. R. Bell, for respondent.

SCOTT, J. The material allegations of the complaint in this case are that on the 1st day of August, 1890, one Almond was indebted to the plaintiff in the sum of \$1,425, and that

said Almond, doing business under the name of Almond & Phillips Foundry Company, was indebted to defendant in the sum of \$14,000, and that said Almond was then the owner and in possession of a certain leasehold interest in and to certain premises described, and was the owner of a certain foundry and machine-shop plant, of the value of \$30,000. The fifth and sixth paragraphs of the complaint are as follows: "(5) That on the 21st day of August, 1890, the said Charles H. Almond, doing business as aforesaid, conveyed to one Jacob Furth, the cushier and manager of the defendant, for the use and benefit of defendant, all of said plant, property, stock on hand, lease, and accounts; and the defendant accepted the same, and went into the possession thereof, through one G. L. Faust, who became and was appointed by defendant its general agent and manager in that behalf. (6) That said defendant took and accepted said conveyance and assignment, and entered into the possession of said property, with a view and intention of paying off and discharging all the debts of said C. H. Almond, for the purpose of subserving and promoting its own pecuniary and business interests; and said defendant proposed, for the purpose aforesaid, to the plaintiff and others of the creditors of said C. H. Almond, that if said creditors would forbear the collection of their said debts against said C. H. Almond, and would accept payment thereof from defendant in deferred installments, that defendant would pay off and discharge said debts; and plaintiff and others of said creditors of said C. H. Almond accepted said proposition of defendant, and forebore the collection of their said debts." The court sustained a demurrer to the complaint, and plain-

We are of the opinion that the demurrer was well taken, on the ground that the promise alleged was void under the statute of frauds, it being conceded that it was not in writing. A logical construction of the complaint is that Almond transferred said property to the defendant in consequence of his indebtedness to the defendant, and that the promise made by defendant to plaintiff was made after the execution of said conveyances and delivery of the possession of the property, and was no part of the consideration for said The great weight of authority, certainly, is to the effect that the agreement of a creditor to forbear the enforcement of his debt is not a sufficient consideration to support an oral promise of a third person to pay that debt; and this is not disputed by the appellant, but he contends that the promise was made for the purpose of subserving and promoting respondent's own pecuniary business interests. The most favorable construction that can be put upon the allegations of the complaint in this respect is that the defendant was of the opinion that the payment of Almond's indebtedness to the plaintiff would subserve the defendant's interests; that the

defendant had an idea that such payment would benefit it in some way, although what it was founded upon is not apparent. Yet this was not the consideration for the promise, nor any part of it. The bank already had the property, and had made no promise to pay the plaintiff's debt to obtain it. The obligation, if any, upon the part of the defendant, to pay the plaintiff's claim, arose only upon its promise made to the plaintiff. The consideration for said promise was the forbearance of the plaintiff to proceed against Almond. The promise would have been sufficient to sustain the action, were it not for the statute. Any promise to pay, whether in writing or not, must be founded upon a consideration, to be binding. A consideration, to support a promise, not in writing, to pay the debt of another, must be of a peculiar character, and must operate to the advantage of the promisor, and place him under a pecuniary obligation to the promisee, independent of the original debt, which obligation is to be discharged by the payment of that debt. Ackley v. Parmenter, 98 N. Y. 425; Cross v. Richardson, 30 Vt. 641. Almond's debt to the plaintiff was not discharged by this promise, but remained in force. Affirmed.

STILES, ANDERS, and HOYT, JJ., concur.

STATE ex rel. SUTTER v. O'LAUGHLIN. Sheriff.

(Supreme Court of Washington. Aug. 3, 1894.)

Appeal from superior court, Skagit county; Henry McBride, Judge. Petition by the state of Washington, on the relation of John Sutter, against James O'Laughlin, for a writ of mandamus. From a judgment denying the writ, plaintiff appeals. Reversed.

Million & Houser, for appellant. Joiner, for respondent.

PER CURIAM. The only point presented on this appeal was lately decided by this court in State v. Prince (June 5, 1894) 37 Pac. 291; and, on authority thereof, the judgment is reversed.

STATE ex rel. REPATH v. CALDWELL, Justice of the Peace, et al.

(Supreme Court of Washington. July 7, 1894.) STATUTES-REPEAL-PRACTICE IN CRIMINAL CASES -Constitutional Law.

1. Code 1881, § 772, provided that if a ndant under indictment for an offense, defendant whose trial has not been postponed on his application, be not brought to trial at the next plication, be not brought to trial at the next regular term of court, the indictment must be dismissed. 2 Hill's Ann. St. § 1369, changed the time which must expire before such dismissal to 60 days after indictment found or information filed. Held that, while it repealed said section 772, it did not repeal section 777, Code 1881 (later, 2 Hill's Ann. St. § 1374), which provides that such dismissal is not a bear to subsequent presention for some offeres. bar to subsequent prosecution for same offense, if such offense be felony.

2. The act of February 24, 1891, relating to criminal procedure, does not repeal all former criminal legislation, it appearing that the legislative intent was otherwise.

3. 2 Hill's Ann. St. § 1374, providing that a dismissal of an indictment for want of prosecution, shall not har a second prosecution for

cution shall not bar a second prosecution for the same offense, is constitutional.

Dunbar, C. J., dissenting.

Appeal from superior court, King county; T. J. Humes, Judge.

September 28, 1893, Charles F. Repath was indicted for forgery. December 4, 1893, his motion to dismiss the indictment was granted, on the ground that it had not been brought to trial within 60 days after the finding and filing of said indictment. December 8, 1893, the prosecuting attorney, John F. Miller, filed a complaint with William Caldwell, justice of the peace, charging respondent with the crime of forgery, for which the indictment had been dismissed, and his hearing set for December 16, 1893. December 15, 1893, respondent applied for a writ of prohibition, prohibiting the prosecuting attorney from prosecuting him under said charge, and the justice from examining him thereunder. From a judgment making the writ of prohibition perpetual, said William Caldwell and John Miller appeal. Reversed.

John F. Miller, Pros. Atty., and S. H. Piles, for appellants. Wiley & Bostwick and Chas. F. Repath, for respondent.

HOYT, J. This is an appeal from an order prohibiting defendants from further proceeding in the prosecution of the relator for for-The following is an extract from the brief of the relator: "Relator was discharged, and an indictment against him for felony dismissed, by the superior court of King county aforesaid, under the provisions of section 1369, 2 Hill's Ann. St., and section 22 of the declaration of rights in our constitution, because, without fault of his own, or other cause, and notwithstanding his repeated demands thereof, he was deprived of his right to a speedy trial within sixty days, by the acts of the prosecuting attorney. It must be conceded that if section 1374, 2 Hill's Ann. St., providing that such a discharge is not a bar to a further prosecution for the same alleged felony, is-First, a subsisting law; and, second, constitutional,-the demurrer should have been sustained." From this it will be seen that but a single question is presented for our decision, and that is as to whether or not said section 1374 is in force. This section was in the Code of 1881 as section 777, and in the same chapter was "If section 772, which provided as follows: a defendant indicted for an offense whose trial has not been postponed upon his application, be not brought to trial at the next regular term of the court in which the indictment is triable after the same is found, the court must order it to be dismissed, unless good cause to the contrary be shown." In 1891 said section 772 was amended to read

as follows: "If a defendant indicted or informed against for an offense whose trial has not been postponed upon his application be not brought to trial within sixty days after the indictment is found or the information filed, the court must order it to be dismissed, unless good cause to the contrary be shown." It is claimed on the part of the relator that the effect of so amending this section was to repeal said section 777. His contention is that the last-named section was but a proviso to other sections in the chapter, among which was section 772, and that for that reason, when section 772 was amended. and in the amended section this provision was omitted, the effect was to repeal it, the same as if, instead of having been an independent section, it had been attached to the section amended as a proviso. That the amendment of a section repeals the amended one is evident, but it does not follow that an independent section, even though its force depends upon the amended one, will be thus affected by the amendment. Under the provisions of our constitution a section can be amended only by its re-enactment, and for the purposes of giving these provisions force the division into sections in the act of which the section to be amended forms a part must not be overlooked. If the amendment of a section under such constitutional provisions should be held to have the effect contended for by relator. the necessary result would be that the legislature would often amend a section in such a manner as to affect other sections, in form independent, of which the legislature took no notice, and which it had no intention to change by the enactment of the amendatory section. Section 777 was more than a proviso to the other sections of the chapter, though its legal effect may have depended to some extent upon their provisions. It was in form an independent section, containing a direct and affirmative enactment; referring, it is true, to the former sections, but only in the same manner that any independent section may properly refer to those preceding it. But, even if its legal effect was that of a proviso to the other sections only, yet its character as an independent section would prevent its being repealed by the amendment of one of those to which it was such proviso. The amended section would take the place in the chapter of the one amended, and the independent sections would thereafter depend upon it as amended, instead of in its original form.

It is further contended on the part of the relator that the act of February 24, 1891, repealed all of the provisions of the then existing law relating to criminal procedure, for the reason that the design of the act was to provide a complete system upon that subject. If it appeared from said act that it was the intent of the legislature to provide by independent enactment an entire code as to these proceedings, there would be force in the contention of the relator, and the effect of the

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act would doubtless be to repeal all laws relating to that subject not therein contained. A careful examination of the act fails to satisfy us that such was the intention of the legislature. On the contrary, it seems to us clear that there was no intention to provide an entire system of laws upon the subject. The evident intent was only to make such changes in the existing law as to make it harmonious with the changes brought about by the constitution, and by the law allowing proceedings to be by information as well as by indictment. That this was the main purpose of the statute is evident from an inspection of nearly every section contained therein. In many of such sections the only change from the text of the amended one is to add to the statement as to what may be done in cases of indictment the words "or information." In other sections the only change is to replace the term "district court" by "superior court." It is true that there are some independent provisions contained in the act, which seem to have been inserted therein for other purposes; but they are clearly incidental to the main object to be accomplished, as above stated. Besides, the act lacks a good deal of comprising an entire course of criminal procedure. Material sections in the former law are omitted, and to hold that the legislature intended their repeal would be to convict it of most inconsiderate legislation. Section 777 was unaffected by the amendment of section 772, or by the act in which it was contained, and was properly brought forward as section 1374 of 2 Hill's Ann. St., as a part of the statute law in force.

Relator further contends that, even although such is the fact, it should not be given force, by reason of its conflict with the provisions of section 22 of article 1 of our constitution. It is claimed that section 1369 of 2 Hill's Ann. St. should be held to be a legislative designation of what constitutes a speedy public trial, as provided for in said section of the constitution, and that by force thereof one who has not been brought to trial as provided for therein has been deprived of his constitutional right, and that, this being so, it was beyond the power of the legislature to authorize a further prosecution for the offense as to which his rights had been so violated. That such would be the effect of the section, if it was entitled to the construction claimed for it, may be conceded, but we are unable to so construe it. In our opinion the legislature has never taken action with reference to said section of the constitution. The only thing that it had in mind at the time of enacting the section relied upon was to effect the same change in the section amended as in others contained in the same act, and that was to bring them into harmony with the system of courts provided for in the constitution. The section amended was a legislative declaration as to the rights of the defendant, and was, of course, construed in the light of the other sections in the same chapter; and in its amendment the legislature only intended a like declaration, and that, when amended, it should be taken in connection with its qualifying section, the same as before. In the absence of any legislation to give force to the constitutional right to a speedy trial, there was no such deprivation set out in the petition as would authorize the courts to hold that such provision of the constitution had been violated.

It follows from what we have said that section 1374 is a subsisting law, and not in conflict with any constitutional provision, and that under the statement of the issues, as shown by the extract from relator's brief hereinbefore set out, the demurrer to the petition should have been sustained. The order granting the writ of prohibition will be reversed, and the cause remanded, with instructions to sustain the demurrer to the petition.

STILES and ANDERS, JJ., concur. DUN-BAR, C. J., dissents.

ALLEN et al. v. HIGGINS.

(Supreme Court of Washington. Aug. 3, 1894.)

EJECTMENT—PLAINTIFF'S TITLE—PLEADING.

Under Code Proc. § 532, providing that defendant in ejectment cannot show any estate in himself or another without specially pleading it, a general denial admits that he is a trespasser without title, and plaintiff, upon proof that the premises had been allotted him in partition, is entitled to recover, though defendant was not a party to the partition.

Appeal from superior court, Pierce county; Emmet N. Parker, Judge.

Ejectment by Seymore R. Allen and John R. Slavin against Jennie Higgins. There was judgment for plaintiffs, from which defendant appeals. Affirmed.

John P. Judson, for appellant. Ben. Sheeks and C. H. Dillon, for respondents.

DUNBAR, C. J. This is an action of ejectment. The complaint alleged that the plaintiffs were the owners, seised in fee, and entitled to the possession of the tract of land in dispute; that while they were such owners. and so seised and possessed, and entitled to the possession, defendant, without right, entered into and upon the same, thereby ousting and ejecting plaintiffs therefrom, and continued to withhold possession therefrom: alleged the damages, value of the rents, profits, etc. The answer was a general denial. The plaintiffs claimed title from two sources,one, as the successors of the interest of George Laviney; and the other, by conveyance from the Workingmen's Joint-Stock Association. Defendant did not offer any evidence. The question, therefore, is, did plaintiffs make a prima facie case? Appellant contends that a general denial puts in issue every

majerial allegation contained in the complaint, and that, under such denial, plaintiffs must prove every fact essential to recovery, and defendant may prove any facts which defeat plaintiffs' right to recover. Under the provisions of our Code of Procedure (section 532) in an ejectment proceeding, "the defendant shall not be allowed to give in evidence any estate in himself or another in the property, or any license or right to the possession thereof, unless the same be pleaded in his answer, and if so pleaded, the nature and duration of such estate or license or right to the possession shall be set forth with the certainty and particularity required in a complaint." Consequently, the testimony offered in this case was inadmissible under the pleadings in this case by defendant to defeat the rights of the plaintiffs. The defendant in this action, then, so far as the pleading or the proof is concerned, was a trespasser, without any right whatever; and, if plaintiffs had any legal right at all, it was a superior right. It had been decreed by the probate court that the premises described in the complaint escheated to the state. This decision of the probate court was set aside by the superior court of the state. Afterwards partition proceedings were instituted in the United States circuit court, the result of which, it seems to us, was to settle this case in favor of the respondents' contention. In that proceeding the respondent Allen, three of the original grantees, D. B. Hannah, administrator of the estate of George Laviney, deceased, and all persons claiming as purchasers from the fourteen grantors, were made parties; and, even if there was a break in the title of the grantors, all the parties in interest were before the United States court, and were bound by the decree which was made, whereby the property was partitioned between the tenants in common, and whereby the Laviney interest was set off and decreed to respondent Allen; and we think the contention of the respondents is correct that, even if all the parties were not before the court, still there were three of them, and the plaintiff Allen became, by said decree, a tenant in common with said grantees. If this be true, then a tenant in common is, as against every person but his cotenant, entitled to the possession of every part of the common land, and may recover the possession of all such land in an action of ejectment brought against a stranger to the common title. Freem. Coten. (2d Ed.) § 343; Touchard v. Crow, 20 Cal. 150; Williams v. Sutton, 43 Cal. 65. The proceeding against the state in which the title was decreed to be in the respondent Allen was a proceeding in rem, and the decree, being in rem, was conclusive and binding upon the defendant. Ryn v. Fergusson, 3 Wash. St. 356, 28 Pac. 910. The judgment will be affirmed.

ANDERS, SCOTT, HOYT, and STILES, IJ., concur.

THYGESEN et ux. v. NEUFELDER. (Supreme Court of Washington. Aug. 4, 1894.)
COMMUNITY PROPERTY—ASSIGNMENT BY HUSBAND
ALONE—VALIDITY.

A husband, in the absence of fraud, may assign all the community property for the benefit of community creditors without the wife joining in the deed, though a statute provides that no conveyance or incumbrance of the community real estate shall be valid unless the husband and wife join in the making thereof, as such assignment is only a surrender of the property into the custody of the court, to be applied as the law requires.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by Christian Thygesen and wife against E. C. Neufelder. There was a judgment for petitioners, and defendant appeals. Reversed.

Strudwick & Peters and Dorr. Hadley & Hadley, for appellant. Bruce, Brown & Cleveland, for respondents.

HOYT, J. Christian Thygesen made a deed of assignment under the provisions of the insolvency act of March 6, 1890. The assignee named therein having failed to qualify, the appellant was, in pursuance of the provisions of the statute, appointed assignee, and qualified and entered upon the discharge of his duties as such. As a part of the assets of the estate, he collected certain moneys due upon a lease which, before the execution of the deed of assignment, had been made by said Christian Thygesen to one Brown and one Carter. Thereafter said Christian Thygesen and Karen M. Thygesen, his wife, filed their petition in the superior court in the assignment proceeding, and prayed that the assignee should be required to account for and pay over to them the money so collected. The superior court made an order granting the prayer of the petition, from which this appeal has been prosecuted.

Appellant relies upon several propositions as furnishing reasons for the reversal of the order, the first and most important one being that the deed of the insolvent debtor, although his wife did not join in the execution thereof, was effectual to convey to his assignee in trust, pursuant to the act above cited, the community real estate for the payment of the community debts. If this contention of the appellant is sustained, the result will be a reversal of the order; for it is conceded that the real estate for the use of which the rent was paid was community property, and it is also conceded that the debts which have been proved in the insolvency proceeding were those of the community. If the deed of assignment executed by the husband alone is to be construed as a conveyance of the property therein described to the assignee named therein, for the pur-

¹ Rehearing pending.



pose of having it applied to the payment of 1 his debts, it is clear that it cannot have force so far as the community property is concerned. In other words, if the assignment therein made is to be treated simply as a conveyance at common law, and the provisions of the statute applied thereto in aid of the common-law assignment thereby created, the property of the community could not be conveyed there-The effect of deeds of assignment under this statute has been already determined by this court. In Bank v. Van Wagenen. 2 Wash. St. 172, 26 Pac. 253, we held that the former law upon the subject was one providing for the application of all the insolvent's estate to the payment of his debts, and that, when once set in motion by the action of the debtor, it passed to the assignee all of his property, whether set out in the schedules or not; and in Mansfield v. Bank, 5 Wash, 665, 32 Pac. 789, 999, we held that the law under consideration had taken the place of the former one, and that proceedings thereunder were for a like purpose, and that the right to all of the property of the debtor passed to the assignee or to the court in which the proceedings were instituted, for the benefit of the creditors, regardless of the question as to whether or not all of such property was set out in the deed. It is therefore unnecessary for us to further consider the question as to the nature of the proceeding under the insolvency act in question. It is now the settled law of the state that it is but one of the means by which an insolvent debtor may surrender to the court all of his property, for the purpose of having it applied to the payment of his debts. This being so, the important question is presented for our decision as to whether or not the husband can alone put in motion the machinery of the act for the benefit of the community, and for the purpose of paying its debts.

In the case of Improvement Co. v. Sagmeister, 4 Wash. 710, 30 Pac. 1058, we held that a judgment against the husband for a liability incurred in the prosecution of his ordinary business was prima facie one which would bind the community, and that community property might be sold in satisfaction thereof. See, also, Calhoun v. Leary, 6 Wash. 17, 32 Pac. 1070; Abbott v. Wetherby, 6 Wash. 507, 33 Pac. 1070. From what was said in these cases, it appears that the only question which was open for investigation by the wife was as to the character of the indebtedness. Though it was prima facie that of the community, she could, before or after judgment, overcome the presumption by showing affirmatively that it was not the debt of the community; and this was all she could do to protect the community property. If she could not show that the debt was not a community one, she could in no manner resist the enforcement of the process of the court against the community property, in satisfaction of the judgment rendered thereon; from which it will follow that, in a case like the one at bar, each of the several creditors could have prosecuted his claim to judgment against the husband alone, and had satisfaction thereof by levy and sale of the community property. Not only would the creditors have had this right, but the husband, for the purpose of saving expense, could have gone into court, and confessed judgment upon each of the claims, with the same effect. The only difference between a judgment by confession and one in a regularly prosecuted action would have been as to the question of good faith on the part of the husband and the creditor; and, it having been established, such judgment could be enforced against the community property the same as any other. It follows that the interest of the wife in the community property is contingent upon the state of the affairs of the community as conducted by the husband. This being so, and it being within the power of the creditors, without any act on the part of the wife, either negative or affirmative, to subject the property of the community to the debts incurred by the husband in the prosecution of its business, we see no reason why he should not be allowed to save the expense incident to the prosecution of the several claims of the creditors, and at the same time do justice between them, by voluntarily placing all of the property of the community in the custody of the court for the benefit of such creditors. Of course, his action in this behalf would be open to attack by the wife, if not in good faith; and it would also always be open to ber to see that the community property was not applied to the payment of other than community debts; and, with these rights reserved to her. it would seem that her interests and those of the community and of the public would be best subserved by the right to thus apply the community property to the payment of these debts being recognized in the husband.

But it is contended on the part of the respondents that to give to the deed of the husband alone any force whatever is in violation of our statute, which provides that no conveyance or incumbrance of the community real estate shall be valid unless the husband and wife join in the making thereof. If this deed comes within the inhibitions of this statute, it is undoubtedly void; but, in our opinion, it does not. As above suggested, we think that it is not a deed or an incumbrance of the property, in the ordinary sense. On the contrary, it is but a surrender of the same into the custody of the court, for the purpose of having it applied as the law requires it to be; and, if there is any surplus remaining, it would be returned to the community. The paper executed by the husband should therefore be considered, not as a conveyance, but as one of the methods by which the property may be subjected to the community debts; and, it being in the power of the husband to contract such debts in the

prosecution of the business of the community, it is within his power to set on foot the machinery of the law by which its property may be applied to their payment. The title to the community real estate passed to the appellant as assignee in the insolvency proceeding, and he rightfully collected the rent as a part of the assets of the estate. The order will be reversed, and the cause remanded, with instructions to dismiss the petition of the respondents.

DUNBAR, C. J., and STILES and ANDERS, JJ., concur.

(9 Wash. 484)

TURNER et ux. v. BELLINGHAM BAY LUMBER & MANUF'G CO. et al.

(Supreme Court of Washington. Aug. 6, 1894.)

MECHANIC'S LIEN—ENFORCEMENT OF DECREE—
PARTIES—INJUNCTION.

Sale under a judgment foreclosing a mechanic's lien against community property will not be enjoined on the ground that the wife was not a party to the suit. Hoyt, J., dissenting.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by E. A. Turner and wife against the Bellingham Bay Lumber & Manfacturing Company and others to enjoin a sale under a judgment foreclosing a mechanic's lien. There was a judgment for defendants, from which plaintiffs appeal. Affirmed.

Fairchild & Rawson, for appellants. Dorr, Hadley & Hadley, for respondents.

STILES, J. In a suit to foreclose a lien for materials furnished for the building of a house, the principal respondent in this action made the appellant E. A. Turner a party defendant, but did not make his wife a party. The lien notice and the complaint alleged E. A. Turner to be the owner of the land against which the lien was claimed. The answer admitted that Turner was the owner of an "interest" in the land, but denied that he was the "owner" of it. The case was tried by a jury, which found specially that he was the Whether it was suggested at the trial that he was a married man or not does not appear. The lien was foreclosed, and the property ordered sold; and now come husband and wife, and in this action seek to have the sale enjoined, upon the sole ground that the wife was not made a party defendant. The land was clearly made to appear to have been acquired by the husband, after marriage, by purchase. Nothing appeared in the lien notice to show notice of the marriage relation of the Turners, as in Sagmeister v. Foss, 4 Wash. 320, 30 Pac. 80, 744; and though one of the defendants, Whitney, alleged the marriage, as was done in Manufacturing Co. v. Miller, 3 Wash. St. 480, 28 Pac. 1035, no issue of that kind seems to have been submitted to the jury, unless it may be

supposed to have been involved in the special interrogatory, to which it was answered that E. A. Turner was the owner. There is no question of the wife's estoppel in this case, since the evidence shows that she was at all times within the jurisdiction, and that when the foreclosure action was commenced she was actually living in the house built with respondents' materials. The sole question is. does the complaint state facts which should cause the decree to be held void? The wife, under the decisions of this court, was a necessary party to the foreclosure proceeding; and, unless she was made a defendant, no judgment could be entered by the court, upon which a sale could be made that would bind a purchaser to take the property. Our practice act requires that the wife, in such a case, be made a defendant; and the general practice of courts is, and always has been, wherever proceedings were taken under which the title of real estate would be changed as a result thereof, to require all parties whom the record showed were interested in the subject-matter of the action to be brought in, either as plaintiffs or defendants, in order that a complete disposition of the whole matter might be maintained, and a perfect title passed to the purchaser. But it has never been held that an action to foreclose a lien of this kind, where some necessary party was either accidentally or purposely omitted, was void, nor have we any precedent cited to us for a holding that the execution of a decree against such parties as were before the court ought to be enjoined. The reason for this is that the parties not brought in are in no manner bound by the judgment, and their rights cannot be interfered with through its operation. Jones, Mortg. §§ 1394, 1395; Wiltsie, Forec. Mortg. ## 116, 117; Phil. Mech. Liens, # 895.

It is not necessary for us to enter upon a discussion of what might be the result if the land involved in this suit should be sold under a decree against the husband alone. We shall not presume that any such thing will be done, now it has been fully disclosed that a necessary party has been omitted from the foreclosure proceeding.

So far as appellants in this action are concerned, it was not necessary for them to resort to this action to preserve whatever rights they may have outside of the decree; and, if they anticipate that the execution of the decree without Mrs. Turner's being a party to it will injuriously affect their interests, all that they need do is to apply to the court which made the decree to set it aside, or to suspend it, and let her in to defend the action upon its merits. On the other hand, it is not to be presumed that the judgment creditor will attempt to proceed with a sale under the decree, now that the existence of Mrs. Turner is disclosed, and thereby reap the barren results of a sale which would be binding, at the most, upon only one of two equally necessary parties defendant, but that it will itself voluntarily open the judgment, make Mrs. Turner a party defendant, and proceed with the cause to a point where it can obtain a decree under which a perfect title can be made in case of sale. Judgment affirmed.

DUNBAR, C. J., and ANDERS, J., concur.

HOYT, J. (dissenting). As it is conceded that no title would pass by a sale under the decree, I can see no good reason why such sale should not be enjoined.

MARX et al. v. PARKI 3 et al.4

(Supreme Court of Washington. Aug. 6, 1894.) GARNISHMENT-CITY FUNDS IN HANDS OF OFFI-CER-INTERVENTION.

1. City funds deposited in a bank by the city marshal to the credit of the city are not subject to garnishment on a personal judgment against such marshal.

2. An officer intrusted with public funds, and required to give a bond for the proper disposition thereof, is not a debtor with title to the funds, but is a bailee, subject by statute to a strict accountability.

3. It was error for the court of its own motion to require the city owning such funds

to appear as intervener.

Appeal from superior court, Whatcom county; John R. Winn, Judge.

Action by Daniel Marx and E. C. Jorgenson, copartners, against W. S. Parker, city marshal, and the First National Bank of Fairhaven, garnishee, to subject deposits of city funds to the payment of a judgment against W. S. Parker. Judgment for plaintiffs, and defendants appeal. Reversed.

Albert Sherman, City Atty., and Kerr & McCord, for appellants. Alexander & Alexander, for respondents.

STILES, J. Marx & Jorgenson, having obtained a judgment for money against W. S. Parker, summoned the First National Bank of Fairhaven as a garnishee. The bank answered that it had an account with Parker as a depositor, wherein he was credited with \$845.14; but it alleged that the money deposited was money of the city of Fairhaven, which Parker, as marshal of that city, had collected in his official capacity, and this fact, at the hearing, it established to a moral certainty. The account was kept in the individual name of Parker, but it was understood that none but city money would be deposited in that account, and that none but checks in favor of the city treasurer would be drawn against it. Still, it was in no sense a special deposit, but the money was used by the bank for its own purposes, with the understanding that it would be required at the expiration of each month, when the statute required the marshal to settle with the treasurer. Gen. St. § 655.

It was error for the court, of its own mo-

tion, to require the city of Fairhaven to ap-. pear as an intervener. It would have neither gained nor lost by the result of the proceeding. Horn v. Volcano, etc., Co., 13 Cal. 62. It was a proper case for an interpleader on the motion of the bank, under Code Proc. § 156, but no such motion was made. Therefore the city must go out of the case, in any event. The disposition of this case depends upon the settlement of two questions; (1) What were the rights of respondents as plaintiffs in the garnishment proceeding? (2) What relation did Parker, as marshal, bear to the city of Fairhaven touching the money collected by him and deposited with the bank?

1. It is a general rule in garnishment that the plaintiff can obtain no greater beneficial relief against the garnishee than the judgment debtor would be entitled to, and that if the debtor's recovery would be limited to a mere legal title, without beneficial interest or right of enjoyment in himself, the proceeding must fail. A judgment creditor cannot have his debt satisfied out of property held in trust for another, no matter how completely his debtor may have exercised apparent ownership over it, unless it was upon the faith of such ownership that the credit was given. Wade, Attachm. § 416; Morrill v. Raymond, 28 Kan. 415; Bank v. King, 57 Pa. St. 202. Therefore, if the deposit in the bank was, in equity, the property of the city, although it stood in Parker's name, respondents had no right to a judgment against the garnishee.

2. The respondents present several propositions, supported by authority, to the effect that a custodian of public funds, who is required by law to give a bond for the proper disposition of the moneys coming to his hands, is not a mere bailee, but is a debtor; and the argument is drawn therefrom that' the money which he receives is his, and can be applied to the payment of his debts. The general rule is conceded to be that an agent can under no circumstances so deal with his principal's property or money that the former cannot, as against him, follow and recover it, or its proceeds, whatever shape he may have caused it to take; and all persons into whose hands the principal's property or its proceeds may come, with notice of its character, are likewise responsible to him in a proper action. National Bank v. Insurance Co., 104 U. S. 54; Bank v. King, supra; Van Alen v. Bank, 52 N. Y. 1; Overseers of the Poor v. Bank of Virginia, 2 Grat. 544; Meadowcroft v. Agnew, 89 Ill. 472. Now, a collector or treasurer of a municipal corporation, without bond and without statutory obligations, would at common law be a mere bailee, and the rules governing bailments would apply to him the same as any other agent; but it is universal that such officers are required to give bonds, and that statutes govern their liability, and out of this fact have grown many cases which seem at first

¹ Rehearing pending.

glance to sustain the view that they are debtors, and not bailees, and that the money they receive is their own. In Inhabitants of Colerain v. Bell, 9 Metc. (Mass.) 499, it was said: "The specific money received by a collector, in the collection of taxes, is his money, and not that of the town." In Inhabitants of Haucock v. Hazzard, 12 Cush. 112, the court, speaking of a collector of taxes, said: "His obligation is not regulated by the law of bailments, and the cases cited to that effect are not applicable. He is a debtor, an accountant." In Egremont v. Benjamin, 125 Mass. 15, concerning a town treasurer, the expression was used: "He was not a bailee of the moneys received, but an accountant." Halbert v. State, 22 Ind. 125, declared it to be well established that a public officer required to give bond for the proper payment of moneys coming into his hands officially is not a mere bailee of the money. Rock v. Stinger, 36 Ind. 346, held that the technical legal title to money in the hands of a township trustee was in himself, and that a loan of such money did not constitute an illegal transaction: and so, in Shelton v. State, 53 Ind. 331, it was ruled that there could be no recovery against a county treasurer for interest received by him on deposits of county funds in a bank, because the money received by him became his own money. This case notes the absence of statutory provisions, which will be spoken of hereafter. Perley v. Muskegon County, 32 Mich. 131, contains an elaborate review of the subject in an action for money had and received against third persons alleged to have received and used money furnished by a county treasurer out of county moneys in his hands, and it was held that the officer was not a bailee merely, and that the action brought would not lie; yet the opinion strongly intimates that an action on the case or a bill in equity might be sustain-So far has the argument drawn from these cases been carried that in State v. Keim, 8 Neb. 63, it was held that the state could not recover money deposited by its treasurer in a bank, on the ground that it was a loan of money prohibited by statute, and not the result of a conspiracy to obtain public money; and in Bank v. Gandy, 11 Neb. 431, 9 N. W. 566, a judgment creditor of a county treasurer was awarded judgment against a bank, as garnishee, of funds deposited with it by the officer, as treasurer. The statute made it a crime for the treasurer to loan public money, and the bank was held to be estopped to set up the fact that it had assisted in the accomplishment of the forbidden act. A leading case on this subject is U.S. v. Prescott, 3 How. 578, where it was said in an action on the bond of a receiver of public moneys: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant rises out of his official bond and principles which are founded upon public policy." The case last cited was followed

in U. S. v. Morgan, 11 How. 154, and U. S. v. Dashiel, 4 Wall. 182; but U. S. v. Thomas. 15 Wall. 337, cleared the atmosphere surrounding the point in discussion to a very great extent. The decision in that case, reviewing the former federal cases, held that a collector of the government was a bailee, but that the policy of the acts of congress had exacted from him a more strict accountability than the common law imposed upon the ordinary bailee. The opinion refers to. acts of congress restricting the authority of depositaries of public moneys, including prohibition against depositing in banks, and declaring certain acts to constitute a crime. It finds the rule to be nearly absolute that the officer is responsible for government money, but it proceeds: "Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public money except as directed. would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility." It seems to us that every one of the earlier cases cited, where the expression was used that such and such an officer was not a bailee, or a mere bailee, or was a debtor, must be regarded from the standpoint of the court and the particular case. They were, one and all, cases where suit had been brought upon the bond of the officer, and he was attempting to excuse his default because he had lost the money by robbery, or from some other cause over which he claimed to have had no control. But in every such case it was held that his liability was absolute, and the true reason, under U.S. v. Thomas, supra, must be, not that he was any the less a bailee, but that the statute imposed upon him a measure of duty larger than that found in the common law. If the courts of the state adhered to the view, broadly stated in 36 Ind., that the money in the hands of a county treasurer is his own money, how is it that the sole case which is cited that such money can be applied to the payment of his individual debts is found in Nebraska? Why do we not see creditors of such officers sending the sheriff into the very safe of the county treasurer, and taking therefrom the money which belongs to the treasurer upon execution against him? Why are no army paymasters stopped on the road, and required. by supplemental proceedings, to pay their debts out of the money in their hands for the payment of troops? No lawyer would think of such a proceeding for one moment, because the money in their hands belongs to the public, and not to themselves; and, if the money in the hands of the officer is thus exempt, what can there be in his depositing it in a bank, or loaning it to an individual, which changes his ownership of it or of the debt created by his deposit or loan? Any principal whose agent converts or deposits or

loans his money can continue to look to the agent, and compel repayment by him as a debtor; but he is not bound to do so when the person receiving it has knowledge of the relations of the principal and agent. Nor is there anything in the fact that states or municipal corporations require bonds, which increase the certainty that their agents will faithfully account, which should deprive them of the common-law right of private principals in similar transactions.

Again, we have, in this state, laws which are fully equivalent to the acts of congress referred to as restricting the authority of federal depositaries, with the exception that deposits in banks are not expressly forbidden; for section 57 of the Penal Code makes it a felony for any officer to use any portion of the public money intrusted to him in any manner or for any purpose not authorized by law, which is the same as a prohibition against using it except as authorized by law. Under the Nebraska case cited, it was held that a deposit of such funds in a bank would be a breach of the bond of the officer and a violation of a penal statute similar to ours. This may be correct, but we do not believe it to be logical to say that for that reason the equitable owner of the fund should not have it, or that the debtor bank should be estopped to defend in garnishment by disclosing such owner. The liability of the bank to the officer is a chose in action, which, although the naked legal title to it is in him, really belongs to his principal. Some complications may grow out of this doctrine, as they certainly must out of any other; but it is not a new doctrine at all, and it will operate as well in practice where a municipal corporation is the principal as where he is a private individual or corporation. Mechem, Pub. Off. § 922, and cases cited. Although garnishment is a purely statutory proceeding, it is always administered upon equitable principles; and, upon the answer of the bank and the proofs, we hold it not to be liable for respondents' judgment against Parker.

Judgment reversed, and cause remanded, with instructions to dismiss the garnishment proceeding. The First National Bank of Fairhaven will recover costs against respondents, but not against the city of Fairhaven. The city of Fairhaven will not recover costs.

DUNBAR, C. J., and ANDERS, HOYT, and SCOTT, JJ., concur.

OLSON v. VEAZIE.

(Supreme Court of Washington. Aug. 6, 1894.)

PARTMERSHIP—JUDGMENT AGAINST PARTMERS—
INTEREST.

1. Where persons are sued as individuals composing a firm, and as joint debtors, and are called by their individual names in the plead-

ings and papers and in the caption of the judgment entry, the entry itself, "that the plaintiff herein recover of the defendants [name of firm] the sum," etc., shows a judgment against each individual member of the firm.

2. It is no objection to a separate action on a joint judgment, against one of the debtors thereon, that plaintiff, having recovered such judgment on a joint and several claim, has exhausted his right to bring a separate suit.

3. In a suit on a foreign judgment, though there be no proof that judgments bear interest in the foreign jurisdiction, interest at the legal rate is properly allowed as damages for the detention of money due.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by John Olson against William H. Venzie on a judgment. Judgment for plaintiff. Defendant appeals. Affirmed.

Stevens, Seymour & Sharpstein, for appellant. M. L. Clifford, for respondent.

ANDERS, J. On October 13, 1884, the respondent, John Olson, commenced an action in the district court of the first judicial district in and for the county of Washington, in the state of Minnesota, against the appellant, Orange Walker, and Samuel Judd, as partners doing business as Walker, Judd & Veazie, to recover the amount due on three promissory notes made and delivered to appellant by said firm. On January 8, 1886, the following judgment was entered in that action: "It is hereby adjudged that the plaintiff herein recover of the defendants, Walker, Judd, and Veazie, the sum of three thousand three hundred fifty-five & 36/100 dollars damages," etc. This judgment was never paid, and subsequent to its rendition the appellant, one of the defendants therein, removed to Pierce county, in this state, where this action was instituted against him to recover the amount thereof, with interest. The case was tried by a jury, and there was a verdict and judgment in favor of the plaintiff for the sum of \$5,038.30, and the defendant appealed.

The first error assigned by the appellant as a ground for reversal of the judgment appealed from is that the judgment of the Minnesota court, upon which this action was based, is void, for the reason that it was rendered against a firm, as an entity, and, so far as the record discloses, in the absence of any statute of that state authorizing such a judgment. It is true, as claimed by appellant, that, "in the absence of a statute, partners can neither sue nor be sued in the partnership name." 2 Bates, Partn. §§ 1018, 1049, 1059. But in this instance the action was not waged against the defendants in the firm name. They were sued as individuals composing a partnership, and as joint debtors. and were designated by their individual names in the pleadings and papers in the case, even including the caption to the judgment entry itself. Construing this judgment by the entire record, we think there can be no doubt that on its face it is a valid judgment against all of the individuals composing the firm of Walker, Judd & Veazle. In his valuable treatise on the Law of Judgments (section 50a), Mr. Freeman says: "The name of the firm may be given, instead of the names of its individual members, or the parties may be designated generally as the plaintiffs or the defendants, provided a reference to the caption, or to the pleadings, process, and proceedings in the action, makes certain the names of the parties thus designated." See, also 1 Black, Judgm. § 116; Bolling v. Spiller (Ala.) 11 South. 300; Hendry v. Crandall (Ind. Sup.) 30 N. E. 789.

It is also urged on behalf of the appellant that if it be true that the action in the Minnesota court was an action against all the members of the firm of Walker, Judd & Venzie, and that the court, in that action, obtained jurisdiction of each of them, still this action cannot be maintained against this appellant, for the reason that the respondent, having recovered a joint judgment upon a joint and several claim, cannot now sue the parties separately. In other words, it is insisted that the original cause of action is merged in the judgment, and, having obtained a joint judgment, the respondent thereby exhausted his election, and cannot now recover in a separate action. But, be that as it may, it is evident that the question of merger is not a material one in this case, for this action is founded upon the judgment of the Minnesota court, and not upon the original cause of action set forth in the complaint filed in that court by the respondent.

Whether the appellant appeared, or was served with process, in the action which culminated in a judgment against him in the court in Minnesota, are questions upon which there is a marked conflict in the testimony; and the verdict of the jury will not, therefore, be disturbed on the ground that it is contrary to the evidence. In making up the amount of their verdict, the jury allowed interest at the legal rate upon the judgment sued on. There was no proof of a statute of Minnesota authorizing the collection of interest on judgments rendered in that state, and the judgment itself, by its terms, did not purport to bear interest; and the appellant therefore contends that the verdict is excessive, and ought to be set aside, and a new trial granted. This contention is supported by the supreme court of California (Cavender v. Guild, 4 Cal. 253), and perhaps some others; but in our opinion the better reason, and the greater weight of authority, are in favor of a contrary doctrine. In cases like this, interest should be allowed from considerations of justice, as damages for the detention of money due, and such is the well-established rule in several of the states. Barringer v. King, 5 Gray, 9-12; Hopkins v. Shepard, 129 Mass. 600; Sayre v. Austin, 3 Wend. 496; Mahurin v. Bickford, 6 N. H. 567; Stuart v. Hurt (Va.) 13 S. E. 438; Shickle v. Watts, 94 Mo. 410, 7 S. W. 274; Wetherill v. Stillman, 65 Pa. St. 105; Ritchie v. Carpenter, 2 Wash. St.

512, 28 Pac. 380. We perceive no error in the record, and the judgment is therefore affirmed.

DUNBAR, C. J., and STILES, HOYT, and SCOTT, JJ., concur.

CURRY et al. v. CATLIN et al. (Supreme Court of Washington. Aug. 7, 1804.)
HUSBAND AND WIFE—COMMUNITY PROPERTY—LIABILITY FOR DEBTS—PLEADING.

1. The levy of an execution on lands standing in the name of the wife, under a judgment against the husband for a community debt, will not be enjoined, though a small part of the purchase price has been paid with the wife's money, where the land was contracted for by the husband, and the contract assigned to the wife shortly before a deed was procured, when defendant was pressing for payment of his debt, and there was no understanding that the land should be the wife's until after such part payment was made.

2. A complaint, in an action to have lands conveyed to a wife after marriage declared community property, and subjected to a judgment against the husband for community debts, is demurrable, where it fails to allege that the wife was claiming the land as her separate property.

Scott, J., dissenting.

Appeal from superior court, King county; J. W. Langley, Judge.

Action by Lizzle M. Curry and John Curry against Jerome Catlin and J. H. Woolery to enjoin the levy of an execution, consolidated with an action by Jerome Catlin against Lizzle M. Curry and John Curry in aid of an execution. There was a judgment for Jerome Catlin in both actions, from which Lizzle M. Curry and John Curry appeal. Judgment affirmed.

Thompson, Edsen & Humphries and Ronald & Piles, for appellants. Allen & Powell, for respondents.

STILES, J. The record in this case seems to us to disclose very clearly that the claim of the appellant Lizzie M. Curry, that the land which was sought to be subjected to respondent Catlin's judgment was her separate property, was an afterthought, probably suggested as a means of evading the payment of the judgment mentioned. John Curry, while he was a single man, in 1886, procured of the Northern Pacific Railroad Company a personal contract for the conveyance of certain lands in King county, in consideration of the payment of \$689, \$68.90 of which was cash, and the remainder in nine annual installments. In March, 1887, appellants were married, and at that time Mrs. Curry had about \$425 in money. She allowed her husband to take her money, and use part of it,perhaps as much as \$150,-in the payment of the installments of purchase money due upon the lands mentioned, and upon installments due upon a similar contract for other lands taken by him from the Northern Pacific Railroad Company in 1887, after the marriage. The remainder of her money was probably expended in paying for clearing and other permanent improvements upon the land, and in the living expenses of the husband and wife. Both of the land contracts remained in the hands of the husband, and were unassigned by him, until April, 1892. At that time, and within a few days of the final payment of the full purchase price of all the contracts, they were formally assigned by the husband to the wife; and a deed for the land was procured from the railroad company, which named the wife as the grantee. In the meantime some installments of the purchase money had been paid with money borrowed by the husband from the respondent and others, and out of the proceeds of crops grown by the husband upon this land, but the bulk of it was paid by means of a mortgage executed by the husband and wife to an investment company. As was said before, the assignments of the contracts were made just before the deed was procured from the railroad company, and at a time when respondents were pressing for the payment of the demand out of which grew the judgment mentioned. The only evidence which went to show any understanding between the husband and wife that the land was to be hers was furnished by their own testimony, and related mainly to conversations had between them after the money had been in part, at least, received by the husband, and applied to his own use. Such evidence as there was on this point was vague and unsatisfactory, and was contradicted in material points by the sworn statements of the parties in other litigations which they had had. The court below found against the appellants upon this evidence, and we should not, even were it much stronger in their favor, feel like disturbing that finding.

Catlin brought a suit against both of the appellants, in which he alleged a judgment, that it was based upon a community debt, and that the record title of the land sought to be charged was in the wife, but that it was acquired by her after her marriage; and the prayer of the complaint was that the property be declared community property, that the judgment be declared a judgment against the community, and that the property be subjected to the lien of the judgment. We do not think this complaint stated a cause of action. Where real property is acquired by purchase, by either husband or wife, after their marriage, the statute declares that it shall be community property. Where such real estate is conveyed to either husband or wife after their marriage, by deed, the presumption is that it is community property. Yesler v. Hochstettler, 4 Wash, 349, 30 Pac, 398. Being community property, it is subject to the payment of community debts, and the judgment against the husband is prima facie a community debt. Calhoun v. Leary, 6 Wash. 17, 32 Pac. 1070. There was no obstacle, therefore, in the way of levying an execution upon and selling this real estate to satisfy the judgment. It was nowhere alleged in Catlin's complaint that Mrs. Curry was claiming that the land was her separate property, or was placing any obstacle in the way of a sale of it, so that there was no occasion for bringing the action. In fact, the seventh paragraph of the complaint shows that the sheriff had been directed to levy his execution upon the land in question. In the consideration of this case, therefore, we leave the case of Catlin v. Curry out of it. But, subsequent to the commencement of Catlin's suit, appellants brought a suit alleging that the respondent had levied his execution upon the land, and that the sheriff was about to sell the same, and showing facts tending to establish that the appellant Lizzie M. Curry was the owner of the land as her separate property. The two actions were consolidated, and tried together, and it is upon this second action that we think the judgment in this case should rest; and the costs of the case should be adjusted so that Catlin may be taxed with the costs of his action, and may recover in the action brought against him. This disposition of the case obviates one point made by the appellants, viz. that the judgment was wrong because it found the property community property, whereas the property purchased under the first contract was not community property, but was either the separate property of the husband or separate property of the wife. We have seen that it was not the separate property of the wife. If, by reason of the fact that the contract with the railroad company was made before the marriage, it was the separate property of the husband, the result would be the same. since it would be liable for the judgment against him. Judgment affirmed.

DUNBAR, C. J., and ANDERS, J., concur. SCOTT, J., dissents.

OLSON v. McMURRAY CEDAR LUMBER CO.

(Supreme Court of Washington. Sept. 4, 1894.)
INJURY TO EMPLOY — CONTRIBUTORY NEGLIGENCE.

Plaintiff was employed in defendant's mill to remove lumber to the runway of a saw. In connection with the runway there was a cog wheel, which crushed plaintiff's finger on the third day of his employment. The wheel was unprotected, and the view of it was somewhat obstructed from where plaintiff usually worked, but, if he had looked, he could have seen it at any time when the mill was clear of lumber. Held, that plaintiff could not recover.

Appeal from superior court, King county; Richard Osborn, Judge.

Action by Robert Olson against McMurray Cedar Lumber Company to recover damages for personal injuries. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Jas. B. Howe, for appellant. James Hamilton Lewis and L. Hulsether, for respondent.

DUNBAR, C. J. The respondent, plaintiff in this case, was an employe in the mill of the appellant. He lost his right thumb by having it crushed in appellant's sawmill. He obtained a verdict for \$1,000 damages, from which judgment an appeal has been taken to this court. At the close of respondent's testimony, motion was made for a nonsuit, which was overruled. Under the conditions of respondent's employment, it was his duty to remove slabs, lumber, and edgings from the rollers on which such material passed from the edging machine sliding along the skids to the slab saw, and from thence out of the mill. Respondent had been employed around the mill as a common hand for about three months, but the accident which caused the injuries happened on the third day of his employment within the mill. The cog which crushed the finger of respondent was uncovered. His theory is that this was negligence on the part of the appellant, and that, in any event, respondent should have been instructed as to his duties around the machinery and the danger of the same. Respondent, in picking up small pieces of lumber which had fallen over the skid and in front of the cog which was in the live roller, did not notice the cog, and his hand was thereby brought in contact with it, and the injury induced. He claims he did not know that the cog was there, or could not see it, by reason of its being covered by this refuse lumber; and that he could not see it from his original position, by reason of his view being obstructed by a skid which was between him and the live roller or cog where he was injured.

It seems to us from all the testimony in this case, and from the testimony of the respondent alone, that he was guilty of gross and inexcusable negligence. He testifies that the mill was cleaned out once a day, and that the refuse lumber or odds and ends which fell upon this roller were not there in the morning, and especially were not there Monday morning, when he went to work. If this be true, then, if he had exercised the sense of sight which every man is called upon to exercise under such circumstances, he would have seen where this cog was located; and it is going too far to say that his vision was obstructed by a skid which was only four inches broad and eight inches deep, so that he could not see a cog which was ten inches wide. In answer to the question, "Do you mean that skid covered the cog wheel, so that you could not see it?" respondent said, "If I noticed, I could have seen it; but I didn't do it." Men, when they are working around dangerous machinery, must no-

tice. Their faculties and senses are given them for the purpose of self-preservation, and they must exercise them to a reasonable extent. The testimony of this man shows that he knew where all the live rollers were, and that in every live roller there was a cog, and that he knew that, if his hand came in contact with the cogs, he would be hurt; and it seems to us that the very slightest prudence on his part would have saved him from the results of this accident. It makes no particular difference whether it was one of the rollers that was three feet from the ground or the roller, as claimed by the respondent, that was ten inches from the ground. Three days' observation of this machinery around which this man was working would naturally make him acquainted with the location of all the cogs; and if he did not exercise discretion or thought or care enough, and pay sufficient attention to their location to know where they were, he cannot complain if by reason of such heedlessness he is damaged. The dangers in this instance were apparent, and the law is well settled that an employé, when he assumes his employment, takes the risk of all apparent danger. This was the doctrine announced by this court in Week v. Fremont Mill Co., 8 Wash. St. 629, 29 Pac. 215, and Jennings v. Motor Co., 7 Wash. 275, 34 Pac. 937, and is the doctrine of common justice and right between employer and employe, and the doctrine of common sense. We think the plaintiff's own testimony in this case shows so clearly a disregard of the apparent dangers of his employment that he should not be allowed to recover damages for the injuries suffered by him. The judgment will therefore be reversed, and the cause remanded, with instructions to grant the motion for so nonsuit asked by the appellant.

ANDERS, HOYT, and SCOTT, JJ., concur.

(9 Wash. 524)

TRUMBULL v. JACKMAN et al.
(Supreme Court of Washington. Sept. 5, 1894.)
ACTION AGAINST SEVERAL DEFENDANTS—PLEADING
AND PROOF—SEVERAL LIABILITY.

1. Where several defendants are jointly sued under the Code for attorney's fees, they may show under a general denial that the services rendered each of them were rendered under several contracts, so as not to warrant a joint judgment against them for the full amount of the services.

2. An order granting a new trial, for insufficiency of the evidence, will be reversed only in case of abuse of discretion.

Appeal from superior court, Jefferson county; Richard Osborn, Judge.

Action by John Trumbull against Thomas Jackman and others. There was a verdict for plaintiff, and from an order granting a new trial plaintiff appeals. Affirmed.

A. R. Coleman and Trumbull & Trumbull, for appellant. Morris B. Sachs and George II. Jones, for respondents.

HOYT, J. This is an appeal from an order granting a new trial. Numerous questions have been presented for the consideration of the court, and elaborately argued by counsel. We shall find it necessary to refer to but few of them. It is conceded by the appellant that an order granting a new trial will not be set aside by the appellate court unless from the record it appears that there was an abuse of discretion by the superior court in making it; and for the reason that such an order does not deprive the one against whom it is made from having the issues tried as prescribed by law, and thereby his rights protected, while the result of its reversal is to finally determine the rights of the parties to the action, it is the duty of the appellate court to refuse to disturb such an order, unless the abuse of discretion is made clearly to appear. If there is any theory upon which the action of the lower court can be reasonably sustained, the order should be affirmed.

This action was brought to recover from the defendants jointly a fee for legal services growing out of the defense of an action brought against them in the circuit court for the district of Washington. The answer of some of the defendants was a general denial of the material facts stated in the complaint. The other one admitted that he had employed the plaintiff to represent him in the action referred to; that the services rendered in pursuance of such employment were of a certain value; and alleged that he had fully paid the plaintiff therefor. The trial court allowed proof to be introduced tending to show that the employment of the plaintiff was not the joint act of the several defendants; that, instead thereof, he had been separately employed by each of said defendants. If this proof was admissible, the order must be affirmed, as it was of such a nature that it furnished the trial court such grounds for making the order that we could find no abuse of discretion on his part in doing so. Appellant insists that, in order to authorize the introduction of this proof, it was necessary that the answers should deny the making of the joint contract, and set up affirmatively the several contracts. That the adjudicated cases in the code states establish the doctrine that, in a suit against several defendants jointly, proof may be introduced and an action maintained against a part only of such defendants, is beyond question. But this fact does not justify the contention of appellant. The only change brought about by the reformed practice shown by these adjudications is to make the rule which formerly applied only in equity applicable to all classes of cases. But the rule in equity did not allow a recovery against a party who had been jointly sued without showing a liability against him. If a suit were brought against several defendants, and the proofs developed the fact that only a part were liable, a judgment would be rendered against them, and in favor of the others. It was never the rule in equity that

a defendant jointly sued was required, not only to deny his joint liability, but to go further, and set up affirmatively a several liability, in order to authorize him to disprove the allegations which he had denied. In our opinion, the authorities do not establish the doctrine contended for by the appellant; at least it does not so satisfactorily appear therefrom that the doctrine is as contended for by him as to justify us in setting aside the rule to the contrary, established by the supreme court of this territory in the case of Iron Co. v. Worthington, reported in 2 Wash. T. 472, 7 Pac. 882, 886. In that case it was held that the denial of the making of the contract sued upon was not aided by setting up another. The case is not here presented of the effect of proof which tended to establish liability against one or more of the defendants, as there was no attempt to show the value of services rendered for any one of the several defendants. In cases like the one at bar a joint contract should only be found upon clear proof. It is greatly to the interest of the plaintiff to make out a joint contract, if possible, for, by so doing, he would be assured of being able to recover his fee for services rendered for all of the defendants, if any one of them was responsible, while, if several contracts only were established, he could recover his entire fee only in the event of each of the defendants being of such pecuniary ability that the judgment against him could be collected. For this reason, it may well be doubted whether or not the plaintiff, by his own testimony, established a joint liability against the defendants; and it is clear that from such testimony, and that upon the part of the defendants, such a state of the proofs was presented that it was no abuse on the part of the trial court to find that a joint contract had not been sufficiently established to warrant the verdict rendered thereon. The order appealed from will be affirmed.

DUNBAR, C. J., and ANDERS, J., concur.

RILEY *. SALT LAKE RAPID TRANSIT

(Supreme Court of Utah. July 27, 1894.)

ELECTRIC RAILROAD COMPANY — ACTION FOR DEATH OF CHILD—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—NEGLIGENCE OF PARENTS—WHAT CONSTITUTES—INSTRUCTION—EXCESSIVE DAMAGES.

1. In an action against an electric streetcar company for the death of plaintiff's minor son, evidence that the car was running somewhere between 11.96 miles and 17 miles per hour supports a finding that defendant was negligent in running the car at a greater rate than 12 miles per hour, to which it was limited by ordinance.

2. There was a conflict of evidence as to whether the gong on the car was sounded before crossing the street on which the boy was struck, and as to what occurred at the time he was struck, and before the car passed over

¹ Rehearing denied.

him. He was carried in front of the car or wheels some 50 feet, and there was evidence that the car running at full speed could be stopped in 35 feet; that, when the motorman first saw him, he was 25 feet in front of the car and that when the car transpol it had car, and that, when the car stopped, it had passed over his body. Held, that the supreme court could not say the jury should have found defendant not guilty of negligence.

3. There was evidence that the boy, was seven years old, was playing in the street behind a wagon; that he either came on the track from behind the wagon, or walked on the track from some point near the wagon; and that he was standing on the track some 65 feet in front of the car, where he might have feet in front of the car, where he might have been seen by the motorman, and where he might have seen the car if his attention had been called to it. *Hcld* not to show the boy guilty of contributory negligence.

4. It is not negligence per se for parents to permit a child seven years old to go on the street unettended.

street unattended.
5. The statute authorizing a verdict by less

than 12 men is valid.

6. The motorman testified for defendant that the car was going 11.96 miles per hour at the time of the accident; that he could not have stopped if it had been going less than 12 miles per hour; and that, when he first saw the boy, he was "letting go" of the wagon 20 or 25 feet in front of the car, and 6 or 8 feet to one side. Held, that it was not error to resmit him to testify on cross-examination. feet to one side. *Held*, that it was not error to permit him to testify, on cross-examination, that he thought, if his car had been 30 or 40 or 50 or 100 feet further back, behind the time that it was on, the boy would have gotten

that it was on, the boy would have gotten across the track.

7. The conductor of the car testified that he did not know how far in front of the car the boy was when discovered, but when he first saw him he was from 4 to 6 feet ahead of it, and that before he saw him the motorman called to the boy to "look out," or something to that effect. Held, that it was proper to permit him to state, on cross-examination, that he thought the car was from 10 to 15 feet from the boy when the motorman called to him.

ne thought the car was from 10 to 15 feet from the boy when the motorman called to him.

8. Where the testimony tended to show that the street was built up in the vicinity where the accident occurred, the assumption of the court, in its instructions, that the accident occurred in a thickly-settled portion of the city,

was not misleading.

9. In the absence of evidence to explain the excessive speed of the car at the time of the ac-cident, it was not error to charge that the run-ning of the car at a rate of speed forbidden by

ordinance was negligence per se.

10. A verdict for \$5,000 for the death of plaintiff's seven year old son is excessive to the amount of \$2,000.

Appeal from district court, third district; before Justice C. S. Zane.

Action by Julian Riley against the Salt Lake Rapid Transit Company to recover damages for the death of plaintiff's minor son, caused by defendant's negligence. From a judgment for \$5,000 entered on the verdict of a jury in favor of plaintiff, defendant appeals. Reversed unless plaintiff remits \$2,000 of the judgment.

Bennett, Marshall & Bradley, for appellant. George Sutherland, Brown & Henderson, and S. R. Thomas, for respondent.

SMITH, J. Respondent brought this action to recover damages for the death of his seven year old son, alleged to have been caused by the negligence of the appellant. The appeal is from a judgment in respondent's favor, and from the order overruling the motion for a new trial. The appellant is a corporation engaged in operating a line of street railway on different streets of Salt Lake City, and, among others, a line running south on State or First East street to Fourth South street, and then turning and running east and west on the last-named street. On the 14th day of June, one of appellant's cars operated by electricity ran down State street, made the turn to the east on Fourth South street, and proceeded one block east on said street, when, at or near the intersection of Fourth South street and Second East street, the car ran over the son of the respondent, and killed

The appellant complains that the evidence is insufficient to justify the verdict in several particulars, but generally it may be stated that the claim is that the evidence fails to show negligence on the part of the appellant,that it failed to show that the defendant was running its cars more than 12 miles an hour, and fails to show that the ordinary warning by ringing the gong was not given; and, second, it is claimed that the evidence is insufficient to support the verdict, for the reason that the boy killed was shown to be guilty of negligence contributing to the injury; and, third, that the evidence was insufficient to support the verdict, because it appeared from the evidence that the plaintiff and his agents were negligent in permitting the boy injured to run around in the street, unattended and uncared for.

We will first discuss these three assignments, before we begin to discuss the errors of law assigned. There was evidence tending to show that the car which was being operated by the defendant company, and which caused the injury, was, at the time of the injury, running at a rate of speed somewhere between 11.96 miles per hour and 17 miles per hour. The city ordinance permitted the car to be run not to exceed 12 miles per hour. This running in excess of this provision of the ordinance was the first matter of negligence alleged and complained of. There was certainly evidence tending to support the finding of the jury to the effect that the car was running at a greater rate of speed than that permitted by the ordinance. There was a conflict of evidence as to whether the gong upon the car was sounded before crossing Second East street, or at any time before the child was struck and killed. There was great conflict in the evidence as to just what occurred at the time the child was struck, and before the car passed over him. He was carried in front of the wheels, or in front of the car, and driven and knocked along the track, a distance of some 50 feet. There was also evidence that the car, running at full speed, could be stopped in about 35 feet. The evidence tended to show that, when the motorman first saw the boy, the boy was some 25 feet away from the car, and in front of it, and, when the car stopped, it had passed over

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his body entirely. With this evidence before them, we are not warranted in saying that the jury should have found that there was no negligence on the part of the railway company in the operation of its car. It certainly appears that the car was either running at an extraordinary rate of speed, and required a much greater space in which to stop it than usual, or else there was no effort made to stop it, as there should have been. It was purely a question of fact for the jury, and there was a substantial conflict in the evidence in regard to it. Under such circumstances, it was proper to submit the matter to the jury, and have them determine whether or not the defendant was guilty of negligence in the premises.

The next assignment of error is to the effect that the deceased child was guilty of negligence contributing to the injury, and that, therefore, no recovery can be had in this case. There was no dispute but that the child was only seven years old, was playing in the street, and was possibly holding onto the rear end of a wagon which was coming in an opposite direction to the car of the defendant, and on a road parallel to its track and by the side of it. Either the child was behind this wagon, and came upon the track from behind the wagon after he dropped off of it, or else walked onto the track from some point near this wagon as it was passing up the street. There is evidence tending to show that the child was standing upon the railway track some 65 feet ahead of the car, and in a position where he might have been seen by the motorman, and where he might have seen the car if his attention had been called to it. It is a well-established rule that children are not chargeable with the same degree of care in protecting themselves as grown people, and the child in this case was only bound to use such care as a child of his age, experience, and intelligence might reasonably be expected to use for his own protection. If this is the correct rule, there is no evidence in the case that the child was guilty of negligence at all. He was playing upon the street, as this child or any other had a right to do, and it seems was in such position that he might have been seen by the motorman. He was evidently not of sufficient age to understand his danger until the discovery of it would have, perhaps, frightened him to such an extent that he would have been unable to do anything for his own protection. There is no evidence as to whether the child was familiar with the car, or knew anything of the danger to himself resulting from his being on or near the track, and there is nothing in the record to show but what the child became confused, finding himself suddenly in the presence of the car running at a high rate of speed. The burden of showing contributory negligence is upon the defendant, unless the testimony of the plaintiff shows it. See Reddon v. Railway Co., 5 Utah, 344, 15 Pac. 262. For a complete synopsis of the law relative to the negligence of children under such circumstances, see 1 Shear. & R. Neg. § 73, and notes.

The next assignment upon the insufficiency of the evidence is that the plaintiff or his agents in charge of the child were negligent in allowing the child upon the street. The record is entirely and absolutely silent upon the subject of the care of those intrusted with this child. There is nothing showing, or tending to show, how the child came into the street, and it seems to us that it would be going a long way to hold that it was negligence per se for the parents of a child seven years old to allow him to go upon the public streets. There is nothing to show that they knew anything of his being on the street. The defendant, in operating its street-car line, should operate it in such a way as to protect the lives of children and other people, who have an equal right to the use of the street; and it is guilty of culpable negligence if it fails to exercise ordinary care for the protection of such children, when they themselves, or those in charge of them. have done nothing to unnecessarily expose them to danger.

The first error of law assigned raises the question again as to whether or not a verdict by less than 12 jurors can be received and is valid. We have frequently passed upon this question, and have upheld the statute authorizing such verdicts, and therefore we will not stop to discuss it again in this opinion.

The next error of law relates to the admission of testimony. The witness McGann, introduced on behalf of the defendant, had testified to the speed of the car at the point where the accident occurred, and testified that it was 11.96 miles per hour. On crossexamination he was asked this question: "If your car had been 30 or 40 or 50 feet, or 100 feet, back further west, behind the time that it was on, you are not prepared to say but what that boy would have got across the track, or would not have got up there on it?" To this question there was an objection by the defendant that it was irrelevant and immaterial. The court permitted it to be answered as a hypothetical question, in view of the previous testimony that had been introduced in the case, and the witness answered that "I think, if it had been that far back of where it was, that he would have gotten across." It is difficult to see how this testimony prejudiced the appellant. The witness had testified, in answer to a previous question, that he could not have stopped. if he had been running at less than 12 miles per hour, in time to have prevented the accident. He also had testified that when he first saw the boy he was just letting go of the wagon, and was 20 feet or so from the end of the car,-20 or 25 feet,-and was off

to one side 6 or 8 feet. He was then asked the question above quoted, and made the answer that, if the car had been that far back of where it was, the child would have gotten across. It may be admitted that the answer of the witness did not tend to prove negligence on the part of the defendant; but it must be borne in mind that it was a part of the cross-examination, and would seem to have been admissible for the purpose of distinguishing his prior testimony,-for the purpose of testing the truthfulness of his former statement that the accident would have occurred anyhow, even if the car had been running at a slower rate of speed after leaving State street. See 1 Thomp. Trials, § 408. It is undoubtedly true that the negligence complained of must be the proximate cause of the injury in order to entitle the party injured to recover. In other words, if excessive speed was the negligence complained of in this case, it must be shown that the speed was excessive at the point where the accident occurred, and that the accident was due to it. It is not sufficient to show that there had been an excess of speed at some other point, and that the car would have been in a different position at the time the child reached the track if it had been running at a legal rate of speed. In such case the negligence is too remote to entitle the party to recover. But it does not appear that this question upon cross-examination was offered for the purpose of proving prior negligence with a view to recover at all, nor did the answer tend to prove any such thing. It was offered for the purpose of showing that the statement of the witness that the car could not have been stopped, if it had been running at a legal rate of speed, in time to save the child, was not correct, and for this purpose we think it was admissible. In any event, it is not such an error as would warrant us, in view of the testimony in the case, in setting aside the verdict. The witness Burton was asked, on cross-examination, "How far, in your judgment, do you think the car was from the boy when he hallooed?" This was objected to as incompetent. The court overruled the objection, and permitted the witness to answer, to which an exception was taken. The witness had testified that he did not know how far ahead of the car the boy was when he was discovered, but when he first saw him he was from four to six feet ahead of the car; that before he saw him the motorman hallooed to the boy, "Look out!" or something to that effect. He was then asked the question complained of. We see no objection to this question. The witness was the conductor upon the car; knew about the speed that the car was running, and about the space it would pass over in a given period of time. He heard the motorman halloo, and, within a certain length of time after, he saw the child from four to six feet ahead of the car. Of course, he does not know whether the child had changed its position or not in the meantime. He did know approximately how far or how much the car had changed its position, and could give a reasonably accurate opinion as to the relative positions of the child and the car at the time the motorman shouted to him. Especially is this true in view of the fact that the space of time between the time the motorman shouted and the time when he saw the child was exceedingly slight, and the distance covered by the car, even, was not great. The witness answered that the child was probably from 10 to 15 feet from the car when the motorman shouted to him. showing that, although the car was running at not less than 11.96 miles per hour, it had only progressed from 6 to 9 feet during the time intervening between the shout and the time when he saw the child. We think that there was no error in admitting this testimony.

The only two remaining assignments of error that are discussed by the appellant relate to the instructions, and the first is that the court assumed that the place of the accident was in a thickly settled portion of the city, which the evidence did not show, and which was a question for the jury. It seems to us that this objection is exceedingly technical, in the light of the evidence. The testimony tended to show that the street was built up in the vicinity where the accident occurred. While there is no express statement by any veness that it is thickly settled, there are numerous statements as to the different buildings and dwellings situate on different sides of the street at the point where the accident occurred. We think that this assumption by the court that it was in a thickly-settled portion of the city, if it be treated as an assumption, could not have misled the jury.

The next instruction complained of is that the court instructed the jury that the running of the car at the rate of speed forbidden by the city ordinance was negligence per se. There was no attempt to explain or excuse the excessive speed of this car upon the day of the accident and at the time of the accident. We think the true rule is as stated by Shearman & Redfield on Negligence (volume 1, § 467), that the running of trains in violation of a statute or ordinance regulating the speed of trains, if left without explanation or excuse, is conclusive proof of negligence. Where there is no attempt at explanation, it certainly could not be misleading to the jury to say to them that such excessive speed is negligence per se, because there is certainly no difference in the effect of this language. and language which would state to them that this proof constituted conclusive proof of negligence. The authorities are conflicting upon the question as to whether or not the act is negligence per se or merely evidence of negligence, but, as we say, the true rule seems to be that it is evidence of the negligence only, but that that evidence is conclusive when no explanation is given. In the case at bar there was no attempt at explanation, and we think the instruction could not have misled the jury.

This disposes of each of the questions raised by the appellant upon this appeal, except the general discussion upon a request of the defendant for an instruction to find for the defendant. This we think we have sufficiently discussed in passing upon the sufficiency of the evidence to justify the verdict. Considering the age of the deceased, and all the surrounding circumstances of the case, we think the verdict for \$5,000 exceeds by \$2,000 the amount which plaintiff is shown to be entitled to as damages in this case, and, unless the plaintiff will consent to reduce the judgment to the sum of \$3,000, the judgment should be reversed. If such consent is given forthwith, then in that case the judgment is affirmed to the amount of \$3,000 and costs, with interest from this date. We find no other error in the record.

WEST v. NORWICH UNION FIRE INS. SOC.1

(Supreme Court of Utah, July 27, 1894.)
INSURANCE — AUTHORITI OF AGENT — WAIVER OF
CONDITIONS.

1. Where an insured requested the agent of a company, who was authorized to issue policies, fix rates, and countersign policies, to indorse on the policy permission for additional insurance, which he failed to do after promising to do so, the company is estopped to set up a provision against additional insurance, though the provision required such permission to be indorsed on the policy, and contained a clause restricting the agent's power to waive any of the provisions of the policy.

2. Where an agent has knowledge, at the time a policy is issued, that the property is mortgaged, and that it is also on leased ground, the company cannot set up as a defense provisions avoiding the policy for such reasons.

3. Where an agent of a fire insurance company cannot set up as a defense provisions avoiding the policy for such reasons.

3. Where an agent of a fire insurance company, who is also agent for another company, has issued a policy for the latter company, the former is conclusively presumed, on the issuance of a policy by him on the same property for it, to have notice of the additional insurance.

Appeal from district court, fourth district; before Justice J. A. Miner.

Action by Perry C. West against the Norwich Union Fire Insurance Society. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Evans & Rogers and A. G. Horn, for appellant. C. B. Pash and O. R. Leonard, for respondent.

BARTCH, J. Certain property belonging to the plaintiff having been destroyed by fire, he brought this action to recover the amount of an insurance policy issued thereon by the defendant. The jury returned a verdict assessing the plaintiff's damages at \$1,600, and judgment was rendered thereon accordingly. Upon the overruling of a motion for a new trial, the defendant appealed both from the judgment and order denying a new trial.

It appears from the record, substantially, that the policy sued upon was issued by the defendant company on the 6th day of February, 1892, and was a renewal of a policy which was about to expire, and upon which was indorsed, "Permission for other insurance concurrent herewith;" that the Utah Loan & Trust Company of Ogden city was the agent of the defendant, and wrote these policies of insurance; that there was also another policy of insurance at the same time, on the same property, in another company, of which the Utah Loan & Trust Company was also the agent; that the property insured was on leased ground, and was destroyed by fire on the 24th day of March, 1892; that at the time of the fire the Ogden State Bank had a chattel mortgage on the property, but made no claim of any indebtedness due from plaintiff by reason of the mortgage; that, at the time the policy in question was issued, the agent of the defendant knew of the existence of the mortgage, and that the property insured was on leased ground, and promised plaintiff to make the proper indorsement on the policy, but failed to do so; that after the fire the agent of the defendant introduced to plaintiff one Tiedman, an insurance adjuster for the defendant company; that the plaintiff gave Tiedman a sworn statement showing the cause of the fire and the amount of damage done, and together they selected two builders to estimate the value of the house destroyed, which estimate was given to Tiedman, and an inventory was made of the property which was saved; that Tiedman then left, promising to return in a few days, but failed to do so, and soon thereafter the defendant repudiated the plaintiff's claim.

The real question is, what was the effect of the contract of insurance under this state of facts? Counsel for appellant contend that the plaintiff cannot recover because he had other insurance on the property, and failed to have the consent of the defendant company thereto indorsed on the policy in question, which failure was a violation of that clause in the policy which provides that "the entire policy, unless otherwise provided by agreement indorsed hereon or added hereto. shall be void if the insured now has, or shall hereafter make and procure, any other contract of insurance, whether valid or not, on property covered, in whole or in part, by this policy." If this clause be literally construed, and the agent cannot waive a compliance therewith by his acts or neglect, and bind the principal, as is insisted, then, indeed, the insured is without a remedy. The agent was authorized to issue policies to parties seeking insurance, to fix rates and premiums, and to countersign, renew, and sign the transfer of policies in Ogden and vicinity. Where such powers are conferred upon an agent of an

¹ Rehearing denied.

insurance company, he becomes the general agent of such company within his district, and his acts, performed within the scope of his agency, will be binding upon his principal, and his knowledge and consent will be that of his principal. The company is bound, not only by his acts, but also by whatever may be said or done by him regarding the contract or risk. Through him the company has knowledge of every fact in relation to the insurance or contract, and when he issues additional insurance on the same property for another company he becomes the agent of both companies, and the former company will be conclusively presumed to have knowledge of the additional insurance. If, then, such company fail to avail itself of its right, under its contract, to object to such additional insurance, and to declare the policy void, so long as there is no apparent danger of loss, it will be estopped from insisting upon a forfeiture of the policy after loss has occurred, because its consent to other insurance was not indorsed thereon in writing. These policies are in a printed form, and, as a general thing, the insured knows little about their conditions and restrictions; but the agent is presumed to know them, and justice and fair dealing will not permit him to lull the insured into a state of security by promises, continue to receive the premiums, and then, when loss occurs, the company deny its liability because the agreement of its agent was not indorsed as required by the insurance contract. In the case at bar the insured requested the agent of the defendant to make the proper indorsement, which he promised to do, but, after having issued the new policy, for some cause failed to fulfill his agreement; and it is apparent from the record that the agent issued the additional insurance with the full knowledge of the existence of the policy in question. Under these circumstances, the clause of the policy now under consideration cannot avail the defendant. A verbal agreement is of as high a legal degree as one in writing, and either one may be varied or abrogated by subsequent agreement, parol or written; and, upon principle, there appears to be no good reason why this rule should not apply to insurance companies as well as private individuals. Therefore the agreement of the agent, by which he promised to indorse on the policy permission for further insurance, is regarded as the agreement of the defendant company, and is binding upon it. The fact that it had no actual knowledge of it at the time it was made, and did not actually assent to it, is entirely immaterial, because it was within the scope of the agent's authority to make it. Nor does the fact that the policy in question contained a clause restricting the agent's power to waive any provision or condition of the policy add force or give effect to the clause under consideration, because the agent had the legal capacity to agree that other insurance might be procured on the property; and he having agreed to do this, and then failed to perform, the defendant cannot now be heard to complain because the neglect and failure of the agent was the neglect and failure of the com-

pany. It is true this question has been attended with much difficulty, and the decisions of the courts are by no means uniform. Many of the earlier decisions appear to hold the parties rigidly to the terms of the insurance contract. Upon examination of the more recent authorities it seems clear that the rule of strict construction, in regard to the terms of an insurance policy, has been much relaxed, and the courts now hold that where an insurance company or its agent has been notified of additional insurance, or of changes in the condition of the property, and no objection has been made, the company will be estopped from insisting on a forfeiture because permission in writing was not indorsed on the policy. An agent who has the power to enter into contracts of insurance and issue policies may also waive forfeiture. Wood, in his treatise on the Law of Fire Insurance (volume 2, § 415), says: 'That an insurance agent authorized to make contracts of insurance and issue policies may waive forfeiture, and reinstate and restore a void policy as a valid instrument, is held by numerous cases. Indeed, it is a power incident to the authority to make a contract of insurance, and the company is as much estopped from denying that he possessed such power as it is from denying his authority to make contracts, when it has delegated such power to him or permitted him to exercise it." See, also, Id. §§ 383, 416. In Pelkington v. Insurance Co., 55 Mo. 172, Mr. Justice Wagner, delivering the opinion reversing "The court, by its the lower court, said: ruling in striking out the replication, virtually decided that it was absolutely necessary to obtain the written indorsement of the company's assent to the additional insurance, before any recovery could be had. There are cases which undoubtedly sustain this position, but the tendency of the modern decisions is to relax and modify this stringent doctrine. It is emphatically averred that the agent was duly notified of the subsequent and additional insurance, and assented to the same. Notice to the agent was notice to the principal, and the company was bound by that notice." 2 May, Ins. \$\$ 369, 370; Kahn v. Insurance Co. (Wyo.) 34 Pac. 1059; Insurance Co. v. Earle, 33 Mich. 143; Insurance Co. v. Ruckman, 127 Ill. 364, 20 N. E. 77; Insurance Co. v. Munger (Kan.) 30 Pac. 120; Insurance Ass'n v. Griffin, 66 Tex. 232, 18 S. W. 505; Cobb v. Insurance Co., 11 Kan. 97; Insurance Co. v. Taylor, 73 Pa. St. 342; Weed v. Insurance Co., 116 N. Y. 106, 22 N. E. 229.

The next point raised is in relation to the clause in the policy relating to chattel mortgages. Counsel insists that, the insured having had such a mortgage on the property,

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it avoided the policy. The existence of this mortgage was known to the agent when he issued the policy, and therefore the views expressed herein in regard to additional insurance apply with equal force to the questions raised concerning the chattel mortgage. So, likewise, as to the clause in the policy, "that the policy should be void if the subject of the insurance be on ground not owned by the insured in fee simple," because the agent knew, when he issued the policy, that the property insured was on leased ground. The company should not be permitted to perpetrate a fraud on the insured by accepting the premium, and then, after loss had been incurred by fire, repudiate the policy because the subject of the insurance was upon leased ground. Nor do we think the court erred in admitting the evidence in regard to Tiedman's representing himself as an adjuster of the defendant, and in regard to the proof of loss. In fact, under the circumstances of this case, as shown by the record, no proof of loss was necessary, for the company repudiated the policy, and refused to recognize the plaintiff's claim, on other and distinct grounds, and thereby proof of loss was See Daniher v. Grand Lodge (dewaived. cided at this term) 37 Pac. 245. We are also of the opinion that the allegations of the complaint were sufficient to admit evidence as to waiver. Where a pleading contains an allegation of the performance of a condition, it is not absolutely necessary to allege a waiver, because proof thereof is admissible under the general allegation. 2 May, Ins. § 589; Insurance Co. v. Dougherty, 102 Pa. St. 568.

It is not deemed necessary to consider any of the other points raised in the record, because we think they present no reversible error. The judgment is affirmed.

MERRITT, C. J., and SMITH, J., concur.

OREGON SHORT LINE & U. N. RY. CO. v. STANDING, County Collector.

(Supreme Court of Utah. Aug. 31, 1894.)

POOR TAX-VALIDITY-STATUTE -- REPBAL BY IMPLICATION-TAX SALE-INJUNCTION -- CLOUD ON TITLE.

1. Act March 8, 1888, authorizes counties to take care of their poor, and empowers county courts to levy the necessary tax. Act 1890, amending the revenue act (1 Comp. Laws 1888, § 2008, subsec. 1), after providing for the amount of other taxes to be levied, authorizes the county courts to levy a tax for "county purposes," not to exceed three mills. Held, that the latter act repealed the former act so far as it provided for a levy of a special tax for the care of the poor.

2. The collection of an illegal tax by sale of a railroad company's cars will not be enjoined, on the ground that a cloud will be thereby cast on the company's realty, though it does not affirmatively appear that they are sufficient in value to pay the tax, as the presumption always is that a levy is sufficient to satisfy the demand.

Appeal from district court, fourth district; before Justice James A. Miner.

Action by the Oregon Short Line & Utah Northern Railway Company against Hiram Standing, county collector, to enjoin the collection of a tax. There was a judgment for plaintiff, and defendant appeals. Reversed.

Maloney & Perkins and Nels Jensen, for appellant. Williams, Van Cott & Sutherland, for respondent.

SMITH, J. This is an action begun by the plaintiff in the court below to enjoin the collection of a tax levied in the county of Box Elder, amounting to the sum of one mill on the dollar of the plaintiff's taxable property, the same being levied as a tax for the support of the indigent poor of said county. The total amount of the tax which was claimed to be illegal is \$366.04. The plaintiff paid the taxes levied upon its property other than the one-mill tax levied for the support of the county poor. The complaint alleged that plaintiff was the owner of a railway track in Box Elder county, also of the engines, cars, and other property used in and about the running and operation of its railway; that its property was assessed in the year 1893 at the total assessed valuation of \$366,039.90, in that county; that the total taxation, territorial, county, and county school taxes, and special school taxes levied on such property in Box Elder county, was \$4,855.66; that, in addition to the tax levied by the statute for territorial school purposes. the county court of Box Elder county also levied upon the property of the plaintiff three mills on the dollar as county taxes. two mills on the dollar as county school tax, and one mill on the dollar as county poor It is this latter tax which is complained of. It is further alleged that there were special school taxes levied within certain school districts within the county. The complaint then alleges that the county court was authorized by law to levy taxes for all county purposes whatsoever, not exceeding three mills on the dollar, and that the levy of said tax of one mill on the dollar for a county poor tax, in addition to the three mills for county purposes, was in excess of the powers of the county court, and void. Then follow an allegation as to the payment of the legal taxes and a statement of the amount of the illegal tax. It is then alleged that the defendant is county collector, and, as such officer, claims and demands payment from the plaintiff of the sum of \$366.04, being the amount alleged to be excessive and illegal; that the plaintiff had refused to pay the taxes, and that the same had not been paid; that the defendant, in consequence of such refusal, and for the purpose of collecting such illegal tax, and without any other authority, on the 10th of December, 1893, seized and levied upon certain cars belonging to the plaintiff, and advertised the same for sale. It is also alleged that, unless the

defendant is restrained, he will sell the property. The court below granted the restraining order and order to show cause. The defendant appeared, and demurred to the complaint-First, that the complaint shows on its face that the county court of Box Elder county had power and authority to levy the tax of one mill on the dollar to provide for the care and maintenance of the indigent sick or otherwise dependent poor in said county; second, that the complaint shows on its face that the county court had authority to levy a property tax in addition to the tax for general county purposes; third, that said complaint shows on its face that plaintiff had a full, speedy, and adequate remedy at law: fourth, that the complaint does not state facts sufficient to constitute a cause of action. The court, upon hearing, overruled the demurrer; and the defendant refusing to answer, and having elected to stand upon the demurrer, the court entered judgment in favor of the plaintiff, and against the defendant, making the injunction perpetual, and taxing the costs of the action against the defendant. The defendant reserved the proper exceptions to the ruling, and brings the case here for review.

The first question presented is whether or not the county court had authority to levy the tax complained of. Section 2008, subsec. 1, p. 719, 1 Comp. Laws 1888, provides: "There is hereby levied, and directed to be assessed and collected annually, beginning with the year 1878, an ad valorem tax on all the taxable property in the territory of Utah, as follows: Three mills on the dollar for territorial purposes; three mills on the dollar for the benefit of district schools: and such sum as the county courts of the several counties may designate for county purposes, not to exceed six mills on the dollar." section, however, was amended by the act of 1890 (page 50, Sess. Laws 1890), and made to read as follows: "That there is hereby levied and directed to be assessed and collected annually, beginning with the year 1890, an ad valorem tax on all taxable property in the territory of Utah as follows: Two mills on the dollar for territorial purposes, three mills on the dollar for district school purposes, such sums as the county courts of the several counties may designate for district school purposes in such counties not to exceed two mills on the dollar and such sums as the county courts of the several counties may designate for county purposes not to exceed three mills on the dollar." This language would seem to be quite clear, and to permit of no doubt that the limit of taxation for county purposes other than district school purposes was three mills; but the appellant contends, however, that this is limited or modified by section 187, subsec. 6, p. 299, 1 Comp. Laws 1888, hich provides, among other things, as fol-'s: "The county courts in their respective counties have jurisdiction and power under such limitations and restrictions as are prescribed by law to provide for the care and maintenance of the indigent sick or the otherwise dependent poor, transients and residents of the county, erect, and officer and maintain hospitals and poor houses in their discretion therefor, or otherwise provide for the same; and for such purposes annually at the time appointed by law for the levying of taxes for county purposes to levy the necessary property tax therefor." This act was passed March 8, 1888, and was in operation at the time of the passage of the act of 1890 (page 50), above quoted. The question is, does the term "county purposes," in the act of March, 1890 (page 50, Laws 1890), include the support of the indigent, sick, or otherwise dependent poor of the county, or does it only include other county purposes? It will be observed that the law, since 1878, has permitted the county to levy a tax not to exceed six mills on the dollar for county purposes. The law of 1890 limited this to three mills for county purposes, and two mills or less for the benefit of the district schools of the This act having been passed after county. the act which authorizes the county court to levy a tax especially for the benefit of the indigent, sick, or otherwise dependent poor, and seeming to be full and complete legislation on the subject, in our opinion limits or repeals section 187, subsec. 6, p. 299, 1 Comp. Laws, so far as it provides for the levy of a special tax for that purpose. While repeals by implication are not favored, we think that it is manifest that the legislature intended to limit the power of the county court to levy taxes by the act of 1890, and that that limitation is three mills for county purposes other than school purposes, and two mills for school purposes. We are of the opinion, therefore, that the levy of the additional tax of one mill on the dollar, in addition to the three-mill levy for county purposes, which was made by the county court of Box Elder county for the support of the poor in that county, was illegal and

This brings us to the consideration of the remaining question, has the plaintiff sought the proper remedy by endeavoring to enjoin this tax? In Dows v. City of Chicago, 11 Wall, 110, the supreme court, in passing upon this question, say, speaking of injunctions against tax collectors: "No court of equity will therefore allow its injunctions to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked." Mr. High, in his excellent

work on Injunctions, at section 492, says: "A tax will not be enjoined because of its alleged illegality when it is not shown that its enforcement will lead to a multiplicity of suits, or produce irreparable injury, or throw a cloud upon the title to real estate; and it is not sufficient ground for relief to allege that the tax sale, if allowed to proceed, would involve the owner of the property in litigation with purchasers." The same author, at section 496, says that "the unconstitutionality of a tax, or of the law under which it is imposed, * * * does not justify relief by injunction against its enforcement. The collection of the tax under such circumstances is regarded as a simple tort or trespass, susceptible of compensation in damages at law; and, since relief by injunction against a tort rests wholly upon the inadequacy of the legal remedy, the fact that the law under which the defendant is about to proceed in the collection of the tax is unconstitutional and void will not justify a court of equity in extending relief by injunction." The supreme court of Michigan, in the case of Henry v. Gregory, 29 Mich. 68, which seems to be a case analogous in every point to the one at bar, says: "A bill in equity will not lie to restrain the sale of personal property seized for the collection of taxes, in the absence, at least, of any showing that the property possessed any peculiar value not capable of compensation in damages. The remedy at law is ample."

It is contended by the respondent that, while the property levied upon is personal property, still there is no showing that it is sufficient to pay the tax; and that there may be a residue unpaid, which would be a cloud upon the real estate; and that, therefore, the case comes within the authorities above cited. The answer to this proposition is found in the opinion in Henry v. Gregory, supra, delivered by Cooley, J., where the following apt language is used by that eminent jurist in passing upon this question: "A levy has been made upon the personal property of Isaac Henry to satisfy the tax. The bill does not show whether or not the levy was sufficient, but, in the absence of any distinct allegation on that subject, we cannot assume it to be insufficient. A levy upon personal property by virtue of an execution is prima facie satisfaction while it remains in force,"-citing Bank v. Kingsley, 2 Doug. (Mich.) 379. We cannot distinguish that case from this. Judge Cooley then proceeds: "A bill cannot be sustained as a bill to remove a cloud from the title to lands, since, presumptively, the cloud is already removed. It is conceded that equity cannot interfere to restrain the sale of personalty, because the remedy by action at law to recover the value is regarded as adequate." We think that this answers the suggestion of the respondent that there may be a residue of the taxes which would be a lien or cloud upon the title to the real property. There is no reason shown in the

bill why the plaintiff should not have paid to the collector the amount of the tax claimed to be illegal, under protest, and have brought a suit at law to recover it back. This would have been a perfect remedy; and, if unable to raise the money to pay the tax, the property levied upon was only personal property, and a suit to recover its value would have afforded an ample remedy. For this reason, we are of the opinion that the court erred in overruling the demurrer to the complaint. The judgment of the court below is reversed, and the cause remanded to that court, with instructions to sustain the demurrer to the complaint; the costs in this court to be taxed against the respondent.

MERRITT, C. J., and BARTCH, J., concur.

COWHICK v. SHINGLE et al.

(Supreme Court of Wyoming. Sept. 21, 1894.)
LIMITATION OF ACTIONS —PART PAYMENT BY ONE
JOINTLY LIABLE—EFFECT—DEMURRER.

1. Rev. St. 1887, § 2369, requires an action on a "contract or promise in writing" to be brought within five years. Section 2381 provides that "when payment has been made upon any demand founded on a contract, or a written acknowledgment thereof or a promise to pay the same has been made and signed by the party to be charged, an action may be brought thereon within the time herein limited, after such payment, acknowledgment or promise." Held, that a payment on a note by one of two jointly and severally liable thereon, made without the knowledge or consent of the other, does not suspend the running of the statute in favor of the other.

favor of the other.

2. A complaint is demurrable when it shows on its face that under the statute of limitations no action can be brought.

Error to district court, Laramie county; Richard H. Scott, Judge.

Action on a promissory note by Oscar F. Cowhick, administrator of the estate of John Y. Cowhick, deceased, against John K. Shingle and Henry Altman. Judgment for defendants, and plaintiff brings error. Affirmed.

The plaintiff in error was plaintiff below. The action was brought in the court below to recover upon a promissory note made by the defendants to plaintiff's intestate, and which is as follows: "\$100.00. Cheyenne, Wyoming, January 3, 1888. One year after date. we jointly and severally promise to pay to the order of John Y. Cowhick one hundred dollars, at the First National Bank of Cheyenne, for value received, waiving benefit of stay and exemption laws, and appraisal on sale before execution, with interest at 11/2 per cent. per month from date until paid. If this note is not paid at maturity the undersigned agree to pay expenses of collection, including attorney's fees. John K. Shingle. H. Altman." It is alleged in the petition of plaintiff "that the time within which said note was due and payable has long since elapsed, and yet said note has not been paid,

nor any part thereof, except interest thereon from the date of said note up to and including the 1st day of June, A. D. 1890, which said interest from the date of said note up to and including said 1st day of June, A. D. 1890, was paid to said John Y. Cowhick by said John K. Shingle, without the knowledge or consent of Henry Altman, on said 1st day of June, A. D. 1890." The defendant Shingle made default. The defendant Altman interposed a general demurrer to the petition, and for ground thereof relies upon the statute of limitations, which demurrer was sustained by the court below. Plaintiff brings the case here, assigning as error (1) that the court erred in sustaining the demurrer of defendant Altman to plaintiff's petition; (2) that the court erred in rendering judgment in favor of defendant Altman. The cause of action upon the note accrued on the 7th day of January, A. D. 1889, and this action was commenced on the 2d day of February, A. D. 1894,-more than five years after the cause of action accrued. The sections of the statute relied upon are the following of the Revised Statutes of 1887:

"Sec. 2368. Civil actions other than for the recovery of real property can only be brought within the following periods, after the cause of action accrues.

"Sec. 2369. Within five years an action upon a specialty or any agreement, contract or promise in writing.

"Sec. 2381. When payment has been made upon any demand founded on contract or a written acknowledgment thereof, or promise to pay the same has been made and signed by the party to be charged an action may be brought thereon within the time herein limited, after such payment, acknowledgment or promise."

The foregoing statutory provisions have been in force in this state since June 1, 1886. Prior to that time, and since March 1, 1874, the Code provision in force here, which corresponds with section 2381, supra, was section 21, c. 13, Comp. Laws 1876. We quote the latter section, as we shall have occasion hereinafter to refer to it. It was as follows: "Sec. 21. In any case founded on contract where any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim or any promise to pay the same shall have been made, an action may be brought on such case within the period prescribed for the same, after such payment, acknowledgment or promise, but such acknowledgment or promise must be in writing, signed by the party to be charged thereby."

R. W. Breckons, for plaintiff in error. Hugo Donzelmann, for defendants in error.

CLARK, J. (after stating the facts). It is to the parties making them. This act, how-the settled construction of our Code of Civil Procedure that "where it appears upon the face of the petition that the cause of action after or take away or lessen the effect of any

accrued at such a period that, under the statute of limitations, no action can be brought, the defendant may demur to the petition on the ground that the petition does not state facts sufficient to constitute a cause of action." Sturges v. Burton, 8 Ohio St. 215. It is clear that more than five years elapsed between the date the cause of action accrued upon the note and the commencement of the suit, and hence the demurrer of the defendant Altman was properly sustained by the court below, unless the payment of the interest by the defendant Shingle on the 1st day of June, 1890, had the effect of suspending the running of the statute in favor of the defendant Altman. Briefly stated, the sole remaining question for determination is, does a partial payment by one of two parties jointly and severally liable upon a promissory note suspend the running of the statute in favor of the other? Before proceeding to the consideration of our own statutes, so far as they bear upon this question, it may not be amiss to briefly look into the history of the law upon this subject.

The first statute in our system of jurisprudence which placed limitations upon personal actions was chapter 16 of 21 Jac. I., enacted in 1623. In the construction of this statute, and of statutes enacted at an early day, by several of the states of the Union, which were substantially like it, there was great diversity of opinion upon the question we have presented here. The leading case on this question in England is Whitcomb v. Whiting, 2 Doug. 652, decided in 1781, where it was held by Lord Mansfield and his associates that "payment by one is payment for all,-the one acting virtually as agent for the rest,-and, in the same manner, an admission by one is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." Willes, J., concurring in the views expressed by Lord Mansfield, further said: "The defendant has had the advantage of the partial payment, and therefore must be bound by it." This case seems to be wholly opposed in principle to the case of Bland v. Haselrig, 2 Vent. 151, decided many years before, but after the adoption of the statute of 21 Jac. I. While the doctrine of Whitcomb v. Whiting was several times seriously questioned by eminent English judges,—notably by Lord Ellenborough in Brandram v. Wharton, 1 Barn. & Ald. 463,-it became the generally accepted rule in England, and was such until parliament interfered in 1828, and, adopting what is known as "Lord Tenterden's Act," declared among other things, that no joint contractor should be in any manner affected by any written acknowledgment or promise made by his co-contractors, thus limiting the effect of written acknowledgments or new promises to the parties making them. This act, however, contained this proviso: "Provided, always, that nothing herein contained shall

payment of any principal or interest made by any person whatsoever." We cite this thus fully because it is urged upon us that this statute is in substance the same as our section 2381, quoted in the statement of facts hereto appended, and inasmuch as the English courts, after the adoption of the act, gave the same effect to a partial payment by one of two or more joint obligors as was given in Whitcomb v. Whiting, that hence the cases so holding are authority for the proposition that our statute should be so construed as to make a payment by one obligor effective as to the others. I cannot assent to this contention, because, considering the state of the law in England at the time of the adoption of Lord Tenterden's act as declared by the courts there, it seems clear to my mind that the effect of the proviso in that act was to leave the legal effect of a payment made by "any person whatsoever" just exactly what it had been held by the courts to have been. In fact, it might be very strongly urged that the proviso was in effect a legislative affirmation of the rule previously established by the courts; and such in effect seems to have been the view taken by the court in Wyatt v. Hodson, 8 Bing. 309, and by Chief Justice Shaw in Sigourney v. Drury, 14 Pick. 387. By this act of Lord Tenterden the effect of the decision in Whitcomb v. Whiting was limited solely to partial payments, and its effect in that respect was entirely overthrown in 1856 by the act entitled the "Mercantile Law Amendment Act." So that long before the territory or state of Wyoming came into existence the doctrine of that celebrated case had met its death in the land of its birth, and, as stated at pages 608 and 609 of Wood on Limitations, "the judgment of the profession, as well as of the people generally, as to the wisdom of the doctrine, is best evidenced by the circumstance that it has been nearly obliterated by legislative and judicial action."

In the United States, under statutes substantially like the English statute, the doctrine of Whitcomb v. Whiting met with great disfavor at an early day, and was wholly repudiated in several well-considered cases. Among them may be mentioned, as especially worthy of consideration, Bell v. Morrison, 1 Pet. 351; Bank v. Sullivan, 6 N. H. 125; Coleman v. Forbes, 22 Pa. St. 156; Levy v. Cadet, 17 Serg. & R. 126; Van Keuren v. Parmelee, 2 N. Y. 524; Shoemaker v. Benedict, 11 N. Y. 176; Yandes v. Lefavour, 2 Blackf. 371; Belote v. Wynne, 7 Yerg. 534; Muse v. Donelson, 2 Humph. 166; Lowther v. Chappell, 8 Ala. 353; Succession of Voorhies, 21 La. Ann. 659; Walker v. Duberry, 1 A. K. Marsh. 189; Steele v. Jennings, 1 McMul. 297. In some of the above cases the acknowledgment or partial payment relied upon to take the case out of the statute was made before the bar of the statute had become complete, but in my judgment there is no distinction in principle between the legal effect of acknowledgment or payment made before or after

the bar of the statute had attached. In either case the legal effect thereof is to create a new cause of action. Muse v. Donelson, 2 Humph. 169; Bell v. Morrison, 1 Pet. 351; Shoemaker v. Benedict, 11 N. Y. 176; Allen v. O'Donald, 28 Fed. 17, at page 25; Wheelock v. Doolittle, 18 Vt. 440, at page 442; Willoughby v. Irish, 35 Minn. 63, at page 69, 27 N. W. 379. In the case of Coleman v. Forbes, 22 Pa. St. 156, it is said: "We cannot but regard the case of Whitcomb v. Whiting, which declared that a payment by one joint debtor was a new promise by all, as being at the bottom of all the confusion that exists in the decisions in England and in this country on the subject of this statute, in its relation to joint debtors." And, from the review in that case of the English decisions, it would seem that the doctrine had led to inextricable confusion, and to such extreme views that the statute was in effect a nullity, as shown by the decision in Goddard v. Ingram, 3 Adol. & E. (N. S.) 839. In this case the two defendants had been partners with one Shuttleworth. The partnership was dissolved in 1832, and, upon the dissolution, was indebted to the plaintiffs, bankers, in the sum of £2,000. In 1839 James Goddard. one of the plaintiffs, who was individually indebted to the old partnership, on his single account, in the sum of £35, drew his check upon his own bank for that sum, and placed it to the credit of the partnership. A day or two afterwards, Shuttleworth, who was hopelessly bankrupt, called at the bank, and expressed himself satisfied with the transaction. This was held a sufficient payment to take the case out of the statute as to the two defendants; and, in the light of this case, it is not surprising that the Pennsylvania court should say: "To carry out this principle of Whitcomb v. Whiting would allow a debtor that is hopelessly bankrupt to bind others by his new promise, and even to be hired to do it, and thus far the example has led in England." On the other hand, it is true that in many states, especially the New England states, the doctrine of Whitcomb v. Whiting was upheld, and, under statutes similar to the English statute. enforced. In Sigourney v. Drury, 14 Pick. 387, Chief Justice Shaw rendered an opinion sustaining the doctrine of Whitcomb v. Whiting, and which may well be considered the leading case upon that side of the question in the United States. Cox v. Bailey, 9 Ga. 467, is another strongly-reasoned case in favor of the doctrine. The same rule was held to be the law in Rhode Island, Connecticut, Maine, and other states; but it is, I think, a circumstance worthy of great consideration that within a few years after the rendition of the decisions sustaining this rule the legislatures of nearly all the states so holding, by legislative enactment, declared that no joint debtor should be deprived of the benefit of the statute by reason of the fact of payment by his codebtor.

It must be admitted that at the time of the adoption of section 21, c. 13, Comp. Laws Wyo. 1876, to wit, December 11, 1873,-in fact, at the time of the organization of the territory of Wyoming, in 1868,—the rule that one joint debtor was affected by the partial payment of his codebtor in such way as to deprive him (the former) of the benefit of the statute prevailed in only a few of the states of the Union, to wit, Connecticut, New Jersey, Rhode Island, Delaware, Georgia, Oregon, North Carolina, Missouri, and perhaps, at that date, Minnesota and one or two other states. In all the other states, and in England us well, the rule had been entirely overthrown, either by judicial decision or by legislative enactment. This fact is in my mind a strong circumstance, as evidencing the judgment of the profession, and of the people as well, concerning the wisdom and propriety of the rule here contended for by the plaintiff, and is entitled to consideration in attempting to properly construe our statute upon the subject, because, when we come to construe our statute, it is a fair presumption that our legislature, when engaged in legislating upon a subject so generally acted upon in other jurisdictions, did have some regard for the general state of the law upon that subject, and we may very properly bear this in mind when we undertake to ascertain what was the legislative intention with respect to the statute. It is urged upon us that "when a statute is in general terms it is subject to the principles of the common law, and is to receive such construction as is agreeable to that law in cases of the same nature;" and then it is said "that the common-law rule is clearly laid down in Whitcomb v. Whiting." As a rule the term "common law" means both the common law of England, as opposed to statute or written law, and the statutes passed before the emigration of the first settlers of America. Patterson v. Winn, 5 Pet. 241; Com. v. Leach, 1 Mass. 61. And, applying this definition to the matter in hand, I am unable to perceive that there is any common-law rule upon the subject. At common law there was no limitation as to time upon the right to bring a personal action. Such limitations are, and always have been, pure creatures of the statute; and the rule contended for is a rule which grew up and developed in the construction of the statute of 21 Jac. I., and in no other way. It was first announced in 1781 by Lord Mansfield, in Whitcomb v. Whiting; and, while any statement of the law made by that great judge is entitled to great weight and respect, his declarations, even as to the common law, are simply persuasive authority.

This brings us now to the consideration of our own statute, and, before reviewing the authorities construing this and similar statutes, I will examine the statute independently of them. It is quite clear that under the statute no written acknowledgment or new promise, howsoever solemnly executed or

made by one of two codebtors, could in any measure suspend the running of the statute as to the other, and this would be so whether the acknowledgment or promise was made before or after the statutory bar had attached. This being so, it would seem that inasmuch as the law does not permit one codebtor, by his express promise or acknowledgment, to bind the other, it would logically follow that he could not, by an act which is simply, in legal effect, an acknowledgment from which the law implies a promise, bind him. I am unable to escape this conclusion, and it seems to me to be abundantly justified by the authorities. In 1866 the twenty-fourth section of the Code of Ohio was identical with section 21. c. 18. Comp. Laws Wyo. 1876. Thereafter, the legislature of Ohio adopted a new Code, section 4992 of which is identical with our section 2381, Rev. St. Wyo. 1887. These sections are set forth in the statement of facts preceding this opinion. In my judgment the two sections are in substance the same. There is no sort of difference in their effect. In Marienthal v. Mosler, 16 Ohio St. 570, the supreme court of Ohio, in construing the twenty-fourth section of their Code, used this language: "By comparing this section with the one for which it is substituted in the limitation act of 1831, and judicial constructions given to the act of 21 Jac. I., it is apparent that the legislature did not intend to enlarge the facilities for taking cases out of the statutory bar. Before this can now be effected by an acknowledgment of an existing debt. or a promise to pay the same, it 'must be in writing, signed by the party to be charged thereby.' No change is made in the effect of a part payment of a debt. It will be seen, however, that the same effect is given to such part payment as is given to a written promise signed by the party to be charged thereby. It would seem, therefore, from analogy, that the payment must be made by the party to be affected thereby, or by an agent authorized for that express purpose. In the contemplation of the statute, the part payment of a debt is regarded as evidence of a willingness and obligation to pay the residue, as conclusive as would be a personal written promise to that effect. It could not then have been intended to give this effect to payments other than those made by the party himself, or under his immediate direction. Surely, nothing short of this would warrant the assumption of a willingness to pay, equal to his written promise to that effect." Hance v. Hair, 25 Ohio St. 349, it was held. under the same section, that "a partial payment on a joint and several promissory note by one of the several makers will not prevent the running of the statute of limitations as to the other makers." And the case of Marienthal v. Mosler, supra, was expressly affirmed. In Kerper v. Wood, 48 Ohio St. 613, 29 N. E. 501, the statute in existence and relied upon was section 4992, Rev. St. Ohio, identical with our section 2381, Rev. St. Wyo.

1887. The court quoted from the decisions in Marienthal v. Mosler, supra, and Hance v. Hair, supra, and say, at page 621, 16 Ohio St.: "These decisions give emphasis to the reason and language of the statute. A payment or acknowledgment or a promise in writing will not avail to take a case out of the statutory bar, unless made by the party to be charged thereby, or by an agent authorized for that express purpose." It is quite apparent from these decisions from Ohio that the supreme court of that state regarded the two sections as the same in substance, and, in view of the fact that we adopted our statute from that state, these decisions are entitled at least to more than ordinary weight in the construction of our statute. In Com. v. Hartnett, 3 Gray, at page 451, it is said that "it is common learning that the adjudged construction of the terms of a statute is enacted as well as the terms themselves, when an act which has been passed by the legislature of one state or country is afterwards passed by the legislature of another." In Steele v. Souder, 20 Kan. 39, Mr. Justice Brewer, delivering the opinion of the court, in construing a statute identical with section 21, c. 13, Comp. Laws Wyo. 1876, uses this language: "The language may indeed be open to three constructions,-one, that the mere fact of payment, whether by a party to the instrument or not, keeps it alive as to all originally liable on it; another, that payment by one party keeps it alive as to all; and, third, that payment, like acknowledgment or promise. keeps it alive only as to the party paying. It seems to us that the latter is the true construction. No valid reason exists why parment should be more potent than acknowledgment or promise. Indeed, payment was treated by the courts as simply an evidence of acknowledgment. Such construction makes the various provisions of this section not only harmonious with each other, but with the general provisions of the statutes making each party to an instrument severally liable thereon. Severally liable, each should be severally protected. We conclude, then, that payment suspends the running of the statute only as against the party making the payment." I think there is no room to doubt the correctness of the learned justice's views with respect to the effect of the payment. It is certain that Lord Mansfield made no distinction between the legal effect of a payment and acknowledgment, and such is the generally accepted opinion. It is true that Tindall, C. J., in Wyatt v. Hodson, 8 Bing. 309, attempted to draw a distinction between a payment and "an ordinary acknowledgment;" but, however much force there may be in his remarks when applied to an ordinary oral acknowledgment, I am unable to perceive any in cases where the acknowledgment or new promise is required to be in writing, and subscribed by the party. In Nebraska the statute was as follows (Code Civ. Proc. § 22): "In any case founded on contract when any part

of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or claim or any promise to pay the same, shall have been made in writing, an action may be brought in such case within the period prescribed for the same after such payment, acknowledgment or promise." Mayberry v. Willoughby, 5 Neb. 369, it was held that part payment by one of two joint debtors does not take the case out of the statute as to the other. In Mirnesota the statute was (Gen. St. c. 66, § 24): "No acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of this chapter unless the same is contained in some writing signed by the party to be charged thereby; but this section shall not alter the effect of any payment of principal or interest." In Willoughby v. Irish, 35 Minn. 63, 27 N. W. 379, it was held, in a well-considered case. that "a partial payment upon a promissory note by one of the joint and several makers thereof, and indorsed upon it before the note is barred by the statute of limitations. and within six years before suit is brought. is inoperative to prevent the running of the statute as to the others." Syllabus. In New York the statute is identical with that of Minnesota just quoted. In McMullen v. Rafferty, 89 N. Y. 456, it was held that payments made by one of two joint and several makers of a note did not prevent the running of the statute as to the other, although the partial payments were made before the statutory bar had attached. The following cases also hold that payment by one of two joint obligors does not suspend the running of the statute as to the others: Bush v. Stowell, 71 Pa. St. 208, at page 212; Kallenbach v. Dickinson, 100 III. 427; In re Sanders' Estate (Surr.) 24 N. Y. Supp. 317; Littlefield v. Dingwall (Mich.) 39 N. W. 38; Tate v. Clements, 16 Fla. 340; Davis v. Mann, 43 Ill. App. 302. See, also, 1 Smith, Lead. Cas. pt. 11, p. 957. giving note to Whitcomb v. Whiting; Ang. Lim. (6th Ed.) p. 269, and note at page 281 et seq.; 3 Pars. Cont. (6th Ed.) p. 79 et seq.; Wood, Lim. p. 605; U. S. v. Wilder, 13 Wall. 254; 3 Kent, Comm. 50.

We have examined with care the cases upon the other side of this question, especially Sigourney v. Drury, 14 Pick. 387; Quimby v. Putnam, 28 Me. 419; Hewlett v. Schenck, 82 N. C. 234; Moore v. Goodwin (N. C.) 13 S. E. 772; Moore v. Beaman (N. C.) 16 S. E. 177; Merritt v. Day, 38 N. J. Law, 32; Cox v. Bailey, 9 Ga. 470; McClurg v. Howard, 45 Mo. 365; Perkins v. Barstow, 6 R. I. 505; Institution for Savings v. Ballou, 16 Atl. 144. In the last-cited case, from 16 Atl. 144, the supreme court of Rhode Island, at page 147, after reviewing the cases in that state, say, "The cases are doubtless at variance with the rule now generally prevailing in the United States," and hold that the doctrine is too firmly established in that state to be altered except by a statute. In the

case of Hunter v. Robertson, 30 Ga. 479, the court, while holding to the rule declared in Cox v. Bailey, 9 Ga. 467, as to the effect of a payment by one of two joint obligors, refuse to extend the rule so as to affect indorsers or sureties, and express grave doubts as to the correctness of the rule as to joint obligors, and use this language: "But, again, if the principle is wrong when applied to joint makers,-and there is no doubt in my mind that it is,—shall we extend it to an indorser, on the same fallacious reasons." In the case of McClurg v. Howard, 45 Mo. 365, Judge Bliss, delivering the opinion of the court, and referring to the case of Shoemaker v. Benedict, 11 N. Y. 176, says: "I confess it would be very difficult to reply to or resist the force of the reasoning of Judge Allen, who gave the opinion of a majority of the court in that case; and, were the question a new one in Missouri, I would favor the application of its doctrine to the present case, but the question was expressly decided the other way by this court in Craig v. County Court, 12 Mo. 94, and the decision was in accordance with the authorities at that time." And hence the question was considered as not an open one in Missouri. To the same effect is Campbell v. Brown, 86 N. C. 376, at pages 380, 382.

And thus, upon examination of the authorities, we find, not only that the principle here contended for by the plaintiff is denied by the overwhelming weight of authority, but also that in some of the states where it is recognized as the law the courts continue to sustain it solely for the reason that it has been so decided in earlier cases.

The case of Cross v. Allen. 141 U.S. 528. 12 Sup. Ct. 67, is strongly urged upon us as being a case which, in effect, denies the doctrine of Bell v. Morrison, supra. There are some expressions in the case which give some foundation to the contention, but an examination of the case leads me to the conclusion that it was correctly decided for reasons which in no wise conflict with anything said in Bell v. Morrison. The case arose in the state of Oregon, and the question was whether the payment by a principal suspended the running of the statute as to a surety. Of course, this called for a construction of the statute of Oregon. The statute in force was peculiar to that state and Minnesota. In each of those states the statute had been considered by their supreme courts, and held to mean that payment by any party upon an existing contract after it becomes due had the effect of causing the statute to run as to all the parties only from the date of the last Whitaker v. Rice, 9 Minn. 14 payment. (Gil. 1); Partlow v. Singer, 2 Or. 307; Sutherlin v. Roberts, 4 Or. 378. In these cases the peculiarities of the statute are pointed out and commented upon. We have hereinbefore quoted the present statute of Minnesota. A comparison of that statute with the one existing at the time of the decision in 9 Minn. 14 (Gil. 1), will show the reasons for the different rulings in that state. See Willoughby v. Irish, 35 Minn. 63, 27 N. W. 379.

Upon the whole case, I am of the opinion that the true construction of our statute (section 2381, Rev. St. 1887) is that given by the supreme court of Ohio in Kerper v. Wood, 48 Ohio St., at page 621, 29 N. E. 501, viz.: "A payment, an acknowledgment, or a promise in writing will not avail to take a case out of the statutory bar, unless made by a party to be charged thereby, or an agent authorized for that express purpose,"—and that the judgment of the district court of the county of Laramie should be, in all respects, affirmed.

GROESBECK, C. J., and CONAWAY, J., concur.

PEABODY v. HUTTON et al. (Supreme Court of Wyoming. Sept. 21, 1894.) PERSOWAL JUDGMENT.

A judgment which orders that the plaintiff "have and recover of the defendant H. the aforesaid sum" is a personal judgment against the said H., and cannot be satisfied out of property held by him as administrator of his wife.

Error to district court, Albany county; J. W. Blake, Judge.

Action by Alfred S. Peabody against George L. Hutton, personally and as administrator with the will annexed of Rowens S. Hutton, deceased, and Elizabeth Ann Hutton, to annul a conveyance. Judgment for defendants, and plaintiff brings error. Affirmed.

N. E. Corthell, for plaintiff in error. C. E. Carpenter, for defendants in error.

CONAWAY, J. This action was brought in the district court by plaintiff in error against defendants in error to annul a conveyance, through a trustee, of realty from the defendant in error George L. Hutton to the defendant in error Elizabeth Ann Hutton, his wife, and to subject the realty so conveyed to sale upon execution to satisfy a former judgment against George L. Hutton. Much of the argument on behalf of plaintiff in error has been an effort to make it appear that such judgment is a judgment against George L. Hutton as administrator of the estate of Rowena S. Hutton,—that is, against the estate; and that the conveyance of the realty in question should be set aside in order to subject it to sale on such judgment as a judgment against the estate of Rowena S. Hutton. The judgment is in the following words: "It is therefore ordered and adjudged that the plaintiff, Alfred S. Peabody, have and recover of and from the defendant George L. Hutton the aforesaid sum of six hundred and twenty-five and 67-100 dollars, together with his costs in this action, taxed at thirteen dollars." The district court finds

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that this is a personal judgment against George L. Hutton. This finding is clearly right. It is not a judgment against the estate of Rowena S. Hutton.

The sole remaining question is, has plaintiff in error shown error in the refusal of the district court to annul the conveyance of the realty in question, and order it sold to satisfy the judgment against George L. Hutton? The property consists of two lots in the town of Laramie, with improvements. There is no evidence in the record and no finding of the court as to their values. It is alleged in the answer of defendants in error, and denied in the reply of plaintiff in error, that, ever since the death of Rowens S. Hutton, the premises in question have been occupied as a homestead by defendants in error, George L. Hutton and Elizabeth Ann Hutton, and their children. There is no evidence in the record and no finding of the court upon this point. It is alleged in the petition of plaintiff in error, and denied by the answer of defendants in error, that the conveyance attacked was made with intent on the part of defendants in error to hinder, delay, and defraud the creditors of George L. Hutton. The district court finds that there was no such intent. The record does not purport to give all of the evidence upon these points. For lack of evidence, we cannot review this finding of the district court or its judgment. Judgment affirmed.

CLARK and SCOTT, JJ., concur.

GROESBECK, C. J., having announced his disqualification to sit in this case, the other justices called in R. H. SCOTT, judge of the third judicial district court, to sit in his stead.

TIMES PUB. CO. v. CITY OF EVERETT et al.

(Supreme Court of Washington. Sept. 4, 1894.)

CITY CONTRACT — AWARD TO HIGHEST BIDDER—
INJUNCTION BY COMPETITOR — RIGHTS OF TAXPAYER.

 A city will not be compelled by mandamus to award a contract to the lowest bidder for city work required to be let to the lowest bidder.

2. Under Gen. St. § 649, providing that cities of the third class shall award all contracts for printing to the lowest bidder, the performance of such a contract, if awarded to one who was not the lowest bidder, will be enjoined at the instance of a taxpayer, where the council merely finds that the one to whom the contract was awarded was the "lowest and best bidder therefor," without finding any facts which rendered another, who was apparently the lowest bidder, not the lowest bidder in fact.

in fact.

3. Where the lowest bidder for city work, which is required to be awarded to the lowest bidder, is also a taxpayer, he may sue as a taxpayer to enjoin the performance of a contract therefor awarded to a higher bidder, though his action is prompted by other considerations than his liability to excessive taxa-

4. Though an action by a taxpayer to enjoin the performance by a city of a contract which was not let to the lowest bidder, as required by statute, cannot be joined with an action by the taxpayer, as the lowest bidder, to compel the city to award such contract to him, yet, since the latter action will not lie, a prayer for the latter relief, in an action to enjoin the performance of the contract, will be treated as surplusage, thereby avoiding a misjoinder of actions.

Hoyt, J., dissenting.

Appeal from superior court, Snohomish county; John C. Denney, Judge.

Action by the Times Publishing Company against the city of Everett and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

Church & Akerman, for appellant. H. D. Cooley (N. D. Walling, of counsel), for respondents.

STILES, J. Gen. St. § 649, provides that in cities of the third class the council shall annually, at a stated time, contract for doing all city printing and advertising, which contract shall be let to the lowest bidder; advertising to be done in a newspaper printed and published in such city. The city of Everett, by Ordinance No. 3, fixed the stated time as April 1st; required that the newspaper must have been published at least one year before the date of contract, and that the contractor must give bond as the council might determine; and directed the city clerk to give notice, by publication, of the annual letting. Pursuant to this ordinance the clerk gave a notice that bids for the city advertising would be received at a certain time. The notice stated no particulars of what would be required in the way of advertising, or how the bids should be framed. At the proper time, two bids were presented,-one by appellant and one by James N. Bradley. Appellant's bid was for solid nonpareil, at 25 cents per inch for the first insertion, and 15 cents for subsequent insertions. Bradley's bid was for the same kind of type, at \$1 per inch for the first and 50 cents for each subsequent inser-Other propositions of the two bidders were substantially the same, except that Bradley offered that if the contract were awarded to him he would publish the official proceedings of the council free of cost to the city, and the city delinquent tax list at the rate of 5 cents for each description. The council awarded the contract to Bradley by resolution declaring him to be the "lowest and best bidder therefor." There was no other finding concerning either of the bids. Appellant, in its complaint, shows these facts, and that a contract based upon his bid has peen entered into between the city and Bradley, and also that it is a taxpayer in the city of Everett. The object of the action, as stated in the prayer, is to enjoin the performance of the contract, and to require the city to enter into a contract with it, as the lowest bidder, for the advertising.

Four grounds of demurrer were alleged:
(1) No jurisdiction of the subject-matter; (2) defect of parties, in that the individual members of the council were not made defendants; (8) several causes of action improperly joined; (4) not sufficient facts to constitute a cause of action. We are not advised upon which of the grounds the court sustained the demurrer, but only the last two are argued here.

As to the third, it is urged that the appellant is seeking relief in a dual capacity, and inconsistent relief at that. As a taxpayer, it would enjoin the performance of the contract on the ground of its illegality, and because, by reason of the high price agreed to be paid for advertising, in face of the lower bid, it will suffer wrong in excessive taxation. this capacity it has no interest in its own bid, and the result of the suit would be a new letting of the contract. But, as bidder, its object is to secure a contract for itself, based upon its low bid, and it has no concern whether the city go on with the Bradley contract or not. There is no question but that the complaint was framed with the double purpose of enjoining the defendants at the suit of a taxpayer, and of procuring a mandamus for its own benefit as a bidder, and the brief frankly concedes this. This was an attempt to improperly join two causes of action, to the second of which Bradley was neither a necessary nor a proper party. But if there was a statement of one good cause of action, and an attempted statement of another, which called for a species of relief which would not be conceded under any state of the pleading, we think a demurrer for misjoinder ought not to lie. It must be premised that this complaint is not divided into separate counts or causes of action, but is a continuous statement of facts, only two paragraphs of which, the twenty-first and twenty-seventh, together with the prayer, indicate a design to claim relief other than by the injunction. Strike out such portions of the paragraphs mentioned as pertain to the appellant's prospective profits under its bid, and the prayer for a mandamus, and there will be left only a taxpayer's complaint for injunction, which, in our view, is the only sustainable cause of

The generally accepted rule is that the courts will not, by mandamus, compel a municipal corporation to enter into a contract with one who shows himself to have been the lowest bidder in a competition of this kind. High, Extr. Leg. Rem. § 92; State v. Board, 24 Wis. 683; Kelly v. Chicago, 62 Ill. 281; State v. McGrath, 91 Mo. 386, 3 S. W. 846; Douglass v. Com., 108 Pa. St. 559; Madison v. Harbor Board (Md.) 25 Atl. 337. The case of Baum v. Sweeny, 5 Wash. 712, 32 Pac. 778, is distinguishable from the foregoing citations in that the adjudication there had was upon an appeal which lay directly from the board of county commissioners to the superior court, and there was only one bid which was entitled to consideration under the statute. Added force is given to the rule by our statute which provides that the council may reject all bids presented, and readvertise, at their discretion. On the other hand the agents of municipal corporations must maintain themselves within the law, in the matter of awarding contracts, and if, through fraud or manifest error not within the discretion confided to them, they are proceeding to make a contract which will illegally cast upon taxpayers a substantially larger burden of expense than is necessary, the courts will interfere by injunction to the effect of restricting their action to proper bounds. Beach, Pub. Corp. §§ 634, 635; Dill. Mun. Corp. § 922; Crampton v. Zabriskie, 101 U. S. 601; Mayor, etc., v. Keyser, 72 Md. 106, 19 Atl. 706; People v. Dwyer, 90 N. Y. 402; High, Inj. §§ 1251-1253. The case of State v. Milligan, 3 Wash. St. 144, 28 Pac. 369, in no way contravenes this rule. The sole matter of discretion there discussed was that as to whether the council of the city of Tacoma could, under the peculiar language of the city charter, contract with one who at the time was not the publisher of a newspaper; and all that was said upon the subject of noninterference by courts of equity was directed to that point, and nothing else. And so, in this case, even under the strict language of the statute requiring the contract for advertising to be let to the lowest bidder, it must be conceded that there would be some discretion of a judicial character left to the council. A guide to the exercise of this discretion was enacted in Ordinance No. 3, providing that the newspaper must have been published at least one year, and that a bond should be given by the contractor. So, also, if the proposed contract were to cover many different items, bid for at different rates, and the quantities were not previously ascertained, it would take an extremely strong case to call for equitable interposition; as, also, if the bids were for large amounts, and the differences between bids were small and inconsiderable. Kelly v. Chicago, supra. The responsibility of the bidder, his experience, and his facilities for carrying out a contract, may be looked into: and an honest determination that on the whole his bid will not be, in the long run, the lowest, will be entitled to control. Com. v. Mitchell, 82 Pa. St. 343; Findley v. City of Pittsburgh, Id. 351; Douglass v. Com., 108 Pa. St. 559. But in every such case, in order to protect itself from interference, the contracting agent should judicially find the facts which, in its judgment, render the apparently lowest bid not the lowest in fact. Beach. Pub. Corp. § 698.

We have this case upon the complaint alone, and under its allegations the conclusion cannot be escaped that there was, on the part of the council, a gross disregard of the interests committed to it, in making its award. It found nothing but that the bid of Bradley was the lowest and best, but the

complaint shows affirmatively that the appellant was in every respect qualified and competent, and was equally entitled to consideration with its competitor. Yet, with the bidders standing upon an equal footing, the contract was awarded to that one whose bid was almost four times that of his rival, without any apparent excuse or reason but the arbitrary will of the council. It was shown that for the previous year this printing cost about \$500, but with the same amount of work this year it will cost \$2,000; a very substantial addition to the tax roll of a city of this cass. Kimball v. Hewitt (Com. Pl. N. Y.) 2 N. Y. Supp. 697, is cited in support of the position that appellant ought not to be allowed to maintain an action of this kind, in view of the disclosure that its interest is prompted by other considerations than its liability to excessive taxation. Examination of the opinion in that case shows several other important matters to have entered into the decision, chief among which was that the action appeared to be in the interest of a bidder which had attempted to perpetrate a fraud on the city by withdrawing its bid, which was the lowest one made, and to recover a certified check which would have been forfeited, had it refused to enter into a contract. Mazet v. Pittsburgh, 137 Pa. St. 548, 20 Atl. 693, is a well-considered case, holding in effect that if the plaintiff, in cases of this kind, is not a mere volunteer, but has a direct and substantial interest in the controversy, as being one who is liable to be taxed, in common with the general public, for the work contracted for, his ulterior motives will not be permitted to disqualify him. The judgment is reversed and the cause remanded, with instructions to overrule the demurrer and proceed upon the cause of action sustained.

ANDERS and SCOTT, JJ., concur. HOYT, J., dissents.

NEIS et al. v. FARQUHARSON et al. (Supreme Court of Washington. Sept. 4, 1894.) EQUITY—ACCOUNTING—WITNESS—DEPOSITION.

1. An agent under contract to buy produce for his principal exclusively is liable to the principal for all profits realized on produce bought by him while the agency lasted, and sold by him without the principal's consent; and, since the amounts are peculiarly within the agent's knowledge, equity will compel an accounting, and will not remit the principal to an action for damages for breach of contract.

2. Code, § 389, providing that, in suits by or against a personal representative, an adverse party shall not testify in his own behalf, will not exclude from a trial had after the death of an original party, and the substitution of his representatives, the deposition of an adverse party duly taken before such death.

3. A demand for discovery and accounting,

3. A demand for discovery and accounting, since it necessarily involves an uncertain amount, need not be presented to the administrator for allowance. Appeal from superior court, Pierce county; W. H. Pritchard, Judge.

Action by Phillip Neis and Richard Brangon, trading as Phillip Neis & Co., against William Wagner and A. S. Farquharson (afterwards against Christina Wagner, A. J. Miller, and A. S. Farquharson, administrators), for accounting. Judgment for plaintiffs. Defendants appeal. Affirmed.

W. W. Likens and Ira A. Town, for appellants. H. F. Garretson, for respondents.

ANDERS, J. In the year 1883, the respondents, Phillip Neis and Richard Brangon, partners, under the firm name of Phillip Neis & Co., instituted this action against William Wagner and Alexander S. Farquharson, partners, doing business at Puyallup, under the name and style of William Wagner & Co., to compel the defendants to account for and pay over the proceeds of certain hops alleged to have been purchased by defendants for and on account of plaintiffs in the year 1882. The complaint alleges that on or about June 7, 1882, the plaintiffs and defendants agreed that defendants should, during the year 1882, as agents of said plaintiffs, purchase hops in Washington territory, for the use of and on account of the plaintiffs. to be shipped to plaintiffs at San Francisco. Cal., and that plaintiffs should pay to said defendants a commission of one-half cent for each and every pound of hops so purchased, and that plaintiffs should from time to time make all necessary cash advances to enable the defendants to purchase said hops, and that said purchases should be made under such general instructions and directions as plaintiffs might give from time to time concerning the same. It is further alleged therein. in substance, that the defendants, under said agreement, and as plaintiffs' agents, did purchase from time to time during said year 1882, and prior to September 1, 1882, large quantities of hops for the use of and on account of plaintiffs, and under their directions and instructions, from divers persons in Pierce county, and, to enable them to make said purchases, the plaintiffs furnished said defendants large sums of money, amounting to the sum of \$577.76, which money was received by them, and expended in paying cash advances on said hops to the several persons selling the same. That the plaintiffs have no knowledge or definite information as to the quantity of hops so purchased by said defendants under said agreement, but believe the same to exceed 30,000 pounds; and they do not know the names of the different persons from whom they were so purchased. That the said hops so purchased, being then and there the property of the plaintiffs, came into the possession of the defendants, who thereafter sold the same, contrary to their said agreement, to divers persons to the plaintiffs unknown, and that the proceeds of said sales were paid to defend-

ants, who now hold and possess the same for the use of plaintiffs. That plaintiffs have no knowledge or means of knowledge as to the amount so received by the defendants, but believe the same exceed the sum of \$20,-000. That plaintiffs have repeatedly demanded of defendants an accounting of their acts and doings as such agents, and of the quantity of hops so purchased under said agreement, and from whom, and of the money paid defendants by plaintiffs for said cash advances, and of the amount of hops so received by them and the charges thereon, and also an account of the proceeds of said sales, but the defendants have refused, and still refuse, to comply with any of said demands; and that plaintiffs have offered from time to time to pay all commissions due to said defendants, and all personal advances or payments which may have been made by defendants in the purchase of said hops, and now offer to pay the same whenever ascertained. The answer of the defendants denies each and every allegation of the complaint, and sets up affirmatively that in the summer of 1882 the plaintiffs loaned defendants the sum of \$577.76; and that thereafter, and on August 23, 1882, the defendants tendered the same to plaintiffs, together with interest thereon at the rate of 10 per cent. per annum, which the plaintiffs then and there refused, and have ever since refused; and that defendants now are, and ever since have been, ready and willing to pay plaintiffs said sum of money. That at all times mentioned in the complaint, and prior thereto, defendants were engaged in doing a general business as merchants, and were also engaged in buying and selling hops on their own account and for others, which facts were at all times known to these plaintiffs. That defendants, while so engaged in business as aforesaid, agreed to purchase hops for plaintiffs at such prices and in such lots and of such quality as plaintiffs might from time to time instruct them to purchase, but not otherwise. That plaintiffs did from time to time instruct them to purchase hops of certain quality, in certain lots and at certain prices, but that defendants were unable to purchase any hops upon the terms, conditions, and of the quality and at the prices to which they were limited by plaintiffs' said instructions, and that the plaintiffs, during all the times mentioned in the complaint, refused to pay the ruling and market price demanded for hops of the quality and in such lots as plaintiffs instructed them to purchase, and, by reason thereof, these defendants purchased no hops for or on account of plaintiffs. The affirmative matters set forth in the answer were denied by the reply of plaintiffs, and, upon the issues thus raised, a trial was had, resulting in a decree for plaintiffs, and the defendants appealed.

No formal order was made by the trial court for an accounting between the parties to the action, but a referee was appointed to take the testimony and report it to the

The referee was appointed in the court. year 1884, but it seems he did not report and file the testimony taken by him until March, 1888. The final hearing was had upon the testimony so taken and reported by the referee, and the deposition of R. M. Brangon, one of the plaintiffs. This deposition was regularly taken before a notary public in San Francisco, Cal., on August 13 and 14, 1885; and the defendants were then and there represented by counsel, who appeared and crossexamined the witness fully in their behalf. Thereafter, and on August 6, 1886, William Wagner, one of the defendants, died, intesate; and Christina Wagner, administratrix, and A. J. Miller, administrator, of his estate, were substituted as defendants, and the cause proceeded against them, and judgment was rendered against them and A. S. Farquharson, in their representative capacities (the latter having been appointed administrator of the partnership estate of William Wagner & Co.), on February 25, 1893. jection is made by the appellants to this judgment, on the alleged ground that the plaintiffs failed to make out a cause for an accounting or any cause within the jurisdiction of a court of equity. It is not disputed that the relation of principal and agent existed between the original parties to this action. In fact, such a relation is virtually admitted by the defendants' answer, the substance of which is above set forth. But the extent and character of the agency are disputed. The testimony of the defendant Farquharson shows that during the summer of 1882, and while their agreement with the respondents was in full force, the firm of Wagner & Co. purchased hops from divers persons for themselves; but he further says they were unable to purchase any for the respondents, owing to the conditions imposed upon them as to price, quality, and quantity. The record discloses, however, that the firm of William Wagner & Co notified the respondents by letter, on one occasion at least, that they had purchased a certain quantity of hops; but neither in that nor in any other communication during the existence of the agency were the respondents informed that the purchase was not made on their account. but on account of Wagner & Co. We are convinced from the evidence, as a whole. that the respondents had good reason to believe, and did believe, that Wagner & Co. were buying hops on their account exclusively. Indeed, they were not even informed to the contrary by the letter of August 9. 1882, by which they were notified that Wagner & Co. would no longer act as their agents. In that letter Wagner & Co. say: "We feel that our connection with your house has not been a source of much profit to us this year." If they up to that time had purchased no hops for the respondents, it is reasonable to suppose they would then have plainly said so; and in that event there would have been no occasion to mention the subject of "profit"

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at all. An examination of all of the evidence in the record leads us to the conclusion that the appellants ought, in equity, to account to the respondents for the proceeds of the hops purchased by Wagner & Co. while acting as the agents of the respondents, and subsequently sold by them without the consent of their principals; and this being so, it follows that under the law existing at the time of the trial, as often construed by this court, a finding of facts by the trial court was not a necessary prerequisite to the validity of the decree, and therefore the omission of such finding is no ground for its reversel

It is earnestly insisted by the learned counsel for the appellants that inasmuch as no fraud is alleged or proven, and no money of the plaintiffs is shown to have been used in paying the purchase price of the hops, plaintiffs are not in a situation to claim equitable relief, their remedy being exclusively an action at law for damages for breach of contract. But we think this contention of counsel cannot be sustained. As matter of fact, the defendants had money of the plaintiffs in their hands, which they might have used if they did not, and which the plaintiffs expected they would use in part payment for hops. Equity will not permit a party who undertakes to act for another in any given matter to act for himself in the same matter, or place himself in a position where his own personal interests conflict with the interest of his employer (2 Pom. Eq. Jur. § 959); and this is just what Wagner & Co. did in this instance. The rule is well stated in Dutton v. Willner, 52 N. Y. 312, in which case the court said: "It is a well settled and salutary rule that 'a person who undertakes to act for another in any matter shall not in the same matter act for himself.' * * * If the agent make a profit out of the transaction, he is bound to account for it, though made without the knowledge or authority of the principal, and without risk or expense to him." In this case the quantity of hops purchased and the price paid, as well as the amount received for them by Wagner & Co., were peculiarly within their own knowledge; and, under such circumstances, the jurisdiction of equity attaches. 3 Pom. Eq. Jur. § 1420, and note 1.

Nor do we think that the failure of the court below to order a technical accounting is proof that, in the opinion of the court, the plaintiffs were not entitled to an accounting The statute prescribes no method at all. by which an account shall be taken or stated in actions like this, and a mere departure from the recognized procedure under the former practice in chancery is not alone a sufficient ground for the reversal of the judg-The court itself found the amount due plaintiffs, and, if the amount so found was not larger than the evidence warranted, the defendants certainly have no legal cause of complaint.

It is next urged that the court erred in admitting in evidence the deposition of Bran-It is claimed that this deposition, though competent when taken, was incompetent at the time of the final hearing of the cause, by reason of the provisions of section 389 of the Code of Washington, which are as follows: "* * * provided, however, that in an action or proceeding where the adverse party sues or defends as executor, administrator, or legal representative of any deceased or insane person, or as guardian of a minor under the age of fourteen years, then a party in interest, or to the record, shall not be permitted to testify in his own behalf." This contention on the part of the appellants is based upon the alleged legal proposition that the competency of a witness whose deposition is offered in evidence must be determined by the law in force at the time of the trial, and not by the law existing when the deposition was taken. In support of this proposition, appellants cite Weeks, Dep. § 413, Mitchell v. Haggenmeyer, 51 Cal. 108, Fielden v. Lahens, 6 Abb. Pr. (N. S.) 341, and 5 Am. & Eng. Enc. Law, 582, and they insist that, tested by these authorities, the deposition was inadmissible. Had the action been brought against Wagner's administrators in the first instance, or had Brangon testified after they were substituted as parties defendant, it seems clear that his testimony would have been incompetent under the statute. But it will be remembered that, when he testified, there were no administrators in the case, no one was sning or defending in a representative capacity, and in such cases only is a party in interest or to the record prevented from testifying. would, in our opinion, be extremely unreasonable to hold that Brangon did not "testify" until his deposition was read at the hearing. He testified at the time his deposition was taken, and when he was a competent witness. The statutory prohibition is to testifying under certain specified circumstances: and it makes the time of testifying the test of competency, rather than the time of the hearing. If at that time the witness is competent, the prohibition does not apply. We think there was no error in admitting the deposition in evidence; and, as was said in Marlatt v. Warwick, 18 N. J. Eq. 108: "This is in accordance with the well-settled rule of evidence, both at law and in equity, that the objection to the witness must exist at the time of his being sworn. If a witness should, after being examined, die, become interested in the suit, or be convicted of crime, his testimony would not be rejected on that account." See, also, Ford v. Grieshaber, 2 Head, 435; Cameron v. Cameron, 15 Wis. 6; Smith's Ex'x v. Profitt's Adm'x (Va.) 1 S. E. 67; Keran v. Trice, 75 Va. 690. In Comins v. Hetfield, 80 N. Y. 261, it was held that the death of the defendant was no ground for striking out that portion of plaintiff's testimony given before the death occurred.

And in Sheidley v. Aultman, 18 Fed. 666, it | was said that it is the rule in chancery that, if the testimony was competent when the deposition was taken and filed, it remains competent; and the court there held that this rule of equity was not changed by section 858 of the Revised Statutes of the United States, which is a statute similar in its object and purpose to ours, but that the administrator merely takes up the case as it stood when the intestate party died. And to the same effect is the case of Vattier v. Hinde, 7 Pet. 252, in which Chief Justice Marshall said: "The new parties plaintiffs are the representatives of Belinda Hinde, an original plaintiff, and the proceedings are revived in their names, by order of the court, on their bill of revivor. Under such circumstances, the settled practice is to use all the testimony which might have been used had no abatement occurred." See, also. 5 Am. & Eng. Enc. Law, 610.

It is further contended that the judgment must be reversed for the reason that there is no proof that plaintiffs ever presented their demand or claim to the administrators for their allowance or rejection, as they were required to do by section 988 of the Code of Procedure. But this contention cannot prevail. In the first place, it is questionable, to say the least, whether plaintiffs' demand was such a claim as is contemplated by our statute. The statute (section 980) provides that "every claim presented to the administrator shall be supported by the afficavit of the claimant that the amount is justly due, that no payments have been made thereon, and that there are no offsets to the same to the knowledge of the claimant." It is difficult to see how the plaintiffs could have made such an affidavit. Their action was instituted for the very purpose of discovering and ascertaining the "amount" of their claim which they alleged in their complaint they did not know, and had no means of knowing except an accounting. Where the demand is merely for equitable relief, or for uncertain and unliquidated damages, it has been held, and not without reason, that it is not necessary to present it to the administrator for allowance or rejection, "for it is obvious tnain all such cases the exhibition would be buan idle ceremony." 2 Woerner, Adm'n, § 386 Evans v. Hardeman, 15 Tex. 480; Toulouse v. Burkett (Idaho) 10 Pac. 26; Thompson v. Bank, 19 Nev. 242, 9 Pac. 121. In the second place, the appellants are not in a position to urge the objection in this court that there was no presentation of plaintiffs' claim or demand to the administrator. The record does not show that the objection was made in the court below, and it cannot be taken for the first time in the appellate court. Coleman v. Woodworth. 28 Cal. 568; Bank v. Howland, 42 Cal. 129; Drake v. Foster, 52 Cal. 225.

Lastly, it is claimed that the evidence is insufficient to establish a right in plaintiffs to

a recovery in this action. But in this view we are unable to concur. There is a conflict in the evidence on some material points, but the judgment cannot be disturbed on that account. The judgment must be affirmed, and it is so ordered,

HOYT and SCOTT, JJ., concur.

COLE . SATSOP R. CO. et al.

(Supreme Court of Washington. Aug. 7, 1894.)

COBPORATIONS — ACTION ON STOCK SUBSCRIPTION

— RECEIVER AS PLAINTIFF — SUBSCRIPTION BY

"TRUSTEE"—EFFECT.

1. Where subscribers for stock of a corporation, with knowledge that some of the stock has been subscribed for by another corporation, pay their subscriptions on some of the stock, they cannot, "as against creditors," defend an action against them for their subscriptions on other stock on the ground that, the subscription by the corporation being invalid, the whole stock was not subscribed for, and therefore they are not liable on their subscriptions.

2. Where a person subscribes for the stock of a corporation "as trustee," it may be shown

2. Where a person subscribes for the stock of a corporation "as trustee," it may be shown by parol evidence that he subscribed as agent for individuals, thereby making it a "pool" subscription, so as to bind such individuals.

3. A receiver of a corporation, appointed in a proceeding by judgment creditors after a return of nulla bona on their executions, acquires all the rights of the creditors; and in an action by him for unpaid stock subscriptions the stock-holders cannot set up a defense which, though good in an action by the corporation, could not be set up in an action by the creditors individually.

Hoyt, J., dissenting.

Appeal from superior court, Pierce county; John C. Stallcup, Judge.

Action by Frank B. Cole, receiver of the Pacific Mill Company, against the Satsop Railroad Company and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

Jas. B. Howe, Thomas Carroll, and Dunning, Richards, Murray & Pratt, for appellant. Parsons, Corell & Parsons, for respondents.

STILES, J. The complaint in this case, to which a demurrer was sustained, alleged: (1) The incorporation of the Pacific Mill Company under the laws of Washington, with a capital of \$500,000, divided into 5,000 shares of the par value of \$100 each. (2) The incorporation of the Satsop Rasiroad Company under the laws of Washington, with a capital of \$100,000, and having, by its articles of incorporation, authority to subscribe for and acquire stock in other corporations. (3) That the defendants subscribed for the entire capital stock of the Pacific Mill Company, as follows: Satsop Railroad Company for 198 shares; C. F. White, as trustee, for 4,300 shares; and other individuals for 502 shares. (4) That said subscription of said C. F. White, as trustee, for said 4,300 shares of the capital stock of the Pacific Mill Company, was made by the said C. F. White,

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as trustee and agent, for the benefit of all of the shareholders of said Pacific Mill Company, at the request of said shareholders, and upon the express agreement between all of said shareholders that the said subscription was made by said C. F. White in trust for all the shareholders of said company, each of said shareholders to have an interest therein in proportion to the number of shares subscribed for by each subscriber in the individual name of such subscriber; and said subscription so made by said C. F. White as trustee and agent for said shareholders was so made in consideration of the mutual promises made to the others by each of said shareholders, and in consideration of the benefits to be derived from being members of said corporation. (5) That the said subscription made by said C. F. White as trustee and agent for said shareholders was, after the making thereof, ratifled and confirmed by said shareholders, and held and used for their benefit, and was ratifled and accepted by the Pacific Mill Company aforesaid as the subscription of said shareholders. (6) That the subscriptions made to the capital stock of said Pacific Mill Company by the said defendants and each of them, individually and by their agent and trustee, the said C. F. White, were made with full knowledge of the subscription of the Satsop Railroad Company for 198 shares of the capital stock of said Pacific Mill Company. (7) That the Pacific Mill Company had commenced business, incurred a large indebtedness, and become insolvent. (8) That the individual interests of the defendants in the subscription of C. F. White as trustee were as set forth. (9) That no part of the subscription of C. F. White as trustee had been paid, except the sum of \$25,000, by the Satsop Railroad Company, and the amounts owing thereon and unpaid were as set forth. (10, etc.) That C. T. Le Ballister & Co. had recovered a judgment against the Pacific Mill Company for \$5,021.-48 and costs; that an execution issued was returned nulla bona; that Le Ballister & Co. had commenced an action, in behalf of themselves and all other creditors who should join them, for the appointment of a receiver, and other relief; that the Pacific Mill Company had been adjudged insolvent; that plaintiff had been appointed receiver; that proof of claims had been taken to the amount of \$65,000; that the receiver had demanded of the board of trustees of the Pacific Mill Company that it levy an assessment upon the unpaid subscriptions to the stock of the company to an amount sufficient to pay said indebtedness, which had been refused; that the court, upon the application of the receiver, ordered a levy of 14 per cent. on the said subscriptions, and authorized the receiver to bring suit therefor; that each of the defendants was notified of said assessment. and called upon to pay the same in the sums set forth, but each had failed and refused; and that the Pacific Mill Company was in-

solvent, and had no assets whatever, except the stock subscriptions sued for. Judgment was prayed accordingly.

From the briefs we are assured that the action of the court below was based upon Hotel Co. v. Schram, 6 Wash. 134, 32 Pac. 1002. If so, we think the court overlooked many manifest differences between that case and this, as disclosed by the complaint, which we have set forth with much fullness. It is true that the Satsop Railroad Company was a large subscriber to the capital stock of the Pacific Mill Company, and it is also true that under the decision in Schram's Case it was not liable for any of its subscription, although it assumed to authorize itself to make the subscription by its articles of incorporation, and that without its subscription the capital of the Pacific Mill Company was not all subscribed for; that it was not authorized to commence business: and that subscribers sued under the same circumstances as Schram was would not be liable. The action against Schram was the ordinary one of a corporation against one of its stock subscribers for the amount of his subscription, and nothing was there considered except the bare legal propositions arising out of the relations of the plaintiff and defendant on the facts. But in the case before us it is pointedly alleged that each of the subscribers had full knowledge of the subscription made by the Satsop Railroad Company, and that each of them paid his individual subscription, the subscription of White as trustee being the only one not paid. Such knowledge and action have frequently been held to constitute a waiver of the right of the subscriber to insist on a full subscription. Thomp. Liab. Stockh. § 120; Mor. Priv. Corp. § 156, and cases cited; Hager v. Cleveland, 36 Md. 476; Morrison v. Dorsey, 48 Md. 468; Musgrave v. Morrison, 54 Md. 161; Hotel Co. v. Hunt, 57 Mo. 126. Great force is added to the reason for thus holding when the purpose of the action is to procure funds with which to pay the creditors of an insolvent corporation. Nearly \$50,000 was paid in by the individual subscribers, the purpose of which payment could have been nothing else but to enable the corporation to commence its proposed business. As against creditors, the defendants cannot rely on the Schram Case. The respondents, however, present two other questions which are material:

1. It is sought to hold the respondents for the subscription of "C. F. White as trustee," under the fourth and fifth paragraphs of the complaint. The position of the respondents on this point is that, in the absence of fraud, parol evidence is not admissible to show that the subscription was other than what upon its face it appears to be; that the word "trustee" added to the name of the subscriber in such a case, in making an original subscription, whatever may be its effect as to transfers and other entries upon the books

of the company, has no effect whatever; and that the effect of our statute is to relieve the trustee from personal liability, and to charge the trust estate, if any, and not to create a trust where there is no estate, or to charge a third party upon the allegation that he was the real party in interest, and in that way open the door for the admission of parol evidence to vary the contract. The statute referred to is Gen. St. § 1512: "No person holding stock as executor, administrator, guardian or trustee * * shall be personally subject to any liability as a stockholder of the company, but * * * the estate and funds in the hands of * * * the trustee shall be liable in like manner and to the same extent as the * * person interested in the trust fund would have been, if he or she had been living and competent to act and hold the stock in his or her name." But this law can have no bearing upon a case like this, for if one who has no estate for which he is acting as a trustee can subscribe for stock, and escape liability by affixing the words "as trustee" to his signature, he is being directly aided by the law to commit a fraud both upon the corporation and other subscribers, which was never intend-The first proposition, viz. that parol evidence is not permitted to show that the subscriber "as trustee" is not the real subscriber, has received general sanction in England. Cook, Stock & S. § 253. But in this country the rule has not been adhered to. Burr v. Wilcox, 22 N. Y. 551. While a trustee is not an agent, an agent is an agent, in whatever way he may describe himself. We can see no greater reason for restricting inquiry into this kind of a contract than into any other. In Stover v. Flack, 30 N. Y. 64, it was held that, although Stover alone subscribed for the stock, yet under the arrangement between him and Flack the latter was a stockholder, and was liable to contribute towards the debts of the corporation. Here the allegation is broadly made that White made the subscription as the agent of the respondents, at their request, and for the benefit of each of them, in proportion to his individual subscription. In other words, it was a "pool" subscription by a dummy, which was understood by the corporation, and was ratified by it, as the subscription of the individuals. Nothing could be more strongly stated, and we think a cause of action was alleged.

2. The other point contended for by respondents is that the receiver, being the representative of the corporation and standing in its shoes, cannot maintain the action, because, inasmuch as the stock had not all been subscribed for, and the subscriptions were therefore not absolute, the corporation itself could not sue thereon. Perhaps it might be justly argued, from what has been said upon the subject of the alleged waiver of the full subscription, that in this case the corporation could have sued notwith-

standing the subscription of the Satsop Railroad Company. But it is not necessary to so hold in this case, for we think this particular receiver could maintain the action whether the corporation could do so or not. The authorities cited to our attention do not, when examined closely, hold to the contrary. language used in High on Receivers (sections 201, 315) is general, to the effect that a receiver is usually only clothed with such rights of action as the person or corporation over whose estate he has been appointed might have maintained; but the same volume recognizes it as usual for receivers to pursue and recover property of an insolvent sufficient to pay creditors (section 455), and respondents concede that such is the fact. It is to be observed, however, that Mr. High's work, so far as receivers appointed at the suit of creditors in aid of execution are concerned, is based almost entirely upon New York cases, which, in turn, are founded upon the very full provisions of the Code and laws of that state. See chapter 12, tit. "Creditors." But at section 324a the same author gives the same weight to decisions in Maryland and New York holding that, when there were acts of waiver on the part of the subscriber, he would be estopped to defend against a suit on his subscription by a receiver on the ground that the stock had been only partially subscribed, or that he had been deceived by false representations as to the condition of the paid-up capital. Farnsworth v. Wood, 91 N. Y. 308, discussed a personal liability imposed upon stockholders to the extent of the par value of their holdings, and did not depend upon subscriptions at all. Haskell v. Worthington, 94 Mo. 560, 7 S. W. 481, is a negative authority on the question of the effect of a waiver, but on the point in discussion it does not support the respondents. The plaintiff appears to have been a commonlaw assignee of an insolvent corporation merely, who, it is well understood, takes nothing but what is conveyed to him by the deed of assignment, and does not represent creditors. Bouton v. Dement, 123 Ill. 142, 14 N. E. 62. Mann v. Pentz, 3 N. Y. 415, depended entirely upon statute, the result turning upon the fact that it was sought to sustain an action by the receiver of a manufacturing corporation against a stockholder by a statute which applied only to moneyed corporations. In Insurance Co. v. Swigert, 135 III. 150, 25 N. E. 680, the receiver was appointed upon the application of the state auditor, showing the insolvency of the corporation, and asking that its affairs be wound up. The receiver applied for leave to proceed against certain stockholders to set aside a cancellation of their subscriptions made by agreement with the company some years before. The court held that the transaction amounted to a purchase of its own stock by the corporation, which, as between the parties, was a valid one, and that the receiver stood so exactly in the shore of the

corporation that he could not overturn the arrangement made with stockholders. The opinion is based upon the statute of Illinois, which is a winding-up act of the affairs of insolvent insurance companies, and expressly prescribes the powers of receivers under it, which are held not to constitute them the representatives of creditors, except in the matter of distribution. But on page 172, 135 Ill., and page 680, 25 N. E., this is said: "Almost all of the cases cited by defendant in error fall in one or the other of the four classes following: * * * (3) Where the receiver was appointed in a proceeding prosecuted by creditors, which was supplemental to execution, and the receiver had the rights of the creditors at whose instance, and to secure whose claims, he was appointed.

* * With the law of such cases we have no fault to find." It is needless to call attention to the fact that the case before us is of the class mentioned. There is no reason apparent why Le Ballister & Co. might not have brought this suit for themselves and such other creditors having unsatisfied judgments as might join them, for there is no specific property to be taken possession of; but it is certainly a common method of procedure for a receiver to be appointed in such cases, and when appointed he represents creditors, and not the corporation, and, by the order appointing him, becomes possessed of the rights of creditors, for the purposes of collection, as fully as though their judgments were assigned to him. The cases cited from Maryland, supra, were all cases of this class, not depending upon statute. The judgment is reversed, with directions to the supreme court to overrule the demurrer.

DUNBAR, C. J., and ANDERS, J., concur. SCOTT, J., concurs in the result. HOYT, J., dissents.

KOCH v. SACKMAN-PHILLIPS INV. CO. et al.

(Supreme Court of Washington. July 17, 1894.)

INJURY TO RESIDENCE LOT — DEPOSIT OF DIRT —

LIALILITY OF ONE GRADING STREET — MEASURE
OF DAMAGES.

1. Defendant, who had permission from the city to grade certain streets, also contracted for the grading of lots owned by him, and for the filling of other lots with the dirt taken from the lots and the street. In order to raise certain lots in a ravine to the established grade, and as a foundation for the street, which was to be raised 30 feet, the contractor, with defendant's knowledge, built a bulkhead near plaintiff's lot and dumped in quicksand and wet dirt, which would not uphold its own weight. The bulkhead gave way, and the sand was deposited on plaintiff's lot, demolishing his fences and outbuildings. Held, that defendant was liable for the damages.

2. In an action for damages to residence property by reason of dirt being deposited thereon, thereby demolishing the outhouses, fences, and shrubbery, the measure of damages is not the difference between the market value of the lot just before and after the injury, but it is

the amount it would take to put the premises in as "good" a condition as before the injury, allowing deductions therefrom for any increased value of the lot arising from the deposit of the dirt thereon.

3. Where, in an action by a husband alone for injuries to his land, he testifies on cross-examination that he purchased the land with his separate money, it is not error to refuse to permit him to be further cross-examined as to his ownership.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by William A. L. Koch against the Sackman-Phillips Investment Company and another. There was a judgment for plaintiff, and the investment company appeals. Affirmed.

Jenner, Legg & Williams, for appellant. Arthur, Lindsay & King, for respondent.

The complaint alleged that STILES, J. the defendants had wrongfully caused a quantity of water, sand, gravel, rocks, and debris to overflow and settle upon plaintiff's lots in the city of Seattle, to his damage; whereupon the Sackman-Phillips Investment Company answered affirmatively to the following effect: It was the owner, with one Colman, of all the lots fronting on all the streets, save one, in the Twelfth Avenue addition, the said streets having been fully dedicated to the public. Desiring to have these streets graded, it procured the passage of Ordinance 2196, by which it and Colman were authorized to grade the streets at their own expense, under the supervision of the city engineer, and in accordance with plans and specifications to be prepared by him, which were required to comply with the established grade. A contract was then let to the other defendants, Taylor Bros., for the entire work, the stipulations therein being those required in contracts entered into by the city of Se-Taylor Bros. were thus as nearly independent contractors as the nature of the case would permit. After alleging that the contractors had performed their work in all respects according to the plans and specifications and the directions of the city engineer, and in a good and workmanlike manner, the answer concluded thus: "(11) That in the grading of said streets and avenues the said defendants Taylor Bros. performed said work wholly within the limits of said streets. That in the performance of said work as aforesaid numerous hidden springs, the existence of which was unknown to this answering defendant, were found, which said springs had no definite course, and which, with other percolating and surface waters, flowed over said streets and avenues naturally and directly, and in no manner was their course directed by any of said defendants, and any and all gravel, sand, rocks, earth, and debris which may have been carried upon the premises of plaintiff as alleged in his complaint were carried and deposited there by the ac-

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tion of said waters in their natural, ordinary, and direct flow, and was done without any negligence, carelessness, or fault of this defendant, or of Taylor Bros., so far as this answering defendant is informed. (12) That the premises of said plaintiff herein are situated below the grade, and in the natural, ordinary, and direct flow of all waters from said street, wherein the said streams were struck as hereinbefore alleged." A demurrer was sustained to the affirmative defense, upon which action error is assigned.

The position taken by appellant is that, under the ordinance authorizing it to grade the streets, it assumed no responsibility except that of paying for the work, and that all liability for the injury complained of must rest either with the city or the contractors, who were acquitted by the jury. So far as injury might accrue in such a case from the inherent defects of the plan of improvement adopted by the city through its engineer, we think this position would be a sound one as to the city; as, for instance, if the effect of an embankment were to cast surface water upon plaintiff's lots, which had not theretofore had its natural flow in that direction, or if an insufficient drain or culvert were provided, where it was plainly necessary that such water should have an outlet. So, also, if the injury were found to have been caused by negligence in construction, it would seem that, although either the city or the contractor might be liable, the appellant would not be, if the facts stated in the answer were true, since the pleading shows a clear instance of an independent contract on the part of Taylor Bros. The allegations contained in the paragraphs quoted are somewhat vague and indefinite as to what caused the gravel, etc., to be cast upon plaintiff's lots, but we are inclined to view them liberally, as tending to show that the difficulty was either in the plans or in the manner of doing the work. We shall treat the case as though no demurrer had been interposed, and consider each point made on its merits, since no evidence of any materiality under the affirmative defense was rejected, except such as would have presented questions of law only, and the rejected evidence is in the record upon exceptions. The evidence, however, disclosed a state of facts which did not bear out the appellant's claims On the same day that it made its contrac with Taylor Bros. for the grading of the streets it made another contract with the same firm for the grading of a large number of lots. Each contract provided that Taylor Bros, should furnish the earth necessary for the filling of the low places, but the evidence showed that it was understood that the surplus earth from either streets or lots, indifferently, should be used as filling wherever needed. Some of the area to be graded consisted of wet lands, there being springs located in them, so that the earth taken therefrom was described as "mushy," and so mixed with water that when dumped into a place that required to be filled up it would not bank up, but flowed away. One of the places to be filled was in the line of Twelfth avenue, where it crossed a depression 30 or more feet below the level of the grade; and into this place, for the period of nearly a month, the contractor dumped masses of the mud taken from the wet area. The ravine crossed by Twelfth avenue carried a small stream of water, which was added to the water already in the dump, and probably helped its flow towards respondent's property, which was about 300 feet from the avenue, and much lower than the avenue at that point. Seeing that the material being used for the filling would not stand in the avenue, appellant procured from the owners of lots between the avenue and respondent's lots the right to let the mud flow down over them. Certain logs, brush, or other obstacles checked the flow near respondent's line. and for some time piled up the mud against them; but after a time the whole mass gave way, and was thrown over respondent's lots, burying his fences, walks, gardens, etc., and causing the damage complained of.

None of the allegations of paragraphs 11 and 12 of the answer were sustained by any evidence. The claim that appellant and its contractor were acting under authority of the city while they were casting this quicksand upon respondent's lots cannot be sustained for a moment. The authority granted was to fill Twelfth avenue, and it was implied that the material used would be something suitable to the purpose, and which would keep up its own weight. But the defendants went clear beyond this authority, and beyond the terms of the contracts between them, and used wholly unfit material. and undertook the filling of lots which neither appellant nor Colman owned. Whether the stuff used came from the streets or from appellant's lots does not appear. Undoubtedly the filling of the Booth lots was undertaken as a matter of convenience to the contractors in disposing of the surplus mud, and to assist them in getting a foundation upon which the avenue fill would stand; but it was done with appellant's knowledge and by its procurement. Both of them knew from respondent of the danger that threatened his property, but they paid no attention to him; they were equally responsible; and we are only surprised that the jury should have relieved the contractors. The city engineer, Thompson, testified that, after the damage was done, he, at respondent's request, went and looked over the situation, and that, in his opinion, a large part of the damage was due to a rainstorm which had occurred the day before; and upon this the court was asked to instruct the jury that if the damage, or a large part of it, was caused by the elements, there could be no recovery. The witness gave no facts upon which he based his opinion, had not seen the place before while the

work was being done, and was not qualified to advise the jury upon the matter. It was not error, therefore, to refuse to base a charge upon his evidence.

Appellant, having denied respondent's alleged ownership of his lots after he had stated on cross-examination that he purchased them with his separate funds, subsequent to his marriage, sought to cross-examine him further; whereupon the court refused to allow the inquiry to proceed upon that subject, giving as a reason that it made no difference whether he was married or not. Perhaps, under the decision in Parke v. City of Seattle (rendered Jan. 16, 1894) 35 Pac. 594, it would make a difference in a proper case; but the answer had been taken that the money paid for the lots was respondent's separate mon-The refusal of further cross-examination, after the subject had been once gone into and dropped, was not reversible error, if it was error at all.

Appellant requested a charge that the measure of damages in this action would be the difference between the value of respondent's premises immediately before and immediately after the sand, gravel, and other débris came thereon; but it was refused. This request stated the general rule of damages to land, where the premises are considered as land only (Sedg. Dam. [8th Ed.] § 932; Suth. Dam. [2d Ed.] § 1017); but even in such cases the cost of restoration is sometimes adopted, where the injury is slight, and the cost of removing débris, etc., would be less than the decrease in permanent value, if it were not removed. But where, as in this case, a considerable part of the damage grows out of the destruction of fences, walks, outhouses, trees, and shrubbery upon city residence premises, the bare difference in market value might not, and in this case we think it would not, constitute a just measure of damage at The filling up of the lots with gravel even may have been a large benefit, and some of appellant's witnesses seemed to be of the opinion that it offset all of the damage, and that the property would sell just as well as But, while respondent would have to accept such a benefit as against the damage to his mere land, he cannot be compelled to take gravel in lieu of fences, outhouses, etc., which must be replaced at the expense of money to enable him to enjoy the reasonable use of his property. Many forms of charge which might have been given in such a case would have been proper, and that which was given by the court was one of them, viz. that the amount of the recovery would be such an amount as would put the premises in as good condition as they were before the gravel, etc., was washed upon them. Appellant argues upon this instruction as though the jury were allowed to award the cost of restoring the property to its original condition by the removal of the gravel, or the importation of new soil; but it does not warrant this construction.

good condition" did not mean the same condition. It might have been necessary to build a new fence, but the instruction would only justify a recovery for the value of the old fence. So with regard to the filling, the court told the jury that if the gravel, etc., had benefited the lots in any particular they should make allowance for such benefit in assessing damages. Finding no error, the judgment is affirmed.

DUNBAR, C. J., and SCOTT and ANDERS, JJ., concur. HOYT, J., dissents.

MATSON v. PORT TOWNSEND SOUTH-ERN R. CO.

(Supreme Court of Washington. Aug. 4, 1894.)

RAILROAD COMPANY—RIGHT OF WAY—TITLE—IN-JUNIES TO TRESPASSER—EVIDENCE—MOTION FOR NONSUIT—WAIVER.

1. Where it is determined in a proper action that a railroad company has complied with that part of a contract for a right of way which required it to construct its road within two years, and it appears that the construction and operation of the road was the substantial consideration, its title is unaffected by the fact that it has not paid a consideration of one dollar and the expenses of the deed of such right of way, as provided in the contract.

2. In an action against a railroad company

2. In an action against a railroad company for injuries caused by the falling on plaintiff of a log from a car, where there is no testimony to show that plaintiff was outside of defendant's right of way, except statements amounting to little more than guesses by the witnesses, and the testimony that he was on the right of way is of the most satisfactory nature, a finding by the jury that plaintiff was not on the right of way is clearly the result of prejudice or mistake, and must be disregarded on appeal.

3. Where a railroad company is in the habit of stopping its trains to allow passengers to get

3. Where a railroad company is in the habit of stopping its trains to allow passengers to get on and off whenever signaled, the license to others than those operating trains to occupy the right of way extends to those only who come thereon to get on trains, or who alight therefrom

4. Where the persons operating a railroad train have no reason to suspect the presence of a boy 10 years old, who is trespassing on the right of way, he can get no benefit from the fact of his tender years, and the company is not liable for injuries to him, in the absence of such gross negligence as amounts to wantonness.

hable for injuries to him, in the absence of such gross negligence as amounts to wantonness.

5. Where a motion for nonsuit, made at the close of plaintiff's evidence, is improperly denied, and the evidence afterwards introduced by defendant, and by plaintiff in rebuttal, in no manner strengthens plaintiff's case, the motion for nonsuit must be given force, since defendant's waiver of it by going into his defense only goes to the extent of allowing plaintiff to benefit by the evidence afterwards introduced.

Appeal from superior court, Jefferson county; R. A. Ballinger, Judge.

Action by Edgar Matson, by Andrew Matson, guardian ad litem, against the Port Townsend Southern Railroad Company, for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

Andrew F. Burleigh, for appellant. F. C. Robertson and R. W. Jennings (D. J. Crowley, of counsel), for respondent,

HOYT, J. Plaintiff was a boy of about 10 years of age. He was fishing in a creek near a bridge or trestle upon which the trains of the appellant crossed. While thus engaged, a train consisting of logging cars loaded with logs, some flat cars, and a passenger coach, came along, and, just before it reached the creek crossing, one of the logs fell from the train. Upon seeing this, plaintiff attempted to run away from the vicinity of the bridge, and while he was so doing, the train having reached the crossing, another log fell therefrom, and struck him, breaking his leg and inflicting other injuries. To recover for the damages flowing therefrom, this action was brought, and resulted in a judgment for the plaintiff, from which this appeal has been prosecuted.

The place where the accident happened was upon a portion of what had been the farm of the plaintiff's father, and was at a distance of about a quarter of a mile from his house. In the course of the trial it became a contested question as to whether or not the appellant had a right of way across said farm, and, if it did have, as to whether or not the plaintiff was within the limits thereof at the time the log struck him. The undisputed facts showed that the father, his wife joining him, had made a contract with the railroad company by which, in consideration of the payment of one dollar and of the expenses incident to the execution of the deed, it was agreed that a right of way 100 feet in width across the premises should be conveyed to the appellant if it should construct and operate its road across the same within a period of two years. It further appeared that Andrew Matson, the father, and his wife, had brought an action in the superior court, in which they alleged and sought to prove that the railroad company had not complied with its contract as to the time when said road should be constructed and operated; that upon the trial in that action the issue made upon this allegation was found against the plaintiffs, and a decree was entered therein to the effect that upon the payment of one dollar, and the expenses incident to its execution, the appellant should be entitled to a deed of warranty, conveying to it title to a right of way 100 feet wide, being 50 feet on each side of the center of its track, across the premises of the plaintiffs. It was contended on the part of the respondent that notwithstanding this decree the appellant had no title to the right of way, for the reason that it had not paid said sum of one dollar, nor the expenses incident to the preparation of the deed. This contention might be sustained, so far as the technical legal title was concerned, but no further. It is evident from the language of the contract, and from the circumstances surrounding its execution, that the money to be paid was not a substantial part of the consideration for the right of way. The substantial consideration was the construction

and operation of the railroad, and, it having been found that this part of the consideration had been fully paid, the title had been substantially earned. This substantial title could not be defeated, or its possession thereunder disturbed or in any manner affected, by the fact that the stipulated dollar had not been paid, so as to entitle appellant to a conveyance of the legal title.

The question as to the location of the plaintiff at the time he was injured was one of fact, and the finding of the jury to the effect that he was more than 50 feet from the center line of the railroad track is conclusive upon this court, unless, from the proofs, it is made so clearly to appear that it was within the boundaries that the finding to the contrary appears to have been from prejudice or mistake. We have carefully examined all the proofs offered upon the subject, and are forced to the conclusion that they so clearly established the fact that he was within the boundaries of the right of way that the finding of the jury to the contrary must be disregard-There was no testimony tending to show ed. that he was without such boundaries, excepting some statements which amounted to little more than guesses on the part of the witnesses, while it was made to appear that he was within the boundaries by testimony of the most satisfactory nature. A person shown to be a competent engineer testified to the fact that he had made actual and accurate measurements, and from such measurements had drawn a map showing the location of different objects in the vicinity of the place of the accident, including the creek in which the plaintiff was when injured. The testimony of the plaintiff had shown clearly that he was somewhere within this creek at the time the log struck him. This map, prepared as above stated, showed conclusively that no portion of the creek, at the place of the injury, was at a greater distance from the center of the railroad track than 45 feet. There was other testimony tending to confirm the facts as shown by this map, among which were the statements of some of plaintiff's own witnesses as to their opinion of the distance from the center of the track to the place where the injury was in-The rights of the parties must thereflicted. fore be determined in view of the fact that the appellant had a right of way across the premises, and that the plaintiff was within the boundaries of such right of way at the time he was injured.

There was some proof offered for the purpose of showing that notwithstanding this fact the appellant had made such use of its right of way as to authorize persons to come upon it. This testimony was only to the effect that it was in the habit of stopping its trains for the purpose of allowing passengers to get on or off whenever signaled so to do. But it did not establish, or tend to establish, such a course of dealing with its right of way on the part of the appellant as

to amount to a license for its occupancy by others than those connected with the operation of the railroad. But, even if it did, such license could only extend to those who came upon the right of way for the purpose of getting upon the trains of the appellant, or those who, having alighted from a train, were making use thereof for the purpose of reaching their destination; and, as it is not claimed that the plaintiff belonged to either of these classes, he can get no benefit from the action of the railroad company in this regard.

It follows from what we have said that the plaintiff was a trespasser upon the right of way of appellant at the time he was injured. The undisputed proofs showed that none of those operating the railroad train had any reason to suspect the presence of the plaintiff upon the right of way until after the accident. This being so, he can get no benefit from the fact of his being of tender years, for while it is true that the duty of the railroad company to a child, upon discovering him upon its right of way, would be different from what it would be in the case of an adult, yet this obligation would not arise until it had notice of his presence. Until it had such notice it owed no duty to him, even although he was of tender years. The plaintiff being a trespasser, and the injury having been committed without any knowledge on the part of the appellant, or any of its agents, of the fact of his presence in the vicinity, the most that could be claimed in his behalf would be that the company would be liable in case of such gross negligence on its part as was equivalent to wantonness. The proof as to the circumstances surrounding the accident, and leading thereto, entirely failed to establish any such degree of negligence. If the proof showed that the logs were loaded in the manner required by the custom prevailing among those engaged in the transportation of logs on cars propelled by steam power, the presumption of negligence, if any existed, would be overcome. All that is required of one engaged in the prosecution of any business, so far as his duty to the general public is concerned, is that he shall conduct it in as safe a manner as is customary among prudent men engaged in the transaction of like business. But, whether or not the proof tended to establish any degree of negligence, there was nothing to show such a degree as would make the company liable to one situated as was the plaintiff. It did not as clearly appear at the time appellant interposed his motion for a nonsuit that the plaintiff was upon the right of way as it did later in the progress of the case, but we are of the opinion that at the time such motion was interposed the testimony was insufficient to sustain a verdict for the plaintiff, and that it should have been granted. And, even although it should be held that by going into its defense the appellant waived such motion, such waiver would only go to the extent of allowing the plaintiff to benefit by any evidence introduced by the defendant, or by himself in rebuttal thereof; and, as the plaintiff's case was in no manner strengthened by such proofs, the motion for a nonsuit must be given force. The judgment will be reversed and the cause remanded, with instructions to dismiss the action.

ANDERS and STILES, JJ., concur. DUN-BAR, C. J., concurs in the result.

MATSON V. PORT TOWNSEND SOUTH-ERN R. CO.

(Supreme Court of Washington. Aug. 4, 1894.)

Appeal from superior court, Jefferson county;

R. A. Ballinger, Judge.

Action by Andrew Matson against the Port
Townsend Southern Railroad Company to recover damages for personal injuries to plaintiff's minor son, caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Reversed.

Andrew F. Burleigh, for appellant. F. C. Robertson and R. W. Jennings (D. J. Crowley, of counsel), for respondent.

HOYT, J. This cause was tried upon the same proofs as that of Edgar Matson, by same proofs as that of Edgar Matson, by Andrew Matson, guardian ad litem, against the same defendant, just decided (37 Pac. 705), and presents no questions of law or fact not determined by the decision in that case. The judgment will be reversed and the cause remanded, with instructions to dismiss the action.

ANDERS and STILES, JJ., concur. DUN-BAR, C. J., concurs in the result.

TOWN OF ELMA v. CARNEY et al. SAME v. WOOD.1

(Supreme Court of Washington. Aug. 6, 1894.) Public Improvements—Street Grading—As-SESSMENTS.

1. Where the town council's record shows that a contract for street grading was let to the lowest bidder, and that the work was accepted by the council as satisfactory and in accordance with the contract, a lot owner is, in the absence of fraud or mistake, concluded from denying these facts.

2. A contract required the grading of streets according to the profiles and specifications made by the town engineer, and according to the directions and to the satisfaction of the council. Subject to such directions, the foot of dumps in fills was to be kept inside the street line. Held, in the absence of any special order of the council, that the contractors were not obliged to construct sidewalk benches in the fills.

3. Where neither charter nor general or-dinance requires passage of a resolution of intention to grade streets, an ordinance for doing the work, which recites that it is in ac-cordance with such a resolution, but which includes for assessment property not included in the resolution, is not therefore invalid.

4. Gen. St. § 678, requiring assessments for street grading to be made on the land fronting on the street in proportion to the benefits on the property to be benefited, to cover the total expense of the work to the center of the street

¹ Rehearing pending.

fronted, is mandatory, and avoids an assessment based on the number of front feet of each lot, ascertained from a map, without examination or exercise of judgment, as to benefits.

Hoyt, J., dissenting.

Appeal from superior court, Chehalis county; Mason Irwin, Judge.

Actions by the town of Elma against John J. Carney and others and against Walter H. Wood to foreclose liens for street grading. Judgment for defendants in each case. Plaintiff appeals. Affirmed.

Austin E. Griffiths, for appellant. Geo. D. Schofield, for respondent Carney. R. R. George, for respondent Wood.

ANDERS, J. These actions were instituted by the town of Elma, a municipal corporation of the fourth class, for the purpose of foreclosing alleged liens upon real estate of the respondents, for grading portions of Third and Fourth streets in that town. The questions involved in both cases are practically the same, and they were tried together in the court below, and were so argued and submitted in this court, though separate briefs were here filed. The complaints set forth in detail, among other things, that certain resolutions and ordinances were duly passed by the town council, authorizing and ordering the grading of Third street and Fourth street, in said town, at specified localities: that publication of notice calling for bids was duly made, and a contract let for the same to the lowest bidder; that said streets were duly graded under and in accordance with said contract; that the work was accepted by the council; that under and by virtue of an ordinance (No. 34) of said town an assessment was duly made, levied, and equalized upon each of the lots of the respondents equal to the amount of the benefit derived by each of said lots, respectively, from said improvement, and sufficient to pay the cost of said grading in front of said lots to the center of the street, and that said assessments became due and were delinquent on June 1, 1891. The answers admitted the due incorporation of plaintiff, and that the premises described in the complaints were situated as therein alleged, but denied generally the remaining allegations of the complaint. In the Carney case the defendants also denied ownership of certain of the premises described in the complaint. It was affirmatively alleged in both answers, in substance, that the plaintiff caused said streets to be graded without letting any contract therefor, and without due authority of law, and thereafter, and prior to the commencement of this suit, accepted the same as fully completed, but that said work was wholly incomplete, and was not done in accordance with any contract, plan, or specification, and that neither of said streets was graded so as to conform to the established grades on said streets. In the replies certain facts were pleaded as matters in estoppel. At the trial the plaintiff introduced in evidence an assessment roll, and rested. The defendants moved for a nonsuit, which was denied, and they then introduced the entire record of the proceedings of the council of Elma concerning the alleged improvements, and also oral testimony, over the objection of plaintiff, in support of the allegations of the answer above set forth. After the testimony was all in, the court, without making any findings of fact or conclusions of law, dismissed the complaints in both actions, for the reason, as stated by the learned trial judge in his written opinion, which is inserted in the record, that the work had not been done in accordance with the plans and specifications adopted for the grades, and that the defect in the improvement resulted directly to the injury of the defendants. Counsel for the appellant insists that this ruling of the court was erroneous, and that the judgment, upon the grounds stated in the court's opinion, is not supported either by the law or the facts disclosed by the record, and we feel constrained to agree with him. The record of the proceedings of the town council shows that the contract for the grading of these streets was let to the lowest bidder, and that the work was accepted by the council as satisfactory and in accordance with the agreement. That action of the council was, in the absence of bad faith or palpable mistake, conclusive upon the defendants. Elliott, Roads & St. p. 416; Cooley, Tax'n (2d Ed.) 671. It was the province and duty of the council to determine whether the work was properly performed, and their conclusion, under the circumstances, cannot be set aside by this court. And, besides, we think the proofs show that the contractors did perform the work substantially in accordance with the terms of the contract. There was nothing in their agreement requiring them to do more than grade the streets according to the profiles and specifications prepared by the town engineer. Nothing was said in the specifications as to sidewalk benches, but it was therein specified that the grading should be done in accordance with the directions, and to the entire satisfaction, of the council. The specifications, among other things, required the foot of dumps in fills to be kept, as a rule, inside the street line, but the work was to be done according to the directions of the council. The dump evidently could not be kept within street lines where it was necessary to fill in from three to six feet of earth in order to make "sidewalk benches" without at the same time making retaining walls or bulwarks to support the earth. Neither the contractors nor the council undertook to do anything of that kind. The contract, as we have said, was for grading the streets; and nothing else, and in such cases the word "street" is generally understood to mean the traveled way between sidewalks, and such was the understanding of the council and the contractors in these instances. See Elliott,

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Roads & St. p. 17. The council never directed any sidewalk benches to be made in fills, under the contract, which we must presume they would have done if they had deemed it a part of the agreement.

It is contended by the learned counsel for the respondents that even if the court committed error in dismissing these actions, the judgments should nevertheless be affirmed. The point is made in support of this contention that the council never acquired jurisdiction of the work that was done, and that the alleged assessment was void. It appears that the council, some time prior to the commencement of the improvements in controversy, passed certain resolutions declaring it expedient to improve Third street by grading the same from Railroad avenue to Eaton street, and Fourth street by grading and sidewalking the same from Anderson to Waldrip street. Neither of these resolutions included the property of the respondents now in question. On August 21, 1890, however, the council passed a special ordinance, wherein and whereby Third street was ordered graded from Railroad avenue to Greenwood avenue, and establishing all lots and parts of lots and blocks abutting on said street between said points, to the full depth thereof, as an assessment district, and liable for the cost of grading said street. On the same day a similar ordinance was passed, ordering Fourth street to be graded from Anderson street to Greenwood avenue. The district mentioned in these ordinances included the premises of the respondents, and the ordinances themselves recite that the orders therein set forth were in accordance with the previous resolutions above mentioned, and which in fact did not include the property in controversy. But we do not think the ordinauces ought to be deemed invalid on account of that recital. Neither the statute, which is the charter of the town, nor the general ordinance in relation to street improvements, requires any resolution of intention to grade streets to be passed. The statute (section 678. Gen. St.) authorized and empowered the council to order the work to be done. This was done by the special ordinances which we have mentioned, and we are therefore of the opinion that the council had jurisdiction of the work notwithstanding the discrepancy between the resolutions of expediency and the subsequent ordinances. The statute above referred to provides that, "whenever any expenses or costs of work shall have been assessed on any lands, the amount of said expenses shall become a lien upon said lands, which shall take precedence of all other liens, and which may be foreclosed in accordance with the provisions of the Code of Procedure." The vital question, therefore, in these cases is, was the land of the respondents assessed,-that is, legally assessed? It was said by this court in Town of Elma v. Carney, 4 Wash. 418, 30 Pac. 732, referring to this statute, that the production of an as-

sessment roll or list would prima facie entitle the town to a decree, unless the defense should establish such a failure of conditions precedent to a lawful assessment as would, in equity, require the court to find that there had been no assessment at all. But it was not meant by what was there said to announce as a legal proposition that anything which the council might accept as an assessment would in fact be deemed such in equity. Nor did the court intend to say or to intimate that an assessment for street improvements could be lawfully made in a different mode from that prescribed by the statute, for we believe the law to be otherwise. The power to grade streets and to assess the cost thereof against abutting property is derived solely from the statute; and in this state the legislature has seen fit to provide that such assessments shall be made upon the lands fronting on the street improved "in proportion to the benefits upon the property to be benefited, sufficient to cover the total expense of the work to the center of the street on which it fronts." Gen. St. § 678. Although this statute is mandatory, it seems not to have been followed in these cases. There is no certificate of the assessor or council attached to the alleged assessment roll, which is made a part of the record, stating how the assessment was made, and the roll itself shows on its face that the lots therein described were assessed according to frontage. That alone would not be conclusive against the validity of the assessment, for it might be possible for property to be really benefited in proportion to its extent along the street. But it will not do, under our statute, to make the number of lineal feet of lots along a street the basis of the assessment, and assume, without inspection or examination, that the property to be assessed is benefited in proportion to its frontage. Benefits can only be ascertained by the exercise of judgment on the part of the assessing officer or body, and the result contemplated by law can only be reached by taking into consideration the condition in which the property will be left by the proposed improvement, and how it will thereby be affected. This was not done in these cases. The assessor, according to his own testimony. based his assessment upon the number of front feet of the respective lots, which he ascertained from a map of the town. He did not even undertake to determine, as a matter of fact, how much any particular lot would be benefited by the improvement, but simply assumed that all the lots would be equally benefited in proportion to size. This was not a mere error of judgment, for no judgment was exercised at all. It therefore follows that the lands of the respondents were not legally assessed, and, that being so, no lien was created thereon in favor of the town, and the foreclosure proceedings should have been dismissed for that reason. The appellant, however, is not precluded by our ruling from having a proper assessment levied under

the act of March 9, 1893. Being of the opinion that the assessment was void, it is not deemed necessary to determine other questions discussed in the briefs of counsel. The judgments are affirmed.

DUNBAR, C. J., and STILES, J., concur. HOYT, J., dissents.

POTWIN v. BLASHER et al.1

(Supreme Court of Washington. Aug. 6, 1894.) Action on Purchase-Money Note — Defenses— Breach of Covenants — Eviction by Paramount Title—Invalid Tax Deed—Attorney's Fees.

1. Where the purchaser of a tax title void on its face sells the land covered by it and takes a purchase-money mortgage therefor, the assignee of such mortgage is not an innocent purchaser as against the purchaser claiming under covenants in the deed to him.

2. Where one purchasing a title based on a tax deed void on its face receives a deed containing a covenant that the grantor is the owner in fee simple and a warranty against incumbrances, and he is thereafter compelled to compromise a suit brought by the original owner, and to buy out the latter's title, there is a constructive eviction, and he is entitled to recover from his vendor the amount so paid and the expenses of such litigation.

3. In a suit to foreclose a purchase-money mortgage, defendant may set up a breach of the covenant of title in that he was forced to compromise a suit brought by one having a valid claim to the premises, and to buy the latter's title.

4. Costs which depend on facts not ascertainable from the record should be itemized in

the bill of costs.

5. Costs on execution should not be allowed in the cost bill. Where there is an agreement in a mortgage for attorney's fees, the statutory fee will not be allowed on foreclosure.

fee will not be allowed on foreclosure.

6. Under Code Proc. § \$23, which allows parties to make their own agreements as to attorney's fees, a fee amounting to 9 per cent. of the amount due on the mortgage, in the presence of an agreement for 5 per cent., is excessive.

7. Under Act 1893, p. 111, requiring that the findings should consist of a concise and separate statement of every essential fact established by the evidence, a refusal, on request of a defendant, to file the findings on issues raised by the answer, is error.

Appeal from superior court, King county; T. J. Humes, Judge.

Action by Mary B. Potwin against F. A. Blasher and others to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Reversed.

Parsons, Corell & Parsons, for appellants. Ira A. Town and W. W. Likers, for respondent.

STILES, J. The sheriff of King county, on the 19th day of April, 1883, executed a tax deed of certain lands to John Murray, reciting in the deed that he had sold the land April 22, 1881. This deed was void on its face, having been executed three days before

the time allowed for redemption. Murray quitclaimed the land to Fountain O. Chezum. March 12, 1886, and he sold it (reserving two acres) to appellant Blasher June 18, 1889. covenanting for a fee-simple title, and warranting against incumbrances. Biasher and wife executed a purchase-money mortgage to Chezum for \$10,500, and this action was brought by respondent, claiming to be the assignee of the mortgage and unpaid notes to foreclose the lien. A purported quitclaim deed from John Moore, the owner, prior to the tax sale to Chezum, of date December 19, 1888, was immaterial, as it was conceded to have been a forgery; Moore, the grantor, having been for many years an inmate of the insane asylum, and another person having executed it. The respondent, although showing the legal title enabling her to sell, was not a purchaser for value, and was chargeable with all defenses maintainable against Che-The tax deed being void, and not having been supported by the limitation law of 1881 (Ward v. Huggins, 7 Wash. 617, 32 Pac. 740, 1015, and 36 Pac. 285; Baer v. Choir, 7 Wash. 631, 32 Pac. 776, and 36 Pac. 286). the title wholly failed. But appellants had taken and retained possession, and this fact is respondent's justification of the judgment entered in the lower court. There were other material facts, however, which must be stated. In November, 1890, the guardian of John Moore commenced an action of ejectment against Chezum and purchasers through him. Chezum was notified to defend the action, and promised to do so, but defended only as to his own two acres. The other defendants thereupon procured their own counsel, and filed their answers. The common defense was the tax deed, based on the three-year statute of limitations. An error seems to have existed in the minds of all parties to the effect that the sale for taxes had taken place March 22, instead of April 22, 1881, which would have made the deed good on that The guardian, in his reply, denied all the allegations in regard to the tax deed, and sought to avoid the bar of the statute by pleading the insanity of his ward. Notwithstanding the denials, a demurrer was sustained to the reply, and the guardian was left with the right to appeal only. Upon this the parties entered into a compromise, under leave of the probate department of the superior court, whereby the guardian agreed to accept \$2,000 for a conveyance of the interest of Moore's estate in the land held by the appellants,-two-thirds of the whole. Chezum procured a like compromise covering his two acres, and took a decree of the court quieting his title. This decree purported to cover the whole tract, but it did not have that effect, as his answer was a specific defense as to his two acres only. Fifteen thousand dollars was the price paid Chezum for the land, and the compromise made was an eminently prudent one for his grantees. The tax deed was void, and the fact of the true

¹ Rehearing pending.

date of the sale must have come out on a trial of the cause. The allegation of a false date in the answers was all that saved them from failure on demurrer. The action of the court in sustaining the demurrer to the reply was certain to be reversed on appeal, since it contained a general and full denial of all the facts alleged concerning the tax deed. Thus the defendants had nothing to operate in favor of their retaining possession of any of the land but the fact that the guardian was without means belonging to the estate to prosecute an appeal. Chezum was bound, under the warranties of his deed, to successfully defend the title or make it good. He refused to do either, and left his grantees to make the best arrangement they could. Having done that, he is bound to reimburse them what they paid for the title and their necessary expenses in the litigation.

The only question is whether this outlay of the appellants can be set off against a complaint to foreclose the mortgage, by way of an affirmative defense. The covenant in the deed was that the grantor was the owner in fee simple of the premises. This was a covenant of seisin, and was broken the moment it was made. Neither the legal nor the equitable title was in the grantor, and the possession which he surrendered had nothing to support it. There was no actual eviction, but the suit commenced by the guardian was a constructive one, which compelled appellants to pay for the title their grantor had warranted. When this suit was commenced the liability of Chezum was fixed and liquidated, and was a subsisting cause of action against him in favor of the principal defendants. Moreover, it arose out of the transaction constituting the foundation of the plaintiff's claim; and the principal action and the defense both arose on contract. These conditions brought the case clearly within the provisions of our code,—Code Proc. §§ 194, 195. Walker v. Wilson, 13 Wis. 584. It would be a strange commentary on the supposed advance made by the adoption of the modern codes containing such provisions as ours if all the matters of difference between a vendor and a purchaser of land, which have been advanced to the position of subsisting causes of action, could not be adjusted in one suit, brought to recover a balance of purchase money. Under any system, we think, this defense could be made. Rice v. Goddard, 14 Pick. 293; Jones, Mortg. § 1504; Wilsie, Forecl. Mortg. § 384. Where there has been no fraud and no eviction, either actual or constructive, the rule may be the other way (Peters v. Bowman, 98 U. S. 56); but the case before us is not of that kind, and the appellants will not have the rights guarantied them by the law if they are compelled to submit to a sale without deducting their just set-off against the mortgage. From the evidence it is certain that appellants paid \$2,000 for the land, under the compromise, and they are entitled to credit for that sum upon the notes as of the date when they paid it. As to their expenses, they are entitled to a similar credit for what they paid as the reasonable value of the legal services of their counsel in the defense of the guardian's suit; but that should not include the prosecution of the forger of the John Moore deed, or the appointment of a guardian. The evidence upon this matter is indecisive, and we refer the cause to the superior court to hear further evidence on both sides, and determine the amount proper to be allowed, not exceeding \$2,000. The answer was framed as a defense, not as a counterclaim, and no special damages were pleaded; none are therefore allowed.

A motion was made to retax costs. It is said that the first four items covering clerk's, sheriff's, and attorney's fees, \$56.65, were connected with the erroneous entry of a judgment by default, the same being thereafter set aside by stipulation. The cost bill does not show these facts, and, as no other costs for like matters appear to be included, they will stand, except the attorney's fee. There is an item of \$131.60 for "copies served in the conduct of the action, 658 folios." The record does not support any such charge, and it is disallowed. Where, under any statute or rule of court, costs of this kind depend on facts not ascertainable from the record of the case, the cost bill should itemize the charge, so that the opposing party may know what is claimed. "Abstract of mortgaged property, \$25," is another unsupported item. The abstracts in the case appear to have been put in evidence by appellants.

Costs on execution have no place in the cost bill. They are accruing costs, which the sheriff adds as they are made. \$26.90 under this head is disallowed. The notes provided that if suit should be brought upon them the maker would pay "such sum as the court may adjudge reasonable as attorney's fees." The mortgage had it that "a reasonable attorney's fee, equal to five per cent of the amount due," should be included in the judgment. Upon a recovery of \$6,093.35 the court allowed an attorney's fee of \$550. The statute (Code Proc. § 823) allows parties to contracts to make their own agreements as to attorney's fees; but, in the absence of any agreement, section 829 regulates the matter. There was an agreement in this instance, and therefore the statutory fee of \$15 was improperly in the cost bill. The notes and mortgage constituted one transaction, and the effect of the limitation of 5 per cent. in the mortgage was a construction by the parties of what was a reasonable maximum. Therefore the allowance made was excessive, as it exceeded 9 per cent. of the recovery.

This case was tried in May, 1893. June 24th findings and conclusions of law supporting the plaintiff's case were filed, and on the same day the decree was entered. At this time the act of 1893 governing exceptions in all cases, legal or equitable, was in force.

In September the defendants filed exceptions to the findings on file, and requested the finding of facts which had been established by the evidence and were material to the issues raised by the answer. All these the court refused. Respondent maintains that there was no error, because there were findings sufficient to support the judgment. While the act of 1893 (page 111) did not expressly make Code Proc. § 379, which directs the procedure on trials by the court, applicable to equity causes, the implication is very strong that it should be so applied. If so, the findings should cover all the issues, and not merely such as may be sufficient to support the judgment. "The findings should consist of a concise, distinct, pointed, and separate statement of each specific, essential fact established by the evidence, in its proper 'order." Hidden v. Jordan, 28 Cal. 306. Judgments reversed for want of sufficient findings on issues made by answers. Polhemus v. Carpenter, 42 Cal. 375; Roeding v. Perasso, 62 Cal. 515; Walker v. Brem, 67 Cal. 599, 8 Pac. 320.

Precisely the same statute as Code Proc. § 379, has existed in California for many years, except that, under an amendment, findings in writing are now required only after request. Section 3 of the act of 1893 plainly contemplates that findings shall be filed, and time given to except thereto, before a judg ment is entered thereon, after notice of the filing, if it occurs in the absence of the excepting party; and courts should be liberal in finding facts material to the issues presented by the losing party, since he may desire to appeal upon the law as applied to such facts alone, and will thus be saved the necessity of a statement containing evidence, and much consequent expense. The judgment is reversed, and the cause remanded for further proceedings in accordance with this opinion.

DUNBAR, C. J., and ANDERS, HOYT, and SCOTT, JJ., concur.

PARKER et al. v. JEFFERY et al.

(Supreme Court of Oregon. Sept. 10, 1894.)

Bond of City Contractor—Action by MateRIAL Man.

A person furnishing materials to one under contract with a city to build a sewer, and within 90 days after its completion to pay all sums of money due at its completion for materials used on said work, cannot sue on the bond given by the contractor for the faithful performance of his contract with the city, unless the bond was made for the direct and primary benefit of such material man.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by C. N. Parker and others against E. J. Jeffery and others on a city contractor's bond. Judgment for plaintiffs, and defendants appeal. Reversed.

W. W. Thayer, for appellants. Clarence Cole and A. L. Frazer, for respondents.

BEAN, C. J. This case comes here on appeal from a judgment given in favor of plaintiffs for want of an answer, the defendants electing to stand by their demurrer to the complaint, which was overruled by the court. From the complaint it appears that on November 23, 1892, the defendants Robertson Bros. contracted in writing with the city of Portland to furnish the material and perform the labor necessary for the construction of a sewer in Curry street, to be completed by February 24, 1893, in good and workmanlike manner, according to plans and specifications therefor, to the satisfaction of the committee on streets and public property. and to be responsible for, and hold the city harmless from, any loss or damage resulting from carelessness or negligence in doing the work. As a part of this contract, it was stipulated and agreed that within 90 days after the completion of the work Robertson Bros. "would pay all sums of money due at the completion of the work, or hereafter to become due, for material used in and labor performed on or in connection with said work." On the 29th of November, 1892, they executed and delivered to the city their bond in the penal sum of \$1,940, with the defendants Jeffery and Bays as sureties, conditioned that: "Whereas, the above-bounden Robertson Bros. have this day entered into a contract with the city of Portland for the construction of a sewer in Curry street, of said city, according to the plans and specifications therefor, in accordance with the provisions of Ordinance No. 7915 of said city of Portland: Now, if said contractor shall well and faithfully perform all the covenants and conditions in said contract mentioned, then this obligation to be void; otherwise to be and remain in full force and virtue." During the progress of the work, plaintiffs sold and delivered to said contractors material to be used in the construction of the sewer to the amount and value of \$127.50, and, the same not having been paid within 90 days after the completion of the work, or at all, this action is brought against the sureties on the bond to recover the amount thereof.

At the outset it may be well to observe that when the contract and bond in suit were executed the charter of the city of Portland contained no provision authorizing or requiring it to exact from contractors a stipulation to pay for labor and material used by them in the performance of their contracts; and, while the absence of such a provision would not, perhaps, necessarily render the stipulation inoperative (Knapp v. Swaney, 56 Mich. 345, 23 N. W. 162), yet without it the obligation of the defendants must be determined by the same rules as would apply in the case of similar contracts between individuals. To support the judgment of the court below, the plaintiffs invoke the doctrine that, if one person makes a promise to another for the benefit of a third, the latter may maintain an action upon it, though the consideration

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did not move from him. Upon this question and the application of the rule, or rather the exception to the general rule that to sustain an action there must be privity of contract between the parties, the cases are discordant, and not at all reconcilable. But, whatever may be said of the doctrine elsewhere, it must be regarded as settled in this state that a third person may, under certain circumstances, enforce a contract made by others for his benefit (Baker v. Eglin, 11 Or. 333, 8 Pac. 280; Hughes v. Navigation Co., 11 Or. 437, 5 Pac. 206; Schneider v. White, 12 Or. 503, 8 Pac. 652; Chrisman v. Insurance Co., 16 Or. 283, 18 Pac. 466); and this, we believe, is generally regarded as the prevailing rule in this country (Pom. Rem. § 139; Pars. Cont. 467; Hendrick v. Lindsay, 93 U. S. 143; Lawrence v. Fox, 20 N. Y. 268). But the doctrine is not applicable to every contract made by one person with another from the performance of which a third person will derive a benefit, but is limited to contracts which have for their primary object and purpose the benefit of a third person, and which were made for his direct benefit. "To entitle him to an action," says Mr. Justice Rapallo, "the contract must have been made for his benefit. He must be the party intended to be benefited." Garnsey v. Rogers, 47 N. Y. 240. To the same effect are Vrooman v. Turner, 69 N. Y. 280; Railroad Co. v. Curtis, 80 N. Y. 219; Second Nat. Bank of St. Louis v. Grand Lodge, 98 U. S. 123; Shamp v. Meyer (Neb.) 29 N. W. 379, 24 Cent. Law J. 111, note; Austin v. Seligman, 18 Fed. 519; Wright v. Terry, 23 Fla. 160, 2 South. 6; Chung Kee v. Davidson, 73 Cal. 522, 15 Pac. 100; Burton v. Larkin (Kan.) 13 Pac. 398; Greenwood v. Sheldon, 31 Minn. 254, 17 N. W. 478; Depeau v. Waddington, 2 Am. Lead. Cas. 182. From these and other authorities which might be cited we take the rule to be that, to entitle a third person to recover upon a contract made by others, there must not only be an intent to secure some benefit to such third person, but the contract must have been made and entered into directly and primarily for his benefit; for, if a contract should be enforced by a person who would be incidentally or indirectly benefited by its performance, as was said by Rapallo, J., in Garnsey v. Rogers, supra: "Every agreement by which one party should agree with another, for a consideration moving from him, to become security for him to his creditors, or to advance money to pay his debts, could be enforced by the parties whose claims were thus to be secured or paid. I do not understand any case to have gone this length." There are many cases, it is true, in which the language of the court does not expressly so limit the doctrine, but would seem to extend the rule so as to allow any person to maintain an action whenever the contract contains a provision for his benefit; but an examination of the facts upon which the various decisions rest will, in most instances, we think, show that the language used in the instance referred to is broader than the case called for. Judges have differed widely as to the principle upon which the doctrine rests, and it is almost, if not quite, impossible to extract from the cases any general principle by which they can be reconciled. 23 Am. Law Reg. (N. S.) 1. But in nearly, if not quite every, case coming under our notice in which the action has been sustained, unless on a bond or obligation authorized by law, there has been some property, fund, debt, or thing in the hands of the promisor upon which the plaintiff had some legal or equitable claim, and from which the law, acting upon the relationship of the parties to the fund, established the privity, implied the promise, and created the duty upon which the action was founded. Applying these rules to the case in hand, it seems clear that plaintiffs cannot maintain this action, because there was no promise by Jeffery and Bays to pay for labor and material used by Robertson Bros. in the performance of their contract with the city; nor was the bond taken by the city for the benefit of parties who might furnish such labor or material, but to indemnify and save it harmless from loss or damage by the failure of Robertson Bros. to perform their contract. The obligation of Jeffery and Bays is measured by the terms of their contract, which is an ordinary penal bond, by which they acknowledge themselves indebted to the city of Portland in the sum of \$1,940, and which they bind themselves to pay to the obligee in the bond, and not to any other The condition that, if Robertson Bros. should comply with their contract with the city, the obligation should be void, is incorporated in the bond for the benefit of the sureties. It simply declares upon what terms they may be exonerated from their liability to the city. The bond contains no covenant or agreement to pay the plaintiffs, or to see them paid, but only a condition, the performance of which will exonerate them from liability; and such a condition will not be construed as a promise. Lamb v. Vaughn, 2 Sawy. 161, Fed. Cas. No. 8,023. Thus, in Turk v. Ridge, 41 N. Y. 201, where the defendant, in consideration of a conveyance to him by one Perkins of a farm, executed and delivered to the latter a bond in the penalty of \$15,000, conditioned that the same should be void if the defendant should pay a certain promissory note given by Perkins to the plaintiff, and indemnify and save him harmless against the note, otherwise to remain in full force and virtue, it was held that the plaintiff could not recover, because there was no express agreement of the defendant to pay the note. The court said: "The defendant's agreement is to pay this \$15,000 to Philip Perkins. The rest is a mere condition or defeasance for the benefit of the defendant. It simply sets out what shall avoid the defendant's covenant or obligation cor

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tained in the penal part of the bond, and simply states the terms and conditions upon which he can exonerate himself from the debt which he has agreed to pay the obligee. The condition, standing by itself, wants the very elements of a contract, and it seems to me very clear that Harriet Perkins could never maintain an action upon the conditions contained in this bond, as well for the reasons above stated as for the palpable reasons appearing upon the face of the instrument itself." And in Merrill v. Green, 55 N. Y. 270, Roberts and Green were partners. They dissolved, and Green and one Nichols executed a bond to Roberts, conditioned that Green should pay all the partnership debts. In a suit on the bond by a creditor it was held that he had no cause of suit, Grover, J., saying: "I do not think the case within the principle of Lawrence v. Fox. Green was liable, with Roberts, for the payment of the firm debts. He agreed with Roberts, upon a valid consideration, to assume the payment of the whole of the debts, and Nichols undertook that he should perform this contract. This was no agreement made by Green and Nichols with the creditors, or for their benefit, but one with Roberts, to exonerate him from his liability for the debts of the firm by payment which Green was to make, and, in case of his default, such payment to be made by Nichols. All the liability incurred by either was upon the bond, and this was to the obligee only." And in Simson v. Brown, 68 N. Y. 355, one Boyd was indebted to Macdonald on a bond and mortgage, which was assigned to the plaintiff, and which Boyd subsequently, and without knowledge of the assignment, paid in full to Macdonald. Afterwards, and "for the purpose of securing to the plaintiff the amount of principal and interest unpaid to him on said bond and mortgage, and to indemnify the said Boyd against the claim of the plaintiff thereon, the said W.J. Macdonald, together with one John Macdonald, executed and delivered, under seal, their bond to said William Boyd," in the penal sum of \$1,000, conditioned that, "if the obligors pay or cause to be paid unto plaintiff the amount of said bond and mortgage, and hold the said Boyd harmless therefrom, then the bond should be void." The defendant guarantied the payment of the bond. It was held plaintiff could not sue, because the bond contained no promise for his benefit, and, although it may have been made for the purpose of securing to the plaintiff the amount of the principal and interest unpaid to him on the bond and mortgage, it would not entitle him to recover thereon; Folger, J., saying: "He is not entitled to maintain this action, and recover therein, unless the promise is to pay to him. We have seen that the obligation in this case contains no promise to that effect. Whatever agreement there is in it, is to pay to Boyd the sum of \$1,000. The condition is not a promise, but an alternative for the benefit of the Macdonalds. It contains no agreement to pay any one, and is not the basis of an action." And further on in the opinion it is said that: "It is not to be denied that the performance of the condition of the bond to Boyd would have worked consequentially a benefit to Simson, if it had been performed by the payment of the \$500 and interest to him. It might then be said, in a way, to have been a benefit to him in the execution of it. But it is not every promise made by one to another, from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the con-The contract must be made for sideration. his benefit as its object, and he must be the party intended to be benefited." The case of Jordan v. Kavanaugh, 63 Iowa, 152, 18 N. W. 851, is, we think, clearly distinguishable from the case at bar in this: that the contract containing the promise of the principal to pay all just claims of subcontractors is attached to and made a part of the bond, and the two instruments were considered and read together by the court in determining the undertaking of the obligors in the bond, and. when so considered, contained a promise by the obligors to pay such claims; and, besides, the statute of Iowa gave a right of action to any person intended to be secured by such a bond who has sustained injury in consequence of a breach thereof. The bond upon which the case of City of St. Paul v. Butler. 30 Minn. 459, 16 N. W. 362, was brought was one required by law to be executed by all contractors with the city "for the use of all persons who may do work or furnish material pursuant to any such contract," and hence such parties were the real obligees of the bond, although taken in the name of the city. From what has been said it follows that the complaint does not state facts sufficient to constitute a cause of action, and the judgment of the court below must be reversed, and the cause remanded, with directions to sustain the demurrer.

BELLINGER v. THOMPSON et al. (Supreme Court of Oregon. Sept. 10, 1894.)

EXECUTORS AND ADMINISTRATORS—POWER TO REQUIRE BOND—VALIDITY OF BOND—LIABILITIES OF SURETIES.

1. Under Hill's Ann. Laws. § 1100, requiring the county court to supervise an executor in the performance of his duties, the county court may require a bond, though the will provide that none be given.

vide that none be given.

2. A bond voluntarily given for the faithful performance of his duties by an executor is valid, though the county court had no authority to require such bond.

ty to require such bond.

3. Where an executor, who is also appointed trustee to convert assets into cash, and pay over the proceeds as directed, assumes such duties in the capacity of executor, his sureties, in an action on the bond, cannot question the capacity in which he was acting.

4. Sureties on the bond of an executor con-

4. Sureties on the bond of an executor conditioned for the falthful performance of his du-

ties are liable for assets misapplied before the execution of the bond.

5. An order of the county court discharging the sureties on an executor's bond, and substituting a new bond, at the instance of the executor, and against the protest of those interested in the estate, is void.

6. In an action by a guardian against the sureties on an executor's bond, to recover an amount due his wards, the objection that the action should have been brought in the name of the wards cannot be raised for the first time on appeal

on appeal.
7. In an action on an executor's bond, a judgment against the executor on the final settlement is conclusive upon the sureties, in the absence of fraud or collusion.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by C. B. Bellinger against D. P. Thompson, Frank Dekum, and W. W. Spaulding, on the bond of Rufus Ingalls, executor. From the judgment, both parties appeal. Modified.

J. F. Watson, Geo. H. Williams, and C. J. McDougall, for plaintiffs. C. B. Bellinger, R. Mallory, and A. H. Tanner, for defendant.

BEAN, C. J. This is an action brought by C. B. Bellinger, as guardian of Linda and Ben Campbell Holladay, minor children of Esther Holladay, deceased, against D. P. Thompson, Frank Dekum, and W. W. Spaulding, as sureties on official bonds of Rufus Ingalls, executor of the will of said Esther, to recover the sum of \$12,558.09 ascertained and found to be due to his wards from said executor on final settlement. The facts are that on April 5, 1889, the said Esther Holladay died leaving a will whereby she devised and bequeathed all her property to Ingalis, upon "trust to sell and convert the same into cash, and after paying all testamentary expenses and just indebtedness, and making final settlement of said estate, to pay over all moneys so realized to the guardian of her children, Linda and Ben Campbell Holladay, to be held, managed, and expended by such guardian for their benefit." She appointed Ingalls sole executor thereof, and charged him, both as trustee and as executor, with the execution, in his several capacities, of the various trusts reposed in him, and expressly directed that no bonds should be required of him. The will was admitted to probate, and letters testamentary issued to Ingalls, who duly qualified as executor, and entered upon the discharge of his duties, on the 21st day of April, 1889, without bonds, and continued so to act until January 29, 1891, when the plaintiff, as such guardian, filed a petition in the county court charging Ingalls with an abuse of his trust, and praying that he be required to file his final account, and pending the settlement thereof to deposit the money in his hands, belonging to the estate, in some bank of deposit, to be paid out only as the court might direct, or that he be required to give a good and sufficient bond to account for the money received by him to the use of such guardian, and for such further order and relief as to the court might seem proper. Thereafter, such proceedings were had on said petition and Ingalls' answer thereto that on March 27, 1891, the county court ordered and required Ingalls to file a good and sufficient bond as such executor, in the sum of \$25,000, "for the faithful execution of the trust reposed in him as executor of the last will and testament of said Esther Holladay, deceased, according to law." In obedience to this order, Ingalls, on April 13, 1891, filed his bond in due form, with one J. Loewenberg as surety, which bond was approved by the county court. Afterwards, and on the 23d of the same month, on the application of Ingalls, the county court, without notice to or the consent of said guardian, made an order allowing him to substitute for the bond theretofore given, with Loewenberg as surety, one with the defendants Thompson and Dekum as sureties, and ordered the first bond canceled and the surety discharged, The Thompson and Dekum bond was thereupon executed, filed, and approved by the county court, as a substitute for the Loewenberg bond. Thereafter, and on the 4th day of August following, upon another application by Ingalls, the county court, with notice to, but without the consent of, the guardian, made another order, allowing and permitting Ingalls to file a third bond, with the defendant Spaulding as surety, and relieving Thompson and Dekum from liability on their bond on account of any future acts of Ingalls as executor. The Thompson and Dekum bond and the Spaulding bond were each conditioned as required by law, and each referred to the order of the county court of March 27, 1891, requiring Ingalls to give a bond; but no order was ever made requiring the execution of either of said bonds, nor were they made or executed or filed at the instance or request of any person interested in the estate. other than Ingalls. The final accounting of Ingalis as executor of the estate was made on December 14, 1892, upon consideration of which it was found and decreed by the court that there was a balance in his hands as such executor, after allowing all proper credits, of \$12,557.09, and that there were claims against the estate, still unpaid, amounting to \$2,613.22. In the settlement of this account the sum of \$7,897.80, which had been paid out by Ingalls on alleged claims against the estate, principally in his own favor, prior to the order of the county court requiring him to give bonds, was disallowed, and he was charged with such sum. The order of the county court on final settlement required Ingalls to pay and discharge the outstanding claims, amounting to \$2,613.22, and to pay the balance, of \$9,943.87, to the plaintiff, as guardian, and directed that upon the filing of the proper receipts from the claimants and guardian his bond should be exonerated. On appeal to the circuit court the decree of the county court was in all things affirmed, ex-

cept that the executor was ordered and required to pay the said \$2,613.22 to the guardian, to be by him disbursed to the claimants entitled thereto, "making the aggregate amount found to be due from the executor, and ordered to be paid over to the guardian, the sum of \$12,557.09." These orders having been disregarded, this action was brought against the sureties upon the second and third bonds filed by Ingalls. The case was tried without the intervention of a jury, and judgment rendered in favor of plaintiff for the amount claimed, less the said sum of \$2,613.22 found due to the other claimants, and by the circuit court ordered to be paid to the plaintiff, but not allowed in this action. From this judgment both parties appeal to this court.

The defendants contend that because Mrs. Holladay expressly declared in her will that no bonds or security should be required of Ingalls as the executor thereof, the county court had no authority to require him to give bonds, and, this being so, no liability exists upon the bonds in question. Under the early English law the spiritual courts, which had jurisdiction in the settlement of estates, exerted so little authority over an executor, who was supposed to derive his powers from the testator, and not from the grant of the ordinary, that they refused to require bonds of him, even though he should become insolvent, or misappropriate and squander the assets of the estate. But the consequence of this doctrine was such that the courts of chancery were early compelled, in order to protect widows and orphans, to assume a new jurisdiction; and it became a rule of that court that an insolvent and bankrupt executor, or one who was unfaithful to his trust, would be compelled to give security for the faithful performance of the duties of his office. Schouler, Ex'rs, § 137. In this country the duties of the spiritual court and of the court of chancery, in this respect, are exercised by courts having probate jurisdiction. The English rule permitting an executor to administer upon the estate of his intestate without giving bonds in the first instance prevails in many states, but in a majority of them, including Oregon, the privilege is given only when the will expressly so directs. Hill's Ann. Laws, § 1088; 1 Woerner, Adm'n, 250. In the latter case the will simply operates to place the executor in the same position in which he is placed in those states which have adopted the English rule. The exemption which the will makes under the sanction of law in the one case is of no more authority than the exemption which the law makes without reference to the will in the other. Upon this question a recent work on the Law of Administration says: "In those of the states in which an executor is permitted to administer without giving bonds, whether the exemption arise under the statute or by express direction of the testator, his office is one of special trust and

confidence, for which reason no bond is required of him. But if a court become satisfled that the executor, who was solvent when named in the will, is likely to become insolvent, and that there is danger that he may abuse his trust, or has ground to suspect that he will indirectly and fraudulently administer the estate to the prejudice of creditors or legatees, he will be ordered to give bond with sufficient surety to protect the estate." 1 Woerner, Adm'n, 251. This is thought to be but an exercise by the probate court, which is given exclusive jurisdiction in the first instance over the administration of estates, of the powers formerly exercised and enforced in chancery in order to protect estates. In Re Holderbaum, 82 Iowa, 69, 47 N. W. 898, it is held that, though the law provides that bonds shall not be required of the executor, yet, when the effect of his management of the estate is to destroy the security of a creditor, it is proper for the court to order him to give bonds. The order requiring bonds in this case, it is true, was made on the motion of a creditor, but this is of no consequence in determining the power or authority of the court. The rights of a legatee are certainly as much entitled to protection as those of a creditor, and, if the court has authority to require bonds for the protection of the one, it certainly has for the other. By the statute of Mississippi it is provided that an executor may be exempted from giving bonds by the intestate, and in such case no bonds shall be required unless the court at any time shall have good reason to suspect the executor of fraud or maladministration. In Clark v. Niles, 42 Miss. 463, the court, in referring to this statute, says: "This statute only reiterates what has been the action of courts having jurisdiction of the settlement of estates of deceased persons. The nature of the business, as well as the relation between the probate judge and administrators or executors, requires that the judge should have, and should more frequently exercise, a general supervision over the settlement of estates, and, upon his own motion, require the representatives of such estates to give new or additional bonds whenever, in his judgment, the interest of the heirs or creditors of such estates might seem to require the same." By our statute (Hill's Ann. Laws, § 1078) the mode of proceeding in the county court in the transaction of probate business is in the nature of a suit in equity, as distinguished from an action at law, and such court has exclusive jurisdiction "to direct and control the conduct and settle the accounts of executors, administrators and guardians" (Id., § 895); and it is made its duty "to entertain a supervisory control over the executor, to the end that he faithfully and diligently performs the duties of his trust according to law" (Id., \$ 1100). These sections of the statute, it seems to us. plainly confer upon the county court jurisdiction to control and exercise general super-

vision over executors and administrators, to the extent of requiring of them bonds for the faithful performance of their trusts whenever, in the opinion of the court, the interests of the estate require the same. It is charged by law with the duty of seeing that such officers faithfully perform the duties of their trust, and it is necessary to the safety and interests of the estate that this should be so. The only effect of the statute allowing the testator to exempt his executor from giving bonds is to relieve him therefrom in the first instance, but we think it is plainly not only the right, but in many instances the duty, of the county court, when it has reason to suspect that an estate will be fraudulently administered, or the property thereof lost to those interested in it, on a proper application by a legatee or creditor, to require the executor to give a bond, notwithstanding such exemption in the will.

But if, in view of the provisions of the will, the county court had no authority to require Ingalls to give bonds as executor, the bonds upon which this action is brought are nevertheless valid as common-law obligations. They were given voluntarily, contain no conditions unauthorized by law, and are not against public policy. So far as the record discloses, the parties interested in the estate were fully satisfied with the Loewenberg bond, but these defendants seem to have been quite willing to substitute their bond in place of one already satisfactory to the parties; and, having done so, the law will hold them to the obligations they have thus voluntarily assumed. "Because a bond is a voluntary one," says Sherwood, C. J., "its binding and obligatory force is by no means lessened." State v. Creusbauer, 68 Mo. 254. The facts, as stated in the opinion from which the above quotation is made, are that prior to the execution of the bond sued on the administrator had given another bond, sufficient in all respects, which had been approved by the probate court, and on which letters were granted, but afterwards, on his own motion, without any orders of the court or request of the sureties on the original bond, procured the defendants to sign the bond sued on, signed it himself, and handed it to the clerk of the probate court, who filed it, but never called the attention of the court thereto; and it was held that the bond was good as a voluntary bond, though not approved by the probate court, and the party injured had his option to sue upon either bond. And in Folkes v. Docminique, 2 Strange, 1187, a voluntary bond given by an administrator in the spiritual court was held to be valid, though the court had no authority to take it. So, also, in McChord v. Fisher, 13 B. Mon. 194, it was held that although the appointment of an administrator was void. for want of jurisdiction in the court, a bond given by him as such administrator was binding, not as a statutory but as a common-law bond, being upon good consideration, and not

against the policy of the law. And again, under a statute authorizing the judge of probate to order a new bond to be given in place of an old one, on the petition of a surety seeking a discharge, a person who was not, but erroneously supposed himself to be, surety upon an executor's bond, filed a petition to be relieved from further liability on such bond. Acting upon this petition, and under the same error as the petitioner, the judge of probate ordered a new bond, and entered a decree discharging the petitioner, whereupon the principal on the old bond, acting under the same mistaken idea, filed a new one, which was approved by the judge of probate. In an action against the sureties on the second bond, it was held that, although it may have been given under a mistake of fact, it was nevertheless valid, as having been voluntarily given. Brooks v. Whitmore, 142 Mass. 399. 8 N. E. 117. And in U. S. v. Rogers, 28 Fed. 607, it was held that it is sufficient to make a bond given by an officer of the government, although not expressly required by law, valid as a common-law obligation, that it is voluntarily given, and that the office and duties assigned to the officer and covered by the bond are duly authorized by law. Now, in this case, the bonds on which this action was brought were authorized by law, voluntarily given, and the duties of the executor covered by them provided by law; and they are therefore binding obligations, whether the county court had authority to require a bond from Ingalls or not. Schouler, Ex'rs, § 143: State v. Creusbauer, 68 Mo. 254; State v. Cannon, 34 Iowa, 322; Holbrook v. Klenert, 113 Mass. 268. Nor do the authorities cited by defendants conflict with this principle, but, so far as they are applicable to the case before us. are in harmony with it. They are cases in which the bond either contained conditions variant from those provided by law, and was extorted under color of office, or the bonds were not authorized or required by a valid law, or were against public policy. U.S. v. Tingey, 5 Pet. 115; Benedict v. Bray, 2 Cal. 251; Hicks v. Mendenhall, 17 Minn. 475 (Gil.

But it is contended that, under the terms of Mrs. Holladay's will, Ingalls was a trustee holding the legal title of the property, and liable to account for the same to the guardian only in a court of equity, and that the county court only had jurisdiction to control his conduct and settle his accounts as executor to the end that all testamentary expenses and debts of the estate should be paid, but that when his account was settled, and the balance in his hands ascertained, he held the same in trust for the minor children, and can only be compelled to account therefor in a proper court of equity. A sufficient answer to this position is that the will, by its terms, required him, as executor, to pay all moneys realized from the property, after paying all testamentary expenses and just indebtedness. to the guardian, to be held, managed, and expended by such guardian for the benefit of her children, and that Ingalls petitioned for and was appointed executor, entered upon and assumed to discharge the duties of such office, and in that capacity gave the bonds in action, which have reference to his duties as executor. It may be that the will gave to him two characters,-those of executor and trustee,-but the duties of the one are separate and distinct from and independent of the other; and until he was discharged from the former, and assumed the duties of the latter, his liability as executor still contin-Wite v. Ditson, 140 Mass. 351, 4 N. E. 606; Foster v. Wise (Ohio Sup.) 16 N. E. 687; Cranson v. Wilsey (Mich.) 39 N. W. 9. A mere order of final settlement or distribution could not discharge him as executor, or relieve his bondsmen, until the distribution was actually made. This could only be done, under the terms of the will, by paying the balance in his hands to the guardian of the minor children. In Foster v. Wise, supra, it was urged in an action on an executor's bond that at the time it was given the executor held the assets as trustee under the will. by which he was authorized to invest them for the benefit of a third person, but in passing upon this view of the case the court said: "It is a sufficient answer to this to say that he never qualified as such trustee, and no such investments were made He cannot, therefore, be regarded as having acted in any other capacity than as executor. Prior v. Talbot, 10 Cush, 1. Moreover, the sureties on his bond as executor are estopped from asserting that he had ceased to be an executor, and was only a trustee. In all cases where the condition of the deed has reference to any particular thing, the obligor shall be estopped to say that there is no such thing." So, in this case, Ingalls having qualified as executor, and acted as such throughout, his duty to account for and pay over to plaintiff, as guardian, the amount in his hands, belonging to the children, is purely executorial, for a failure to perform which he is liable on his bond as executor. By the will his appointment as trustee, if at all, was for the purpose of converting the assets into cash, and paying the proceeds over to the guardian. This duty he never assumed to perform, except in the capacity of executor, and, having assumed so to act, the sureties on his bond are estopped from questioning the capacity in which he was acting.

It is next contended that because Ingalls had, prior to the order requiring him to give bonds, paid \$2,937.80 on claims against the estate in favor of third persons, and applied the sum of \$5,970 on a claim in his own favor, for which he was not allowed credit on final settlement, the sureties on the bond in action are not liable for the money so applied. In other words, the contention for the defendants is that such application was a conversion of the funds belonging to the estate, and that they are only liable on their bonds

for assets converted and misapplied after the execution thereof. It is undoubtedly the general rule that sureties on official bonds are only liable for defaults occurring after the commencement of the term of office for which they become responsible, and such is the purport of the authorities cited by defendants. But this rule has no application to an administrator's or executor's bond, because the law under which and the purposes for which they are given are different. There are no terms of office of an executor or administrator. It is a continuous employment from the date of appointment until the close of the administration. If during such time an administrator or executor should for any sufficient reason give a bond, he would not thereby be entitled to a new commitment of the estate to his hands, nor would it result in any settlement or rest in his accounts. again, the condition of an official bond is that the principal shall faithfully perform the duties of the office to which he has been elected or appointed; and it would be an unwarranted construction of the terms of such bond to hold the sureties liable for any default occurring prior to the commencement of the term, but an administrator's or executor's bond is conditioned "that he shall faithfully perform the duties of his trust according to law." Hill's Ann. Laws, § 1088. A failure to pay over to the heir or legatee the amount ascertained on final settlement to be due such heir or legatee, and ordered paid to him, is a breach of such bond and condition (Gerould v. Wilson, 81 N. Y. 573); and the sureties thereon at the time of such breach are liable for such default, no matter when the bond may have been executed, or when the funds were actually misapplied or lost to the estate. The executor or administrator, from the moment he becomes such, is entitled to the possession and control of all the property of the estate, but he is not required to pay or account for any money or property coming into his possession until ordered to do so by the county court. In every case, therefore, where a bond is given by an executor during the progress of administration, the sureties assume liability thereunder, upon the assumption that he is in possession at the time the bond is given of all the assets of the estate which have been received by him and are unaccounted for, and they in effect agree that he will execute his trust by faithfully administering upon and accounting for such assets. The bond is security against a breach of duty, and there is no such breach until there is a failure to account or pay over the money as ordered by the county court. Schooler. Ex'rs, § 148; 1 Woerner, Adm'n, § 255; Scofield v. Churchill, 72 N. Y. 565; Lacoste v. Splivalo, 64 Cal. 35, 30 Pac. 571; Pinkstaff v. People, 59 Ill. 148; Choate v. Arrington, 116 Mass. 552; Foster v. Wise. 46 Ohio St. 20, 16 N. E. 687; Dugger v. Wright, 51 Ark. 232, 11 S. W. 213; Brown v. State, 23 Kan.

235; State v. Creusbauer, 68 Mo. 254; Beard v. Roth, 35 Fed. 397. Pinkstaff v. People, supra, was an action on an administrator's second bond, in the trial of which the sureties sought to defend, as the sureties do here, on the ground that the assets came into the hands of the administrator, and were misapplied before the bond was executed; but Chief Justice Lawrence, speaking for the court, said: "Conceding the sureties upon the bond are liable only for breaches occurring after its execution, the breach in the present case is of that character. Even if the money due the heirs had been, as averred in the plea, appropriated by the administrator to his own use before the bond was given, yet, for such misapplication of the funds, he would be liable only for nominal damages, if able and willing to pay the heirs whatever might be due them on final settlement. The gravamen of this action is, not that the administrator had confounded the trust funds with his own, and appropriated them to his own use, but that he did not respond to the demands of the guardian. Whether he had in fact used the trust funds or not, when this bond was given, they were, in the eye of the law, then in his hands to be administered, and the bond was given as security that they should be so administered. But for this new bond he probably would then have been removed, and the heirs and creditors would have had their recourse upon the first bond. By the additional bond he was kept in office, the securities thereon undertaking that he would duly administer all unadministered assets. The bond can have no other rational construction, and such must have been the intention of the parties. He then stood chargeable with certain assets. For the purposes for which this bond was given they were in his hands. The securities undertook that he would pay them over to the persons entitled to receive them, when duly called upon. This he has not done, and hence the liability of these defendants." And in Brown v. State, supra, it is said that the liability of an administrator to an estate for property he has received and converted to his own use is "assets in his hands belonging to the estate," which it is his duty to make available, and to account for on final settlement. In Dugger v. Wright, supra, it was held that, although the executor had converted the funds of the estate prior to the execution of the bond, it was still his duty to account to the probate court therefor, and, when he failed to comply with the order of the court directing him to pay over the amount with which he had been charged on that account, the sureties on the bond were liable, by the terms of the undertaking, to make good the default. A surety on an administrator's or executor's bond, conditioned as the bonds in action are, is liable for whatever is properly chargeable to the executor in his official capacity; and it is not necessary to show that the funds or property so chargeable were actually on hand, intact or in specie, at the time the bond was executed. If they are shown to have come into the hands of the executor in his official capacity, and he has not properly disposed of or accounted for them, he is bound to do so on final settlement; and the sureties upon his bond, whenever given, are held for the faithful performance of that duty. But it is argued that the intention of the guardian in applying for an order requiring bonds, of the county court in making the order, and of the sureties in giving the bond, was only to secure the money and funds on hand at the time from further This intention is sought to be drawn principally from the prayer of the petition. By his petition the guardian charged Ingalis with an abuse of his trust, in misapplying the funds of the estate, and asked that he be required to make final settlement, or give a bond to "account for the money received by him to the use of the petitioner's wards." Under this petition the county court had authority to compel Ingails to make final settlement if the condition of the estate would admit of it; if not, to remove him, and appoint some one else in his stead, or continue him in office, with or without bonds, as in its judgment seemed best for the estate. It chose, in the exercise of its judicial judgment, to allow him to continue in office by giving a bond to faithfully discharge the duties of his trust, and it seems to us an unfair inference to assume that in doing so it did not intend to provide for the security of the funds which it was claimed Ingalls had already misapplied. But why speculate on this question, when the intention of the sureties plainly appears from the terms of their undertaking? By their bonds they undertook and agreed that Ingalls should faithfully perform the duties of his trust. This obligation they must be held to have intended to assume, and the law will require its performance by them.

It is claimed on behalf of Thompson and Dekum that the order of the county court allowing the Spaulding bond to be substituted for the one formerly given by them, and exonerating them from any further liability as sureties for Ingalls, relieves them of responsibility for any violation by Ingalls of his trust as executor, occurring subsequent to the date of such order. By reference to the statement of facts, it will be observed that this order was not made on the application of any heir, legatee, or creditor, or other person interested in the estate, but solely at the solicitation and upon the request of Ingalls, and even against the protest of the plaintiff in this case. The power of the county court to relieve a surety on an administrator's or executor's bond from liability is purely statutory. After a bond has been given, the heir, legatee, or creditor of an estate acquires and has a vested inverest in it, and the power of the county court over it ceases, except in a proceeding authorized by law. When, therefore, an executor or ad-

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ministrator has given a bond for the performance of his duties as such, he cannot, after it has been accepted and filed, upon his own motion, to suit his own convenience or his own interest, apply for and obtain an order of the county court setting it aside, and discharging the sureties thereof, and substituting a new one in its stead. If such was the rule there would be no security for the estate, and the authorities abundantly show that no such power is vested in a probate court. Schouler, Ex'rs, § 147; Com. v. Rogers, 53 Pa. St. 470; Wood v. Williams, 61 Mo. 63; Burnett v. Vandiver, 56 Ga. 304; Brooks v. Whitmore, 142 Mass. 399, 8 N. E. 117. In many states the statutes provide that a surety may, on his own petition, and with notice to interested parties, obtain an order, and be discharged from further liability on an executor's or administrator's bond, but we have no such statute in this state. The only method provided by which a surety can be discharged or relieved is found in sections 1096, 1097, of the Code, and it is not pretended or claimed that the proceedings upon which the order in this case was made were in conformity with the provisions of these sections. The authorities above cited clearly show that it does not follow that, because a county court has power to compel an executor or administrator to give a bond, it also has power to cancel it, and substitute another in its place. After the bond has been given the power of the county court over it ceases, and the heirs, legatees, or creditors for whose security it is given have a vested interest therein, of which they can only be deprived by some proceeding known to the law. It is only when the amount of the executor's or administrator's undertaking is insufficient, or the sureties therein, or either of them, have become nonresidents of this state, or are likely to or have become insolvent, that the county court may require a new bond, which will operate to discharge the sureties on the former undertaking from any liability on account of their principal, arising from his acts or omissions subsequent thereto; and this proceeding is, by statute, wisely limited to cases where complaint is made by an heir, legatee, devisee, or creditor, or other person interested in the estate, and who, as we have shown, have a vested interest in such undertaking or bond. A rule permitting a county court, on its own motion, and not in the manner provided by statute, to, at will, relieve a surety on an executor's bond from liability, would tend greatly to the insecurity of estates, and might in some instances permit the substitution of insolvent sureties for solvent ones. We are clearly of the opinion, therefore, that the order of the county court attempting to relieve Thompson and Dekum from liability |

on their bond was wholly and entirely void, and the Spaulding bond, not having been given in conformity with the provisions of any statute, and being simply a voluntary bond, had the effect only of adding new or additional security for the faithful performance of Ingalls' duties as executor. In this view of the liability of the sureties upon the respective bonds, the plaintiff was at liberty to proceed against any or all the bonds, as he might elect.

And, finally, for defendants, it is claimed that this action should have been brought in the name of Linda and Ben Campbell Holladay, and not in the name of their guardian. This question was not presented in the court below, but is raised here for the first time, and hence comes too late. Hill's Ann. Laws, § 67; Seaton v. Davis, 1 Thomp. & C. 91.

We are of the opinion, therefore, that the bonds in action are valid, and that plaintiff is entitled to a judgment against the defendants as sureties thereon, and the only remaining question is as to the amount of such judgment. It was ascertained and determined by both the county and circuit courts that there was due from Ingalls to the estate the sum of \$12,557.09, of which sum the county court ordered him to pay to the guardian \$9,944.87, and to certain claimants the remainder; but, on appeal, the circuit court modified this order, and decreed that the entire sum, \$12,557.09, should be paid to the plaintiff as guardian. This decree is, we think, conclusive upon the defendants in this action. It is by no means certain that the decree of the circuit court ordering the executor to pay to the guardian the entire amount found due the estate from the executor was not erroneous, but the question as to whom the money thus found due should be paid was necessarily determined by the court on the accounting; and, so long as the decree stands unreversed, it cannot be questioned in a collateral action either by the executor or his sureties. In an action on an executor's or administrator's bond, a decree of final settlement is conclusive, not only upon the executor or administrator, but also, in the absence of fraud or collusion, upon the sureties, because, by their contract, they have made themselves privy to the proceedings against their principal, and when the principal is concluded the surety is concluded also. Casoni v. Jerome, 58 N. Y. 315; Housh v. People, 66 Ill. 178; Slagle v. Entrekin, 44 Ohio St. 637, 10 N. E. 675; Stovall v. Banks, 10 Wall. 583. It follows, therefore, that the plaintiff is entitled to a judgment against the defendants for the amount claimed, less an admitted credit of \$658.50, to wit, for the sum of \$11,898.59, with interest thereon from the 14th day of December, 1892, at the rate of 8 per cent. per annum, and for his costs and disbursements, and it is so ordered.

PIERCE v. CONNERS.1

(Supreme Court of Colorado. June 18, 1894.) DEATH BY WRONGFUL ACT — PLEADING — NEGLIGENCE—PROXIMATE CAUSE—DAMAGES—PARTIES.

1. The averments of the complaint in this case considered, and held to state facts sufficient

to constitute a cause of action.

2. It is negligence to leave a team of spirited, high-lifed horses, unhitched and uncared for, by the side of a public highway. The master's liability for the negligence of his servant, and also the proximate cause of the injury, consid-

3. The law does not exact the same degree of care and diligence from a child of tender years that it does from an adult person of pre-

sumed judgment and discretion.

4. Where a parent sues for damages resulting from the death of a minor child, evidence of the value of the child's services until it attains its majority is admissible, though the recovery is not necessarily limited to the value

of such services.

5. The true measure of recovery is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been rrom the deceased in case his life had not been terminated by the wrongful act, neglect, or default of defendant; but the recovery allowable is in no sense a solatium for the grief of the living, occasioned by the death of the relative or friend, however dear. Some of the circumstances and contingencies by which the damages to be awarded may be approximated are pointed out in the opinion.

6. If the deceased he a winer the father

6. If the deceased be a minor, the father and mother may join in the suit, and each shall have an equal interest in the judgment; but the joining of the father and mother is permissive,

joining of the father and mother is permissive, not imperative. Either may sue alone.

7. A parent not joined, but entitled to join, in such suit, may be made a party on his or her application at any time, even after judgment or after review in an appellate court, for the purpose of protecting the interest which he or she may have in the judgment. may have in the judgment.

8. The joinder or nonjoinder of a parent in such action is material only to the parents themselves. The defendant cannot be prejudiced by the nonjoinder of one of them. The measure of the nonjoinder of one of them. recovery is the same, whether the action be brought in the name of one or both. The de-fendant can only be subjected to a single suit.

(Syllabus by the Court.)

Appeal from district court, Lake county. Action by Timothy Conners against F. M. Pierce. Verdict and judgment for plaintiff. Defendant appeals. Affirmed.

A. S. Weston, for appellant. A. S. Blake and A. J. Sterling, for appellee.

ELLIOTT, J. The overruling of the general demurrer to the complaint is assigned for error.

1. Among other things, the complaint states, in substance, that defendant, Pierce, owned and kept a team of horses; that the horses were flery and fractious; that while they were in charge of a driver employed by defendant for the purpose of delivering lumber to his customers, and engaged in that business, the driver left them standing by

2. The evidence sustained plaintiff's cause, in substance, as alleged. The horses were a spirited, high-lifed team. It was negligence to leave them, unhitched and uncared for, by the side of the public highway. This act of negligence was committed by the servant while intrusted with his master's team, and employed in and about his master's business. It was an act within the scope of his employment, and hence the master was responsible for the negligence. So, too, leaving the horses unhitched and uncared for, whereby they ran away, and drove or knocked the child under the wheel of the ore wagon, was the proximate cause of the injury. The fact that the injury was inflicted by the ore wagon does not relieve the party responsible for the original act of negligence. The evidence does not disclose any negligence on the part of the driver of the ore wagon. Neither does the fact that the Hannen boy took hold of the lines of defendant's team, and so caused them to start and run away, relieve the party liable for the original act of negligence. The age of the boy has not been disclosed on this appeal. The father, in testifying, spoke of the boy as a "kid." The driver should have so secured the horses that a mere child could not have thus caused them to run away.

3. Nothing in the evidence tends to show that the Conners child was guilty of contributory negligence. She was upon the usually traveled footpath by the side of the public highway in a rural neighborhood. She was where she had a right to be, and the evidence does not show that she did anything amiss. It is true, an adult person might have escaped, but the law does not exact

the roadside, without being hitched or secured in any way, and without any person to hold or take care of them; and that, while they were thus left unhitched and uncared for, they ran away. The complaint further shows that Mary Ellen Conners, daughter of plaintiff, a child about seven years old, was on the street at the time defendant's team ran away; that she was upon the path usually traveled by people going afoot along said street, and was not in that part of the road used by wagons and carriages; that while on said path, and out of the way of teams passing along the road, defendant's team, running away as aforesaid, came along the road, and, coming near another team hauling a heavily-loaded ore wagon, made a bound off the road, and up on the bank or path where the child was, and struck her, and thereby knocked her down into the road, where she was struck and crushed by the wheel of the ore wagon, and thereby injured so that from the injuries thus received she died a few days thereafter. It is unnecessary to state further, in detail, the averments of the complaint. The facts alleged were sufficient, in substance, to constitute a cause of action, and the demurrer was properly overruled.

¹ Rehearing denied September 17, 1894. v.37r.no.12-46

the same degree of care and diligence from a child of tender years that it does from an adult person, of presumed better judgment and discretion. All the facts of the case are practically undisputed, and the law applicable thereto is purely elementary. Shear. & R. Neg. § 10; 2 Thomp. Neg. 1140.

4. The trial court did not err in admitting evidence of the value of the services of a girl like the deceased from the age of 7 years to the age of 18, though the law does not necessarily limit the recovery to the value of such services. The act of 1877 (Gen. Laws, p. 343), under which this action was brought, fixes the maximum limit of recovery in cases of this kind at \$5,000; and the damages allowable under section 3 are compensatory, not exemplary or punitive. This subject was much considered in Moffatt v. Tenney, 17 Colo. 189, 30 Pac. 384, and again in Hayes v. Williams, 17 Colo. 468, 30 Pac. 352. In each of the foregoing cases the action was by the wife for damages resulting to her from the death of her husband. But in Railroad Co. v. Wilson, 12 Colo. 20, 20 Pac. 340, the action was by the father and mother for damages resulting to them from the death of their son, a young man 25 years of age, and unmarried, and it was said the parents were entitled to recover "their pecuniary loss" resulting from the death of their son. See, also, Orman v. Mannix, 17 Colo. 564, 30 Pac. 1037.

5. The true measure of compensatory relief in an action of this kind, under the act of 1877, supra, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of the defendant. Such sum will depend on a variety of circumstances and future contingencies, and will therefore be difficult of exact ascertainment; but the damages to be awarded in each case may be approximated by considering the age, health, condition in life, habits of industry or otherwise, ability to earn money, on the part of the deceased, including his or her disposition to aid or assist the plaintiff. Not only the kinship or legal relation between the deceased and the plaintiff, but the actual relations between them, as manifested by acts of pecuniary assistance rendered by the deceased to the plaintiff, and also contrary acts, may be taken into consideration. But it must be borne in mind that the recovery allowable is in no sense a solatium for the grief of the living, occasioned by the death of the relative or friend, however dear. It is only for the pecuniary loss resulting to the living party entitled to sue, resulting from the death of the deceased, that the statute affords compensation. This may seem cold and mercenary, but it is unquestionably the law. From a careful consideration of the rulings of the court at the trial, and the instructions to the jury, no substantial error appears. The rulings and instructions were as favorable to defendant as the law required.

6. Only one further assignment of error requires discussion. The question arose as follows: Defendant's answer specially alleged a defect of parties plaintiff, in this: that "the wife of the plaintiff and the mother of the deceased, Mary Ellen Conners, is living, and that she has a joint and equal interest with the plaintiff in the subject-matter of the action, and in whatever judgment may be recovered therein." The replication did not deny that the mother was living, but denied that she had an equal interest, or any interest whatever, in the subject-matter of the suit, or in any judgment which might be recovered. Such denial presented a peculiar issue, which should have been determined, if at all, before the trial was entered upon. But it does not appear that the attention of the trial court was called to the state of the pleadings in this respect until after the taking of testimony was commenced before the jury. A certain question was then propounded to the plaintiff, as a witness, and was objected to on the ground that the mother had not been made a party. The court overruled the objection, and this ruling is assigned for error. The statute giving the right of action in cases of this kind designates the party or parties entitled to sue. It provides, inter alia, that if the deceased be a minor, or unmarried, the suit is to be brought "by the father and mother who may join in the suit and each shall have an equal interest in the judgment; or if either of them be dead then by the survivor." Gen. Laws 1877, p. 343. The true reading of the statute is "father and mother." Such is the language of the first official publication, and such is the language of the enrolled bill in the office of the secretary of state, though in Gen. St. 1883, § 1030, and also in Mills' Ann. St. § 1508, the reading is "father or mother." It is true the Code requires that every civil action, except as otherwise provided in the Code itself, shall be prosecuted in the name of the real party in interest; also, that those who are united in interest shall be joined as plaintiffs or defendants; and that, if a party who should join as plaintiff will not do so, he may be made a defendant, the reasons therefor being stated in the complaint. Code, §§ 3, 12. But section 9 of the Code (original section 10) provides that "a father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child." All these provisions of the Code were originally enacted 10 days subsequent to the passage of the damage act, supra, and were also re-enacted 10 years afterwards. See damage act, supra, approved March 7, 1877; Original Code, approved March 17, 1877; also Code 1887. The plea of defect of parties in this case was not a plea in bar, nor was it sufficient to abate the action. It could have been avoided at

any time by bringing in the mother as a party, either as plaintiff or defendant. Code, § 16. But was it error to disregard the plea and the objection to testimony, without requiring the mother to be joined as a party?

7. The provisions of the damage act and of the Code above mentioned, being to a certain extent in pari materia, are to be construed together. The task is difficult, the provisions being peculiar and somewhat incongruous. Our conclusions, however, are that, while the father and mother may join in a suit of this kind, it is not essential that they should so join. The joining of the father and mother appears to be permissive, not imperative. It is clear that under certain circumstances one parent has the right to sue alone. In general, the better practice is for the parents to join, since the statute permits them to do so; and, where a parent not joined applies to be made a party, such application should be granted, unless resisted upon some legal ground,—as that such parent has deserted his family. And such application may be presented at any time, even after judgment or after review in an appellate court, for the purpose of protecting the interest which the party so applying may have in the judgment recovered; for it is to be observed that while the Code permits the father, and, under certain circumstances, the mother, to sue alone, it does not deprive the parent not joined of that equal interest in the judgment which the damage act says each shall have, nor is there room for inference that either parent is to be so deprived, except in case of a parent deserting the family. In this case the mother made no application to be joined as a party in the lower court. It may be supposed, therefore, that she was then willing that her husband should sue for her interest as well as for his own. If this supposition be wrong, or if the mother now desires to have her equal interest in the judgment protected, she may apply therefor upon the remanding of this cause. The wife, though a proper party, was not a necessary party. The plea of nonjoinder being interposed by the defendant was not, therefore, fatal to the maintenance of the action; and the court did not err in overruling defendant's objection, and in proceeding with the trial, notwithstanding such plea. If the objection had come from the mother, a very different question would have been presented.

8. The conclusion at which we have arrived can work no hardship to the defendant. The joinder or nonjoinder of a parent in an action of this kind is material only to the parents themselves. Since either or both may sue, the defendant cannot be affected or prejudiced, whichever course they may take. The grounds and measure of recovery are the same in either case, and the defendant can only be subjected to a single suit. The judgment of the district court is affirmed, and the cause remanded. Affirmed.

DENVER TRAMWAY CO. v. LONDONER, Mayor, et al.

(Supreme Court of Colorado. Sept. 17, 1894.)
STREET RAILWAYS—MUNICIPAL GRANT—SUBSEQUENT ACTION.

The city of Denver passed an ordinance granting the right of way through its streets to a street-railway company, to construct its road and operate its cars by electricity. This was done by the city before its charter contained any express provision authorizing such grant. Subsequently the charter was amended, authorizing the city to grant right of way for such purpose, and thereupon the city passed ordinances recognizing its prior grant as valid, and providing specially for its enjoyment to a certain extent. Acting upon such legislative and municipal authority, the railway company occupied certain streets for the purpose granted, and expended large sums of money in and about the construction of its electric lines. Held, that the executive officers of the city could not, while such municipal consent remained unrevoked, justly deny the right of the street-railway company to complete the work already begun, nor treat its employés as trespassers for prosecuting such work.

(Syllabus by the Court.)

Error to district court, Arapahoe county. This action was brought by the Denver Tramway Company (plaintiff below) on December 11, 1889, to enjoin the then mayor and chief of police of the city of Denver from interfering with its employes in the construction of a certain line of electric street railway in a street of the city of Denver. It appears that the plaintiff company, at and prior to the commencement of this action, was a corporation formed by the consolidation of the Denver Electric & Cable Railway Company and the Denver Railway Association, corporations theretofore duly organized; and the city of Denver was a municipal corporation, duly organized under special charter, in the county of Arapahoe, and state of Colorado. It further appears that in December, 1889, the mayor and chief of police of the city of Denver caused the arrest of certain employes of the plaintiff company as trespassers, on the ground that they were engaged in constructing the electric lines of said company in said city without any authority or permission so to do. It was to prevent said municipal officers, their agents and subordinates, from interfering with the plaintiff company in the construction of its electric lines, that the writ of injunction in this case was applied for. A temporary writ was granted, but upon final hearing the temporary writ was dissolved, and the bill was dismissed. To reverse this judgment the plaintiff company prosecutes this writ of error. Reversed.

James H. Brown, L. S. Dixon, Hugh Butler, and A. M. Stevenson, for plaintiff in error. Wolcott & Vaile, amici curiae. J. F. Shofroth, G. W. Whitford, F. A. Williams, and A. B. Seaman, for defendants in error.

PER CURIAM. In the opinion originally promulgated in this case it was said: "The particular relief sought by the action is rendered nugatory by the completion of the line of railway in controversy under subsequent state and municipal legislation." But in the preparation of that opinion it was assumed that counsel for plaintiff had conceded the power of defendants (the mayor and chief of police) to question the validity of the authority under which the plaintiff company was constructing its electric lines. Such was our understanding of their oral arguments, and upon this assumption it was said: "The sole question submitted for determination is whether the municipal authorities of the city of Denver were authorized to grant, in perpetuity, the privilege of constructing lines of street railway to be operated by electricity, at the time of the enactment of the ordinance." By the petition and briefs for a rehearing, counsel insisted that their oral arguments were misunderstood; that they did not make, nor intend to make, any such concession. There being no written evidence of such concession, it could not be insisted on as against the denial of honorable counsel, and so a rehearing was granted.

Upon reargument and re-examination our conclusion is that this court ought not to express an opinion as to the extent of the rights or privileges of the plaintiff company under Ordinance No. 3, of February 6. 1885, hereinafter quoted, except so far as may be necessary to determine whether the mayor and chief of police of the city were justified in interfering as they did with the employes of said company in the work of constructing its electric lines in December, 1889. Whether the ordinance granted to the plaintiff company a privilege in perpetuity is not material to the determination of the present controversy. It is conceded by the written argument of counsel for defendants that "the matter now in controversy can in no way affect the liability of the plaintiff in error (the tramway company) or its right to the use and enjoyment of the streets for railway purposes which it now occupies." It is clear that there is not at the present time any actual, living controversy as to the use of the streets already occupied by the plaintiff company for electric railway purposes. It will be time enough to determine whether the company has a valid grant of right of way (in perpetuity or otherwise) in streets not occupied when such a claim is asserted, and actually brought in issue.

The actual question now presented for determination is simply this: Were the employes of the plaintiff company, in prosecuting the work of constructing the electric rall-way lines of said company through the streets of the city of Denver, in December, 1889, guilty of such misconduct as to render them

liable to be interfered with, and treated as trespassers, by the executive officers of the city? The determination of this question involves the consideration of the laws of the state, and also the ordinances of said city as they existed prior to and at that date. The constitution of Colorado has always contained the following provision: "No street railroad shall be constructed within any city, town, or incorporated village, without the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad." Article 15, § 11. The charter of the city of Denver, as amended in 1883, provided, among other things, that the city council should have power by ordinance as follows, to wit: "Forty-first. To permit and regulate the running of horse railway cars, or cars propelled by dummy engines, the laying down tracks for the same, the transportation of passengers thereon, and the form of rail to be used, upon the written consent of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes." "Forty-third. To regulate and prohibit the use of locomotive engines and require railroad cars to be propelled by other power than that of steam. * * *" Sess. Laws 1883, art. 2, § 17, pp. 64, 65. While the foregoing charter provision was in force, the city of Denver passed an ordinance containing the following: "Section 1. That the right of way be, and the same is hereby granted to the Denver Electric and Cable Railway Company, its successors and assigns, to build, operate and maintain a single or double track railway, with the switches, turnouts, side tracks and other appliances necessary for the operation of the same, in, along and across the streets of the city of Denver, said railway to be operated by power transmitted by use of electricity or by cable." See Ordinance No. 3, adopted February 6, The charter of the city of Denver, as 1885. amended in 1885, among other things, authorized the city "to regulate the use of locomotive engines, to direct and control the location of cable and other railroad tracks." Sess. Laws 1885, art. 2, § 20, p. 85. Under the charter thus amended the city council passed an ordinance expressly recognizing Ordinance No. 3 of February 6, 1885, as valid, and providing for its enjoyment to a certain extent by the plaintiff company. See Ordinances 28 and 29, adopted May 2 and 3, 1888. The charter of the city, as amended in March, 1889, authorized the city council by ordinance "to permit and regulate the running of horse railway cars, or cars propelled by dummy engines, cable or electricity, the laying down tracks for the same, the transportation of passengers thereon, and the form and kind of rail to be used; and to require railway companies using streets to lay their tracks at the official grade thereof, and to require them to bring such streets between the sidewalks to the official grade at their own expense;

¹ Opinion withdrawn from files when rehearing opinion filed.

and to compel them to pave the streets between their tracks, and for a distance of two feet upon each side of the same." Sess. Laws 1889, p. 127. Subsequent to the passage of this amendment, the city council passed an ordinance (No. 27, adopted May 13, 1889) recognizing rights of way theretofore granted for the use and occupation of the streets and avenues of the city by street-railway cars propelled by electricity as well as by horse power, dummy engines, cable, and steam. Such ordinance provided for the issuance of permits by the city engineer to any company or corporation constructing such railways to excavate the streets for that purpose, and also contained specific regulations concerning the manner in which the streets and avenues should be used and occupied for such purposes. The agreed statement of facts shows that permits to excavate were issued by the city engineer to the plaintiff company in accordance with the requirements of Ordinance No. 27 of May, 1889, and that such permits were continued up to December 9, 1889, two days before the commencement of this action. The agreed statement of facts also shows the following: "That during the month of May, A. D. 1889, and subsequent thereto, down to the time of the filing of the complaint in this action, the said plaintiff company was the only person or corporation which had been, as it claims, by virtue of the ordinances above set forth, granted the right of way to use and occupy any of the streets and avenues of the city of Denver for the purpose of laying a track or tracks to be used in running cars propelled by electricity. That at the time of the passage of said Ordinance No. 27, A. D. 1889, there was no other ordinance in existence granting or purporting to grant to any other company than the said plaintiff the right to construct a street railroad to be operated by means of electricity."

It will be observed that all the foregoing statutes and ordinances, as well as the constitutional provision above quoted, were adopted before the action in this case was commenced. It is true, the charter of 1898 did not specifically authorize the city of Denver to permit the operation of street railways by electricity; but, as we have seen, the various amendments to the charter of the city of Denver bear ample proof of the policy of our legislation in the matter of the location and operation of street railways. As by the progress of science, discovery, and invention new kinds of motive power have been found useful for propelling street-railway cars, so the charter has been amended, expressly authorizing the use of cable power in 1885 and electric power in 1889 for that purpose, in addition to horse power and dummy engines. theretofore authorized to be used. It is true that, in advance of specific legislative authority, but nevertheless in pursuance of the general legislative policy of the state, the city council of Denver did pass an ordinance authorizing the company (of which the plaintiff company is the successor) to construct and operate street-railway cars by electricity. It is also true that by a charter provision subsequently enacted by the state legislature the city was expressly authorized to permit the running of railway cars by electricity, and this charter provision was shortly followed by a city ordinance expressly recognizing such grants of authority as had theretofore been given to use and occupy the streets of the city for the purpose of constructing and operating railway cars by electricity, as well as by other kinds of motive power.

Conceding that the city was without authority to adopt Ordinance No. 3 on February 6, 1885, it is nevertheless urged with much force and reason that the charter amendments of 1885 and 1889, as above stated, and the ordinances adopted thereunder, are to be regarded as curative statutes, thus legalizing the subsequent use of electric power by the plaintiff company. A standard author says: "The rule in regard to curative statutes is that, if the thing omitted or failed to be done, and which constitutes the defect sought to be removed or made harmless, is something which the legislature might have dispensed with by a previous statute, it may do so by a subsequent one. If the irregularity consists in doing some act, or doing it in the mode which the legislature might have made immaterial by a prior law, it may do so by a subsequent one. On this principle the legislature may validate contracts made ultra vires by municipal corporations. It may thus ratify a contract of a municipal corporation for a public purpose." Suth. St. Const. § 483. In any event, it is clear that the mere executive officers of the city could not, as late as December 11, 1880, be heard to question the plaintiff company's right to complete its electric lines already commenced. By the agreed statement of facts in this case it appears that at and before the commencement of this suit the plaintiff company "had contracted for the construction and erection of the lines of double-track electric street railway alleged in its complaint to the aggregate extent of about 15 miles, including the construction and erection of the same upon the streets mentioned in the complaint, and that, in pursuance thereof, plaintiff had incurred liabilities to the amount of over \$100,-000; that, in addition to the construction of said two miles of double-track electric street railway described in the complaint, said plaintiff had constructed about two miles of its lines of double-track electric street railway (through almost the entire portion of its lines described in the complaint), situated in the west division of the city of Denver, excepting the planting of poles and the stringing of the wires thereon; that the said poles are of the same class and character as other poles planted in the streets of said city of Denver, used for the carrying of telephone, electric light, and other wires, except as to

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height, which was considered immaterial by the court, according to its own statement; that the wires along which the electricity is to be transmitted for the purpose of propelling the cars of plaintiff by electricity are to be strung at a height of from eighteen to twenty feet above the surface of the street, at an average height higher than that at which some of the arc electric lights are strung across the streets in said city of Denver." Under such circumstances it was manifestly unjust for the executive officers of the city to treat the plaintiff company or its employes as trespassers for proceeding with the work of constructing the electric line of the plaintiff company through the streets of the city already occupied for that purpose. The company had expended large sums of money in a great public enterprise. It had done this upon the faith of the express action of the city authorities. The use of the streets for such purpose had received legislative sanction; that is, such use had been made lawful when supplemented by municipal consent. The city had recognized such use as lawful, and had specifically provided the way and means whereby the plaintiff company should proceed with its work in constructing its electric lines, so that, even though the original grant of authority may have been in excess of the chartered powers of the city, still the executive officers of the city could not, while such municipal consent remained unrevoked, justly deny the right of the plaintiff company to complete the work already begun, nor treat its employés as trespassers for prosecuting such work under the circumstances. Herm. Estop. p. 1363, § 1222; Glasby v. Morris, 18 N. J. Eq. 72; Kreigh v. Chicago, 86 Ill. 407; Union Depot Co. v. City of St. Louis, 8 Mo. App. 413; Mutual Union Tel. Co. v. City of Chicago, 16 Fed. 309; Easton, S. E. & W. E. P. Ry. Co. v. City of Easton, 133 Pa. St. 505, 19 Atl. 486; People v. Salomon, 54 Ill. 39.

Considering all the circumstances of the case, our conclusion is that the suit of the plaintiff company should have been sustained as against the mayor and chief of police, the only defendants in the action. The former opinion is accordingly withdrawn, the judgment of affirmance is vacated, and the judgment of the district court is reversed, and the cause remanded. In view of the rehearing, neither party shall recover costs of the other in this court. Reversed.

RUSSELL et al. v. DANIELS et al.1 (Court of Appeals of Colorado. May 28, 1894.) COMPROMISE—CONSIDERATION—REVIVAL OF JUDG-MENT.

 An agreement not to appeal from a judgment is a sufficient consideration to support an agreement to compromise a claim against the judgment creditor, if a right of appeal exists, or if there are sufficient grounds for a belief in its existence

2. A promise to compromise a claim is supported by sufficient consideration when the promisee thereby suffers the loss of another debt.

3. Where one firm, in consideration of its agreement not to enforce a judgment against another firm, exacts an agreement effecting a compromise of debts in the power of the other to prosecute, it is thereafter estopped from enforcing the judgment.

4. Where a judgment has stood for 20

years, the presumption of payment, though not conclusive, will prevent its revival, when supconclusive, will prevent its revival, when plemented by evidence of a compromise.

Error to district court, Arapahoe county. Action by William B. Daniels and another against Asahel Russell and another to revive a judgment. Judgment for plaintiffs, and defendants bring error. Reversed.

G. Q. Richmond and H. B. Johnson, for plaintiffs in error. Wells, McNeal & Taylor, for defendants in error.

BISSELL, P. J. This was a proceeding under chapter 19 of the Code to revive a judgment. The petition contained all the requisite averments to entitle the petitioners to maintain the proceeding. From it and the proof it appears that in October, 1874, W. B. Daniels & Co. recovered a judgment for \$450 and costs against Russell & Swink, who were then copartners. In the November following an execution was issued, which was returned in February entirely unsatisfied. The proof showed that at this time, and for many years afterwards, Russell & Swink were entirely solvent, and engaged in transacting a mercantile business at Rocky Ford. To render the controversy intelligible, something of the history of the original suit must be stated. During the inception of the matters which formed the subject of the original action, Russell & Swink sold to one Sweeney, on the order of Sweeney's agent, Stewart, a lot of goods which were used in and about the care and management of a herd of cattle running in that vicinity. The goods were originally charged to Sweeney, although ordered by Stewart, as the foreman of the herd. There was some connection-though what, the evidence does not clearly disclose -between W. B. Daniels & Co. and Sweeney. in the ownership of the cattle. Either Daniels & Co. were jointly concerned with Sweeney in the ownership at the time, or else negotiations were pending between the parties with reference to the stock, and the title thereto subsequently passed to Daniels & Co. This is of small moment in the present discussion. Russell & Swink had bought goods of Daniels & Co., for which they had not paid, evidently declining to settle on the theory that their claim against Sweeney should offset the Daniels & Co. account. The dispute culminated in an action by Daniels & Co. against Russell & Swink to recover the bill. This suit was brought in the county court, and in it Russell & Swink attempted to set up as an offset the claim which

¹ Rehearing denied September 24, 1894.

they had against Sweeney. The offset was disallowed, and judgment was finally entered in favor of Daniels & Co. for the amount stated. It is impossible to determine why the two accounts were not balanced, and under the record, as now presented, we cannot say whether the ruling of the court was based on the failure of Russell & Swink to show Sweeney's authority to act on behalf of Daniels & Co., or whether the proof was such as to show that the transaction originally was one of a purchase and sale of goods between Sweeney and Russell & Swink, whereby Daniels & Co.'s promise to pay was the promise to pay the debt of another, and the proof was insufficient to establish the liability. At all events the set-off was denied. After the entry of judgment, Russell & Swink and Daniels & Co. had some discussion concerning the situation of the two accounts and the judgment entered, and commenced negotiations looking to the satisfaction on their books by Russell & Swink of the claim against Sweeney, in consideration of the settlement of the judgment which Daniels & Co. had obtained. Russell & Swink's account against Sweeney was larger than that of Daniels & Co. against Russell & Swink. How far the negotiation was advanced by reason of any dealings then pending or concluded between Sweeney and Stewart and Daniels & Co. concerning the cattle is not clear; but according to the facts, as found by the court and stated in its findings, it was agreed between the parties that, if Daniels & Co. would not enforce the judgment which they had obtained against Russell & Swink, Russell & Swink would cancel their account against Sweeney, and would not appeal to the district court from this judgment, and further litigate the controversy on other evidence which they might procure concerning the matter. The court finds the agreement and its terms, and that it was on the condition that, if Daniels & Co. failed to notify Russell & Swink within 10 days of their refusal to carry out the settlement, it should be taken as concluded, and Russell & Swink need concern themselves no further about the judgment. The court finds that no such notice was given. It further appears that the account against Sweeney for the goods sold was either charged off, or the claim allowed to lapse, and never enforced or collected from Sweeney, or presented to him for payment. On these facts the court held, as a matter of law, that there was no consideration for the agreement between the parties because no right of appeal lay from the probate court to the district court, and that the agreement not to prosecute the appeal constituted the sole consideration for the settlement. If it be concluded that the district court erred in respect of its determination of this particular question, or if it be concluded that there was still another sufficient consideration to uphold the promise and support the settlement

of the accounts, the judgment must be re-

Under the act concerning the revival of judgments, such causes are triable to the court which hears and determines the question of fact, to wit, whether the judgment remains unsatisfied in any part, and, on its conclusion respecting this proposition, renders the judgment to revive, or denies the petition. The present claim is so stale and offensive in its antiquity that a judgment of revival should not be entered unless the court is clearly satisfied that the judgment remains unpaid. As against claims of such ancient origin, the presumption of payment is exceedingly strong, and less evidence is requisite to justify the court in refusing to revive so old a judgment than is necessary to entitle it to enter a judgment in an original suit between the parties. Mercantile houses like Daniels & Co. are not wont to permit judgments against solvent persons and solvent firms to remain unsatisfied and unenforced for a period of years, if their claim be just and collectible. It is quite possible that the present attempt to enforce this judgment may be the result of a change in the personnel of the old firm of Daniels & Co., and that the facts concerning the transaction are not within the knowledge and recollection of the firm, as now constituted. We do not intend to hold that the absolute presumption of payment which arises as a matter of law after the lapse of the time which may be prescribed by some statute exists in the present case, but simply that the length of time is such that the presumption will aid proof which may be more limited. perhaps, than would be absolutely necessary to entitle the court to render a judgment in an original action based on the same facts. There is considerable contrariety of opinion in the decisions as to what constitutes a bar in an action of this sort. Most states have a statute on the subject. Other states have established a rule of judicial construction which has been followed so that it may be deemed settled. Yarnell v. Moore, 3 Cold. 173; Baker v. Stonebraker, 36 Mo. 338; Angell v. Martin, 24 Kan. 334; Smithpeter v. Ison, 4 Rich. Law, 203. Colorado has no statute, and the only act which may be said to bear on it is section 197, Gen. St. 1883, which adopts the common law of England. in so far as it is applicable to questions not covered by positive legislation. Under this act it could not be adjudged that the conclusive presumption which follows the lapse of time may be indulged in. We have already suggested, however, if there be proof in the case of an agreement between the parties which can be held a sufficient consideration to uphold the compromise and prevent the enforcement of this very stale judgment, a court would naturally feel itself quite at liberty to regard the evidence in that direction as quite persuasive, and to regard with conas quite persuaste, and a sight discrepance

concerning the terms of the alleged compromise.

We do not accept the court's conclusions respecting the right of appeal. The matter is not one of any consequence to the profession, and what we decide concerning the right of appeal in 1874 is not likely to be a matter of any future interest to other litigants. It is not probable that any other case will arise, calling for a construction of the statutes on the subject. We shall therefore not discuss the question with that fullness which would be essential if we were establishing a precedent. It will be enough to refer to the decisions and the law, and to state our general judgment concerning the matter. Gen. Laws Colo. T. 1872, p. 105; Id. 1874, p. 217; Rev. St. Colo. 1868, p. 527. These acts, together with the act of congress approved May 4, 1870, which is referred to in the case of McClure v. Sanford, 3 Colo. 514, cover the matter of appeals, and jurisdiction of the probate and district courts of the territory. In general it may be said that the right of appeal originally lay from what was then termed the "probate courts" of the territory to the district court, and that the latter heard and tried the case in very much the same fashion as district courts now hear and determine such appeals when they are taken from our present county courts. The act of 1872 undoubtedly gave the right of appeal in all cases. That of 1874 attempted to except the county of Arapahoe from the operation of the antecedent law, and to take away the right of appeal in that county. The law seems not to have been effectual for the purpose. The limitation upon the power of the territorial legislature to affect the rights granted in the organic act and the amendments thereto by congress was very early considered in the state. Cass v. Davis, 1 Colo. 43; McClure v. Sanford, supra; Stebbins v. Anthony, 5 Colo. 273. These adjudications lead us to conclude that at the time this judgment was rendered, in 1874, there was a right of appeal from the probate to the district court in Arapahoe county. The question as to the force and effect of the act of 1874 was of such great doubt that if, as the court found, Russell & Swink were asserting a right to appeal, which they agreed to forego in case the suit was adjusted, it was a contention for which there was a reasonable ground, and on which even lawyers might possibly differ; so that the precise determination of this question is not absolutely essential to support our conclusions. We think, however, that the right of appeal existed. If it did not exist, there were reasonable grounds to believe it to exist; and, even though it might be ultimately adjudged that Russell & Swink did not have the right, yet the matter was involved in so much uncertainty that the agreement not to take an appeal might operate as a sufficient consideration to uphold the settlement of the disputed claim. Hewett v. Currier, 63 Wis. 386, 23 N. W. 884; Bellows v. Sowles, 55 Vt. 391;
Miller v. Hawker, 66 Ill. 185; Clark v. Turnbull, 47 N. J. Law, 265; Rector v. Teed, 120
N. Y. 583, 24 N. E. 1014.

There is still another basis on which the court might well adjudge, should it find the requisite facts, that there was a sufficient consideration moving between the parties to make the agreement operative to estop Daniels & Co. to enforce the present judgment, The conclusion at which the trial court arrived concerning the preceding legal proposition may have led it not to weigh and consider the evidence with much care with reference to the theory now under discussion. A detriment and a loss to one is as much a valuable consideration as a profit or a benefit to the other. There is evidence in the record which tends to show that, after this agreement was entered into between Russell & Swink and Daniels & Co., the former firm charged off the account against Sweeney, and never afterwards attempted to enforce or collect it. If this was done in pursuance of the agreement between the two firms, as contended for by Russell & Swink, and that firm ultimately lost its account against Sweeney by reason of their reliance on Daniels & Co.'s promise not to enforce the judgment against them, this of itself would be a sufficient detriment to Russell & Swink to furnish a good consideration for the promise of Daniels & Co., who would thereafter be estopped to enforce their judgment against the original debtors. It cannot be true that where a compromise of two claims is thus agreed upon between the parties, and one of the promisors thereby suffers the loss of another debt, the two promises shall not furnish a sufficient consideration, one for the other, and be operative to defeat the right of one of the parties to enforce his claim.

It is our conclusion that the right of appeal lay, and the executed agreement not to exercise it furnishes a sufficient consideration to make the compromise a valid one as against the Daniels & Co. judgment. We likewise conclude that, if the court shall find the facts concerning the disposition of the Sweeney claim to be as indicated by the present record, this conclusion would establish the existence of another sufficient consideration to uphold the settlement. The judgment will be reversed and the cause remanded. Reversed.

ASPEN WATER & LIGHT CO. v. CITY OF ASPEN.¹

(Court of Appeals of Colorado. March 26, 1894.)

Corporations—Incomplete Organization—Powers.

A corporation which has issued no stock, and has received no stock subscription, has no

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¹ Rehearing denied September 28, 1894.

power to contract, and a grant of franchises to it by a city is inoperative.

Appeal from district court, Pitkin county.

Action by the Aspen Water & Light Company against the city of Aspen to recover damages for breach of contract. Judgment for defendant. Plaintiff appeals. Affirmed.

James M. Downing, Porter Plumb, and Joseph W. Taylor, for appellant. William O'Brien, for appellee.

BISSELL, P. J. The industry of counsel has not unearthed a precedent for an action resembling this, in some of its phases. The city counsel of Aspen passed an ordinance purporting to grant to the Aspen Water & Light Company the exclusive right to furnish water and light to the city, and then attempted, according to the plaintiff's contention, to modify and repeal the franchise. The suit is for the damages resulting from this alleged legislative action. Numerous questions are raised and discussed, but, as the claims of the appellant must be adversely adjudged on two grounds, no other proposition will be determined, and only incidental reference, if any, will be made to the other contentions.

During the winter of 1884-85, a half dozen gentlemen, who may be left unnamed, devised a plan to furnish the city of Aspen with water and electric lights. In furtherance of the scheme, on the 27th of February, 1885, they prepared articles of incorporation designed to incorporate the Aspen Water & Light Company. It will be assumed that the parties complied with the statute in the execution and record of the certificate, for there is nothing in the proof tending to show otherwise. Concurrently, an ordinance was introduced in the common council of the city, which granted to this company the right to maintain and operate the works necessary to distribute water and lights to the citizens. The grant was for a term of 20 years, and the ordinance contained all of the usual provisions supposed to be necessary safeguards to protect the municipality, and to limit and define the rights of the corporation. Nothing further need be stated concerning it. It was alleged and proven that this ordinance was passed with due observance of the conditions and limitations prescribed by the General Statutes, and by the vote of a majority of all the persons elected to the council. It will be assumed, for the purposes of this decision, that the ordinance was valid and became a It provided that within 10 days from the time it was ratified by a vote of the people the company should commence active operations for the construction of the works according to the specified plan, and file a bond to protect the city against any breach of the agreement or disregard of the limitations of the act. The vote was an affirmative one, and the promoters at once commenced what, in their proofs and arguments, are called "operations." The contracts were limited, and the amount of work done was exceedingly small. The reason of this is very plain. Early in April a controversy sprung up, which extended to the citizens, the members of the council, and the applicants for the right to furnish water and What the council did is left in a little obscurity. On April 13th a resolution was offered to forfeit the franchise. It was ineffectual for legal purposes, for it was not adopted by a majority of all the members elected. Its further consideration may therefore be dismissed. On the 15th of April a motion was made in the council to adopt another ordinance authorizing a contract with the water and light company. This evidently omitted a part of the provisions of the original act. Just what this latter ordinance was, the scope of the amendment, or how it varied from the original, is not apparent from the proof, nor is the claim of counsel concerning it made evident by their arguments. The complaint undoubtedly charges that the city refused to permit the company to construct its works; avers that it notified them it would not carry out its agreement. attempted to repeal the ordinance, and to contract with another corporation. was no evidence, however, offered, to show any rescission by the city, other than the motion of April 15th, which has been stated. Evidence was introduced which tended to prove that after the passage of the resolution, in April, one of the principal promoters returned to the city, and started with a force of men to dig on the street. This was stopped by the mayor, but for reasons which are not disclosed. Work was never afterwards In April, 1890, the company resumed. brought this action to recover damages. These facts were elicited to support the contention that the plaintiff had acquired certain rights by virtue of the ordinance which had been infringed by the subsequent proceedings of the council. It was claimed the city authorities repealed the ordinance, and rescinded a contract, of date March 21st, between the city and the company, to supply water and lights at an agreed price. To further sustain a recovery, and evidently as an essential part of it, a large amount of evidence was offered to the point that all the promoters of the enterprise were men of abundant capital, and had ample means to perform the contract. The proof, however, was limited to the financial ability of the promoters, and in no manner tended to show that the company itself was possessed of any means, or had in its treasury any funds, which could be used for these purposes. It was shown that the treasury was empty, and that no stock had ever been subscribed for or been issued. Judgment went for the defendant. The record has been thus fully stated that the force and effect of the situation of this company, and the position which the court takes concerning it, may be thoroughly appreciated.

In an action between individuals, where the gravamen of the suit is a breach of a contract, to support the recovery of substantial damages the agreement must appear, either presumptively or by proof, to have been entered into between persons competent to contract, and performance, or its legal equivalent, must be established. There was manifest failure in this case as to the first element of this proposition. A corporation, in Colorado, is undoubtedly a creature of the statute. To create it, the statutory requirements must be followed, and all the prescribed formatities which relate to the essentials of corporate existence must unquestionably be observed. Thus far, it may be conceded, the plaintiff has gone with its proof. The certificate of incorporation was offered in evidence, and received without objection; and if the execution of that paper, ex vigore, gave breath and life to the corporate entity, it might be conceded that the Aspen Water & Light Company was competent to contract, and possessed of power to sue and be sued. It is quite possible that, if the corporate character had not been otherwise attacked than by the general denial contained in the answer, the legal presumptions flowing from the production of the certificate would have sufficed to enable it to maintain the suit. It is likewise possible, where a city contracts with a corporation, it may be estopped, in a suit upon that contract, to deny the corporate character. The application of this principle, however, can only concern the written agreement between the city and the company, by which the city agreed to take a certain number of lights and a certain amount of water, and pay a specified price for the service. It is not plain, and may well be doubted, whether this latter principle can be invoked in a suit brought by a corporation against a city to recover damages sustained, if at all, by the repeal of an ordinance granting certain rights and privileges to the complaining party. Ever since the principle was first enunciated by the supreme court of the United States that when a legislative body has granted a charter which confers certain rights and privileges upon a corporation, and contains elements of a contract, the sovereignty may not repeal it, and thereby violate the contract which it contains, there has been a reluctance on the part of the courts to extend the principle to cases not strictly within the terms and limits of that adjudication. Some courts have decided that where a corporation is in existence prior to the time of the grant of the privilege, and the right conferred simply relates to the use of the streets of a city, or the construction of bridges, or the establishment of ferries, such grants, if not indefinite in their character, will be taken to be licenses which are the subjects of rescission, and not to fall within the principle of the Dartmouth College Case. In one sense, of course, ordinances of this description contain certain contractual elements which the

courts recognize and enforce; but, where the breach alleged is charged to come from the repeal of the act by the legislative body, the doctrine of estoppel cannot be invoked to prevent the city from contesting the corporate existence of the company bringing the suit. Whatever may be the general rule of law which determines the extent of the issue made by the allegation of corporate character and a general denial of the averment, the plaintiff in the present suit settled the matter by its own proof. Recognizing the necessity to show a readiness and ability to perform, much evidence was put in to show the financial status of the promoters. While giving evidence on this subject, one of them testified that all the promoters were possessed of ample means; but there was no money in the treasury of the company, and the corporation had issued no stock, at the time of the passage of the alleged ordinance, the taking of the vote of the people, nor up to the time of the trial, on the 12th of May, 1892,-more than seven years after the doing of the things stated. Another witness testified that they had never issued a particle of stock, and never intended to. There was no proof made of any stock subscription, or of the existence of any agreement to take certain stock, or any specified interests in the enterprise, nor evidence given of any contract between the parties which would make them joint holders of the stock of the company when issued. Under these circumstances the importance of the suggestion that both parties to an agreement must be competent to contract becomes apparent. In this state, as in most others, corporations are organized under a general statute. We are not concerned with all the limitations and conditions annexed to the right, whether for the benefit of the body or the protection of the public. The first important step to be taken is the preparation and record of the prescribed certificate. It would be unhesitatingly conceded that such a certificate, containing whatever was directed by the act, must be executed by the persons interested, and filed in the officers named. When this certificate is executed and filed, it may be true that for some purposes the corporation has an existence. The extent of the corporate authority. under these circumstances, need not be inquired about, for the case does not disclose the performance of other essential corporate acts. According to the present record, all the promoters ever did was to execute the certificate.

It only remains to determine the legal consequences which flow from the failure to complete the organization by the preparation, issue, and sale of stock. In some states the general incorporation act provides that upon the filing of the certificate the persons who sign it, and their successors, shall become a body corporate, and be invested with certain powers. But even in a case like that the authorities hold that it only thereby becomes

a quasi corporation, invested possibly with certain powers for certain limited purposes. In reality it becomes a corporation only in name. It is universally agreed that a corporation cannot exist without stockholders or members. As said by the learned Commissioner Pattison in Arkansas River, Town & Canal Co. v. Farmers' Loan & Trust Co., 13 Colo. 587, 22 Pac. 954, "without organization and members, without officers and stockholders, a corporation is but a naked body." 1 Mor. Priv. Corp. § 33. We are thus confronted with this situation: Conceding, ex gratia, that the Aspen Water & Light Company had an existence on the 27th of February, 1885, and was possessed of sufficient corporate capacity to render the grant contained in the ordinance operative to vest in that company the rights expressed when the organization should be complete, it remains true that at the time of the alleged breach, and the bringing of the suit, the grant had not become operative. Since the grant ran to an entity not then in esse, it may be doubted whether it could be rendered effective by subsequent birth. This difficult question need not be adjudged. The entity never was born, and hence the grant never took effect. The agreement of March 21st is subject to the same difficulties. It purports to have been executed by the town of Aspen through Hooper, its mayor, and by the Aspen Water & Light Company, by Wilson, its president, attested by Cleary, its secretary. The company never had any legal president and never had any legal secretary, and consequently the so-called contract was never executed. The statute provides (Gen. St. 1883, \$\$ 242-244) that the corporate powers shall be exercised by a board of directors or trustees, who must be stockholders of the company, and from which body a president may be elected. This is a statutory limitation upon the corporate power, and the governing body must, according to that statute, be composed of shareholders, and the president can only be rendered competent by possessing the same statutory qualification. Since it is true that no stock was ever subscribed for or issued by this company, and no agreement was established which obligated the promoters for the stock of the company so that they might be taken to be joint owners of all of it, it follows that there never was any board of directors competent to make a contract, nor any persons who could execute an agreement for the company. Under these circumstances, one of the first essentials of a valid contract is absolutely wanting. There was not at the date of the alleged breach, and there is not at the present time, any such corporation as the Aspen Water & Light Company. What the rights of the promoters may be, if any, is not before us for consideration. The suit was not brought by them, or in their behalf, but in the name and on behalf of a corporation without a legal existence. Having established this fact

by their own proof, its legal results may be invoked by the appellee to maintain the judgment entered in its own favor.

An equally insuperable difficulty springs from the second consideration suggested, to wit, the necessity of proof of performance or its legal equivalent. It would be folly, and a waste of time, to attempt to state what, under all circumstances, would amount to performance, or what, under others, would be held to be its legal equivalent, where one of the parties showed a willingness and readiness to perform, and there was a refusal by the other. The proof in this case demonstrates that the Aspen Water & Light Company, as such, never either performed or tendered performance, or was ever able to discharge any part or portion of its side of the contract. The record is barren of evidence showing any act by the Aspen Water & Light Company, other than what possibly may be called its act in the filing of the certificate of incorporation. Beyond that it did nothing. It never laid pipes, strung wires, dug ditches, brought water, built an electric plant, or took any substantial steps in any of these directions. Its work ceased with the filing of the paper. The record contains much testimony which tended to show that after the passage of the ordinance, and the execution of the alleged agreement of the 21st of March, the promoters of the enterprise made some contract looking to the purchase of an electrical plant, some provision with reference to the supply of water, and did a very considerable amount of work with reference to the initiation and protection of water rights essential to the complete performance of the contemplated scheme. One of the principal promoters attempted to do a little work on the streets, and continued it until interrupted by the mayor. The importance and significance of this proof is not apprehended. What would have been the rights of the Aspen Water & Light Company, had they completed their corporate organization, built the plant, and tendered performance, need not be considered, for, as a corporation, it did nothing. What the rights and remedies of the promoters might have been if the suit had been brought on their behalf, to recover the damages which they sustained by reason of their contracts and expenditures, may likewise be left undetermined. The suit was not brought on their behalf, and the proof with respect to these matters which they offered, and which the court received, was totally inadmissible to support a recovery by the Aspen Water & Light Company. This demonstrates that there was neither performance, tender of performance, nor ability to perform, on the part of the Aspen Water & Light Company. If all the proof offered and found in the record had been admissible in the present suit, and was to be considered in the determination of the issues, it would remain true that the Aspen Water & Light

Company proved no cause of action accruing to it because of the breach of any contract, or the passage of any ordinance by the city of Aspen.

Many errors are assigned on the instructions which the court gave. Since the plaintiff could not sustain a judgment on the proof which he produced, such errors will not warrant a reversal. Hoagland v. Cole, 18 Colo. 426, 33 Pac. 151. The judgment is right. The company was not entitled to recover, and the judgment will be affirmed. Affirmed.

THOMSON, J., did not sit in this case.

LAWSON et al. v. THOMPSON.

(Supreme Court of Utah. July 27, 1894.) REAL-ESTATE AGENT-ACTION FOR COMMISSIONS DEFENSES-FRAUD.

1. Defendant employed plaintiff to sell certain land at a certain price, and promised to pay him a commission. A week thereafter, plaintiff procured a purchaser, and, without written authority, executed to him a contract in defendant's name, and advanced to the purchaser his check for \$200, to enable the latter to make a part payment. The check was handed to defendant, and he was told that plain-tiff had sold the land. He did not offer to return the check, and expressed to the purchaser his satisfaction with the sale. The purchaser tendered the price to plaintiff, as agent for defendant, and demanded a deed, which was refused by defendant. *Held*, that plaintiff

defendant, and demanded a deed, which was refused by defendant. Held, that plaintiff could recover his commission.

2. Where, in an action by an agent for commissions, fraud in the sale is not pleaded, and there is no evidence thereof, an instruction that, if the agent acted in his own interest or in that of the purchaser, he cannot recover, is properly refused.

3. The mere fact that an agent employed to find a purchaser for land advanced to the purchaser money to make a part payment does not prevent a recovery of his commission from the vendor.

the vendor.

4. Nor does the fact that he, without authority, executes a contract of sale in the name of the vendor, prevent such recovery, where the contract is subsequently ratified by both the vendor and vendee.

Appeal from district court, third district: before Justice G. W. Bartch.

Action by A. F. Lawson and another against Alfred Thompson. There was a judgment for plaintiffs, and defendant appeals. Af-

Brown & Henderson, for appellant. Bennett, Marshall & Bradley, for respondents.

MINER, J. This cause was brought in the district court by the plaintiffs against the defendant to recover commission as real estate brokers in Salt Lake City. Plaintiffs claim that on or about September 1, 1889, the defendant employed them, as such brokers, to procure some one "ready, willing, and able to purchase from defendant" certain premises described in the complaint; that the plaintiffs accepted the employment; that they were ready to procure a purchaser for the land for \$18,000, and were to have 5 per cent. as commission. The complaint further alleges that on or about September 20, 1889, the plaintiffs did procure one John A. Groesbeck, who was then and there ready, willing, and able to purchase said premises from defendant on the terms above stated; and that plaintiffs produced him to defendant while he was so ready, willing, and able to purchase said premises on said terms; and that, therefore, the plaintiffs, having performed all of the terms and conditions of said contract, demand a judgment for \$900. The answer denies specifically each and every allegation of the complaint. It denies the employment, the agreement to pay; denies the plaintiffs procured a purchaser, as they allege. The testimony offered on the part of the respondents tended to show that respondents were partners as real-estate agents. About September 1, 1889, appellant told one of respondents that he would pay him a commission of 5 per cent. if he would sell the land in question for \$16,000. A short time after, appellant raised the price to \$18,000, reiterating that the commission would be 5 per cent., and stating to Sibley, another real-estate agent, that respondents had the land for sale. Within about one week thereafter, respondents procured John A. Groesbeck as a purchaser, and gave to him a contract, executed by them, in appellant's name, "by Lawson Brothers, His Agents." Respondents had no written authority to execute the contract. At Groesbeck's request, and on his promise of payment, respondents advanced as a loan to him \$200, as a cash payment to bind the bargain. Thompson was then absent from the city, and respondents drew their own check, payable to him, for \$200, and gave it to James M. Kennelly, who was at that time a partner of Thompson, and requested said Kennelly to send for Thompson, so that the sale might be consummated, and to also deliver the check to him. Kennelly sent for Thompson on some of his partnership business, and when he came in, about September 26, 1889, told him that the Lawsons had sold his land for \$18,000, and then handed him the check, together with other papers, at the same time saying, "There is a check there from Lawson Brothers." Thompson took the check; put it in his pocket. He went to see respondents about the sale: did not offer the check back to them, or, according to his own evidence, express any dissatisfaction with the contract they had made, except as to the unexpired lease on the prem-Thompson kept this check for at least 10 days, during which time he tried and failed to buy out the owner of the lease then on the premises, and, the value of the premises having advanced in that time, refused to carry out the contract, assigning as the only reason therefor that he could not deed except subject to the lease. The day after Thompson returned to town, Groesbeck met him in

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front of respondents' office, and spoke to him of the sale. Both of the respondents and Groesbeck swear that at this conversation, and after appellant had been informed of all the particulars of the transaction, he expressed his satisfaction with it, and agreed to furnish the abstract of title at once, and that Groesbeck then and there stated to him his willingness and anxiety to pay the money and receive his deed. The appellant, the only witness in his own favor as to this, testified that he did not remember anything being said about an abstract, and denied having authorized respondents to sell the land, al. I gave testimony tending to dispute the testimony offered by the respondents. It is uncontradicted that at this time Groesbeck was financially able and willing to purchase the land at the price fixed, and to pay the purchase price in cash; that he was buying for himself alone; and that respondents had no interest in the matter, save as appellant's agents and to earn their commission. Groesbeck afterwards tendered the full amount of the purchase price to respondents, as agents of appellant, and demanded a deed, which was refused.

The appellant excepted to the refusal of the court to give his second request to charge, as follows: "The jury are instructed that if the plaintiffs were agents of the said defendant to sell his land, as claimed in the complaint herein, and as testified to by them, then it was their duty, in transacting the business, to act wholly in his interest. And if, in making the contract or transacting the business, they acted for or in the interest either of themselves or of John A. Groesbeck, or any other party than the defendant, that would be a violation of their duty, and the plaintiffs cannot recover." Had the issue of fraud or bad faith on the part of the agents been alleged in the answer, and proof introduced to sustain it, this request might very properly have been given; but as the answer only denies the allegations of the complaint, and in no manner sets up any fraud or misconduct on the part of the respondents, we do not think the question raised by the request was within the issues before the court, and was therefore properly refused. Schmidt v. Pfau, 114 Ill. 500, 2 N. E. 522; Pom. Rem. & Rem. Rights, § 687; Lefler v. Field, 52 N. Y. 621; Capuro v. Insurance Co., 39 Cal. 123; Kent v. Snyder, 30 Cal. 666. Hager v. Thomson, 1 Black, 91.

It appears that, after the appellant knew that a written contract of sale had been given the purchaser, he received the \$200 check in part payment for the land, and retained the check in his possession for about 10 days. After receiving the check, he expressed satisfaction with the sale, and no particular fault was found with it, until he discovered that he could not buy out the lease upon the property and the land had advanced in value. Then he returned the check, and sought to avoid the sale. The signing of the

contract of sale to Groesbeck was only authorized by the local custom and usage then in force. While this written contract was invalid as a writing to convey the land, yet we find the act subsequently ratified by the conduct of the appellant, and by the offer and tender of the money on the part of the respondents. The making of the written contract, or proof of a local custom authorizing the agent to make it, in no way affected the right of plaintiffs to recover their commission if they had a purchaser ready, able, and willing to pay the price asked. Thompson was in no way injured by it. Under the contract proved, the jury found respondents were entitled to their commission, and the evidence was sufficient to justify the finding.

The fact that respondents loaned the \$200 to Groesbeck with which to make the first payment was no fraud on the appellant, and in no manner altered his position. Thompson, the appellant, did not require any money to be paid down before the delivery of the deed, and the prepayment of \$200 was to his benefit and advantage. It seems to us that the respondents carried out the terms of the agreement, and found a purchaser who was able and ready and willing to purchase the land in question at the price offered and agreed upon by the parties. The whole case was fairly left for the consideration of the jury, under proper instructions from the court. Upon the whole record, we find no error. The judgment of the third district court is affirmed.

MERRITT, C. J., and SMITH, J., concur.

McCHARLES v. HORN SILVER MINING & SMELTING CO.

(Supreme Court of Utah. Aug. 31, 1894.)
Injuries to Servant — Action against Master
—Negligence of Fellow Servant.

1. In an action by a servant against his master for personal injuries caused by the negligence of a fellow servant, the burden of proof is on plaintiff either to show that defendant was guilty of negligence in employing the fellow servant, or to show that the fellow servant's conduct had been so grossly careless during the employment that the master was negligent in not acquiring knowledge thereof, and discharging him

discharging him.

2. Where a servant, who has knowledge of the incompetency of a fellow servant, continues to work with him, without complaint to the master, the latter is not liable to the servant for injuries caused by the fellow servant's negligence, though he was negligent in retaining the fellow servant in his employ.

Appeal from district court, second district; before Justice Bartch.

Action by Thomas McCharles against the Horn Silver Mining & Smelting Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Barlow Ferguson and W. H. Dickson, for appellant. O. W. Powers and Ogden Hiles. for respondent.

MERRITT, C. J. In this action the plaintiff brought suit against the Horn Silver Mining & Smelting Company, a corporation, defendant, to recover damages for an injury sustained by the plaintiff while in the employ of the defendant corporation. The grounds on which the plaintiff relied for a recovery, as stated in his complaint, were that the injuries were due to the negligence and incompetency of the defendant company's engineer in charge, at the time of the accident, of the defendant's hoisting apparatus, and that the defendant company was guilty of negligence in employing said engineer in the first instance, he being, as alleged in the complaint, incompetent, unskillful, negligent, and careless, and that defendant company was also guilty of negligence in retaining such engineer in its employment, well knowing he was unfit and incompetent for such employment. The defendant answered the complaint, specifically denying all its material allegations, and alleging contributory negligence on the part of the plaintiff. A trial was had in the lower court, which resulted in a verdict and judgment in favor of the plaintiff for \$10,000. In due time the defendant submitted a motion for a new trial, which was denied, and this appeal is prosecuted from said judgment and the order denying said motion.

In support of the appeal, numerous alleged errors occurring at the trial, and excepted to by the defendant, are assigned, as well as the insufficiency of the evidence to justify the verdict. We do not deem it necessary to consider the alleged errors occurring at the trial, for we are clearly of the opinion that the evidence is entirely insufficient to sustain the verdict. In the first place, we are by no means satisfied from the evidence that the accident resulting in the injuries complained of was due to any negligence or incompetency on the part of the engineer. But, passing this point, the record discloses that there was no attempt whatever, upon the trial of the cause, to show that the defendant company was guilty of any want of care or diligence in its original employment of this engineer, or that he was not in fact, at the time of his employment, a thoroughly competent and suitable person to be intrusted with the duties of an engineer. In such case, the law presumes that the employer exercised due care in the employment of the servant whose negligence is complained of. If thereafter, and during the course of the employment by defendant, this engineer became incompetent, careless, or so inattentive to his duties as to render him an unsuitable person to be retained in such employment, the burden was on the plaintiff to show this fact, and further to show that the defendant company either had actual notice of such subsequently acquired habits of carelessness or inattention, or that subsequent incompetency, carelessness, or inattention on the part of its servant was so marked or notorious

that knowledge thereof would have come to the defendant, had it given proper attention to its duty. Wood, Mast. & Serv. \$ 433; Railroad Co. v. Baugh, 149 U. S. 369, 385, 386, 13 Sup. Ct. 914. It is useless to multiply authoritles in support of a rule so well established as this, and an inspection of the record discloses that the plaintiff utterly failed to meet the requirements of this rule. There is no evidence tending to show that any of the officers or agents of the defendant company had actual notice or knowledge of any act of carelessness, or of any act tending to show incompetency, on the part of the engineer, during the whole course of his employment by the defendant, which had extended over a period of over five years prior to the time of the accident complained of. There is no evidence tending to show that the engineer had acquired a reputation, among his coemployés or elsewhere, for incompetency or carelessness. Nor is there any evidence of any act of carelessness or inattention on his part, happening under such circumstances as to make it reasonable to assume that any officer or agent of the defendant company would have had knowledge thereof, had such officer or agent been diligent and attentive to his duties.

The plaintiff testified that prior to the accident in question he knew that this engineer was careless and reckless, and he further testified that he never made any complaint thereof to any agent or officer of the defendant company, or in fact to any one, but continued to expose himself to the dangers arising from such alleged recklessness and carelessness. This alone precludes recovery by the plaintiff. Wood, Mast. & Serv. § 432; Davis v. Railroad Co., 20 Mich. 105; Hatt v. Ney, 144 Mass. 186, 10 N. E. 807. The court below so instructed the jury. In the light of the evidence, it is manifest that the jury disregarded the instructions; otherwise, the verdict must have been for the defendant, on the plaintiff's own showing. Judgment and order denying the motion for a new trial reversed, and the cause remanded for a new

SMITH, J., concurs.

OGDEN PAINT, OIL & GLASS CO. v. CHILD et al.

(Supreme Court of Utah. July 27, 1894.)

Assignment for Benefit of Creditors — Preperhed Creditors — Right to Levy on Assigned Property—Estoppel—Injunction.

A preferred creditor who has accepted a benefit under an assignment subsequently declared void is not estopped from levying an execution, under a judgment thereafter obtained, upon property conveyed by the assignee: and a sale thereof will not be enjoined at the instance of a judgment creditor who had never assented

¹ Rehearing denied.



to the assignment, but had never levied his execution upon such property. Bartch, J., dissenting.

Appeal from district court, fourth district; before Justice James A. Miner.

Bill in equity brought by the Ogden Paint, Oil & Glass Company against Warren G. Child and another, in aid of an execution. There was a decree for plaintiff, from which defendants appeal. Reversed.

T. D. Johnson and Evans & Rogers, for appellants. Rhodes & Pash, for respondent.

SMITH, J. This cause was brought and tried in the fourth district court upon a bill in equity brought by respondent. The facts, as shown by the bill, and the findings of the lower court and the admission of the parties, as disclosed by the record, are that on the 31st day of December, 1891, the Consolidated Lumber Company, a domestic corporation, made an assignment of all its property to one W. J. Stephens for the benefit of its creditors. At the time of this assignment, appellant Warren G. Child was a stockholder and director of said corporation, and was made a preferred creditor in the deed of assignment. As a member of the board of directors, said Child voted for said assignment. Other creditors were preferred by said deed of assignment, among which was the Ogden State Bank, which was preferred therein in the sum of \$4,000. Soon after the assignment was executed, the assignee took possession of all the property assigned. On the 25th day of January, 1892, the assignee sold all of the property mentioned in the deed of assignment at a fair valuation. The assignee applied the proceeds of the sale to the debt which the Consolidated Lumber Company owed to the Ogden State Bank. At that time the appellant Warren G. Child was surety upon a note given by the Consolidated Lumber Company to the Ogden State Bank, on which note the proceeds of sale were applied. Kespondent, Ogden Paint, Oil & Glass Company, a domestic corporation, at the time of said assignment was a creditor of the Consolidated Lumber Company, in the sum of \$600. Appellant Warren G. Child was also a bona fide and honest creditor of said Consolidated Lumber Company, in the sum of \$14.000. On the 13th day of June. 1892, the Ogden Paint, Oil & Glass Company brought a suit against the Consolidated Lumber Company for the amount due it, and afterwards, on the 27th day of June of the same year, recovered a judgment for the sum of \$600 and costs. On July 12, 1802, the Ogden Paint, Oil & Glass Company caused an execution to be issued upon its judgment, which was returned unsatisfied. On the 12th day of January, 1893, it caused an alias execution to be issued upon the same judgment, which was also returned, partially unsatisfied. On March 1, 1894, in two suits which had theretofore been pending in the fourth district court, in which W. J. Stephens, as assignee, was plaintiff, and Gilbert R. Belnap et al. were defendants, the court declared said assignment void as to certain creditors, who had, prior to that time, sued out attachments. On March 2, 1894, appellant Warren G. Child filed in the fourth district court a complaint against the Consolidated Lumber Company for the sum of \$14,000, for which amount said Child had been preferred in said assignment, and on the same day summons was issued and served upon the manager of the Consolidated Lumber Company. The manager of said company, since the execution of the deed of assignment. had ceased to act as such. Said manager, however, was still an officer of said company. On the same day he took the summons to attorneys who had always been acting for the Consolidated Lumber Company since its organization. Said attorneys filed an answer in that case, and admitted the indebtedness sued for. On March 3, 1894, judgment was taken in that case in favor of Warren G. Child against the Consolidated Lumber Company for the sum of \$14,000. It is admitted that said sum was an honest and bona fide debt due and owing from said company to said Child. On the day last mentioned an execution issued at the instance of said Child, and was placed in the hands of the sheriff of Weber county, and by him levied upon certain personal property as the property of the Consolidated Lumber Company, and which had been included in the deed of assignment, and which had previously been sold by the assignee, and the proceeds applied as aforesaid. The sheriff proceeded to advertise for sale said property, by virtue of the execution which he held. At this stage of the proceedings, and on the 10th day of March, 1894, the Ogden Paint, Oil & Glass Company filed its bill against Warren G. Child and the sheriff of Weber county, appellants in this action. Upon the filing of said bill the court below issued a restraining order to enjoin the said Warren G. Child and sheriff from proceeding with the sale under said execution. There was no claim that plaintiff had any lien on the property. or any interest in it. Upon the facts above stated, at the hearing the court below gave judgment enjoining appellant Child and the sheriff of the county from proceeding with the sale under the execution caused to be issued by said Child, and ordered that the personal property so levied upon by said sheriff should be levied upon by the United States marshal under an execution on the judgment of the Ogden Paint, Oil & Glass Company against the Consolidated Lumber Company; and the United States marshal was directed. under the latter execution, to sell sufficient of said property to satisfy the debt of the Ogden Paint, Oil & Glass Company. From this judgment an appeal is taken to this

Appellant assigns several errors for reversal, among which are: First, the bill and findings of fact fail to show any ground for equitable relief; second, that appellant and respondent were each honest creditors of the Consolidated Lumber Company, standing upon an equal footing, and that each were entitled to pursue the ordinary remedies at law for the collection of their claims; third, that the undisputed facts show that the property in question had been sold by the assignee at a fair valuation, and the proceeds applied upon the debt owing the Ogden State Bank; and, fourth, that for the purposes of the case, considering the assignment to be void, respondent had an adequate remedy at law, by attachment, judgment, and execution. Other errors are assigned, which we do not think it necessary, in this decision, to consider.

A number of these assignments of errors, if not all, might properly be discussed together. It will be observed that the Consolidated Lumber Company, on the 31st day of December, 1891, made an assignment for the benefit of its creditors; that the deed of assignment, among others, preferred appellant Warren G. Child; that afterwards, on the 25th day of January, 1892, the assignee, who had taken possession under the assignment, sold, for a fair valuation, all the property levied upon, and the proceeds of the sale were applied to the payment of a note of the Consolidated Lumber Company in favor of the Ogden State Bank, on which appellant was surety. It is unnecessary for the decision in this case to discuss or decide whether the assignment was void. It is true it had been declared void in a suit wherein other creditors had attached the property subsequent to the making of the assignment; but it appears that long prior to the beginning of the action brought by the Ogden Paint, Oil & Glass Company, the property had been sold by the assignee at a fair valuation, and applied upon a debt of a creditor of the Consolidated Lumber Company. Such a sale, under an assignment not void upon its face, to an innocent purchaser, in the absence of fraud, is valid, and the title to the property passes to the purchaser. Burrill, Assignm. 417; Pine v. Rikert, 21 Barb. 469; Frazer v. Western, 1 Barb, Ch. 220.

It is, however, urged by respondent that appellant is not in a position to insist upon the validity of the sale by the assignee. It must be remembered, however, that respondent is the person who brought this bill in equity for the purpose of subjecting the property assigned to the payment of its debt; and, unless the facts in the record disclose some equity, respondent is not entitled to relief simply because appellant levied his execution upon property, the title of which had already passed by the assignee's sale. The question is not whether appellant has any right, but is, has the respondent any right? A person seeking relief in a court of equity must show affirmatively facts sufficient to entitle him to relief. Appellant did not bring his action in equity to subject the property in dispute to the payment of his debt. He was simply proceeding according to the ordinary remedies at law, in levying his execution upon certain property pursuant to a judgment regularly obtained. If, as matter of law, the property upon which appellant levied his execution was not subject to levy, by reason of the fact that title had passed to another person under the assignee's sale, yet such fact furnishes no reason why respondent is entitled to bring its action, and insist that a court of equity give it the relief sought, when in fact no right to equitable relief has been shown. It will also be observed that appellant and respondent were each bona fide creditors of the Consolidated Lumber Company; that in June, 1892, respondent brought its suit against the Consolidated Lumber Company, and secured a judgment, upon which an execution issued in July of the same year, which was returned unsatisfied; that on March 1, 1894, at the suit of other parties, the court below declared the assignment void. Thereupon, appellant brought his action, and recovered judgment against the Consolidated Lumber Company for the sum of \$14,000. On the latter judgment execution issued, and was, by the sheriff of Weber county, levied upon the property previously sold by the assignee. The sheriff of Weber county had advertised the property for sale at the judgment of appellant, when, on the 10th day of March of the same year, respondent brought this action against appellant and the sheriff to enjoin them from selling said property upon that execution. Upon the hearing the court granted an injunction restraining appellant and the sheriff from selling the same, and ordered a sale of the property under the execution of respondent. The effect of such a judgment is to say that the execution of one honest creditor can be made to supersede the execution of the other. It is equivalent to saying that honest creditors do not stand upon an equal footing. This is at variance with well-established principles. Bank of Montreal v. Potts Salt & Lumber Co., 90 Mich. 346, 51 N. W. 512; Catlin v. Bank, 6 Conn. 233; Day v. Washburn, 24 How. 352, 357. Respondent, for a period of about two years, had failed to levy its execution upon the property in question. It did nothing until after appellant had secured his judgment, and levied his execution upon the property. Even conceding-which is not necessary for the purposes of the decision—that the sale by the assignee of the property in question is void, yet the facts do not show that respondent has any equitable right to subject the property to the payment of its debt, as against the execution of Child, which had been levied upon the property prior to the time respondent brought its bill in this action. The courts of law were open to respondent. It had the right to pursue the ordinary remedies at

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law for the collection of its debt and the payment of its judgment. Appellant also had the right to pursue the ordinary processes in a court of law to reduce his claims to judgment, and to secure satisfaction of the same. There is no reason shown in the bill of respondent why a court of equity should interpose and aid either respondent or appellant in the collection or satisfaction of their judgment. Each had the right to pursue the ordinary remedies at law, and neither had any lien upon or interest in the property levied upon, until after levy. If one were more diligent than the other in making any discovery of property belonging to the Consolidated Lumber Company, which might be lawfully levied upon and subjected to the payment of the judgment, it was his legal right to do so without interference from a court of equity to prevent or obstruct such diligence. The bill of respondent was not a creditors' bill, brought to declare the assignment void, or to subject the property of the Consolidated Lumber Company, pro rata, to the payment of all creditors alike, who might come in and be made parties to the action. It was a bill brought simply for the purpose of subordinating the execution sued out by appellant to the execution of respondent. Equity will not interfere where there is a plain, spyedy, and adequate remedy at law. So for as the facts of this case show, it is clear that respondent had such a remedy, which it was its province and right to follow. And, again, no fraud is charged or shown in making the assignment, or in the sale of the property by the assignee, except that the court, in a case in which other creditors were interested, had declared the assignment void. No averment appears as to when any fraud, mistake, concealment, or misrepresentation was discovered, nor is there any averment of what the discovery was, or what particular discoveries had ever been made, or when they were made, or by what inquiries, or by what manner, or at what time. Such a bill does not state equitable ground for relief, and shows laches on the part of respondent sufficient to defeat a recovery. Hardt v. Heidweyer (Sup. Ct. U. S.; decided April 2, 1894; not yet officially reported) 14 Sup. Ct. 671; Stearns v. Page, 1 Story, 204, 215, 217, Fed. Cas. No. 13,339, which was affirmed by the supreme court of the United States (7 How. 819); Badger v. Badger, 2 Wall. 87; Wood v. Carpenter, 101 U. S. 135, 140. For aught that appears in the bill, respondent knew all the facts and circumstances connected with the assignment, and of the disposition of the property by the assignee; and yet no steps were taken by it to subject any of the property to the payment of its debt until after the execution was levied by appellant

Attorneys for respondent contend that appellant is estopped from impeaching the assignment in which he had acquiesced by accepting the benefit of having the note on

which he was surety paid out of the proceeds of the sale of the assignee to the Ogden State Bank. The well-recognized principle that a person making, acquiescing, or accepting benefits under an assignment which is void, cannot impeach its validity, is invoked. This doctrine has no application in this case. It can hardly be claimed that appellant's prosecuting his claim against the Consolidated Lumber Company to judgment, and issuing an execution for the collection of such judgment, is an impeachment of the assignment. An assignment for the benefit of creditors is not such a proceeding in bankruptcy as prohibits a creditor from proceeding at law against his debtor in the ordinary way. If the assignment is valid, it simply removes the assigned property from the reach of legal process. If invalid, it has no effect. Any creditor has the right to pursue the ordinary course at law for the collection of a debt honestly due him. The court, in another action, declared the assignment void. Surely, under these circumstances, it cannot be doubted that appellant, as an honest creditor, would have the right to reduce his claim to judgment; and, having reduced it to judgment, he has an equal right to request an execution upon it. But counsel misapply the rule which he invokes. Even if appellant had impeached the assignment, respondent could not complain. The Consolidated Lumber Company would be the only party affected, and the Ogden Paint, Oil & Glass Company, as a creditor, could not collaterally attack such impeachment for its own benefit. We are of opinion that respondent's bill, and the facts shown in the record, do not entitle respondent to any relief. The judgment of the court below is therefore reversed, with costs, with directions to dismiss respondent's bill.

MERRITT, C. J., concurs.

(Aug. 7, 1894.)

BARTCH, J. (dissenting). It is shown by the record that the appellant Child was director and president of the Consolidated Lumber & Milling Company; that the company was insolvent, and on the 31st day of December, 1891, made an assignment of its property for the benefit of its creditors, which assignment Child executed, was a party to it, and was made a preferred creditor therein; that the Ogden State Bank, also a preferred creditor, held a note against the said company for \$4,000, on which note Child was surety; that certain money received by the assignee, because of the assignment, was applied to the payment of his note, with the knowledge and consent of Child. The plaintiff refused to acquiesce in or receive any benefit under the assignment, and in June. 1892, brought suit, and afterwards obtained judgment against the said company; but, although several executions were issued, the judgment remained unsatisfied on the 1st day of March, 1804, when in two certain suits, in Digitized by Göögle which W. J. Stephens, as assignee, was plaintiff, and Gilbert R. Belnap and Joseph Belnap were defendants, the court rendered judgment to the effect that the assignment of the Consolidated Lumber & Milling Company was void as to the creditors Curtis Bros. & Co. and Ainsly Lumber Company. The next day, March 2, 1894, Child, after having acquiesced in the assignment, so far as appears from the record, for a period of more than two years, brought suit against the company to recover the amount of the same claims which had been preferred in the deed of assignment. On the same day summons was served on one Solomon C. Stephens, who was the general manager of the company, but had not acted as such since the assignment was made. Stephens, through a law firm, after having arranged that the attorneys should appear for the company, filed an answer admitting each and every allegation contained in the complaint. On the next day, the 3d of March, service of notice of motion for judgment on the pleadings having been waived by the attorneys for the company, judgment was entered in favor of Child; and, on the same day, under his direction, execution was levied upon the property of the company, which had been included in the deed of assignment, and the property advertised for sale.

It will be observed that within two days after the rendition of judgment in favor of the two creditors, declaring the assignment void as to them, Child brought his action against the company, obtained judgment, had execution levied, and the property advertised for sale. It is not necessary to comment on the mode and manner of obtaining this judgment, nor on the conduct and acts of the appellant Child, as revealed by the record. It is sufficient to say that the facts and circumstances of this case are such as to convince me that Child ought not to be permitted, for the apparent purpose of gaining an advantage over other creditors, to thus repudiate an assignment to which he was a party, in which he was preferred as a creditor, under which he had accepted a benefit, in which he had acquiesced for a long period of time, and which was presumably made under his own management and direction. While it does not appear from the record that Child received money on his preferred claim from the assignee, yet it is shown that a certain sum of money, which came into the hands of the assignee by virtue of the assignment, was applied, with the knowledge and consent of Child, in part payment of the note for which he was responsible as surety, and which he was liable to pay, because the maker was insolvent. In this way he received a substantial benefit, and, when taken in connection with his other acts and conduct revealed by the record, he was as effectually concluded from taking any action which would impeach the assignment as if he had actually accepted a dividend | ing it. * * * And, in general, creditors

under it in payment of his own preferred claim. The assignment was declared void only as to those creditors who refused to come in under it, and brought their suits to set it aside. This did not include the appellant Child, for it appears that he acquiesced in it until the order was made setting it aside as to the two creditors. When an assignment is declared fraudulent and void, it is because its effect is to hinder and delay creditors, or to defeat them, in the collection of their just claims. If, then, it is made with the intent that it shall produce such an effect, it is void as to all creditors who do not assent to its terms; but how can it be said that a creditor who was a party to the deed of assignment, gave his consent thereto, accepted benefits thereunder, and was in possession of all the facts which led to the making of it, was defrauded? He cannot predicate a fraud of facts to which he has assented, and of which he had full knowledge; and yet this is the ground upon which he must base his relief, when, as in this case, there is no question as to the instrument being regular and valid on its face. After giving his assent to the assignment, in order to avoid its effects, a creditor must show that such assent was given under a misapprehension of the facts, and that he was deceived and misled by those in whom he had a right to rely for a true statement of them. Where, however, parties interested mutually assent to the facts which lead to the assignment, and have full knowledge of them, there can be no fraud, because fraud cannot exist where the facts on which it is predicated are equally within the knowledge of all the parties to the transaction. A creditor has the right to assent to or disaffirm an assignment, but he cannot do both. He cannot acquiesce in it so long as it suits his purpose and he is benefited thereby, and then, when other adverse rights are being established in relation to the property in the hands of the assignee, by other creditors, repudiate it, and proceed to collect his claim, the same as though no assignment had ever been made. I think the law is well settled that where, as in this case, a creditor participates in an assignment, assents to it, and receives a benefit thereunder, with a full knowledge of all the facts which led to the making of the instrument, he is estopped from afterwards denying its validity. And it appears to be the general doctrine in regard to fraudulent conveyances, that they are valid as between the parties and privies, and can be avoided only by the creditor of the fraudulent grantor. In Burrill on Assignments (section 503), the author, after speaking of who may assail the assignment, says: "So creditors who have confirmed a fraudulent assignment, by receiving a benefit under it. or have become parties to it voluntarily, and with a full knowledge of all the circumstances, are estopped from afterwards impeach-

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cannot claim the benefit of an assignment, and at the same time attack it as invalid. Thus, if a complainant claim a beneficial interest in an assignment, he is not entitled to any relief on the ground that it is fraudulent, or was intended to defraud creditors." See, also, Id. § 479. In Pratt v. Adams, 7 Paige, 615, Chancellor Walworth, speaking of voluntary assignments, said: "Creditor of the assignor, whether provided for by the assignment or not, who wishes to repudiate the trusts of the assignment on the ground that they are illegal and a fraud upon the honest creditors of the assignor, must apply to set aside the assignment as fraudulent and void against him as a creditor, instead of coming in under the assignment itself, as a preferred creditor or otherwise." v. Henriquez, 13 Wend. 240, Chief Justice Savage said: "The assignment now before us was declared void as to the judgment creditors who filed their bill to set it aside. But suppose those creditors had assented to the assignment as appellant Hone did. Would not they have been estopped from alleging any fraud, when, with a full knowledge of its effects, they had assented to it? It surely could not be said to have been executed with intent to delay and hinder them in the collection of their demands, when they had agreed to its terms. It is universally held, and so are all the cases, that deeds which are fraudulent and void as to creditors are valid as between the parties. It is their agreement, deliberately entered into, and, as between them, there is no fraud. They are not permitted to say that, because it is invalid as to others, it is so as between them." In Adlum v. Yard, 1 Rawle, 163, Chief Justice Gibson, speaking for the supreme court of Pennsylvania, said: "The plaintiff might originally have repudiated this assignment, but, having taken a dividend under it, he shall not now question its validity. * * * Any one may waive the advantage of a law introduced for his own benefit, and I cannot imagine why creditors may not ratify a contract fraudulent only as to themselves, even in anticipation of a benefit. But where money is actually received, and on an implied condition that the receiver shall not question the title, every principle of natural justice requires that the condition should be performed." Cavanagh v. Morrow, 67 How. Pr. 241; Ingram v. Hartz, 48 Pa. St. 380; Rapalee v. Stewart, 27 N. Y. 310; Scott v. Edes, 3 Minn. 377 (Gil. 271); Smith v. Espy, 9 N. J. Eq. 160; Therasson v. Hickok, 37 Vt. 454; Horsey v. Chew, 65 Md. 555, 5 Atl. 466; Richards v. White, 7 Minn. 345 (Gil. 271). I am of the opinion that the assignment was valid as to appellant Child, and that he is estopped by his own acts from impeaching it, and from claiming rights repugnant to those acquired under it. Therefore, I do not agree with my brethren in reversing this case.

OLSEN v. BAGLEY.

(Supreme Court of Utah. July 27, 1894.)

TAX SALE—DESCRIPTION OF LAND—NOTICE—
COSTS.

1. Where land is assessed as W.'s 80 acres, "on" the N. W. ¼ of section 23, the sale thereof for taxes is void, under Comp. Laws 1888, § 2013, which provides that, in assessing real estate, it shall be referred to with reasonable certainty as to locality and quantity.

2. Under Comp. Laws 1888, § 2030, requiring

2. Under Comp. Laws 1888, § 2030, requiring the collector to give notice to each taxpayer of the amount of his taxes, and before making a sale to give the owner, if known and an inhabitant of the county, a notice in writing of the time of sale, the failure to give such notices invalidates the sale.

3. A sale of land for taxes is void where, though the deed calls for only 80 acres, the amount properly sold, the certificate of sale calls for 120 acres.

4. A charge by a tax collector of \$6.60 for the certificate of sale of land, this being included in the amount for which the sale is made, invalidates the sale, when he is authorized to charge only 25 cents per folio, as such certificate should not contain over four folios, at most.

Appeal from district court, third district; before Justice C. S. Zane.

Action by Jens Olsen against Hyrum Bagley to set aside a tax sale. From a judgment for plaintiff, defendant appeals. Affirmed.

Rawlins & Critchlow, for appellant. James H. Moyle and Clesson S. Kinney, for respondent.

MINER, J. The plaintiff brings this action to quiet title to the S. 1/2 of the N. W. 1/4 of section 23, township 2 8., of range 1 E., Salt Lake meridian, containing 80 acres of land, and claims to be the owner thereof. The defendant, Bagley, claims title in himself by virtue of a tax deed to the probate judge, for the benefit of the county, for taxes of 1883; that the county sold the land to one Bamberger, and that Bamberger sold it to the defendant. Under this deed, Bagley claims to own the title to the land. The defendant sets up all the proceedings under which the sale was made. The regularity and legality of these proceedings are attacked by the plaintiff. In this case the tax and costs amount to \$14.65. The property sold is valued at between two and three thousand dollars. The laws of this territory allow 18 per cent, interest on the investment. This is certainly a large demand on an investment of so small a sum, to insist upon the title to property worth more than \$2,000. But the purchaser at tax sale relies upon the letter of his bond, and he has a legal right to de so. But under such circumstances he must rest alone on its letter. He has no overpowering equity to justify a large and liberal interpretation of statutory proceedings in his favor.

Edward Woods owned the land in 1883. In that year the assessor assessed to Edward Woods 80 acres of land on the N. W. ¼ of

section 23, in township 2 S., range 1 E., at \$150, -that being the only assessment made against him,-and no other designation or description of the location of the land was given in the assessment roll, or in the duplicate thereof. In order to collect the taxes the collector levied upon and gave notice of sale of the S. 1/2 and the N. W. 1/4 of the N. W. 1/4 of section 23, township 2 S., range 1 W., containing 120 acres of land, or so much as was necessary thereof to pay \$1.80 taxes, and expense of levy and sale, amounting to \$12.-85. That on the day named for the sale the collector offered the said property for There being no bids, it was struck off to the probate judge for said taxes and costs. A certificate of sale of said land last described was delivered to the purchaser. After this a deed was executed to the probate judge upon said certificate of sale, describing the land sold as the S. 1/2 of the N. W. ¼ of section 23, but making no reference to the N. W. 1/4 of the N. W. 1/4 of section 23. The 80-acre piece was subsequently sold by the county to Bamberger, and by Bamberger to the defendant. Section 2013, Comp. Laws 1888, provides that "in assessing real estate it shall be referred to with reasonable certainty as to locality and quantity." The assessor did not identify the land attempted to be assessed with reasonable certainty. From the assessment, neither the purchaser nor the owner would know whether the land assessed was located on the east, west, north, or south side, or in the middle of the section; and there is no possibility of locating the exact 80 acres that was attempted to be assessed, so far as it appears from the assessment roll or the notice of sale. The assessment WES void for uncertainty. Blackw. Tax Titles, §§ 223-241, inclusive; Black, Tax Titles, § 112; Lyon Co. v. Goddard, 22 Kan. 389; Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508. If there was no definite parcel of land assessed there was no lien, and if there was no lien there could be no legal sale. In the case of Treon v. Emerick, 6 Ohio, 391, the land was described as "sixty acres, part of the north half of Sec. 13, town 3, range 4 west." The description was held uncertain, and the sale void. In Stewart v. Aten, 5 Ohio St. 257, the description in the duplicate roll, "150 acres, part of Sec. 36, N. W. corner," was held defective, unless the 150 acres was situated in the northwest corner of the section, and in a square form. A sale of a rectangular piece in the corner, under such description, was held void. In Head v. James, 13 Wis. 641, the description, "North and west part of S. E. 14, Sec. 4, T. 4, R. 12, 50 acres," in the assessment and sale, was held void. Greene v. Lunt, 58 Me. 518; Perkins v. Dibble, 10 Ohio, 433.

Tax sales are made exclusively under statutory power, and, unless all the necessary prerequisites of the statute are carried out, the tax sale becomes invalid. If one of the prerequisites fail, it is as fatal as if all failed. The power vested in a public officer to sell land for the nonpayment of taxes is a naked power, not coupled with an interest, and every prerequisite to the exercise of the power must precede its exercise. The title to be acquired under statutes authorizing the sale of land for the nonpayment of taxes is regarded as stricti juris, and whoever sets up a tax title must show that all the requirements of the law have been complied with. Cooley, Tax'n, \$\$ 470, 471; Black, Tax Titles, §§ 154, 184; Marx v. Hanthorn, 148 U. S. 172, 13 Sup. Ct. 508; Blackw. Tax Titles, §§ 121, 126; Seymour v. Peters, 67 Mich. 415, 35 N. W. 62; Houghton Co. v. Auditor General, 41 Mich. 28, 1 N. W. 890.

According to the findings, Edward Woods was a resident of the county all the time during the years 1883 and 1884, and his residence was known to the collector. Section 2030, Comp. Laws 1888, requires "that the collector shall furnish to each tax payer, or leave at his residence or usual place of business if known, a notice of the amount of taxes assessed against him and when and where payable, and before making sale, the collector shall give the owner, if known, and an inhabitant of the county, a notice in writing of the time and place of sale." This provision of the statute seems to have been wholly overlooked. The record shows that no notice of the amount of Woods' taxes, or when and where they were payable, was ever furnished to Woods, and also shows that no notice in writing was ever given to said Woods of the time and place of sale, as required by the statute then in force. The certificate of sale is silent upon this subject. The giving of these notices in form and as prescribed by the statute is an essential jurisdictional fact. The omission to give the notice is not a mere irregularity, but a vital defect. Black, Tax Titles, \$ 205. Woods only owned the 80 acres. The levy, assessment, sale, and certificate of sale covered 120 acres. The 40-acre tract was struck out of the deed by the clerk before its delivery. The property covered by the deed was not in fact the property that was advertised and sold. In Stout v. Mastin, 139 U. S. 151, 11 Sup. Ct. 519, Mr. Justice Brewer holds that, if the description in a deed of land sold for nonpayment of taxes departs from the description contained in the assessment roll and the prior tax proceedings, such prior description, if imperfect and insufficient, avoids the deed, although the description in the deed may be sufficient and complete. The deed must not only conform to the requirements of the statute, but must conform to the proceedings upon which it is based, in all essential particulars. The purchaser is entitled to a deed wherein the description corresponds to the certificate issued. In this case the description of the property in the certificate of sale did not correspond

with that of the assessment roll, nor did the description in the deed correspond with the certificate of sale. The recitals in the deed were therefore false, because they did not give a full description of the land sold, as required by section 2034, Comp. Laws 1888. The collector sold 120 acres under an imperfect description, and conveyed by deed only 80 acres, which was not correctly described in the assessment roll. This avoids the sale. Jones v. Dils, 18 W. Va. 759; 2 Derby, Tax'n, § 144; Black, Tax Titles, §§ 112, 405; Blair v. Scott, 44 Iowa, 143.

Section 2030, Comp. Laws 1888, provides that the collector shall be entitled, as costs, to the same fees as are allowed sheriffs or constables for like services. In this instance the tax was \$1.80.

The collector charges for the levy	\$ 2	200
Advertising	•	1 00
Mileage	- 1	2 20
Percentage		05
Certificate of sale	(8 60
Filing certificate		50
Copying notice		50

Total fees \$12 85

In order to collect \$1.80, the collector makes a charge of \$12.85, yet he is entitled to such fees only as are allowed to sheriffs for like services. He charges \$6.60 for the certificate of sale. It is difficult to find any statute authorizing this charge. If such a statute existed at the time of the sale, it has not been pointed out. If it be claimed that the collector should be allowed 25 cents per folio for the certificate, under section 5443, then it would be necessary that a showing be made that the certificate of sale contained over 26 folios. It does not appear from the record how many folios were contained in this certificate of sale. The statute requires these certificates to recite substantially the fact of nonpayment of the tax, the levy upon, advertisement, and sale of the real estate. It would not be possible or reasonable to draw out this certificate to the length of 26 folios. If the collector has the discretionary power to lengthen out the certificate so as to contain 26 folios which are wholly unnecessary, and charge 25 cents per folio therefor to the county, then he can as well increase the length of the certificate to 100 folios or more, and recover compensation from the county or from the delinquent as well. It seems perfectly clear that the certificate of sale should not have contained over three or four folios at most, and that the charge of \$6.60 for this certificate is extortionate, and that all of such charge in excess of \$2 is wholly illegal. The charge of 50 cents for copying notice is also illegal. This sum increased the amount of the tax \$5.10 in excess of what it should have been, and is an additional reason for holding the sale invalid. In Harper v. Rowe, 53 Cal. 233, where a like question was involved, the court said: "The plaintiff attacks the sale on the ground that one of the items for which the land was sold for taxes was the sum of

75 cents for filing and recording the duplicate certificate of sale filed in the recorder's office, which the court below held to have been improperly collected, and it therefore adjudged that, as the sale was for a sum in excess of that authorized by law, the certificate of sale was inoperative to vest any title or interest in the purchaser. We agree with the court below that this item was illegally collected, and that the sale was, for that reason, void." Many authorities hold, and it seems to be the settled law, that if any sum of money, in excess of the tax and legal costs, enter into the consideration for which the property is sold for taxes, this fact poisons and makes void the whole proceeding, and renders the sale void to the purchaser. Treadwell v. Patterson, 51 Cal. 637; Axtel v. Gerlach, 67 Cal. 483, 8 Pac. 34; Cooley, Tax'n, § 497, pp. 844, 551; Seymour v. Peters, 67 Mich. 415, 35 N. W. 62; Fox v. Cross, 39 Kan. 350, 18 Pac. 300; Black, Tax Titles, § 381, 453, 465; Houghton Co. v. Auditor General, 41 Mich. 28, 1 N. W. 890; Mammoth Min. Co. v. Juab Co., 10 Utah, ---, 37 Pac. 348.

From the findings of fact the conclusion of the court below cannot be adjudged erroneous, and therefore its judgment for the plaintiff must be affirmed, with costs.

BARTCH, J., concurs. MERRITT, C. J., and SMITH, J., concur in the result, on the point that the property was misdescribed, and that the proper notice was not given.

HAMER, Tax Collector, v. WEBER COUNTY et al.1

(Supreme Court of Utah. Aug. 31, 1894.) TAX COLLECTORS-FRES-SALE OF REALTY.

1. Since under Comp. Laws, \$ 2012 (amended by Sess. Laws 1890, p. 50), delinquent taxes on real and personal property are a lien on the real estate, the fact that the collector on the real estate, the fact that the collector sells realty of persons who also appear as owners of personalty, without showing the necessary effort to collect the taxes out of the personalty, though it makes the sale voidable, does not deprive the purchaser of his lien; and, if the realty is struck off to the county, the collector is entitled to credit for the amount of the taxes, but not to his real costs since the taxes, but not to his sale costs, since the county could have no valid lien for them.

Bartch, J., dissenting.

2. Comp. Laws, \$ 2031, requires the collector to issue the purchaser of realty at tax

sale a certificate, and to file a duplicate in the office of the recorder, and for realty struck off office of the recorder, and for realty struck off to the county he is to make a like certificate to the probate judge, and the clerk is to credit him with the amount due thereon and costs. Sess. Laws 1890, p. 50, allow to the collector for each certificate 25 cents per folio, and for filing the certificate with the recorder 50 cents. Held, that the collector is entitled to fees for making out certificates to the county judge, but not for making out duplicates thereof.

3. It cannot be presumed that a form of certificate, used by an officer, in the absence of

certificate, used by an officer, in the absence of a statutory form, is fraudulently lengthened by him in order to extort excessive fees.

¹ Rehearing pending.

Appeal from district court, fourth district; before Justice James A. Miner.

Mandamus, on relation of Daniel Hamer, tax collector, to compel Weber county and Joseph P. Ledwidge, county clerk of said county, to credit relator with a certain amount of money. Writ made peremptory, and relator appeals. Reversed.

Richards & MacMillan, for appellant. A. J. Weber (W. L. Maginnis, of counsel), for respondent.

SMITH, J. This was a proceeding in mandamus, commenced by the plaintiff in the court below against the defendants. Weber county and Joseph P. Ledwidge, who was at the time of the filing of the complaint, and still is, the duly elected, qualified, and acting county clerk of Weber county, Utah. The plaintiff was, at all times mentioned, tax collector of Weber county. The petition alleges, in substance, that on the 18th, 19th, and 20th days of December the plaintiff, in accordance with the law, offered for sale at public auction, for delinquent taxes, sundry pieces and parcels of real estate; and that at such sale no person bid for the same or any part thereof; and that the plaintiff struck off the property offered for sale to the probate judge of Weber county, and issued certificates of sale in due form; and afterwards, on the 26th day of December, 1893, plaintiff tendered to defendant Joseph P. Ledwidge, as clerk of said county, such certificates of sale, numbering in the aggregate 905, each representing a different piece or parcel of real estate, and then and there demanded of the clerk of said county credit upon his account for the amount of taxes and costs due thereon, and represented by such certificates of sale to the amount of \$15,853.57. the defendant, as such clerk, then and there accepted the certificates of sale, but then and there refused, and still refuses, to credit the plaintiff with the amount of taxes due thereon and the costs to the date of sale, or any part thereof. The prayer is that the defendant Ledwidge be required to credit the plaintiff with the sum of \$15,853.57. Defendant answered, and denied that any sum or anything at all was due the plaintiff on the said tax certificates or otherwise by reason of the taxes or costs due thereon to the date of the sale, or for any reason at all. The answer then affirmatively alleges that no claim for the amount of the taxes and costs had been presented by the plaintiff to the county court of Weber county for allowance; and, secondly, that the sale certificates tendered to the defendant Ledwidge each contained not less than 12 folios of matter, and it is alleged that the certificates should not contain to exceed two folios each. For a third defense, it is alleged that the plaintiff, as collector, failed to seek out or levy upon all the taxable property of the owners of said real estate in said certificates described, or any

of them, to satisfy and pay the taxes mentioned in said certificates, or any of them. For a fourth defense, it is alleged that the county court, on October 17, 1893, fixed the compensation of the collector (plaintiff) at \$3,000 for the year 1893. After the case was thus at issue, findings of fact were agreed and stipulated by the respective parties. The findings of fact, without setting them out at length, show, in substance, that the plaintiff made 905 sales of real estate for delinquent taxes, for which there were no bidders, and they were struck off to the probate judge; that the amount of taxes represented by such sales are as follows: Territorial taxes, \$4,892.10; county taxes, \$3,913.68; school district taxes, \$806.23. It was also found that he paid, for publishing the delinquent list; \$452.50, and, for filing 905 taxsale certificates with the county recorder, \$452.50. The tax collector claimed \$5,336.56, for costs and fees for making such sales. These costs are claimed to amount to \$7 in each case, including the cost of publication and filing with the recorder. Six dollars of the charge consists of 25 cents per folio for each certificate of sale and 25 cents per folio for each duplicate certificate of sale, there being 12 folios in each. It was also found that the collector has presented no claim to the county court for his fees or costs, or the amount of taxes represented by such certificates; that no part of it has ever been allowed by the county court. It is further found that the compensation of the county collector was fixed for the year at the sum of \$3,000; and, in addition thereto, he was to receive all costs and fees allowed him by law, including costs and fees allowed him by law on tax sales, and for making tax-sale certificates made to the probate judge. It was further found that 65 out of the 905 tax sales which were made to the probate judge were sales of property belonging to persons who had personal property assessed to them. There is no finding as to whether these parties owned any personal property at the time the taxes became delinquent or not. The amount of costs represented by these 65 certificates is \$444.25. The amount of taxes represented by them is \$1,689.88. As to the other 840 sales, it is found that the owners had no personal property. It is further found that the plaintiff gave bond in the sum of \$82,000 for the faithful discharge of the duties of his office before entering upon said office, which said bond was duly approved by the county court of said county. The court, upon these facts, found that it was the duty of the respondent Ledwidge to credit the plaintiff with the sum of \$4,041.90, territorial taxes; \$3,233.54, county taxes; \$646.69, special school tax; and the sum of \$452.50, for publishing the delinquent list; and the sum of \$420, for filing certificates with the county recorder,—making the aggregate of \$8.804.63. These credits are the aggregate amount of

taxes represented by the 840 certificates of sale made to the probate judge, and the costs of the publication of the delinquent list, and 50 cents each for filing the 840 certificates. The court disallowed entirely the claim for credit for the 65 certificates of sale of property belonging to the persons who were assessed for personal property, and also refused to allow any costs or fees for making out certificates of sale, but found, as a conclusion of law, that this claim should be presented to the county clerk for allowance. From this judgment, disallowing and refusing to compel the defendant to credit the plaintiff with the full amount claimed, plaintiff appeals.

The first question which we deem proper to discuss is whether or not the plaintiff should be credited with the amount of taxes represented by the 65 certificates of sale in cases where the owners had personal property assessed to them. There is no finding that these persons had personal property out of which the taxes might have been made at the date when the taxes became delinquent. It is found that the plaintiff made no search for personal taxable property of such delinquent taxpayers prior to making sale of the real estate for their delinquent taxes, but he did examine the assessment roll, and did not at any time or at all seize or levy upon the personal property of the owner of such real estate to satisfy or pay the taxes mentioned in said certificates, or any of them. It was held in Little v. Gibbs, 8 Utah, 265, 30 Pac. 986, that a tax collector who had paid the taxes of a delinquent taxpayer had a right of action in his own name against the delinquent for the recovery of the taxes. In this case the tax collector has not paid the taxes. It may be conceded that he had failed to make a valid sale of the real estate to satisfy the amount demanded for the delinquent taxes. It would seem clear, under the provisions of our statute, that a lien for taxes still exists. The striking off of property at a tax sale to the county, or to the probate judge on behalf of the county, does not constitute the payment of the delinquent taxes at all. Section 2012 of the Compiled Laws of Utah, as amended (page 50, Sess. Laws 1890), provides that the taxes shall attach to and constitute a lien on the property assessed, if real estate, from the 31st day of August of each year, and, if personal property, from the day of the assessment. If the taxpayer is owner both of real estate and personal property, the tax on the personal property shall also be a lien on the real estate. In each and every case the lien shall be paramount to all other liens whatsoever, and it shall not be removed therefrom until the tax is paid, or until the title vests thereto, under a sale thereof, by virtue of proceedings to enforce payment of the tax. It is evident that the taxes of these 65 delinquents have not been paid, and that they constitute a lien upon the real estate of the delinquents for the entire amount of taxes due. The question is, in whose favor is this lien, under the facts found in this case? As already stated, this court has held in Little v. Gibbs that, if the collector paid the taxes himself, he may enforce the lien in his own right. He has not paid them. He has made a sale, voidable at the election of the delinquent taxpayer. Of course, the sale is valid if not objected to by the delinquent taxpayer. If he sees fit to ratify it, it is clear that he may do so; but, if he seeks to avoid, does it not follow, by virtue of the statute just quoted, that the lien for taxes still exists against the property, and that that lien is in favor of the nominal purchaser at the tax sale, and may be enforced at any time? It is never barred by the statute of limitation, and is paramount to any other lien whatever against the property. We are of opinion that this is what the legislature intended by the section just quoted. Such being the case, the lien for these taxes is vested in the county, the nominal purchaser at the tax sale, and the collector is entitled to credit for the amount thereof. If the delinquent taxpayer never makes objection to the sale, the county obtains the title to the property sold, if the statute allows it to take a deed. It is sufficlent for this case to say that the county will either obtain the property by the sale, or will obtain and has obtained a lien for the full amount of the tax due, both territorial, county, and school district, which is a paramount lien against the property of the delinquent taxpayers. Such being the case, it seems clear that the amount of these taxes should be credited to the plaintiff, in addition to the credits allowed him in the court below; the amount, as above stated, being \$1,689.88. Under the findings of fact, we do not think that the plaintiff is entitled to costs for making these sales, or that the county has any valid lien upon the property for such costs; and therefore the plaintiff is not entitled to credit for the amount claimed for making these 65 sales, to wit, \$444.25.

The next question is as to the fees for making out certificates of sale. One of the defenses is that the certificates are more lengthy than is necessary, and that a certificate that contains two folios is sufficient, and that, by reason of the length of the certificates, the charges therefor are extortionate. The statute fixing the fees of the collector is found in the Session Laws of 1890 (page 50), and is as follows, omitting the formal parts: For each certificate of sale. per folio, 25 cents; for publishing the name and amount of tax due from each delinquent, \$1; for filing certificate of sale with the county recorder, 50 cents. Section 2031 of the Compiled Laws of Utah provides: "When real estate is sold for taxes, the collector shall issue a certificate to the purchaser, reciting," etc. "A duplicate of such certificate shall be filed by the collector in the office of the recorder of the county; provided, that if at such sale no person bid and pay the collector the amount of tax required to be paid as aforesaid on any real estate, the collector shall make to the probate judge and his successors in office, for and in behalf of such county, a certificate similar to that given to other purchasers, and such sale to the county shall have the same effect as if made to an individual. And the clerk of the county court shall credit the collector with the amount of the tax due thereon, and costs to date of sale." There appears to be no controversy but that the collector is entitled to 25 cents per folio for each certificate of sale. The difficulty arises in the fact that in these 840 tax sales made to the probate judge. which the court below found to be valid, he also made out a duplicate certificate, and filed the same in the office of the county recorder, and he claims 25 cents per folio for each of these duplicates. The court below declined to allow him anything for making out the certificates of sale. We think, under the stipulation of facts, the court should have directed the clerk to credit him with the amount of fees due him for making out the certificates of sale, and that there was the same authority in the court to make this allowance that there was to allow him for the delinquent taxes, or for publishing the delinquent list, or for filing the certificates with the county recorder. If there was any necessity at all for the county court to pass upon the questions, we think it was waived by the stipulation of facts; but certainly there was the same necessity for the county court to ascertain the fact that the delinquent tax list had been published as there was for it to ascertain the amount due for each certificate. In other words, if there was anything for the county court to pass upon in relation to the plaintiff's claim, it would seem that it, of necessity, extended to his entire claim, and not to any particular part of it. And yet the court below did allow him about \$8,000 of delinquent taxes, and the costs of publishing the delinquent list, \$452.50, and the costs of filing 840 taxsale certificates with the county recorder, at 50 cents each. We are of the opinion that, under the stipulation of facts in this case on which the case was submitted, it was the duty of the court to have ascertained the amount due the plaintiff, and to have directed the defendant to credit him with that amount. As we have said, in addition to the credits allowed him, he was entitled to a credit for the remainder of the unpaid taxes. It is found as a fact that the certificates of sale were each 12 folios in length. Under the statute, the fee for making these was three dollars each. A lengthy discussion is had in the appellant's brief to show that the term "each certificate of sale" includes a duplicate certificate. We do not so understand the statute. It may well be doubted whether the statute just quoted requires any duplicate certificate of sale where the property is knocked off to the probate judge for the want of a bidder. The reason for requiring it does not appear to us to exist, and the statute certainly, in terms, does not require But, without deciding the question whether it is required or not, we are of the opinion that the statute does not authorize any charge for making out these duplicate certificates, and that the charge is confined to one certificate for each sale, and that this is the only meaning that can be attached to the words "each certificate of sale," in the law fixing the fees of the collector. We think the plaintiff is entitled to 25 cents per folio for the certificate of each sale that he makes, and that he is not entitled to a like sum for a duplicate of such certificate.

This brings us to the remaining question, whether or not the certificates of sale are unnecessarily lengthy and the charges therefor extortionate. The form of certificate is set out in the record at length, and, while it is more lengthy than perhaps the writer of this opinion would use were he called upon to make a certificate of sale, yet it is clear that the form is not prescribed by statute; that it is left to the discretion of the collector to adopt such form as he may choose. In the absence of any showing (and there is none in this record) that the form was fraudulently gotten up for the purpose of creating illegal charges against the county, we cannot presume that the collector was actuated by bad faith in using it. We think the same presumption is to be indulged in favor of the plaintiff that is indulged in regard to other public officers, and that is that he has acted in good faith, and with an honest intention to execute the law. It was suggested in argument, and not disputed, that exactly the same form is in use throughout the territory, and has been for many years. Whether this is true or not we do not know. but it would seem from a careful examination of the matter that the proportion of words in the certificate which might be eliminated without impairing its sense is not great. Different officers might use or compile different forms of certificates, but, as we have above stated, in the absence of any showing that the officer has acted in bad faith, we do not feel that it is our duty to impute to him bad motives in such a matter as this. It was within the power of the county court, perhaps, to have regulated largely the compensation of the plaintiff with reference to the fees that might be charged for making delinquent tax-sale certificates. It is to be presumed that they exercised their discretion, in view of all the facts before them, when they fixed the compensation of the plaintiff at \$3,000, in addition to the fees which he might receive for tax sales made to the probate judge.

It results from this conclusion that the plaintiff is also entitled to credit for the sum of \$2,520, being \$3 each for 840 tax-sale certificates, in addition to the amount

allowed him below. In concluding this opinion, we may say that we have entertained grave doubts as to whether this action and the kindred one of Weber Co. v. Hamer, 37 Pac. 749, are properly brought by proceedings in mandamus. We should have examined that question more at length were it not for the fact that the stipulation of facts indicates that it was the intention of the court below to fix the amount that the plaintiff was entitled to upon the showing made that the defendant should credit him with it, and upon appeal we are asked to do the same thing. We have done so without considering particularly the question of procedure. We are of opinion that, in addition to the \$8.804.63, with which the court below directed that the plaintiff be credited, he should be credited with \$1,689.88, additional delinquent taxes, and with \$2,520, additional fees and costs; making a total credit of \$13,-014.51. It is therefore ordered that the judgment be reversed, and the cause remanded to the court below, with directions to enter judgment in that court in accordance with this conclusion, and direct its mandate to the defendant Ledwidge, commanding him to credit the plaintiff with the sum of \$13,-014.51; and that the appellant recover the costs in this court.

MERRITT, C. J., concurs.

BARTCH, J. (dissenting). I do not agree with my brethren in reversing this case. It appears from the findings of fact, which were agreed to by all the parties to the suit, that the plaintiff was the tax collector, and, as such, on the 18th, 19th, and 20th of December, 1893, offered for sale, at public auction, certain separate parcels of real estate for nonpayment of territorial, county, and school district taxes for the year 1893. That for 905 of these separate parcels of land there were no bidders, and he thereupon made out certificates of sale to the probate judge of said county, for and in behalf of the county, and afterwards delivered the certificates to defendant Ledwidge, as clerk of the county court, and demanded of said clerk credit for the taxes due and costs to date of sale, amounting to \$15,853.57; and the clerk accepted the certificates, but refused to give the credit demanded, the county also refusing to give the same. That the costs of each sale were \$7, as follows: "For publishing the name and amount of taxes due from each delinquent, together with a description of the property, fifty cents; for filing each certificate of sale with the county recorder, fifty cents; twenty-five cents per folio for each certificate of sale filed with the county recorder; and twenty-five cents per folio for each certificate of sale deposited with the county clerk,"-the one certificate being a duplicate of the other, and each containing not less than 12 folios, exclusive of the description of the real estate. That no claim

for the amount represented by these certificates, nor for costs, was ever presented to the county court for allowance. That the county court fixed his salary at \$3,000 for the year 1893, with the mutual understanding that, in addition thereto, he should be entitled to all costs and fees allowed him by law, including those allowed him by law on tax sales and such certificates made to the probate judge. That, prior to the sale of the real estate for taxes, the collector examined the assessment roll, and found that the owners of but 65 out of the 905 parcels sold were also assessed with personal property, and that the collector made no search for personal taxable property of such delinquent taxpayers prior to the sale, nor did he ever seize or levy upon personal taxable property of the owners of the real estate described in the certificates.

Under this state of facts, the first question raised is whether the 65 tax sales, where the owners of the real estate sold had taxable personal property, are void. The court so held, and counsel for appellant insist that this was error. The statutory provision relating to this question, after providing for the publication of a list of delinquent taxes, reads as follows: "On the third Monday of December of each year, the collector shall expose for sale sufficient of such delinquent's real estate: provided, that the personal taxable property of such delinquent has been first exhausted by a levy and sale, and for that purpose the tax on the real estate is made a lien on the personal property to pay the taxes and costs," etc. Sess. Laws 1892, p. 29. This is an amendment to section 11 of the act approved March 13, 1890, which is a new section, numbered 2030a, added to section 2030 of the Compiled Laws of Utah of 1888. All of these sections contain similar provisions regarding the application of the personal property to a delinquent's taxes and costs. From an examination of these several sections, it is evident the legislature intended that the personal taxable property of the delinquent should be exhausted before the collector had power to sell the real estate for the payment of his taxes. This is a condition precedent to the sale of the real estate, and the tax on the real estate is made a lien on the personal property for that express purpose. This provision of law is designed for the security of the taxpayer, and is therefore mandatory, and cannot be disregarded by the collector. A collector has but a naked power to sell land for taxes. It is not coupled with an interest. His authority is wholly statutory, and is derived from no rule of the common law. He is simply the agent of the law to sell; otherwise he has no authority, having no interest in the property. As such agent, he must strictly comply with the conditions imposed by law, or the sale will be void, for he is constituted such agent only by certain preliminary requirements, which must precede his action, and are the conditions upon which his authority to effect the sale is founded. If he fails to observe or comply with any one of these preliminary steps, such failure will be fatal to his action, for his power to sell is founded, not upon one, but upon all, of these requisites. In the case at bar, the officer attempted to sell the 65 parcels of real estate without first exhausting the personal taxable property of the several owners. The exhausting of the personal property being a condition precedent, under our statute, to his power to sell the real estate, and he having failed to observe it, his power to sell never was created, and his action was without authority. Black, in his treatise on the Law of Tax Titles (section 255), states the law as follows: "Such a direction is mandatory, and its due observance is strictly a condition precedent to the authority to proceed further. It may therefore be stated as a principle generally applicable in those states [referring to states having statutes similar to ours] that a title to real estate by virtue of a tax sale, when its owner had personal property subject to sale, within the jurisdiction, and of sufficient value to discharge the tax, but which was not sought out or demanded by the collecting officer, is invalid and worthless." See, also, Id. §§ 155, 198. Cooley, in his work on Taxation (page 470), says: "It is therefore accepted as an axiom, when tax sales are under consideration, that a fundamental condition to their validity is that there should have been a substantial compliance with the law in all the proceedings of which the sale was the culmination. This would be the general rule in all cases in which a man is to be divested of his freehold by adversary proceedings, but special reasons make it peculiarly applicable to the case of tax sales." See, also, Id. §§ 342, 472. It is quite clear that the sales under consideration cannot be upheld by authority. 2 Dill. Mun. Corp. § 820; 3 Washb. Real Prop. p. 234, c. 3, subd. 12: French v. Edwards, 13 Wall. 506; Houghton Co. v. Auditor General, 41 Mich. 28, 1 N. W. 890; Scofield v. City of Lansing, 17 Mich. 437; O'Byrne v. City of Philadelphia, 93 Pa. St. 225; Seymour v. Peters, 67 Mich. 415, 35 N. W. 62; Wilhelm v. Russell, 8 Neb. 120; Wartensleben v. Haithcock (Ala.) 1 South. 38. It is not necessary to determine in this case whether the county has a lien for the taxes on these parcels of land, thus attempted to be sold by the collector. It is evident, however, that the sales, being void, passed no lien to the county, and that, if the county has a lien, it has it by virtue of section 2012. Comp. Laws Utah 1888, as amended by the act approved March 13, 1890. Neither the certificates of sale nor any deeds which the county might eventually receive thereunder, could create for or pass to it any lien, because the sales were made without authority of law, and therefore conferred no rights which the county can enforce.

It is insisted that the right conferred by

section 2030a, above quoted, is a personal right, and that only the taxpayer can complain. If this be conceded, how can it avail the appellant? The moment the county should attempt to dispose of lands it had acquired through a void sale the owner would assert his right. In that event the county would stand on the same footing as an individual, and with no better rights by virtue of the sale. Where a person, at a void tax sale, purchases land, the payment of the tax thereon is the same as a voluntary payment, made without the request of the owner; and he has no lien for the money so paid, unless given him by statute, for at common law the rule of caveat emptor applies. The county, having acquired no lien or other rights by virtue of the sales in question, is under no obligation to credit the collector with the costs of void sales. Black, Tax Titles, §§ 463, 464; Cooley, Tax'n, pp. 476, 509, 510; Harper v. Rowe, 53 Cal. 233.

It is further contended by counsel for appellant that it was lawful for him to charge 25 cents per folio for the duplicate certificate of each of the remaining 840 tax sales, and that the court erred in holding such charge illegal. It is the duty of the collector, when he sells real estate for taxes, to issue a certificate of sale to the purchaser, and file a duplicate of such certificate in the office of the county recorder. When there is no bidder at any sale who will pay him the amount of the delinquent's tax, he is required to make such certificate to the probate judge, for and in behalf of the county, and then such sale to the county shall have the same effect as if made to an individual. Comp. Laws Utah 1888, § 2031. For these services the legislature has provided fees, as follows: "For each certificate of sale, per folio, twenty-five (25) cents. For publishing the name and amount of taxes due from each delinquent, fifty (50) cents. For filing certificate for tax sale with the county recorder, fifty (50) cents." Sess. Laws 1892, p. 30, § 2030a. It will be observed that there is no provision here for fees for the making of a duplicate certificate, except 50 cents for filing it with the recorder, and there is no implied obligation on the part of a county to make compensation to its officers. The right must be expressly conferred by law; and, when a statute creates a liability where none otherwise exists, it will be strictly construed, and the courts will not aid it in favor of the officer. Nor will they enlarge such liability, or extend it beyond the provisions as expressed in the statute. Nor is the statute under consideration at all ambiguous or uncertain in its provisions. It expressly provides a folio fee for "each certificate," and is silent as to the duplicate, except that it provides for filing it. It is clear that the legislature intended that the duty of making the duplicate certificate should be performed without additional compensation. The collector, having taken upon himself the dis-

charge of the duties of his office, is presumed to have accepted it with a knowledge of the provisions of law relating to it. He therefore assumed the duty of making such duplicate certificate, knowing that there was no provision of law which would entitle him to the fees in question. The statute does not use the plural, but the singular, form of the word "certificate," and the folio fee allowed in each tax sale can apply to but one certificate. Suth. St. Const. § 371; Cooley, Tax'n, p. 266; Rowe v. Kern Co., 72 Cal. 353, 14 Pac. 11; Green v. Holway, 101 Mass. 243; City of Alton v. Aetna Ins. Co., 82 Ill. 45; Boyd v. Hood, 57 Pa. St. 98; Wroughton v. Turtle, 11 Mees. & W. 561. Counsel for appellant has cited the cases of McKinstry v. U. S., 40 Fed. 813, and Clough v. U. S., 47 Fed. 795, in support of the proposition that a statute which fixes the compensation of officers should receive a liberal construction. These cases appear to support the proposition, but they have been overruled in U. S. v. Clough, 5 C. C. A. 140, 55 Fed. 373, and are therefore no longer authority on that point. This last case supports the rule of strict construction.

It is further contended that the court erred in deciding that each of the 840 certificates is longer than necessary, and that the costs charged in each case are one dollar in excess of what should have been charged. It appears from the agreed findings of fact that each certificate contains 12 folios of matter, exclusive of the description of the land. Section 2031, Comp. Laws Utah 1888, provides as follows: "When real estate is sold for taxes, the collector shall issue a certificate to the purchaser, reciting substantially the facts of the non-payment of the tax, levy upon, advertisement and sale of said real estate." It will be observed that there are but four facts which shall be substantially recited in the certificate,—the nonpayment of tax, the levy, the advertisement, and the sale. The statute provides no form, and the collector is therefore entitled to exercise a reasonable discretion in creating and adopting such a form as will enable him to comply with the statute. This discretion, however, will not permit him to insert unnecessary words and sentences into the form, or to recite facts therein not required by the terms of the statute, and charge fees for the same. While the collector will not be held to the strictest rules of propriety in the use of language, yet unnecessary repetition should be avoided, and the form should be reasonably concise. In the case at bar, as appears from the record, the form contains twelve folios, and yet the statute requires the reciting of but four facts in the certificate. An examination of it shows it to be of unreasonable and unnecessary length, and an infringement upon the rights of the taxpayer, who is to pay for the superfluous verbiage at the rate of 25 cents per folio. This is such an abuse of discretion as will authorize a court to interfere, as unwarranted under the law. Such a padding of the form, apparently for the purpose of increasing the number of folios, cannot be upheld upon any principle of justice to the taxpayer. Where the legislature leaves the manner of exercising a power to the discretion of an officer, it does not mean that he shall exercise such discretion arbitrarily to the injury of any subject. It is clear that, under the agreed statement of facts, the court properly reduced the number of folios to be allowed the collector in each case, and rightfully made a corresponding reduction in the amount claimed, and it seems equally clear that, in justice to the parties concerned, the amount thus allowed is still excessive. 5 Am. & Eng. Enc. Law, pp. 681, 682; Van Duzee v. U. S., 59 Fed. 440; Olsen v. Bagley (decided at this term) 37 Pac. 739. The authorities cited by appellant on this point do not appear to be applicable to the case at bar, for here there is a clear abuse of discretion.

Counsel for appellant further contend that it was the duty of the county clerk to credit the collector with his costs, on the assessment roll, without previous allowance by the county court. There are various statutory provisions respecting the duty of the clerk and county court. Section 187, p. 298, 1 Comp. Laws Utah 1888, provides: "The county courts in their respective counties have jurisdiction and power under such limitations and restrictions as are prescribed by law." And, under subdivision 12 of this section, such courts have power "to examine and audit, at least once a year the accounts of all officers having the care, management, collection or disbursement of moneys belonging to the county or appropriated by law or otherwise for its use and benefit," and, under subdivision 13, "to examine, settle and allow, all accounts legally chargeable against the county and order warrants to be drawn on the county treasurer therefor." Section 196 provides how claims must be itemized and verifled before such court can allow them. Section 197 provides that "no account must be passed upon by the court unless made out as prescribed in the preceding section, and filed by the clerk." Section 208 reads: "Accounts for county charges of every description must be presented to the county court to be audited as prescribed in this act." Under these provisions of the law, it would seem that the county court has the exclusive power to pass upon all claims, of every description, which may be chargeable against the county; but counsel for appellant insist that by a provision of section 2031, supra, the county clerk has the right, and that it is his duty, to credit the collector with his costs, and thus pass on his claim without authority from such court. The provision referred to reads: "And the clerk of the county court shall credit the collector with the amount of the tax due thereon, and costs to date of sale." the position of counsel be correct, then the collector's claim for costs will become an

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exception to any other claim against the county. An examination of the various provisions reveals no such intent on the part of the legislature; nor does it reveal any conflict between the several provisions of law. When these several provisions are read together, they mean simply that the county court shall audit and pass upon the claim of the tax collector for fees and costs, the same as any other claim; and then, when so audited and passed upon, the county clerk shall credit him with the amount allowed by the court. The clerk simply acts under the direction of the court. He cannot act in the capacity of clerk without acting under the orders of his superiors in any matter requiring judgment or discretion, judicial in its nature. There is no statute authorizing the clerk to settle with the collector. Nor can the collector determine for himself, without the action of the court, what his fees and charges shall be, independent of a statute. Nor is it clear under the law, as contended by counsel for appellant, that the claims of the collector, arising because of the collection of delinquent taxes, were intended by the legislature to be a direct charge upon the county tax, to be credited to him the same as money, and the money, to the amount of the claim, to be withheld as part of his compensation. The cases which counsel cite to support this proposition do not appear to apply to the case at bar. Most of them are cases arising under statutes which provide that the collector may retain a certain per centum of the tax collected as a commission in lieu of other compensation. Those cases hold that he may retain his commission out of the tax. In this case, as shown by the agreed statement of facts, the collector was paid a stipulated salary by the county court, which was \$3,000, for the year 1893, "with the mutual understanding" between him and the county court that he was entitled, in addition thereto, to certain costs and fees, including costs and fees for sales and certificates made to the probate judge. Under section 2021, Comp. Laws Utah 1888, the county court had the right to fix the collector's compensation. Whether this "mutual understanding" is binding on the county it is not necessary to determine; nor is it necessary to determine whether any of the charges made, pursuant to such "understanding," for the 840 certificates of sale issued to the probate judge constitute a valid claim, or what effect the illegal fees charged by the collector in each one of the 840 sales would have upon the rights of the county, should it at any time attempt to dispose of the real estate under the certificates of sale made to the probate judge, because both the "mutual understanding" and the certificates are treated as binding and valid in the agreed findings of fact.

The question is, can the collector, receiving a fixed salary, withhold any money, which he receives in his official capacity, from the county treasurer, in payment of claims due

him from the county? Section 2036, Comp. Laws Utah 1888, so far as material here, reads as follows: "The clerk of the county court in each county shall keep an account with the collector, debiting him with the amount of tax assessed and crediting him with the amounts paid; and the collector is hereby required to pay to the county treasurer, once a month, or oftener if required by the county court, all county funds collected by him, and shall take the treasurer's receipt therefor, specifying the amounts paid in kind." This is a clear statement of the duties of the collector, and leaves no room for doubt. Under its provisions, the collector must pay, not only a part, but "all, the funds collected" to the treasurer, once a month, or oftener if required by the court; and he has no right to any offset, not even though his claim or demand be for unpaid salary. Having collected the money, it is his duty to pay it over promptly, as provided by law; and he has no right to pause and question the right of the county to receive it before paying a demand due to himself. Nor has he a right to withhold any portion of it, as compensation in addition to his stipulated salary, in the absence of a statute expressly giving such right. Cooley, in his work on Taxation (page 704), thus states the law: "It has been seen that the law sometimes provides very summary proceedings for the enforcement of the duty to pay taxes, and that the legislative competency to do so has been very fully sustained. With much greater reason may the law provide summary remedies against those who, having accepted official positions under the revenue laws, neglect or refuse to perform the duties which pertain to them, or endeavor to substitute a performance of their own for something of a different nature which the law has required. This is particularly true of tax collectors. They have only to collect money, and pay it over to the proper custodian; and it is seldom that a question arises which can justify departure from the strict terms of their authority, or neglect in the prompt payment of what comes to their hands." See, also, Id. pp. 705, 706. In City of New Orleans v. Finnerty, 21 Am. Rep. 569, the court said: "No officer of a government, state or municipal, is empowered to pay himself his salary, or plead in compensation a demand made against him for moneys collected by him in his official capacity, by an amount due him on account of his salary. His duty is to discharge the obligations of his office according to the terms of his acceptance thereof, and to get his pay as other officers get theirs. In other words he cannot pay himself." Mechem, Pub. Off. § 873; Dill. Mun. Corp. § 230; San Francisco v. Ford, 52 Cal. 198; Evans v. City of Trenton, 24 N. J. Law, 764; Hatch v. City of Cincinnati, 17 Ohio St. 48; People v. Supervisors of New York, 1 Hill, 362; Griffin v. Clay County, 63 Iowa, 413, 19 N. W. 327; Sikes v. Hatfield. 13 Gray, 347; White v. Levant, 78 Me. 568, 7

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Atl. 539; Haswell v. Mayor, etc., 81 N. Y. 255. I am of the opinion that in the case at bar it was the duty of the appellant to pay over all the money which he collected, and then present his claims to the county court for allowance, the same as any other officer or claimant. Under the findings of fact, which were agreed to by all the parties to this action, I see no reason for disturbing the judgment of the trial court.

WEBER COUNTY v. HAMER, Tax Collector.1

(Supreme Court of Utah. Aug. 31, 1894.)

Appeal from district court, fourth district; before Justice James A. Miner.

Mandamus, on relation of Weber county, to compel Daniel Hamer, tax collector of said county, to pay over certain moneys. Writ made peremptory, and defendant appeals. Reversed. versed.

Richards & MacMillan, for appellant. A Weber and W. L. Maginnis, for respondent.

SMITH, J. In view of the opinion just rendered in the case of Hamer v. Weber Co., 87 Pac. 741, it is not necessary that we should go over the facts in this case, or discuss at length the questions of law raised upon the appeal. the questions of law raised upon the appeal. This is a proceeding in mandamus, commenced by the county of Weber against the defendant, to compel him to pay over the sum of \$14,733.

34. The answer sets up the same matters which are set up in the complaint in the case of Hamer v. Weber Co., and prays for credit for the amount claimed as delinquent taxes, fees, and costs for making delinquent sales to the probate judge. We have already determined in that case the amount to which the plaintiff is actually entitled under the law, and upon the that case the amount to which the plainth is actually entitled under the law, and upon the facts found. The finding of facts in this case is precisely the same as in that. It results from our conclusion in that case that a writ of mandate should issue in this case, commanding the defendant, Hamer, to pay over to the counthe defendant, finner, to pay over to the country of Weber the difference between \$15.853.57, the amount for which he sought credit, and \$13,014.51, the amount for which he was entitled to credit; or, in other words, the sum of \$2,849.08. It is ordered that the judgment of the court be-low be reversed, and the cause remanded to that court with directions to issue its mandate commanding the defendant, Hamer, as tax collector, to immediately pay over to the county treasurer of Weber county the sum of \$2.849,06, and that the appellant recover his costs in this court only.

MERRITT, C. J., concurs. BARTCH, J., dissents.

GUTIERREZ v. HEBBARD, Judge. (No. 15,694.)

(Supreme Court of California. Sept. 13, 1894.) APPEAL BOND-FIXING AMOUNT-DUTY OF JUDGE.

Under Code Civ. Proc. § 945, providing for a stay of proceedings under a judgment directing the delivery of possession of lands, upon the execution of a proper undertaking on appeal, in an amount fixed by the judge, the judge must fix such amount, though the judgment has already been executed. already been executed.

Rehearing pending.

In bank.

Application by Gutierrez for writ of mandate to compel J. C. B. Hebbard, judge, to fix the amount of an undertaking on appeal. Application granted.

T. J. Crowley, for petitioner. E. J. Pringle, for respondent.

HARRISON, J. Application for a writ of mandate. In the action of Emeric v. Alvarado, for the partition of the Rancho San Pablo, the above-named petitioner was one of the defendants claiming a portion of the land, and by the final decree was awarded one portion of the land claimed by her; another portion, designated as "Lot No. 198." being allotted to H. F. Emeric. This decree was entered March 3, 1894, and notice thereof served upon the petitioner upon the same day. By the terms of the decree, it was ordered and adjudged "that the several parties to this action do forthwith surrender and deliver up the possession of such parcels of said rancho as they now respectively occupy, which have not been allotted to them in severalty by said decree, and that, in default thereof, writs of possession shall. on the application of any of the parties thereto, be issued by the clerk of said court, and under the seal thereof, directed to the sheriff of the county of Contra Costa, commanding him to place said parties in the quiet and peaceable possession of the said parcels allotted to them as aforesaid, and to remove all other persons therefrom." At the date of the decree, and for several years prior thereto, lot 198 was in the possession of W. B. Hellings and his tenants, claiming to hold the same under and as the successor in interest of Mrs. Gutlerrez. After the entry of the decree an appeal therefrom was taken to this court on behalf of, and in the name of, Mrs. Gutierrez; and an application was made to the respondent to fix the amount of the undertaking against waste, and for use and occupation, required by section 945, Code Civ. Proc., for the purpose of staying proceedings on the judgment. This application was heard by the respondent March 23d, after notice thereof had been given to Emeric, and was by him denied. Thereupon, the present application was made to this court for a writ of mandate directing the respondent to fix the amount of such undertaking. In his answer to the application the respondent alleges that on the 5th day of March an affidavit was filed in the superior court showing that, after entry of the decree, demand had been made by Emeric upon Hellings and his tenants for the possession of ot 198, and that they had refused to give possession; that upon an ex parte application on said affidavit a writ of possession was issued by the clerk, under the order of the court, directed to the sheriff, to place Emeric in the quiet and peaceable possession of lot 198, and to remove all other persons

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therefrom; that before any application had been made to fix the amount of the undertaking the said writ had been served and executed by the sheriff, and return thereafter made, to the effect that he had placed said Emeric in actual possession of the premises, and removed all other persons therefrom. It is now claimed on behalf of the respondent that because of these facts he was not required to fix any amount for said undertaking.

We are of the opinion, however, that it was the duty of the respondent to fix an amount for which the appellant might give an undertaking to stay proceedings upon the judgment, if she so desired. Section 945, Code Civ. Proc., provides that all proceedings in the court below upon a judgment which directs the delivery of possession of real property may be stayed if the appellant executes a written undertaking to the effect that during the possession of such property by him he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof. This is a right conferred upon an appellant by the statute, and the same statute makes it the official duty of the judge to fix the amount of the undertaking that is to be given. If the judge refuse to fix the amount for such undertaking, he thereby deprives an appellant of a substantial right which the statute has conferred. The decree in the present case directs the delivery of possession of real property, and was rendered by the respondent; and when he was informed of the desire of the petitioner to appeal therefrom, and to have proceedings thereon stayed pending the appeal, his official duty to fix the amount of the undertaking was clear. If, after the entry of the decree, matters had supervened which might deprive the appellant of an effective stay of proceedings, even though she should give the undertaking, the respondent should determine the sufficiency of those matters when presented upon a direct issue in which her right to the stay of proceedings was involved, rather than adjudicate upon their sufficiency before there was an opportunity for her to ask for such stay. Whether, after she had given such an undertaking, she could avail herself of the privileges which the statute confers, would be a matter then to be considered and determined. If, in fact, the execution of the decree had become so complete that there were no proreedings thereon to be stayed, no harm could be done to any of the parties to the action by the giving of such an undertaking; and if there should be any reason by which the appellant might show herself entitled to a stay, notwithstanding the execution of the decree, she ought to be allowed that privilege. The respondent should not deprive her of the opportunity which the statute af-

fords in this respect, by refusing to fix the amount of the undertaking. The application for the writ is granted.

We concur: BEATTY, C. J.; VAN FLEET, J.; FITZGERALD, J.; DE HAVEN, J.; GA-ROUTTE, J.

108 Cal. 614

EACHUS et al. v. LOS ANGELES CONSOL-IDATED ELECTRIC RY. CO. (No. 19,205.)

(Supreme Court of California. Aug. 30, 1894.) CHANGE OF STREET GRADE - INJURIES TO ABUT-TING PROPERTY-LIABILITY OF CITY - MEASURE OF DAMAGES.

1. Under Const. 1879, art. 1, § 14, which provides that private property shall not be taken or "damaged" for public use without compensation, the owner of a lot on a street which was dedicated to the city may recover for damages thereto caused by the grading of the street to the established grade. Beatty, C. J., and to the established grade. McFarland, J., dissenting.

2. In an action by a lot owner for damage to his lot caused by grading the street, evidence of the diminution in the value of the lot by the adoption of the ordinance establishing such grade is inadmissible, as there can be a re-covery only for the actual physical change of grade.

3. Benefits to the lot from the operation of a street railway on the street after it was graded cannot be considered to diminish the damages.

4. Where the only objection to evidence was that it was "incompetent, irrelevant, and immaterial," it cannot be argued on appeal that such evidence should have been excluded on account of the manner in which the question was asked.

In bank. Appeal from superior court, Los

Angeles county; William P. Wade, Judge.
Action by B. D. Eachus and another against the Los Angeles Consolidated Electric Railway Company. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

John D. Pope, for appellant. Galbreth & Morrison, for respondents.

HARRISON, J. The plaintiffs are the owners of a lot of land in the city of Los Angeles, situate at the corner of First and Figueroa streets, having a frontage of 142 feet on First street and 50 feet on Figueroa street. The lot is a portion of a larger tract of land which originally belonged to the municipality, and was laid out by it into blocks and streets in 1872. The plaintiffs became the owners of their lot in 1887, and built a house thereon in which they lived for several years. In 1891 the defendant received a franchise from the city of Los Angeles to construct a railroad along First street in said city in front of the plaintiffs' property, and, in preparing the street for the construction of its railroad, made an excavation in the middle of the street to its official grade. The street is 821/2 feet in width, and, for the purpose of laying its tracks upon the official grade of the street, the excavation made by

the defendant in front of the plaintiff's propcrty was 28 feet in depth at the corner, gradually diminishing to a depth of 20 feet at its rear and extended to within ten feet of the boundary line of their lot fronting on the street. The ordinance conferring the franchise upon the defendant is not set forth in the record, and it does not appear whether there was any requirement that the track should be laid upon the official grade of the street; and, although it was admitted that until the excavation made by the defendant the street had never been changed from its natural grade, it does not appear from the record when the official grade was established. The plaintiffs brought this action to recover the damages caused to their lot by reason of the acts of the defendant in cutting off their access thereto. The cause was tried by a jury, and a verdict rendered in their favor for \$823. The defendant has appealed.

The constitution of 1879 (article 1, § 14) provides that "private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." Prior to the adoption of this constitution, it was held that an abutting owner was not entitled to compensation for any injury to his property resulting from a lawful change in the grade of the street fronting thereon; but in Reardon v. San Francisco, 66 Cal. 492, 6 Pac. 317, it was held that this provision of the constitution gave to him a remedy that he did not previously have, and authorized a recovery for such indirect or consequential damage to his property as he might sustain over and above that sustained by him in common with other abutters, or the public in general. This provision does not exist in the constitution of many of the states, and it is only within a few years that it has been incorporated into the constitution of any state. Hence, the opinions of courts in other states, which were rendered at a time when no such rule of law existed, are inapplicable, and apt to be misleading in their reasoning. The constitution does not, however, authorize a remedy for every diminution in the value of property that is caused by a public improvement. The damage for which compensation is to be made is a damage to the property itself, and does not include a mere infringement of the owner's personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution; but the property itself must suffer some diminution in substance, or be rendered intrinsically less valuable, by reason of the public use. The erection of a county jail or a county hospital may impair the comfort or pleasure of the residents in that vicinity, and to that extent render the property less desirable, and even less salable; but this is not an injury to the property itself, so much as an influence affecting its use for certain purposes. But whenever the enjoyment by the plaintiff of some right in reference to his property is interfered with, and thereby the property itself is made intrinsically less valuable, he has suffered a damage for which he is entitled to compensation.

The right of the owner of a city lot to the use of the street adjacent thereto is property which cannot be taken from him for public use without compensation; and any act by which this right is impaired is, to that extent, a damage to his property. When a city subdivides a tract of land, of which it is the owner, into blocks and streets, and sells the same, it thereby dedicates the streets to public use, and the purchaser of one of those lots acquires an easement in the street fronting upon his lot, for the purposes of ingress and egress, which attaches to the lot, and in which he has a right of property as fully as in the lot itself; and any subsequent act of the municipality by which that easement is destroyed or substantially impaired, for the benefit of the public, is a damage to the lot itself, within the meaning of the constitutional provision, for which he is entitled to compensation. Such easement is a right of property incident to the lot itself, and any damage sustained by the owner, in its destruction or impairment, is a damage peculiar to himself, and independent of any damage sustained by the public generally. For the purpose of determining this damage, it is immaterial whether he has the fee in the street, or only an easement for its use. In either case it is property, for an injury to which he is entitled to relief. City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Ruge v. City of St. Louis, 93 Mo. 413, 6 S. W. 257; Hobson v. Philadelphia, 150 Pa. St. 595, 24 Atl. 1048; Schaufele v. Doyle, 86 Cal. 107, 24 Pac. 834. Rigney v. City of Chicago, 102 Ill. 64, is a leading case on this subject. In that case the fee of the streets was in the city; and the city had constructed a bridge or viaduct on a public street intersecting the street on which the plaintiff's lot fronted, and about 220 feet distant from his lot, thus interfering with his access to that street, except by means of a flight of stairs, and his premises were thereby damaged and depreciated in value. The court held that the injury sustained by him in the prevention and impairment of free access to his lot was a damage for which the constitution gave him a right of recovery, and that, in order to recover for the damage which private property had sustained for public use, "it is sufficient if there is a direct physical obstruction or injury to the right of user or enjoyment, by which the owner sustains some special pecuniary damage in excess of that sustained by the public generally, which by the common law would, in the absence of any constitutional or statutory provisions, give a

right of action." The supreme court of the United States gave the same construction to that provision in the constitution of Illinois in Chicago v. Taylor, 125 U.S. 161, 8 Sup. Ct. 820. Similar principles have been enunciated in other states whose constitution contains this provision. City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6; Sheehy v. Railway Co., 94 Mo. 574, 7 S. W. 579; Hatch v. Railroad Co., 6 Wash. 1, 32 Pac. 1063; City of Atlanta v. Green, 67 Ga. 386; Lowe v. City of Omaha, 33 Neb. 587, 50 N. W. 760; Johnson v. Parkersburg, 16 W. Va. 402; Railroad Co. v. Williamson, 45 Ark. 429; Railroad Co. v. Eddins, 60 Tex. 656; Railway Co. v. Fuller. 63 Tex. 467.

Whether the grading of the street in front of a lot will increase or diminish the value of the lot will depend upon the relative condition of the street and lot before and after the grading, and must be determined from the circumstances of each case. The elements which enter into this consideration are varied, and no rule can be prescribed which will be applicable to all cases. It is not every change of grade that will constitute a damage to the adjacent property. An excavation of one or two feet might not appreciably impair the value of the lot, while one of twenty feet would naturally have that effect; and the increased facility for communication with other parts of the city, or the opening up of the land to access by the public, may fully equal if not exceed the cost of grading the lot to correspond with the changed grade of the street. The mere fact that the property is worth as much after the grading as before is not an absolute test, since this may be the result of a general advance in values throughout the entire vicinity, irrespective of the grading, or dependent upon some municipal improvement of which the grading in front of the lot is only a part. Railway Co. v. McCloskey, 110 Pa. St. 442, 1 Atl. 555. Nor is its diminution in value for some paricular use necessarily a damage to the prop-The grading of a street may impair the desirability or salability of a lot for use as a residence, while at the same time it may render it so desirable as a site for a warehouse or a manufactory as to increase its market value. The market value of a lot is not determined by its value for any particular use, but results from a consideration of all the uses for which it is adapted and to which it may be applied. Town Co. v. Neale, 88 Cal. 50, 25 Pac. 977. And it is only when the market value of property is diminished by the public use that the property can be said to have sustained such damage as will entitle its owner to receive compensation.

The same rule is applicable when a street is for the first time reduced to an established grade as when a change in the grade has been made after the street has once been brought to such grade. The suggestion that, when the owner dedicates his land for a

street, it is with the understanding and consent on his part, binding also upon his grantees, that it will be subsequently fitted for use by grading, applies with as much force to any subsequent change in the established grade as to the first establishment of a grade. The power of the city to determine the grade is not exhausted with its first exercise, and the dedication by the owner must be deemed to have been made with a knowledge of this principle as much as with a consent to the establishment of any grade. The purchaser of a city lot fronting upon a street takes it subject to a right in the public to make the street available for the enjoyment of the easement therein for which the street was originally dedicated; but we are not aware that it has ever been held, where the foregoing constitutional provision prevailed, that the public had a right to establish any grade it might choose, irrespective of the damage such owner might sustain. This right to establish a grade in the street is attended with the corresponding obligation imposed by the constitution to make compensation for any damage to the private property which may be caused by the public in its exercise of the right. It may be conceded that the dedication of a street carries with it the right to make such a reasonable grade as will adapt it for use, for in such a case the grading of the street would have the effect to increase rather than to diminish the value of the lots adjacent thereto by making them accessible to the public; but, if the municipality deems it desirable to establish such a grade as will cause a damage rather than a benefit to the lots, the owner is entitled to compensation for the amount of this damage. The establishment of the grade is for the benefit of the public rather than of the adjacent owner, and if, in establishing such grade, the owner suffers damage, his property has been damaged "for public use." In City of Elgin v. Eaton, 83 Ill. 535, the street fronting the plaintiff's property was graded for the first time to a line about six feet below the ground on which his house stood. and the court held that the city was liable for any damage sustained thereby, saying: "It is urged that a municipal corporation is not liable for damages growing out of grading their streets. That was no doubt true before the adoption of our present constitution. Article 2, § 13, declares that private property shall not be taken or damaged for public use without just compensation. Now, this was private property, and the improvement was being made for public use; and, if the property was damaged thereby, appellee is entitled to just compensation for such damage. If injury was sustained, it was for public use." And in City of Bloomington v. Pollock, 141 Ili. 351, 31 N. E. 146; the same court said: "We are unable to see any sound legal ground for a distinction between cases where the damage is done under an ordinance which changes the grade of a street,

and cases where the damage is done under an ordinance which for the first time establishes the grade." See, also, Borough of New Brighton v. United Presbyterian Church, 96 Pa. St. 331; Hendricks' Appeal, 103 Pa. St. 358; Jones v. Borough of Bangor, 144 Pa. St. 638, 23 Atl. 252.

The damage sustained by the plaintiffs was caused by the actual grading of the street, and not by the ordinance fixing the grade. Jones v. Borough of Bangor, 144 Pa. St. 638, 23 Atl. 252; O'Brien v. Philadelphia, 150 Pa. St. 589, 24 Atl. 1047. Until the physical condition of the street was changed, their lot had received no actual damage for public use. The enactment of the ordinance rendered it possible that the street would at some time be reduced to that grade, but a mere paper change of grade did not affect the condition of the lot, or impair its use or enjoyment. Any diminution in value that it might sustain from the mere passing of the ordinance was purely speculative, and contingent upon the time when grading should be done, and would no more constitute the damage contemplated by the constitution than would a diminution in its value resulting from excessive taxation, or the contraction of a municipal debt. Hence, the court did not err in refusing to permit testimony as to the damage caused by the adoption of the ordinance. Nor was the benefit that might be derived from the construction or operation of the defendant's railroad material to the issue. The use to which the street might be put by the defendant after the excavation had been made did not affect the damage caused to the lot by the excava-

The plaintiffs were entitled to recover in this action the entire damage which their lot had sustained by the act of the defendant in making the excavation in the street. Railroad Co. v. Scott, 132 Ill. 429, 24 N. E. 78; City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6. The action was not for any personal damage that the plaintiffs had sustained prior to the action by reason of the interruption that they had sustained in their access to the lot. nor for damages resulting from an unlawful or unauthorized use of the street by the defendant, but it was for the damages which had been done to the lot itself by the permanent change in the street. These damages do not depend upon any subsequent use of the lot, but were complete when the grade was changed, and could be recovered in this action.

For the purpose of ascertaining the amount of damage that the plaintiffs had sustained, witnesses were asked, "What effect did the cut have upon the value of the property?" And, upon replying that its effect was to depreciate the value, they were then asked, "To what extent?" and in reply stated the amount. These questions were objected to by the defendant upon the ground that they were incompetent, irrelevant, and immate-

rial; and it is now urged that the opinions of the witnesses should have been limited to the market value of the property before and after the grading was done, and that the jury should have drawn its conclusion of the amount of damage from such evidence, rather than from the opinions of the witnesses. If this special objection had been made at the trial, the plaintiffs could have asked the questions in such a way as to obviate the objection; but it is well settled that, unless the evidence is inadmissible for any purpose, a party is not at liberty, under this general objection, afterwards to urge a special objection which goes merely to the form in which the evidence is sought. Crocker v. Carpenter, 98 Cal. 418, 33 Pac. 271. The extent to which the property was damaged by the grading was the precise issue in controversy, and evidence tending to establish the amount of that damage was neither incompetent nor irrelevant nor immaterial. The inquiry of the witnesses respecting the value of the property would of itself, in the absence of any qualifying term, imply the "market value;" and it was open for the defendant, upon cross-examination, to show that their opinion referred to some associate value. The subsequent question respecting the "extent" to which its value had been depreciated was but another mode of inquiring what was its market value after the grading; and the defendant had the same opportunity of testing by cross-examination the weight and accuracy of the replies to this question, or to show by other testimony that the value of the property had been increased by the grading, or that its depreciation was attributable to other causes than the grading. The judgment and order are affirmed.

We concur: GAROUTTE, J.; FITZGER-ALD, J.; DE HAVEN, J.

I dissent: McFARLAND, J.

BEATTY, C. J. I dissent. When the tract of land embracing these lots was by the owners laid off into streets and squares. the plat recorded, and the lots sold by reference to such recorded plat, the streets were thereby dedicated to the public; and this dedication carried with it an implied consent, binding upon the owner and its successors, that the streets might be properly graded to fit them for the purpose for which they were dedicated. Such consent was a waiver of any claim for damages to abutting lots by reason of a proper grade. Here the city has established a grade which, so far as appears, is, with reference to the whole tract, entirely reasonable and proper, although it is an injury to these particular lots; and the defendant, in laying its track, has been required to conform to the grade so The owners, in my opinion, established. have no claim for damages for bringing the street to the established grade. Corcoran v.

City of Benicla, 96 Cal. 1, 30 Pac. 798, seems to me to be in direct conflict with the decision here.

103 Cal. 675

PEOPLE v. BRYON. (No. 21,108.)

(Supreme Court of California. Sept. 1, 1894.) COMPOUNDING FELONY - SUFFICIENCY OF INDICT-MENT - DEFECTIVE PLEADING-AIDER BY VER-DICT.

1. An information stating that the crime of grand larceny was committed by one H., and that defendant, knowing of the commission of said crime by said H., did receive from said H. \$20 upon the agreement that the said defendant would compound and conceal the crime, sufficiently charges an offense under Pen. Code, § 153, which provides for the punishment of "every person who, having knowledge of the actual commission of a crime, takes money or proper-ty of another' upon any agreement to com-pound or conceal such crime.

2. Pen. Code, § 1004, provides that, if an indictment or information does not substantially conform to statute made and provided therefor, the defect is a ground for demurrer. Penal Code, § 1012, provides that the objections mentioned in section 1004, if apparent on the face of the information, can be taken advantage of by demurrer only, except objections to the juris-diction, and that the indictment does not charge a public offense.

3. Pen. Code, § 1185, provides that a motion in arrest of judgment may be founded on any defects mentioned in section 1004, unless the objection has been "waived by a failure to demur." Held, that an objection "that the information described by the second to the company of the second to the company of the second to the sec formation does not substantially conform to the law in such case made and provided" is waived if not taken by demurrer.

Commissioners' decision. Department 2. Appeal from superior court, Merced county; J. K. Law, Judge.

William Bryon was convicted of compounding a felony. Order granting an arrest of judgment reversed.

Atty. Gen. Hart, for the People. C. H. Marks and B. F. Fowler, for respondent.

BELCHER. C. The respondent charged by information with the crime of compounding a felony, and convicted. At the time set for pronouncing judgment he moved for an order in arrest of judgment, upon the grounds: "That the information in this action did not and does not state facts sufficient to constitute a public offense,—that is, the facts stated do not constitute a public offense;" and "that said information does not substantially conform to the law in such cases made and provided." The court granted the motion, and the people appeal from the order.

No brief has been filed on behalf of respondent, and we are left to solve the questions presented without any assistance from him. Section 153 of the Penal Code provides: "Every person who, having knowledge of the actual commission of a crime, takes money or property of another * * * upon any agreement or understanding to compound or conceal such crime * * * is punishable," etc. The information charges that on or about the 11th day of December, 1893, in the county of Merced, "one Maurice Hardy did commit the crime of grand larceny, a felony,-that is to say, that at said time and place the said Maurice Hardy did willfully, unlawfully, and feloniously steal and take from the person of E. O. Mickle the sum of forty dollars, lawful money of the United States, said money being the property of and belonging to the said E. O. Mickle; that said William Bryon, at said time and place, and prior to the filing of this information, having knowledge of the commission of said crime by said Maurice Hardy, as aforesaid, did take and receive from the said Maurice Hardy the sum of twenty dollars, lawful money of the United States. upon the agreement and understanding, willfully, unlawfully, and feloniously made and entered into with the said Maurice Hardy, that he, the said William Bryon, would compound and conceal the crime which had been committed as aforesaid by said Hardy, contrary," etc.

The Penal Code contains the following provisions in regard to indictments and informations:

"Sec. 950. The indictment or information must contain * * * 2. A statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended."

"Sec. 959. The indictment or information is sufficient, if it can be understood therefrom * * * 6. That the act or omission charged as an offense is clearly and distinctly set forth in ordinary and concise language without repetition, and in such a manner as to enable a person of common understanding to know what is intended. 7. That the act or omission charged as the offense is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the rights of the case.

"Sec. 960. No indictment or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits."

No demurrer to the information was interposed, and all objections thereto mentioned in section 1004, except that the facts stated did not constitute a public offense, were waived. Pen. Code, §§ 1012, 1185. The only question, then, is, did the information state facts sufficient to constitute a public offense? The facts necessary to constitute an offense under section 153 of the Penal Code are: Knowledge of the actual commission of a crime, and the taking of money or property of another upon an agreement or understanding to compound or conceal such crime. The information charges that the crime of grand larceny was committed by Hardy, and states

when, where, and how it was committed. It then charges that the respondent, "having knowledge of the commission of said crime," took money from Hardy upon the agreement and understanding that he would compound and conceal the same. It is true the information does not say, "having knowledge of the actual commission of said crime;" but, if the crime was committed, it was actually committed, and, if respondent had knowledge of its commission, he had knowledge of its actual commission. The omission of the word "actual" was therefore immaterial. In our opinion the information was sufficient to meet all the requirements of the Code, and there was no valid ground for an order arresting the judgment. We advise that the order appealed from be reversed, and the cause remanded for further proceedings.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed, and the cause remanded for further proceedings.

(102 Cal. 493)

QUACKENBUSH v. REED et al. (No. 15,302.)1

(Supreme Court of California. May 22, 1894.) DECLARATION OF HOMESTEAD - SUFFICIENCY-RE-CORDING-DESCRIPTION OF LAND.

1. Under the homestend act of 1860 (section 1), which requires that the declaration of claim of homestead shall be acknowledged and recorded as conveyances affecting land, and provides that from "the filing for record of such declaration" the husband and wife shall be deemed to hold the homestead as joint tenants. the omission by the clerk to copy into the record the acknowledgment of the wife in such a declaration does not affect the validity of the bomestead.

2. Homestead laws should be liberally con-

strued in favor of the exemption.

3. The description of the land in a declara tion of homestead by reference to a recorded

deed is sufficient.

4. Under the homestead act of 1860 (section 1), providing that the selection of a homestead may be made by the husband and wife, or either of them, or other head of a family, declaring "their" intention in writing to claim the same as a homestead, a declaration by a wife need only declare it is "her" intention.

Commissioners' decision. Department 2. Appeal from superior court, Marin county; F. M. Angellotti, Judge.

Action by Thomas M. Quackenbush against John J. Reed, administrator, and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Pringle, Hayne & Boyd, for appellant. Lindley & Eickhoff and Hepburn Wilkins, for respondents.

TEMPLE, C. This is an action to foreclose a mortgage dated December 8, 1887, executed by Hugh Boyle, now deceased. Defendant Carmelita Natividad Boyle is the

widow of Hugh Boyle, and was the wife of the decedent at the time of the execution of the mortgage, April 29, 1872. She, being then the wife of Hugh Boyle, made a declaration of homestead, which was in due form and properly acknowledged and duly filed for record in the recorder's office of Marin county, where the property is situated, in which the mortgaged premises were claimed as a homestead. The mortgage was executed by the husband alone, and defendants now claim that it is void. Plaintiff contends that the premises were not impressed with the character of a homestead, because (1) the declaration, though duly filed for record, was not recorded; (2) it does not particularly describe the premises; (3) the declaration does not state that it was the intention of both husband and wife to claim the premises as a homestead, but only that it was the intention of the declarant (the wife) to claim such exemption. Appellant also claims (1) that he was a purchaser for value without notice; (2) that the court erred in not permitting him to amend his complaint, and avers that when the declaration was filed the premises were of the value of \$30,000; also in not permitting him to show the present value of the premises that he might recover the excess. The appeal is from the judgment, and from an order refusing a new trial.

The declaration was filed under the homestead law of 1860 (Hitt. Laws, \$ 3541 et seq.). The declaration was copied by the recorder into the proper book, but he omitted from the acknowledgment the words, "and who is personally known to me to be the person whose name is subscribed to the said annexed instrument as a party thereto." Section 1 of the act of 1860 reads as follows: "The homestead, consisting of a quantity of land, together with the dwelling-house thereon and its appurtenances, not exceeding in value the sum of five thousand dollars, to be selected by the husband and wife, or either of them, or other head of a family, shall not be subject to forced sale in execution or any final process from any court, for any debt or liability contracted or incurred after the passage of the act to which this is amendatory. Said selection shall be made by either the husband or wife, or both of them, or other head of a family, declaring their intention in writing, to claim the same as a homestead. Said declaration shall state that they or either of them are married, or if not married, that he or she is the head of a family; that they or either of them, as the case may be, are at the time of making such declaration residing with their family or with the person under their care and maintenance on the premises, particularly describing said premises, and that it is their intention to use and claim the same as a homestead; which declaration shall be signed by the party making the same, and acknowledged and recorded as conveyances affecting real estate are required to be acknowledged and recorded, and from and after the filing for record of such declaration the husband and wife shall be deemed to hold said homestead as joint tenants; and all homesteads heretofore appropriated and acquired by husband and wife under the act to which this act is amendatory shall be deemed to be held by such husband and wife in joint tenancy." The declaration and the acknowledgment being in all respects perfect, does this omission render the claim of homestead void? Appellant contends that, as the section above quoted provides that the declaration shall be recorded as conveyances are required to be recorded, and as such conveyances, as the law stood before the Code, must have been copied into the record, with the proper certificate of acknowledgment, in order to impart notice, it must follow that the same rule applies to homesteads, under the act of 1860. There was, then, no such provision of law as section 1170, Civ. Code, to the effect that an instrument shall be deemed to be recorded when duly filed for record. Appellant claims that the record, when made, is retroactive, and then makes the record notice from the time of filing. I find some difficulty in understanding a retroacting notice. Those who purchase intermediate the filing and the record are purchasers with notice, if the instrument be correctly copied into the proper book; but they will be purchasers without notice if the recorder inadvertently or corruptly omits a word from the acknowledgment. This opens a wide field for fraud, and seems to me unreasonable. Of course, as the constructive notice is a creature of statute, the legislature could make it what they please. But absurd or unfortunate results should be avoided if possible. But I do not find any provision making the record of a declaration of a homestead notice to any one. Certainly the language quoted, requiring that it shall be recorded as conveyances are required to be recorded, is entirely insufficient for that purpose. It is not included in section 24 of the act of 1850 (Hitt. Laws, § 649), nor in sections 25 and 26 of the same act. Nor was it necessary. The question as to homestead under that act was always domicilium vel non. Has the law authorizing the homestead been complied with, or not? If the law has been followed, the premises constitute a homestead; if not, not. True, the legislature has wisely provided for a record, but the provision with reference to it is important only as one thing to be done as a condition precedent to the creation of the homestead. What, then, does the statute require to be done in order to create the homestead? It will not be denied that defendant Boyle did all that was incumbent upon her to do when she filed for record a proper declaration, properly acknowledged. But the legislature had the power to declare that the homestead character shall not attach until and unless the officer has performed his duty, and correctly

copied the declaration into the proper book. Has it so provided? I think not. Appellant contends that the rule of construction applicable to cases where parties are deprived of their rights by legal proceedings, as in suits to condemn land, shall prevail. But this court has decided otherwise; that the law is remedial, and is to be liberally construed in favor of the exemption. Schuyler v. Broughton, 76 Cal. 524, 18 Pac. 436; Southwick v. Davis, 78 Cal 508, 21 Pac. 121. statute says that the declaration shall be cknowledged and recorded as conveyances of real estate are required to be acknowledged and recorded, "and from and after the filing for record of said declaration, the husband and wife shall be deemed to hold said homestead as joint tenants." There could hardly be a plainer declaration that the premises constitute a homestead from the time of filing.

2. The premises are described in the declaration by reference to a map made by H. Austin, civil engineer and surveyor, as a part of the Reed Rancho, and as particularly described in a deed, which is referred to, giving the names of the parties to it, the date and the page of the record in the recorder's office of the same county in which the declaration of homestead was filed. It is not contended that the record referred to does not give a full and ample description, but it is contended that the premises cannot be described by such reference in a declaration of homestead. If the record referred to does not particularly describe the premises, the point might be well taken. As it is, even with the aid of the earnest and able argument of counsel, I fail to see why the case is not completely covered by the case of Ornbaum v. His Creditors, 61 Cal. 455.

S. A mere reading of the statute above set out is a sufficient answer to the objection that the declarant did not state that it was the joint intention of both herself and husband to claim the premises as a homestead. The statute explicitly and carefully provides that either husband or wife may make and file the declaration. This right cannot be taken from either by the refusal of the other to join in the claim. This policy, so plainly manifested, is not defeated by the use of the plural pronoun "their." The context plainly shows that it was not meant to require a joint intention.

The claim that plaintiff is an incumbrancer in good faith need not be further discussed.

If plaintiff could have shown that the homestead claim was void because the premises were at the time of the declaration worth more than \$5,000, he required no amendment to his complaint for that purpose. So, too, if the homestead did not include the entire premises, because the homestead right only extended to land worth \$5,000, that could have been shown without further averment. But the position is not sound. The homestead was the land or premises described (Sanders

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v. Russell, 86 Cal. 119, 24 Pac. 852), and every attempt to convey or mortgage it is unavailing. I see no real difference, so far as this point is concerned, between the statute of 1860 and the present homestead law. In each the homestead consists of the premises described in the declaration. I think the judgment and order must be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

104 Cal. 15

PERRY v. ROSS. (No. 18,312.)
(Supreme Court of California. Sept 6, 1894.)
HOMESTEAD—CONTRACT FOR PURCHASE — ASSIGNMENT—LIEN.

Where a married man, who was in possession of railroad land, and who had filed a declaration of homestead thereon, makes a contract of purchase with the railroad company and assigns the contract to one who advances part of the purchase money, the assignee has no lien on the land.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Clara B. Perry against W. G. Ross. There was a judgment for defendant, and plaintiff appeals. Reversed.

John C. Deuel, for appellant. George A. Nourse, for respondent.

TEMPLE, C. This is an action to quiet title. Plaintiff avers: That she is the widow of Jesse L. Perry, deceased. That decedent died January, 1891, leaving him surviving plaintiff, his widow, and eight children. That letters of administration were duly issued to plaintiff, who qualified and administered the estate. Said Perry, in his lifetime, to wit, June 23, 1890, purchased from the Southern Pacific Railroad Company the tract of land in controversy, and said company, for a valuable consideration paid to it, agreed to make to said Perry, his heirs or assigns, when the deferred payments should be made, a good and sufficient deed for the land. That the land was purchased with community funds. That said Perry was then residing upon the land with his family, and on the 11th day of December made and filed for record his declaration of homestead in due form. That thereafter, in the estate of said Perry, the same was duly set apart to plaintiff for a homestead. That the court did also find that the total value of said estate was less than \$1,500, and thereupon set over to plaintiff all of the estate of said Perry for the support of herself and her minor children. That defendant claims title to the property, but without right. Defendant answered, denying the allegations of the complaint, and for a separate defense averred

that Jesse L. Perry, on the 9th day of December, 1890, being indebted to defendant, made, executed, and delivered to him his promissory note for \$211.21, with interest, and, in case suit was instituted to collect the same, for attorney's fees; that the said sum of \$211.21 was part of the purchase money paid by said Perry for the said land, and that at the time of its execution said Perry assigned, transferred, and delivered to defendant all his interest in said land and the contract of purchase, to have and to hold as security for the payment of the note; that no part of principal or interest of said note has been paid. The case was tried without a jury, and the court found that the probate proceedings were in accordance with the allegations of the complaint. The purchase was not made with community funds, but at the time of the purchase said Perry was married. and was residing on the premises with his family, and had filed a declaration of homestead thereon. The court in the probate proceedings did set over to plaintiff all the right, title, and interest, claim, and demand to said homestead which said Jesse L. Perry had at the time of his death, and had acquired by said purchase; and also found that the whole value of the estate of said Jesse L. Perry did not exceed \$1,500. But the plaintiff did not by any decree become entitled to the premises in suit, or acquire any muniment of title thereto or to said contract of purchase. That Jesse L. Perry executed the note described in the answer in consideration of a loan to said Perry of \$211.21, which was a part of the purchase money paid for said land and contract of purchase; and that at that time said Perry assigned said contract to defendant as security for said note. Defendant is still the owner of the note, no part of which has been paid. Plaintiff, in her motion for a new trial. attacks several of these findings, as not justified by the evidence; among them: (1) That the purchase was not made with community funds; (2) that the money due on the note was a part of the purchase money; and (8) that the contract was assigned.

The first is entirely immaterial. If the money was community property, the husband had the control and management of it. The point aimed at was not whether the money was or was not community property, but whether it was money advanced by defendant for the purchase of the land. Even though it had been so advanced, it was still community property in the hands of Perry.

But the second is also of no consequence. If one having a homestead borrows money to buy an outstanding title or claim of title against it, the lender does not thereby acquire a lien on the homestead. Nor can I see how there can be a resulting trust. No trust results in favor of one who lends money to another with which to buy land.

The real question in the case is raised under the third point. There was no conflict in the evidence. It is a question as to the efplication of the experiment of the experime

fect of the evidence. Does the statement in the note, "This note is secured by R. R. contract 10,353 for deed, given to Jesse L. Perry," together with the fact that the contract was then delivered by Perry to Ross, create a lien upon the land, or convey to Ross the contract right? Perry entered into the contract after he had filed his declaration of homestead. That which is covered by the exemption is the land, and not any particular claim of title to it. Sanders v. Russell, 86 Cal. 119, 24 Pac. 852; Quackenbush v. Reed (No. 15,302) 37 Pac. 755; Alexander v. Jackson, 92 Cal. 514, 28 Pac. 593. When Perry entered into that contract he added to his claim of title by mere possession his right under the contract, which-if the vendor was the legal owner of the land-was an equitable title. He could not convey this equitable title apart from the land, and he could not convey that except as provided in the homestead law. The assignment of the contract would amount to nothing, unless it carried the equitable title. It could not do that under the circumstances. It is true, ordinarily, one having a contract for the purchase of land may transfer his rights by merely assigning the contract. But here is a statutory inhibition. It cannot be doubted but that Perry, after he had become the purchaser with the right of possession, could have acquired a homestead right in the premises. If he had done so, he could not convey the land, except in the statutory mode. He could not evade the statute, and convey the land by assigning the contract of purchase. I cannot see that it makes any difference that he filed his declaration before he made the purchase. Even then he had some evidence of title. Having possession, he was owner as to all the world except the holder of the legal title, and he was entitled to the benefit of the homestead act. I have assumed, for the purpose of this opinion, that the words quoted from the note, with the delivery of the contract, would amount to an assignment of the contract, if the land had not been a homestead. I doubt if this would constitute an assignment, but, under the view I have taken, it is not necessary to determine that. I think the judgment and order should be reversed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed.

103 Cal. 668

MARTIN v. BOARD OF SUP'RS OF YOLO COUNTY. (No. 18,288.)

(Supreme Court of California. Sept. 1, 1894.)

Establishment of County High School — Action by Supervisors—Acquirement of Land.

Under Acts 1891, p. 58, § 3, requiring the board of supervisors, after the people have elected to establish a county high school, "to plet."

estimate the cost of purchasing a lot, erecting a building, and furnishing the same, together with the cost of conducting the same for the next 12 months," etc., and section 5, requiring the board to convey the building, when completed, to the board of education, who are to hold it in trust for the people, mandamus will not be granted to compel the supervisors to estimate the cost of erecting a building, etc., where the only step towards purchasing a lot has been the acceptance of an offer of a person to vouch that another shall convey to them a certain lot, as title to the lot must first be acquired.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Application for writ of mandamus by J. T. Martin against the board of supervisors of Yolo county. From a judgment granting the writ, defendant appeals. Reversed.

O. M. Mead, Dist. Atty., and Armstrong, Bruner & Platnauer, for appellant. R. L. Simpson, for respondent.

McFARLAND, J. This is an appeal from a judgment of the superior court in a proceeding of mandamus, requiring the appellant to estimate the cost of erecting a county high-school building, of furnishing the same, and of conducting the school for 12 months. Waiving all other questions arising out of the somewhat complicated legislation on the subject of high schools, we do not think that the acts which the judgment compels appellant to perform are acts which the law specially enjoins, because no lot of land had been acquired upon which to erect the building. The promise of Ross and Bush to vouch that the city of Woodland would furnish a lot for such school purposes provided the appellant would erect thereon a firstclass high school, the "property to revert to the owners when it ceases to be used for high-school purposes," is entirely too vague to be considered as furnishing any sort of title to the lot mentioned. It is quite clear from the statute' that the board of supervisors must own the lot upon which the building is erected, and must convey it, after the completion of the building, to the board of education, who must hold it in trust for the county, and the acquisition of the lot is the first thing to be done. It is needless to inquire whether the title must be in absolute fee simple, for here the board has no title at The fact that the board at one time inadvertently accepted the offer of Ross and Bush was not of such force as to necessarily drive it onward to the commission of other unwarranted acts. Moreover, what did it accept? A mere promise made by two persons, without consideration, that another

Act 1891, p. 58, \$ 3, requires the board of supervisors, after the people have elected to establish a county high school, "to estimate the cost of purchasing a suitable lot, erecting a building and furnishing the same, together with the cost of conducting the same for the next 12 months." Section 5 requires it, after the building is completed, to convey it to the board of education, "who shall hold the same in trust for the people."

person would, upon the happening of certain contingencies, furnish to the board a conditional estate in a certain piece of land. The judgment is reversed.

We concur: FITZGERALD, J.; DE HA-VEN, J.

4 Cal. Unrep. 767 PADEN v. GOLDBAUM et al. (No. 19,400.) (Supreme Court of California. Sept. 4, 1894.) EXECUTION AGAINST HUSBAND - LEVY ON WIFE'S

PROPERTY -- EVIDENCE OF TITLE -- PLEADINGS-FINDINGS.

1. In an action by a wife to recover for cattle alleged to be her separate property, but sold on execution by a judgment creditor of her husband, although the evidence shows that her husband returned the stock for taxation in his name, and had the use thereof for dairy purposes, and represented to the judgment creditor that he was owner thereof, if it appears that the stock was bought by the wife with

money earned before marriage, and its increase was reserved as her property, a finding that the stock was in fact hers will not be disturbed.

2. Where the sole issue is the truth of the allegations of the answer, a finding "that the allegations of the separate defense contained in the answer of the defendant G. are untrue" is anticipated.

sufficient.

3. A finding that the allegations in the answer are untrue is justified when the only al-legations therein are that the plaintiff, by her conduct, held out her husband as the owner of her separate stock seized on execution against him, and that, on faith thereof, credit was given the husband, and such allegations are contradicted by evidence showing that the creditor ordered the sheriff to seize the property in question, and gave a bond indemnifying such sheriff against the claim of the wife, and had constructive of what had be appropriate to the contraction of the wife, and had constructive of the contraction of the wife, and had constructive of the contraction of the wife. tive notice of such claim by a previously recorded statement of her separate property, includ-

ing the stock seized.

4. Where an answer contains two separate defenses, viz. a denial of the allegations of the complaint, and a justification of the acts complained of, a finding for the plaintiff on the first defense renders a failure to find on the second immeterial.

immaterial.

immaterial.

5. Code Civ. Proc. \$ 689, as amended by Laws 1891, p. 20, provides that, if one claiming property seized on execution serves on the sheriff a sworn claim setting out his title and his right to possession, the sheriff need not keep the property, unless the execution plaintiff gives a bond of indemnity to him against such claim. Held, that proof of the service on the sheriff of such claim is admissible against the sheriff in an action by a claimant for the wrongful seizure of property, though it is not pleaded in the complaint, since the statute is for the benefit of the sheriff, and is matter of defense.

6. Where a husband pastures his wife's cat-

6. Where a husband pastures his wife's cattle in return for their use for dairy purposes, she reserving the increase, such use by the husband, accompanied by a representation on his part that they were his, cannot, in the absence of any such representation on her part, or any act tending to mislead one holding a judgment against her husband as to the ownership of the stock, estop the wife from setting up ownership to defeat an execution levied on the stock un-

der such judgment.

7. An inventory of a wife's separate property, filed with the recorder, is admissible in evidence, against a judgment creditor of her husband, in an action to recover her separate property seized by him on execution, though the husband's debt to him was contracted before such filing, if the levy of execution was made subsequent thereto.

8. The account books of a judgment creditor are original evidence to establish claims against the debtor, and should be introduced as part of the case, and it is proper to exclude them when offered in rebuttal.

9. Evidence as to indorsements on a sheriff's writ of execution, whereby part of the property seized thereunder was surrendered as exempt, was properly excluded on the ground that

its ownership was not in issue.

10. The testimony of a witness in regard to a conversation with the judgment creditor prior

a conversation with the judgment creditor prior to the execution, wherein he offered to take a new note from the husband if the wife would sign it, was admissible to show that the creditor had knowledge that the property levied on was the property of the wife.

11. Where a witness testifies that he has been in the dairy business for seven years, and is familiar with the value of cattle for that business, his testimony as to the value of the cattle in suit is admissible, although he has not seen them for a year previous to the execution.

seen them for a year previous to the execution.

12. Code Civ. Proc. § 437, provides that "where the complaint is not verified a general denial is sufficient." Held, that where an unverified complaint alleges the value of property converted, and the answer is a general denial, the relation is not in increase. the value is put in issue.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Flora J. Paden against Simon Goldbaum and B. F. Hubbert for the conversion of live stock. Judgment for plaintiff, and defendants appeal. Affirmed.

Aitken & Smith and Hunsaker, Goodrich & McCutcheon, for appellants. Withington & Pearson and J. P. Pearson, for respondent.

HAYNES, C. In this action the plaintiff had judgment, and defendants appeal therefrom, and from an order denying a new trial. The complaint alleged that on January 13, 1893, the plaintiff, the wife of Alfred Paden, was the owner of certain milch cows and other cattle, and of certain horses and other personal property; that defendants, knowing that it was her separate property, took possession, and converted it to their own use, under the false pretenses that it was the property of her husband, to her damage in the sum of \$3,000. Hubbert justified, alleging that he was a constable, and took the property under a writ of execution issued upon a judgment in favor of his codefendant against Alfred Paden, whom he alleged was the owner. Goldbaum denied all the allegations of the complaint, and alleged the recovering of the judgment; that he was a merchant; that Alfred Paden conducted a dairy, milk, and stock ranch, and used said stock as the owner; that during said time he extended credit to Alfred Paden, and that the plaintiff, by her acts and conduct, represented the fact to be that her husband was the owner, and permitted him to represent himself to be the owner, of the property in question; that the conduct of both was such as to imply and cause defendant to believe that Alfred Paden was the owner; that he gave credit because thereof; that he had no knowledge of any claim of ownership by plaintiff, and in giving credit relied upon said acts, conduct, representations, and declarations of the plaintiff; and that he would be injured by allowing the truth thereof to be disproved by plaintiff. Findings were for the plaintiff, upon which judgment was entered against both defendants for the sum of \$1,160.

The finding that plaintiff was the owner of the property is attacked. The evidence tends to show that the husband was the owner of about 200 acres of land; that his wife was the owner of the stock; that under an arrangement between them the husband had the use of the stock for conducting the milk business, the wife to have the increase of the stock. There seems to be no doubt that the husband used and spoke of the property as his own, and sold and bought and traded portions of it with the consent of his wife, and returned the property for taxation in his own name. It does not appear, however, that she ever spoke of the property as his, while it does appear that there were rumors in the neighborhood that the stock belonged to her. That her money earned by her before her marriage was invested in stock, and that she was in fact the owner of the stock in question, is, I think, justified by the weight of the evidence; but, if it were doubtful, the conflict is such as to prevent the appellate court from disturbing the finding.

The plaintiff offered in evidence an inventory of property claimed therein to be her separate property, dated April 20, 1891, and filed with the recorder May 7, 1891, which included part of the property in question; the remainder, as plaintiff claimed, being the increase of the stock therein mentioned, or other stock replacing that which had been sold or exchanged. This inventory was received in evidence over defendants' objection. Defendants contend that the statute makes such inventory notice and prima facie evidence of the title of the wife, but only from the date of filing, while the indebtedness of the husband to Goldbaum was contracted in 1888, and that it was therefore inadmissible to prove notice and title at the time the debt was created. Very true; but it was admissible to prove notice of her claim at the time of the levy of the execution, to the extent, at least, that the stock therein described was seized under the execution. If defendant Goldbaum's plea of estoppel had been sustained, it might be that the evidence would not benefit the plaintiff, but that did not affect its admissibility.

As to defendant Goldbaum's answer, the court found "that the allegations of the separate defense contained in the answer of defendant Simon Goldbaum are untrue." This finding is said to be insufficient, and that it is not supported by the evidence. As to the sufficiency of this finding, counsel cite Goodnow v. Griswold, 68 Cal. 603, 9 Pac. 837. In that case the court found specifically several facts, and then made the following

finding: "The court finds that the several allegations of said complaint not in conflict with the foregoing findings are true." But what allegations were or were not in conflict with the findings made were not specified by the trial court, and that question the appellate court held it was not called upon to determine. The sufficiency of the finding here made is sustained by Johnson v. Klein, 70 Cal. 186, 11 Pac. 606; Moore v. Waterworks, 68 Cal. 146, 8 Pac. 816; Williams v. Hall, 79 Cal. 606, 21 Pac. 965. The new matter in the answer was deemed denied, and, as no new matter was or could be pleaded thereto, the sole issue was as to the truth of the averments of the answer, and that was determined by the finding. Whether that finding is justified by the evidence will be considered hereafter.

It is also assigned for error that the court failed to find upon defendant Hubbert's answer. This answer contained two defenses; the first consisting wholly of denials of the allegations of plaintiff's complaint, and the second a justification under the writ of execution. The findings cover the issues raised by the first defense, and, those issues having been found for the plaintiff, a finding that defendant Hubbert had a writ, and took the property under it, would not have affected the conclusion of law that plaintiff was entitled to judgment. A finding thereon was therefore immaterial, unless counsel are correct in the construction given by them to section 689, Code Civ. Proc., as amended in 1891 (Laws 1891, p. 20), a question we shall now consider. Section 689, Code Civ. Proc., prior to the amendment, provided for a sheriff's jury to try the claim of a third person to property levied upon by the officer. section, as amended, is as follows: If the property levied on be claimed by a third person as his property by a written claim verified by the oath of said claimant, setting out his title thereto, his right to the possession thereof, and stating the grounds of such title, and served upon the sheriff, the sheriff is not bound to keep the property unless the plaintiff, or the person in whose favor the writ of execution runs, on demand, indemnify the sheriff against such claim by an undertaking by at least two good and sufficient sureties; and no claim to such property is valid against the sheriff, or shall be received, or be notice of any rights, unless made as above provided." Upon the trial, plaintiff was permitted, over the objection of defendants, to prove the service of a written claim-in all respects conforming to the above provision-upon the constable prior to the sale of the property, the objection being made upon the specific ground that the complaint did not allege service of such claim. The argument is that under this statute there can be no recovery against the officer unless such claim is served; that it cannot be given in evidence unless it is pleaded; and that, therefore, the justification set up in the answer is a good defense, notwithstanding plaintiff's ownership, and therefore a finding of the facts constituting a justification would sustain a judgment in favor of the officer, and was material, and should have been made.

The first question here presented is one of pleading. In statutory actions a compliance with all the provisions conferring the right must be alleged. People v. Jackson, 24 Cal. 630. This, however, is not a statutory action, but one which existed at common law. The former statute, as well as the amendment, was intended for the protection of the officer, and is therefore matter of defense. It is an exception to a general right which need not be alleged in the complaint. 1 Chit. Pl. *p. 247. If the plaintiff had omitted to make the verified claim required by the amendment, the omission, if it could operate as a protection to the officer in this form of action, should in such case be alleged in the answer. The making or omitting to make the verified claim does not affect the ownership of the plaintiff, but, if not made, excepts the officer from liability in certain actions, and is matter of defense. "Wherever there is a circumstance, the omission of which is to defeat the plaintiff's right of action, prima facie well founded, whether called by the name of a 'proviso' or a 'condition subsequent,' it must, in its nature, be a matter of defense, and ought to be shown in pleading by the opposite party." 1 Chit. Pl. *p. 246. The case of Himmelmann v. Danos, 35 Cal. 447, cited by appellants, is not applicable here. That was an action to enforce a lien upon a lot for macadamizing a street, and the complaint did not allege the proceeding required by the statute. The case of Barry v. McGrade, 14 Minn. 163 (Gil. 126), cited by appellants, sustains their contention, although the question of pleading is not discussed. The statute there considered was similar to ours, and it was held that the plaintiff must prove the service of the affidavit of claim in order to maintain the action. If it is necessary to be proved by the plaintiff in chief, so as to prevent a nonsuit, it must be alleged in the complaint. We cannot, however, assent to the reasoning or the conclusion of the court in that case. In the absence of the statute, the right of the plaintiff depends solely upon ownership; and it must be apparent that if the plaintiff, being in fact the owner, cannot recover, it must be because the statute exempts the defendant from liability, and not because it controverts the fact of ownership. It could no more be necessary for the plaintiff to anticipate a claim on the part of the officer that he was not liable because a verifled claim was not served than to anticipate the plea of estoppel by Goldbaum by alleging facts inconsistent with that defense. It is entirely analogous to pleading the statute of frauds or the statute of limitations, which must be taken by answer, unless the defense

appears on the face of the complaint when it may be reached by demurrer. If the verified claim had not been offered in evidence by the plaintiff, the omission would not have availed the defendant Hubbert, since he had not alleged that a verified claim was not served. The result was that the plaintiff disproved a defense not made,-a circumstance which could not prejudice the defendant. Whether the failure of a plaintiff to serve such verified claim would be a defense to an action for damages for the conversion of the property, or only to an action in claim and delivery to recover possession of the property from the officer (a question discussed by counsel), need not be considered here, in view of the conclusion reached upon the question of pleading.

It is also contended that the second finding is not justified by the evidence, in that there is no evidence that defendant Goldbaum took possession of the property, or directed or aided any one to take possession, or that he disposed of it. The officer took the property under a written direction from Goldbaum's attorney, of which the following is a copy: "You are instructed to levy upon all the horned and neat cattle, horses, and other personal property (excepting household furniture) of the defendant, whether said cattle and property be at defendant's place of business, at Oceanside, or at his farm, at San Luis Rey; and you are instructed to have all milch cows regularly and properly milked while in your possession, prior to sale." It does not appear that there was any other property of that description at either of the places mentioned than that levied upon, and all of it, Goldbaum testified, he believed to be owned by Mr. Paden, and the attorney who gave the instruction testified, in substance, that, before he gave the instruction, Mr. Paden told him it was his property; and hence there is no question that the instruction was intended to cover the property in controversy, and required the officer to levy upon it. Not only so, but the constable required from Goldbaum a bond of indemnity, and this was given. Independently of the rumor which Goldbaum says he heard, about the time he commenced his suit against Mr. Paden, that this property belonged to the wife, he had also at least constructive notice of her recorded claim, and following this came the demand from the officer for a bond of indemni-Whether this demand was accompanied by notice of plaintiff's verified claim does not clearly appear. But it was after the seizure, and before the sale. An indemnity bond had been previously given, but whether before or after the seizure does not appear. The additional bond was given, and operated as a ratification of the taking, and was in effect a request, if not a direction, to sell notwithstanding the plaintiff's claim, since, under section 689, Code Civ. Proc., as amended in 1891, the officer "is not bound to keep the property unless the plaintiff of the pla

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demand, indemnify the sheriff against such claim by an undertaking," etc. Whether, upon receiving the bond, the officer is bound to keep possession and sell, it is not necessary to consider. The finding in question is justified by the evidence.

It is also urged by appellants that, if the finding against defendant Goldbaum's plea of estoppel is sufficient, such finding is not justified by the evidence. Mrs. Paden testified that the arrangement between herself and husband was that he pastured the stock for the use of the cattle, and she had the increase. This contract she had a right to make, and the use of the stock under it by the husband could not of itself create an estoppel against his wife. The objection here urged necessarily concedes that she is the owner; and no one else, the arrangement itself being lawful, reasonable, and proper, could, by word or act, create an estoppel against her. So far as the estoppel pleaded relates to the time when the indebtedness which was finally merged in the judgment was created, there was no evidence which tended to support the plea. Mr. Goldbaum testified that at the time credit was given "he (Paden) was running a dairy there, and had cattle and land, and I thought he was good. He was running it in his own name. Mrs. Paden was living with him at the time as his wife. She got some of those groceries from me. • • Mrs. Paden never notified me that she owned any of the cows during the running of this bill, nor that she owned this business, or owned any of the stock." He did not testify to any act or statement done or made by Mrs. Paden which misled him, or that she was at any time called upon to assert her ownership, and was silent, or that she intentionally or deliberately led him to believe that her husband was the owner of the stock, or to act on such belief. Section 1962, subd. 3, Code Civ. Proc., provides: "Whenever a party has, by his own declaration, act or omission, intentionally or deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act or omission, be permitted to falsify it." We find no evidence upon which a finding in favor of the defendant upon his plea of estoppel could be sustained, whether it relates to the period when credit was given, or the time when the execution was levied. That the husband generally spoke of the property as his is doubtless true. but it does not appear that he ever spoke so of it when the question of ownership was discussed, or otherwise than casually in connection with the dairy business he was conducting. But if he had asserted his ownership when that was a material question, unless it was with the knowledge of the wife, and the defendant was misled by her silence when she was called upon to assert her ownership, her title to the property would not be affected. There would be little protection given the wife in respect to her separate property, if, upon the facts of this case, it could be taken to satisfy the husband's debt. There is nothing in Barnhart v. Fulkerth, 90 Cal. 159, 27 Pac. 71, inconsistent with our conclusion, nor is it necessary to comment upon the cases cited from other states, since if they laid down a different rule from that prescribed by the Code, they could not be authority here.

Defendants called a witness in rebuttal, and asked him whether he had any conversation with Mr. Paden since January 11th, about a visit paid to the Padens that day? The court, of its own motion, interposed, saying, "We cannot have this sort of testimony for the purpose of convicting Mr. Paden upon an immaterial point." Counsel thereupon offered to prove by the witness Hayes and by defendant Hubbert that, a few days after the 11th day of January, Mr. Paden said to the witnesses named that he (the counsel) "had been at their house, and as he expressed it, was doing some detective work, and he had acknowledged to me at the time the cattle were his." Counsel for plaintiff did not object to the offer, but the court ruled that it was not competent evidence, saying to counsel for the plaintiff, "If you are willing that it should go in, I do not know that I ought to say it should not, but it would take another day to finish the case, and I will not admit The conversation referred to was given in the testimony of counsel, during the examination of defendants' witnesses in chief, to the effect that Mr. Paden, in a conversation with the witness before the execution was issued,—the plaintiff being present,—said he was running the dairy; that witness asked him whose cattle they were, and "he said they were his cattle." In rebuttal, Mr. Paden gave a different account of the conversation. Counsel, at the time of this conversation, was at Paden's house on other business. Mrs. Paden was at work making butter, and took no part in the conversation. Nothing was said in regard to Goldbaum's claim, or of any effort to collect it. The inquiry was apparently without motive, and did not call for any remark by Mrs. Paden. That she should remain silent was natural. Under the circumstances, she was not affected by the statement of her husband, conceding it to have been as testified to by defendants' counsel; and, if so, the proposed evidence was immaterial, unless for the purpose of impeaching Mr. Paden's testimony in chief, so far as it tended to prove Mrs. Paden's ownership, by showing that he had made statements inconsistent with his testimony. The evidence being immaterial for any other purpose, all testimony tending to show such contradictory statements should have been given by the defendants in chief, and no part of it could be reserved to rebut plaintiff's rebuttal. The defendant can only rebut new matter brought out in plaintiff's rebuttal, unless the court, in its discretion, permits it.

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Under these circumstances the exception will | converted to be of the value of \$2,000. If not avail appellants.

We think the court did not err in excluding Goldbaum's account books, offered by defendants in rebuttal. They were original evidence, and should have been introduced by defendants as part of their case. But, as defendants were allowed, without objection. to give oral evidence of the accounts, a liberal ruling would have permitted their introduction after plaintiff, in rebuttal, disputed the oral testimony. Defendants were not prejudiced, however, as the object of the evidence was to show that credit was given for merchandise because of Mr. Paden's supposed ownership,-a defense that was not sustained by the evidence.

The evidence offered to be shown by Edward J. Martin was properly excluded. What the attorney who drew up the declaration of separate property for Mrs. Paden said about it in her absence was clearly inadmissible, while the fact that it was necessary to go to Mrs. Paden before he could get title to the property would not have benefited defendants.

The indorsements on the constable's return, showing that certain of the property seized was claimed by Mr.:Paden to be exempt from execution, and was surrendered to him, was properly excluded. That property was not in litigation, and it was immaterial to whom it belonged.

The testimony of Joseph Jones, a witness for plaintiff, to a conversation with defendant Goldbaum in October preceding the levy of the execution, was properly received. We have held that the instruction to the constable required him to levy upon the property here in question, so that the objection that Goldbaum had nothing to do with the levy is not tenable, while the answer of the witness shows that at that date Goldbaum knew that Mrs. Paden owned or claimed to own the property, and had offered to Paden to take a new note for half of the amount if Mrs. Paden would also sign it. This also disposes of the objection to a similar question put to William H. Libby.

The witness Olds testified that he had beer, in the dairy business for the last seven years, and was familiar with the values of cattle for dairy purposes; that he had seen these cattle two or three times, the last time being about one year before the trial. This was sufficient to qualify him to testify as to value. It is true he did not see the cattle at the time they were taken, and could not know their condition at that time, but if their condition had changed it was competent for defendants to have shown that fact. His testimony was not so satisfactory, for that reason, nor perhaps entitled to as much weight, as if he had seen them at the time of their conversion, but that was not sufficient to require its exclusion. But it was further objected that there was no issue as to the value. The complaint alleged the property

no issue was taken upon this allegation, the defendants are not injured by the finding of damages at \$1,186. But the complaint was not verified, and each of the defendants denied "each and every, and all and singular. the allegations of the complaint;" and this put in issue the value of the property converted, under section 437, Code Civ. Proc., which provides, "If the complaint be not verified a general denial is sufficient," and puts in issue every material allegation of the complaint.

Appellants, on their motion for new trial, specified 58 errors of law occurring on the We have noticed only such of them as counsel have mentioned in their brief; but we have carefully read the entire record, and find no error justifying a reversal, and advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

102 Cal. 483 FOSTER v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (No. 15,501.)

(Supreme Court of California. May 22, 1894.) LIQUOR LICENSES - INSURANCE BY CITY-REGULA-TION BY ORDINANCE-CONSTITUTIONAL LAW.

1. Const. 1879, art. 11, § 11, authorizes any city to make and enforce all such local, police, sanitary, or other regulations as are not in conflict with the general law. Act March 23, 1878, § 4, provides for certain requisites before licenses to sell liquor shall be issued in the city of San Francisco. Held, that the city, by ordinance, could require additional requisites in the persons to whom such licenses were to be the persons to whom such licenses were to be

the persons to whom such licenses were to be issued.

2. An ordinance providing that licenses to sell liquor shall not be granted to persons who have employed females as waitresses is not unconstitutional as being an ex post facto law, since it is not a criminal law.

3. San Francisco City Ordinance No. 1589, as amended by No. 2637, which prohibits the issuance of liquor licenses to any person who has carried on or is carrying on his business in a certain manner, applies to those who carried on their business in such manner before the adoptheir business in such manner before the adoption of the ordinance.

4. Such an ordinance is not invalid in that it discriminates between different persons.

5. An ordinance of the city of San Francisco regulating the issuance of liquor licenses,

which applies to the entire city and county, is not special legislation.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Petition for writ of mandamus by Edgar M. Foster against the board of police commissioners of the city and county of San Francisco and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Carroll Cook, for appellant. H. T. Creswell, City and Co. Atty., for respondents,

HAYNES, C. Appellant petitioned the superior court for a writ of mandate to compel the board of police commissioners to consent to the issuance to him of a license as a retail liquor dealer. An alternative writ was granted, and upon the return thereof the defendants demurred to the petition, and this appeal is from the judgment entered thereon, dismissing the writ.

Appellant was the proprietor of the Bella Union Theater, and in connection therewith had a saloon, in which, prior to May 1, 1893, females were employed to wait upon those who patronized his place of business. license for the theater was from April 15 to September 15, 1893. His license for the sale of liquor expired June 1, 1893. On May 1st he closed his place of business for repairs. On June 12, 1893, he applied to the license collector for a retail liquor dealer's license, and that officer refused to issue it, and gave as the ground of such refusal that the board of police commissioners had, in writing, directed him not to issue such license to appellant, for the reason that appellant, prior to that time, had employed and permitted females to wait upon customers therein. The petition further alleged that he applied to said board of police commissioners for such consent, assuring them that "he did not intend to, and would not, if such license was granted to him as requested, either procure or suffer any females to wait on or attend in any manner any person in his place of business," and also tendered a recommendation, in writing, of 12 citizens owning real property in the block in which his said business was to be carried on, that such license be granted. This application was denied upon the ground that appellant had prior thereto employed and permitted females to wait upon customers in his said place of business; and the sole question to be determined upon this appeal is the validity of an ordinance approved July 28, 1880, known as "Order No. 1589," as amended May 22, 1893, by Order No. 2637. The material part of the amended section, so far as this appeal is concerned, is as follows: "Provided, however, as a police measure for the suppression of public vice, immorality and crime, that no license shall be granted under this section, upon the recommendation of citizens or other wise, to any person who has been convicted of felony, or to any person who has carried on, is carrying on, or is about to carry on the business of selling or furnishing spirituous, malt or fermented liquors or wines in any dance cellar or dance hall, or in any place where females are suffered or procured to wait or attend in any manner on any person, and wherein also any musical, theatrical or other public exhibition or performance is exhibited or performed, or in connection with any resort for lewd, immoral or unlawful purposes." Appellant contends that this ordinance is void, and bases this contention upon several grounds.

That the act of March 23, 1878, is a part of the consolidation act or charter of the city of San Francisco, that this act was not repealed by the constitution of 1879, and that the amended ordinance is in conflict therewith.

The second subdivision of section 4 of that act is as follows: "Those making sales of ess than \$15,000 per quarter shall pay a license of twenty dollars per quarter; provided, that on and after January 1, 1879, no license as a retail liquor dealer shall be issued by the collector of license unless the person desiring the same shall have obtained the written consent of a majority of the board of police commissioners of the city and county of San Francisco to carry on or conduct said business; but in case of refusal of such consent, upon application, said board of police commissioners shall grant the same upon the written recommendation of not less than twelve citizens of San Francisco owning real estate in the block or square in which said business of retail liquor dealer is to be carried on, or in the four blocks or squares bounding the same." St. 1877-78, p. 444. It may be conceded that the constitution of 1879 did not repeal the act of 1878, but the act in question was purely local, applicable only to the city and county of San Francisco, and was upon a subject included within section 11 of article 11 of the constitution, which provides as follows: county, city, town or township may make and enforce within its limits all such local, police, sanitary or other regulations as are not in conflict with general laws." power to legislate upon such subjects, thus given to the city, necessarily includes the power to amend an existing regulation upon the same subject, and this authority expressly given in the constitution obviates all necessity of any authority being given upon the same subject in the charter. While this case presents some questions not heretofore considered by this court, the power of the board of supervisors to amend the former ordinance has been considered and decided. See Ex parte Christensen, 85 Cal. 208, 24 Pac. 747; Crowley v. Christensen, 137 U. S. 86, 11 Sup. Ct. 13; Ex parte Hayes, 98 Cal. 556, 33 Pac. 337. And in the case last cited it was held that the ordinance here in question is a valid exercise of the power conferred by that provision of the constitution hereinbefore quoted.

It is further insisted by appellant that the amended ordinance in question, so far, at least, as it affects this case, is void (1) because it is ex post facto, and imposes a penalty and consequence for an act that was done prior to the passage of the order; (2) because the ordinance is not equal and unform in its operation; and (3) that it is special legislation.



The ordinance in question is not an ex post facto law, within the meaning of the constitution of this state or of the United States. In Watson v. Mercer, 8 Pet. 110, it was said: "The phrase 'ex post facto laws," is not applicable to civil laws, but to penal and criminal laws, which punish a party for acts antecedently done, which were not punishable at all, or not punishable to the extent or in the manner prescribed." In Ogden v. Saunders, 12 Wheat. 267, in speaking of bills of attainder, ex post facto laws, and laws impairing the obligation of contracts, it was said: "The first two of these prohibitions apply to laws of a criminal, and the last to laws of a civil, character." And such is the uniform construction given by all the authorities. The ordinance in question punishes no past act committed, done, or suffered to be done by appellant. It simply furnishes a standard, applicable to all persons, by which their fitness to conduct a business in itself dangerous to the morals and good order of the city shall be measured. As was said by Field, J., in Crowley v. Christensen, 137 U. S. 91, 11 Sup. Ct. 13: "The statistics of every state show a greater amount of crime and misery attributable to the use of ardent spirits obtained at these retail liquor saloons than to any other source. The sale of such liquors has therefore been, at all times, by the courts of every state, considered as the proper subject of legislative regulation. There is no inherent right in a citizen thus to sell intoxicating liquors by retail." See, also, Cooley, Const. Lim. (6th Ed.) p. 342. that case, after discussing other questions, the court further said: "We, however, find in the return a statement which would fully justify the action of the commissioners. It is averred that in the conduct of the liquor business the petitioner was assisted by his wife, and that she was twice arrested for larcenies committed from persons visiting his saloon, and in one case convicted of the offense and sentenced to be imprisoned, and in the other held to answer. These larcenies alone were a sufficient indication of the character of the place in which the business was conducted for the exercise of the discretion of the police commissioners in refusing a further license to the petitioner." If the past offenses of Christensen's wife were sufficient to justify a refusal to grant a license to him, certainly the past conduct of appellant, in employing females, though not then prohibited by law, is quite as conclusive evidence of his unfitness to conduct a saloon. His protestation that he did not intend to and would not in the future procure or permit females to wait upon his customers, does not aid him. A man who has in the past shown himself willing to debauch the morals of the community to increase his business would not in the future refrain from any line of conduct, in the prosecution of his business, which would not bring upon himself, personally, the penalty of the law, whatever of evil it might bring to others. The ordinance was therefore not only constitutional, but wise, and should be scrupulously observed by those intrusted with its execution.

But appellant contends that the ordinance, properly construed, applies only to those who have, since its adoption, violated its provis-But this construction cannot be sustained. The language is too explicit to admit it. Though not an ex post facto law, it is retrospective in so far as it determines from the past conduct of the party his fitness for the proposed business. Felons are also excluded from obtaining such license, not as an additional punishment, but because the conviction of a felony is evidence of the unfitness of such persons, as a class. Nor can we perceive why such evidence should be more conclusive of unfitness, were the act done after the passage of the ordinance than if done before.

It is also insisted that the ordinance under consideration is objectionable for want of uniformity, and that it discriminates between different persons. That it affects all persons of certain classes without discrimination, and as to them acts uniformly, cannot be questioned. The question, however, is as to the power to discriminate at all. The power thus to discriminate is well settled by the authorities hereinbefore cited, and by many others. This power is exercised in relation to many other occupations besides that of selling liquor, and, when promotive of the best interests of the people, is always sustained. The occupation of engineers and pilots on vessels, and of druggists, physicians, lawyers, and others, are confined by law to persons having certain qualifications, and who are licensed therefor, upon the ground that the protection of the life, health, and welfare of the people at large require those who pursue these avocations to have those qualifications which will prevent, as far as possible, the evils which would result from ignorance and incompetency. Counsel, quoting from Miller v. Kister, 68 Cal. 145, 8 Pac. 813, say: "The legislature cannot discriminate or grant an indulgence to one which is not accorded to another." But the legislature does discriminate, and in many cases properly, while in those cases where the public is affected only by depriving an individual of a right common to all others, the exercise of which is not attended with evil consequences, the above quotation applies.

Nor is it special legislation. If it had been enacted by the legislature, being applicable only to the city and county of San Francisco, it would have been special legislation, because restricted to a portion of the state; but being enacted by the city and county, under the authority of the constitution, and not restricted to a part of the city and county, it is, as to the city and county, a general law.

As to the supposed conflict with the laws of the state, that question is settled by Ex parte Christensen and Ex parte Hayes, supra.

Many other points are made by counsel for appellant, all of which have been considered, but, as the points decided are necessarily conclusive of the case, they need not be noticed here. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

104 Cal. 85

BELL v. PECK et al. (No. 18,266.)

(Supreme Court of California. Sept. 8, 1894.)
Action on Constable's Bond—Joinder of Parties and Actions—Opening Default—Discretion of Court—Harmless Error.

1. In an action on a constable's bond, on account of the illegal seizure of plaintiff's property by the principal in the bond, there is no misjoinder of parties on the ground that the sureties, whose obligation is one of contract, are joined with the principal, sued as a trespasser.

2. An action against a constable for injury to property, in which the sureties on his bond are joined, does not improperly join two causes

of action.

3. On a showing that, pending suit, defendants' attorneys had moved from the county, and had no notice of a transfer of the case to another department of the superior court, though such notice and notice of trial were published in a newspaper of general circulation, and that they were not present at the trial, and did not know of the judgment until after its entry, an order refusing to open up the judgment was not an abuse of the discretion vested in the court in such cases by Code Civ. Proc. § 473.

4. A judgment rendered in the alternative,

4. A judgment rendered in the alternative, that defendant must pay for the property converted, or return the same, will not be disturbed at the instance of the defendant, for whose ben-

efit the alternative was inserted.

Department 2. Appeal from superior court, Fresno county; J. R. Webb, Judge.

Action by T. A. Bell against P. F. Peck, constable, as principal, and Victor and Noble, sureties, for breach of condition in the constable's bond. Judgment for plaintiff, and defendants appeal. Affirmed.

Stanton L. Carter and Newman Jones, for appellants. E. D. Edwards, for respondent.

FITZGERALD, J. This action is brought against the defendant Peck, as principal, and the defendants Victor and Noble, as sureties on Peck's official bond as constable, to recover damages for breach of the condition thereof "that he and said Peck would well, truly, and faithfully perform the duties of his said office during his said term." The breach of official duty complained of is that Peck, in his official capacity as constable, under and by virtue of an "attachment or execution" issued against the property of other parties, illegally seized and converted the property of plaintiff described in the complaint. The complaint was demurred to generally upon the ground that it did not state facts sufficient to constitute a cause of action,

and specially upon the following, among other grounds not necessary to be stated: (1) That the defendants Victor and Noble, sued for breach of contract, were improperly joined with the defendant Peck, sued as a trespasser; (2) that several causes of action were improperly joined, to wit, a cause of action for injuries to property and a cause of action founded on contract. The demurrer was properly overruled upon these grounds, on the authority of Van Pelt v. Littler, 14 Cal. 194; Black v. Clasby, 97 Cal. 482, 32 Pac. 564; and Sam Yuen v. McMann, 99 Cal. 497, 34 Pac. 80. The case of Ghiradelli v. Bourland, 32 Cal. 585, cited by appellants as authority to the contrary, is not in point. As to the other grounds of demurrer, it is sufficient to say they are equally untenable. Upon the overruling of the demurrer the defendants answered, and thereupon, without notice to the defendants or their attorney, the case was assigned or transferred by the judges of the superior court of Fresno county from department 2, where it had laid without being set for trial for more than two years, to department 3 of that court, and by them ordered to be placed on the trial calendar of that department. Notice was thereafter published in two newspapers of general circulation in that county that on April 4, 1893, this calendar would be called, and the cases thereon set for trial; and on that day it was called, and this case set for trial in that department for June 22d following. Afterwards this calendar was published in the same newspapers, and on the day stated the case was called for trial, and, neither of the defendants or their attorney appearing, the court proceeded with the trial of the cause, and, after hearing the evidence offered by plaintiff, gave judgment in his favor for the return of the property described in the complaint, or the value thereof, with interest and costs in case delivery could not be had. Afterwards, on the 31st day of July, following, the defendants moved the court to vacate and set aside the judgment, on the ground that it was given against them through the "inadvertence, surprise, and excusable neglect" of themselves and their attorney. The application was made upon notice and affidavits, including one of merits, duly served, and the pleadings and record in the case, and was resisted by two opposing affidavits, the whole of one of them and the greater part of the other being in opposition to defendants' affidavit of merits, and to that extent are, upon well-settled authority, improper to be considered in a proceeding of this character. The affidavits upon which the motion was made show, in addition to what has been stated, that defendants' attorney moved from Fresno county some time in November, 1892, and that he "has resided without and been absent from said county during the whole of the time, except about two weeks in May, 1893;" that neither he nor the defendants, or either of

them, were present on April 4th, when the trial calendar was called in department 3, and this case ordered to be set for trial on June 22d, nor did they, or either of them, have any notice whatever thereof, nor were they, or either of them, present on the day the case was called for trial and tried, nor did they, or either of them, have any notice thereof, or of the judgment rendered therein, until after the date of its entry. It further appears from the only material part of the counter affidavits filed in this proceeding that the defendant Peck, during all of the time referred to, commencing January, 1893, was an under or deputy sheriff of that county, and as such was in attendance and waiting upon the different departments of the superior court thereof.

The application for relief is based upon the provisions of section 473 of the Code of Civil Procedure, and is addressed to the discretion of the court. Hence it follows that, unless it manifestly appears from the showing made that the court below abused the sound legal discretion thus vested in it by the statute, its action in denying the defendants' motion to vacate and set aside the judgment is not the subject of review here.

It is claimed by appellants that the court below abused its discretion in making the order appealed from, because they had no notice of the assignment of the case to department 3, nor of the regular calling of the trial calendar, and the setting of the case for trial in that department. We have been referred to no rule of that court providing for any such notice, and certainly none is required to be given by the statute. Dusy v. Prudom, 95 Cal. 646, 30 Pac. 798; Eltzroth v. Ryan, 91 Cal. 587, 27 Pac. 932. It may be, however, that where a party to an action makes application to a department of the superior court where the same is pending for an order transferring the case from that department to another department of the same court, the rule would be that notice of such application should be duly served on the opposite party. But such is not the rule where the judges of the superior court, for the more convenient dispatch of business, as was the case here, or for any other reason they may deem necessary, make an order assigning or transferring cases for trial to any one or more of the several depart-The case of Cottrill v. ments of such court. Cottrill, 83 Cal. 457, 23 Pac. 531, cited by appellants, is not in conflict with these views. In that case it was held that "to transfer a case from one department to another, and try it on the same day, without any notice whatever to the opposite party, is a very abrupt proceeding, from which, in a divorce case at least, it is not improper to relieve the absent party." That was a divorce case, and in such cases the rule is well settled that courts should be very liberal in relieving a party from a judgment obtained against him under such circumstances, for the reason that

the public, as well as the parties to the action, has an interest in the result thereof. The nature of that action, and the unseemly haste with which the case, after its transfer, was rushed to trial, in the absence and without the knowledge of the defendant or his attorneys, were the grounds upon which it was held by this court that the defendant was properly relieved from the judgment obtained against him.

Upon the facts disclosed by the affidavits in this proceeding we cannot say that the court below abused its discretion in denying appellants' motion to vacate and set aside the judgment.

It is further claimed by appellants that the judgment is erroneous because rendered in the alternative. Conceding, for the purpose of this case, that the claim is well founded, we do not think that appellants are in a position to complain, for they are not only not injured by the judgment as rendered, but it is decidedly to their advantage, for they are accorded by it the privilege of avoiding the payment of the judgment by returning the property.

The remaining errors complained of are not necessary to be considered, as they are either untenable or immaterial. Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; McFAR-LAND, J.

BAINES v. BABCOCK et al. (WEST COAST LUMBER CO. et al., Interveners). (No. 19,352.)

(Supreme Court of California. Sept. 4, 1894.)

CORPOBATION — ACTION AGAINST STOCKHOLDER— UNPAID SUBSCRIPTIONS — CREDITORS' BILL:—IN-TERVENTION BY OTHER CREDITORS—JOINDER OF PARTIES.

- 1. In an action by a judgment creditor of a corporation for an unpaid subscription of stock, a statement in the complaint that the action is brought on behalf of plaintiff "and all other creditors who may come in and contribute to the costs and expenses" will not entitle a simple contract creditor to be made a party thereto, as he is not entitled to the relief asked for.
- for.

 2. An order appended to a judgment in a suit by a judgment creditor of a corporation against a stockholder for an unpaid subscription of stock, that the "cause be retained, and that any other judgment creditor * * * who shall make a proper showing * * be allowed to become a party," refers only to persons who were judgment creditors at the time the order was made.
- 3. Where a judgment creditor of a corporation improperly intervenes in an action by another judgment creditor against a stockholder of the corporation for an unpaid subscription of atock, and his complaint states a good cause of action against the stockholder, the allegations as to intervention will be regarded as redundant, and the complaint treated as an independent and original one.

4. Judgment creditors of a corporation, holding separate judgments, may join in a suit against a stockholder for an unpaid subscription to stock.

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5. In an action by a judgment creditor of a corporation for an unpaid subscription to stock, a judgment in an action by another judgment creditor against the same stockholder, rendered two years before, is not evidence of the indebtedness of the stockholder to the corporation.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by W. E. Baines, a judgment creditor of the San Diego Street-Car Company, against Babcock and Story, stockholders, to recover an unpaid subscription to stock. Judgment was rendered for plaintiff, and afterwards the West Coast Lumber Company and C. J. Fox, other judgment creditors of the company, intervened and had judgment, from which defendants appeal. Reversed.

Luce & McDonald and Gibson & Titus, for appellants. Trippett, Boone & Neale, for respondent.

VANCLIEF, C. As indicated by the title, the controversy here is solely between the alleged interveners and two of the defendants in the action as originally commenced. The action, as originally commenced against Babcock, Story, San Diego Street-Car Company, et al., was of the nature of a creditors' bill in equity to subject equitable assets of the street-car company, a corporation, to the satisfaction of a judgment against it in favor of the plaintiff. It was averred in the complaint that Babcock and Story and certain other defendants were the owners and holders of a large number of shares of stock of the street-car corporation, on which shares they had paid only 50 per cent. of their par value, and that they were indebted to that corporation for the unpaid balance on their subscription for said stock. After the averment of other facts necessary to constitute a cause of action, the prayer was, in substance, that so much of said indebtedness of each of the defendants to the street-car company as might be necessary for that purpose be applied to the payment of plaintiff's said judgment against the street-car company, and that plaintiff have execution therefor against said stockholders. The introductory clause of that complaint is in the following language: "The plaintiff, for himself and all other creditors of the San Diego Street-Car Company who may come in and be made parties to this action, and contribute to the costs and expenses of the prosecution thereof, complains and alleges." On July 2, 1890, no other creditors having come in, or been made parties to the action, judgment was rendered in favor of plaintiff according to the prayer of his complaint; and in addition to the judgment prayed for, and without any finding that there was any other creditor of the street-car company than the plaintiff, the judgment contains the following paragraph: "It is further ordered, adjudged, and

decreed that this cause be retained, and that any other judgment creditor of the defendant corporation, the San Diego Street-Car Company, who shall make a proper showing to the court of his right thereto, be allowed to become a party to this suit, to establish his claim, and have execution against said defendants for such sum found due such creditor, not exceeding the uncollected balance of the amount herein found due from said defendants, respectively, to said corporation: provided that in no case shall any of said defendants be required to pay, nor shall execution issue against them for, any greater sum than the amount found due from them to the said corporation as aforesaid." The defendants appealed from the judgment in the original action, and from an order denying their motion for new trial, and this court affirmed the judgment and order. Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, and 30 Pac. 776. But no question relating to said last paragraph of the judgment, or to the rights of other creditors of the street-car company, was involved in that appeal, or considered by the court. On September 12, 1892, being two years and two months after the rendition of the above-mentioned judgment, and more than a month after that judgment was finally affirmed by this court, the respondents herein, West Coast Lumber Company and C. J. Fox, applied to the superior court for leave to file in that case what they denominated their "Intervening and Supplemental Complaint," which was granted; and accordingly they filed it, and thereafter amended it. The introductory paragraph thereof is as follows: "Come now West Coast Lumber Company and C. J. Fox. for themselves and all other creditors of the defendant San Diego Street-Car Company who may come in and be made parties to this action, and contribute to the costs and expenses of the prosecution thereof; and they themselves, coming in and joining with the plaintiff in the prosecution of this action, and offering to contribute to the costs and expenses thereof, and by way of coming in under the previous order of this court and judgment herein, by leave of court, now file this, their amended complaint in intervention herein, and complain of the defendants and allege." Then follow allegations of facts constituting the interveners' cause of action against the defendants in the original action. founded on judgments in their favor against the street-car company obtained about 15 months after the rendition of the original judgment in favor of the plaintiff, Baines. In addition to the facts constituting a cause of action against the defendants, Babcock and Story, the intervening complaint set forth all the proceedings in the original action, including the judgment therein in favor of the plaintiff, Baines, and also alleged that the judgment in favor of Baines had been fully satisfied. The plaintiff, Baines, did not answer this so-called interveners' com-Digitized by **GOO**

plaint, but the defendants, Babcock and Story (appellants), answered, denying, among other things, that either of them was indebted to the street-car corporation in any sum whatever, and specifically denying that any sum remained due or unpaid from either of them to said corporation upon the subscription price of any shares of the capital stock of said corporation, owned or held by either of them, as alleged in the intervention complaint. The court found for the alleged interveners, and thereupon rendered judgment as follows: "Now, therefore, by reason of said findings, and by reason of the law and the premises, it is ordered, adjudged and decreed as follows: That the West Coast Lumber Company is a judgment creditor of the San Diego Street-Car Company in the sum of \$6,184.45, upon a judgment duly made and given by the superior court of the county of San Diego, state of California, on the 14th day of October, 1891, in an action therein pending, wherein the said West Coast Lumber Company was plaintiff, and the San Diego Street-Car Company was defendant. That C. J. Fox is a judgment creditor of said San Diego Street-Car Company in the sum of \$2,136.35, upon a judgment duly given and made by the superior court of the county of San Diego, state of California, on the 20th day of November, 1891, in an action in said court pending, entitled C. J. Fox, Plaintiff, vs. The San Diego Street Car Company, Defendant. That each of said judgments remains wholly unpaid, together with interest thereon at the legal rate since the respective renditions thereof. That each of said parties has properly come in and become parties to this action, and established their claims as provided in the decree hitherto entered herein on the 2d day of July, 1890. That the defendant E. S. Babcock, Jr., has not paid the amount adjudged to be due from him to the said San Diego Street-Car Company, or any part thereof, and the said defendant is still indebted to said San Diego Street-Car Company in the sum of \$48,600. That the defendant H. L. Story has not paid the amount adjudged to be due from him to said San Diego Street-Car Company, or any part thereof, and the said defendant is still indebted to said San Diego Street-Car Company in the sum of \$21,275. That the claim of W. E. Baines has been fully paid and satisfied. That the said West Coast Lumber Company and C. J. Fox have and recover of and from the said defendants, Babcock and Story, the amount of their respective judgments, with interest, but not to exceed the amount decreed to be due from said Babcock and said Story, respectively, to said San Diego Street-Car Company. That said West Coast Lumber Company and C. J. Fox share pro rata, according to the amount of their respective claims, any sums recovered of either of said defendants. That said interveners have execution against said defendants for the amounts above decreed to be due them, respectively. Done in open court this 1st day of June, 1893. W. L. Pierce, Judge." The defendants appealed from this judgment within 60 days from the entry thereof, upon the judgment roll, including a bill of exceptions specifying alleged errors in law and fact.

1. Whether respondents had such "interest in the matter in litigation" as would have entitled them to intervene in the original action "before trial," pursuant to section 387 of the Code of Civil Procedure, it is clear that they did not so intervene, and it is quite as clear that under that section they had no right to intervene two years after the trial. Laugenour v. Shanklin, 57 Cal. 70; Carey v. Brown, 58 Cal. 180; Owens v. Colgan, 97 Cal. 454, 32 Pac. 519. Nor do respondents contend that they had. But they contend that the original action was commenced partly for their benefit, as authorized by section 382 of the Code of Civil Procedure. and that they properly came in and became parties to the action two years after final judgment therein. In the first place, the original complaint does not purport to have been made for the benefit of any class of persons who had any interest in any question involved in the action, though it does purport to be on behalf of all creditors of the street-car company who may come in and be made parties to the action, and contribute to the costs, etc. But mere creditors were not of the class to which the plaintiff belonged, nor within any exception which entitled them to the same or similar remedies. Only judgment creditors who had exhausted their remedies at law were of plaintiff's class. Upon the facts stated in the complaint, mere creditors were entitled to no relief what-Though the complaint was sufficient to warrant the relief sought by the original plaintiff, as held in Baines v. Babcock, 95 Cal. 581, 27 Pac. 674, and 30 Pac. 776, it was not sufficient to entitle others on whose behalf it purported to be made even to come in as parties to the action. Carey v. Brown, 58 Cal. 181; Pom. Code Rem. 390. So far as the respondents were concerned, the averment that plaintiff sued on behalf of other creditors was of no consequence, and in relation to plaintiff's cause of action it was merely redundant surplusage. If respondents were entitled to become parties to that action at all, the only mode by which they could have been made parties was by intervention before trial, under section 387, Code Civ. Proc., of which, as above shown, they did not avail themselves. Besides, the so-called "Amended Complaint in Intervention" shows that neither of the respondents became a judgment creditor of the street-car company until October, 1891, 15 months after the rendition of the judgment in the original action; and therefore, until that date, neither of them was entitled to become a party to the action, either under section 382 or section 387 of the Code of Civil Procedure. Digitized by GOGLE

2. Respondents contend, however, that they came in as parties under the order of the court appended to the original judgment, to the effect that the "cause be retained, and that any other judgment creditor * * * who shall make a proper showing * * * be allowed to become a party," etc. But there was nothing in the pleadings upon which to rest this order, except the aforesaid redundant surplusage in the complaint, upon which nothing in the judgment, other than surplusage, could have been founded. But, even if it be conceded that the order is valid, it refers only to persons who were judgment creditors at the time it was made, and not to those who may have become such 15 months or 15 years thereafter. For additional authorities under this head, see Pom. Code Rem. (3d Ed.) 388-400.

3. Although the respondents never became parties to the original action, I think their so-called "Complaint in Intervention" may be regarded and treated as an independent original complaint, and as such is sufficient, notwithstanding the redundant matter relating to the action of Baines v. Babcock, which does not vitiate the complaint, if otherwise good. Wickersham v. Crittenden, 93 Cal. 33, 28 Pac. 788; Carey v. Brown, 58 Cal. 180. Without this redundant matter the complaint states a cause of action similar to that stated in Baines v. Babcock, which was held sufficient by this court. 95 Cal. 582, 27 Pac. 674, and 30 Pac. 776. But the complaint was demurred to on the ground of misjoinder of parties plaintiff, and appellants contend that the demurrer should have been sustained on this ground. But I think there is no misjoinder. Owen v. Frink, 24 Cal. 171; People v. Morrill, 26 Cal. 360; Pom. Code Rem. (3d Ed.) 267, and notes.

4. Upon the issues as to whether the defendants were indebted to the San Diego Car Company, and as to whether that company had refused or neglected to levy an assessment, as alleged in respondents' complaint, the court found as follows: "That only fifty per cent. of the par value of the shares of the capital stock of the San Diego Street-Car Company, alleged in said complaint to be held and owned by said defendants, Babcock and Story, respectively, have been paid. That said defendants, respectively, agreed to pay the remaining fifty per cent. alleged to be due upon said shares. That there is due and unpaid from the defendant Story, upon his subscription to said capital stock, the sum of \$21,275. That there is due and unpaid from the defendant Babcock, upon his subscription to said capital stock. the sum of \$48,600. That the San Diego Street-Car Company has neglected and refused to make or levy any assessment upon any share or shares of its capital stock held by said defendants, or either of them." The appellants contend that neither of these findings is justified by the evidence, and I think this point should be sustained. The only evi-

dence claimed to have any tendency to support either of these findings is the judgment roll in the case of Baines v. Babcock, to which, as we have seen, neither of the respondents here was a party. This judgment roll was admitted in evidence, against the objection of defendants on the grounds that it was incompetent, irrelevant, and immaterial. I think it was incompetent and immaterial, and surely it had no tendency to prove that either of the defendants was indebted to the street-car company when respondents' complaint was filed, two years after the entry of the judgment in favor of Baines. Even as between defendants and Baines. that judgment only proved that defendants were indebted to the street-car company, and that the street-car company had failed to levy an assessment up to the time of the rendition thereof in favor of Baines; and it cannot be presumed that defendants did not pay their overdue debts to the street-car company, nor that the street-car company did not levy an assessment within the next following two years.

Upon the facts of this case, it is not necessary to decide whether or not section 382 of the Code of Civil Procedure was intended to authorize the practice of courts of equity, to its full extent, in permitting one plaintiff to sue on behalf of others, since even that practice does not permit the coming in of additional parties plaintiff, after judgment in favor of the original plaintiff, who were not qualified to come in before such judgment.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and cause remanded for a new trial.

104 Cal. 45

HOWELL v. HOWELL (No. 18,251.) (Supreme Court of California. Sept. 10, 1894.) DIVORCE — GRANT OF ALIMONY AFTER FINAL DE-CREE.

After a final decree of divorce has been entered, in which alimony was not granted, the court has no jurisdiction to grant alimony, as Civ. Code, §§ 137, 139, only authorize the court to grant alimony "while an action for divorce is pending," and to "modify" its order.

Department 2. Appeal from superior court, Tehama county; E. A. Bridgford, Judge.

Action for divorce by Elizabeth Howell against T. N. Howell. From an order granting plaintiff alimony, defendant appeals. Reversed.

L. V. Hitchcock and A. M. McCoy, for appellant. Chas. G. Nagle (W. Henry Jones, of counsel), for respondent.

McFARLAND, J. This is an appeal by defendant from an order of the superior court requiring him to pay to plaintiff \$100 per

month from January 20, 1892, until the further order of the court. On May 14, 1890, the parties were husband and wife, and on that day plaintiff commenced an action for divorce from defendant. She averred in her complaint, as ground for the divorce, desertion by the defendant; and she also averred that there were certain named minor children of the parties, and that there was certain community property in the territory of Wyoming worth about \$10,000, and also certain personal property in California worth \$7,100, and certain described real property here belonging to the community. She prayed for a divorce, the custody of the children, and that the court award to her all the said community property, real and personal, in California. The defendant, who then lived in Wyoming territory, was served by publication, and made The court entered a decree on Sepdefault. tember 11, 1890, in accordance with the prayer of the complaint. There was nothing in either the complaint or the judgment about alimony. By the judgment the property prayed for in the complaint was awarded to plaintiff, but it contained nothing more about property, money, or property rights of any kind. The judgment has never been appealed from, or in any way disturbed. \mathbf{on} January 20, 1892,—more than 14 months after the judgment,-plaintiff filed a petition entitled in said divorce suit, in which, after alleging certain property and income of defendant, she averred that she was in indigent circumstances, and unable to support herself and said minor children, and that "the sum of \$250 is a reasonable sum per month to be allowed plaintiff to support herself, and support and educate her said minor children.' She then prays that, in addition to counsel fees, defendant "pay to plaintiff such further sum as to this court may seem just for support of plaintiff and said minor children." and that "said alimony be made permanent." The defendant demurred to the petition upon the ground, among others, of want of jurisdiction. The demurrer was overruled, and defendant answered. His answer was stricken out for reasons not necessary to be here noticed. The court made findings reciting the history of the divorce, and declaring that defendant had certain property and income, that plaintiff had two minor children dependent upon her, and that she "has not separate property, nor any property, sufficient to maintain herself and said minor children." Whereupon, the court made an order "that defendant pay to plaintiff the sum of one hundred dollars per month on the 20th day of each and every month, commencing on the 20th day of January, 1892, and the defendant do continue to pay said sum to the plaintiff on the 20th day of each and every month thereafter until the further order of this court." From this order, defendant appeals.

We are satisfied that the court had not jurisdiction to make the order appealed from. A judgment in a divorce suit, settling the

property rights of the parties, after the time for appealing therefrom has expired, is as final as any other kind of a judgment, except so far as the power to modify it is given by statutory provision. Of course, when we speak of a "final judgment," we mean one which does not upon its face reserve jurisdiction (when that can be done) to make a supplemental decree, in which case it is not final. In the case at bar there was no such reservation. It was final in form and substance. And there is no statutory provision giving jurisdiction to make the order appealed from. Section 137, Civ. Code, provides that "while an action for divorce is pending" the court may require the husband to pay, as alimony, money necessary to enable the wife to support herself and children, and prosecute or defend the action. Section 139 provides that, where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children. and make a suitable allowance for the support of the wife, and that "the court may from time to time modify its orders in these respects." But the latter section clearly contemplates that the right to alimony, as well as other financial and property rights, shall have been presented and litigated in the action for divorce, and established by the judgment; and the provision is that, where the right to alimony has been thus established, the amount may be changed by a modification of the order. But in the case at bar there was nothing to "modify." After the judgment granting the divorce the plaintiff was no longer the wife of the defendant, and he owed her no longer any marital duty. From that time she could enforce against him no obligation not imposed by the court at the time of the judgment. In the case at bar the judgment became final without any award of alimony, and of course the court could not afterwards "modify" what never existed. In Stewart on Marriage and Divorce (section 366), the authorities are correctly summed up in this language: "When the court has allowed the suit to be dismissed, or has finally entered the decree, it has no further jurisdiction over the parties or the subject-matter, except so far as this is reserved by itself or by statute." And in section 376 the author. further says: "But a decree of divorce a vinculo is final, and the jurisdiction of the court over the parties is, after the expiration of the term, at an end; and just as there can be no grant of alimony after such a divorce, so. there can be no change in the award of alimony, unless the right to make such a change is reserved by the court in its decree, as it may be, or is given by statute, as it often is." See, also, Kamp v. Kamp, 59 N. Y. 212, and Egan v. Egan, 90 Cal. 15, 27 Pac. 22. In the cases cited by respondent the right to alimony had been established in the final decree, or the disposition of the question of alimony had been expressly reserved for further consideration. Our conclusion is that

the court below had no jurisdiction to make the order appealed from, and that the demurrer to the petition should have been sustained. It is not necessary here to determine what order the court might make "after judgment," under section 138 of the Civil Code, with respect to the "custody, care and education of the children of the marriage." The order under review is for alimony for the wife, and for her support, and its character is not changed by the mention of the children. The order appealed from is reversed.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

(104 Cal. xvii)

HOWELL v. HOWELL. (No. 18,250.) (Supreme Court of California. Sept. 10, 1894.)

Department 2. Appeal from superior court,
Tehama county. E. A. Bridgford, Judge.
Action for divorce by Elizabeth Howell against

T. N. Howell. From an order granting plaintiff alimony for the first time made after the entry of the final decree, defendant appeals. Reversed.

L. V. Hitchcock and A. M. McCoy, for appellant. Chas. G. Nagle (W. Henry Jones, of counsel), for respondent. lant.

PER CURIAM. Upon the authority of Howell v. Howell (No. 18,251, this day decided) 37 Pac. 770, the orders appealed from are reversed.

(4 Cal. Unrep. 787)

GRUSS v. ROBERTSON et al. (No. 18,283.) (Supreme Court of California, Sept. 5, 1894.)

APPEAL-REVIEW-GRANT OF NEW TRIAL

The granting a new trial on the ground of newly-discovered evidence is discretionary with the trial court.

Department 1. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by Joseph Gruss against Martha Robertson and others. From an order granting a new trial, defendants appeal. Affirmed.

Goodwin & Goodwin, for appellants. C. E. McLaughlin, for respondent.

PER CURIAM. This is an appeal from an order granting the plaintiff a new trial upon the ground of newly-discovered evidence, and the only question is, did the court abuse its discretion in making the order? It is true that "applications for new trials upon the ground of newly-discovered evidence must be looked upon with suspicion and disfavor, because the temptation to make a favorable showing after having sustained a defeat is great." Arnold v. Skaggs, 35 Cal. 684. But it is also true that "applications on this ground are addressed to the discretion of the court below, and the action of the court below will not be disturbed, except for an abuse of discretion, the presumption being that the discretion was properly exercised." Hayne, Cal. 248, 15 Pac. 86; People v. Urquidas, 96 Cal. 240, 81 Pac. 52. At the hearing of the motion, affidavits were read by both sides, and it must be presumed that they were properly looked upon and considered by the court. They were conflicting as to some of the facts stated, but it was the province of that court to determine on which side was the truth. Assuming, therefore, as we must, that the facts stated in the plaintiff's affidavits were true, we think there was a sufficient showing to meet the requirements of the law in such cases, and to justify the order. At any rate, we cannot say that the action of the court was an abuse of its discretion. The order appealed from is affirmed.

(4 Cal. Unrep. 780)

RAYMOND ▼. GLOVER et al. (No. 19,335.)¹ (Supreme Court of California. Sept. 4, 1894.) MORTGAGE FOR PURCHASE MONEY-VALIDITY-DE-LIVERY TO UNAUTHORIZED PARTY—EFFECT—Ex-TINCTION OF VENDOR'S LIEN.

1. Where an agent for the sale of land, intrusted with a deed thereof, through the negligence of the vendee, who knew that he was au-thorized to deliver the deed only after a purchase-money note and mortgage were executed to the vendor, fraudulently took the note and mortgage in his own name, there was no valid delivery, and the vendor was entitled to a lien for the price, as against an innocent purchaser of the mortgage.

2. Where a vendee signs a purchase money

mortrage, payable to the vendor's agent, under the belief that it is payable to the vendor, after having ample opportunity to examine it, he cannot contest its validity as against an innocent

purchaser.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by Ellen D. Raymond against George W. Glover, Sarah J. Glover, George Munroe, and the German-American Savings Bank to establish a vendor's lien. Plaintiff had judgment, and the defendant bank appeals, and, by a cross bill, seeks to foreclose Affirmed and remanded. a mortgage.

Walter Bordwell and Chapman & Hendricks, for appellant. Lee & Scott and Wilson & Lamme, for respondents.

TEMPLE, C. This appeal is from the judgment, with a bill of exceptions. The complaint, as amended, shows: That on the 1st day of July, 1891, plaintiff owned a certain tract of land in the county of Los Angeles, and on that day entered into an agreement with the defendant George W. Glover to sell to him said tract of land for \$1,800, of which sum \$500 was to be paid in cash, and \$1,300 to be secured by mortgage on the place, payable in three years, with interest at 9 per cent. per annum. That plaintiff was absent from the state, and the sale was negotiated by her through defendant George Munroe. That afterwards, to wit, January New Trial & App. § 87; People v. Sutton, 73 | 22, 1892, plaintiff executed and forwarded to said Munroe a deed duly signed and acknowledged, conveying said property to George W. Glover and Sarah J. Glover, his wife, with instructions to deliver the same to George W. Glover upon receiving the promissory note of said Glover and wife, secured by mortgage as provided in said agreement, and the payment of \$500 cash. That said Munroe received the deed, and, in violation of the instructions to him, gave into the possession of defendant George W. Glover said deed without receiving the said promissory note or mortgage, and said Glover caused the deed to be recorded in the re-corder's office of Los Angeles county. Though said Glovers paid the said sum of \$500, they wholly failed to execute said note and mortgage, or pay the said sum of \$1,300 or any part thereof, and the same is still That said Munroe, at the time he gave said deed into the possession of said Glover, fraudulently prepared a note and mortgage for \$1,300, running and payable to himself, and induced said Glovers to execute the same under the belief that plaintiff was named in said note and mortgage as payee. That the defendant the German-American Savings Bank afterwards caused said mortgage to be recorded, claiming to be the assignee thereof. That said note and mortgage were executed and delivered without the knowledge or consent of plaintiff. That she had no knowledge of such facts until after the pretended assignment to the defendant bank. That said note and mortgage were without consideration other than as herein set forth, and were taken by said Munroe in violation of his duty, and in fraud of plaintiff's rights. That at the time of the delivery to said George W. Glover of said deed, and the execution and delivery to him of said note and mortgage, said Glover had full notice of the agency of said Munroe, and that said Munroe had no right or authority to take such note and mortgage. That the sole consideration for the note and mortgage was the conveyance, and said Munroe had no authority to take them otherwise than in the name of plaintiff, of which facts the bank had full notice. She asks the court to decree that the note and mortgage were accepted, taken, and held by Munroe as her trustee, and are now held by the bank as her trustee, or that she has a vendor's lien upon the premises for \$1,300 and interest, and such other relief as may be equitable. The appellant, the bank, answered, denying all the allegations in the complaint, and averring an assignment to itself for a valuable consideration and without notice. Appellant also filed a cross complaint, in which it seeks to foreclose the mortgage. To this cross complaint the Glovers answer, averring that the note and mortgage were wholly without consideration and were procured by fraud. They also filed a cross complaint, in which they set out the alleged fraud and want of consideration, and ask to have the note and

mertgage declared void. To this cross complaint the appellant answered, denying the fraud, and pleading want of notice, and its purchase for a valuable consideration.

The court found the sale of the land as averred by the plaintiff; that plaintiff was a nonresident; that she signed and acknowledged the deed, and sent the same to Munroe with the instructions averred; that Munroe handed the deed to Glover without taking his note or mortgage as he was instructed to do; that Munroe received the said \$500 from Glover, but, instead of taking the note and mortgage payable to plaintiff, fraudulently prepared a note and mortgage for the same amount payable to himself, and, with intent to deceive said Glovers, represented to them that the note and mortgage were made in favor of plaintiff, in accordance with the terms of the agreement, and pretended to read the papers to the Glovers, but fraudulently read the name of plaintiff as payee; that, relying upon the representations and deceived by the false practices, the Glovers executed the note and mortgage fraudulently prepared by Munroe, believing that they were payable to plaintiff and in accordance with their agreement; that the note and mortgage were so executed without the knowledge or consent of plaintiff, who did not know of the fraud until after the assignment to the bank.

The note and mortgage were without consideration, and were taken by Munroe in violation of his duty, and in fraud of the rights of plaintiff. At the time of the execution of said note and mortgage, said Glovers well knew that Munroe had no authority to accept such a note and mortgage, or any note or mortgage in his own name. Afterwards, on the 23d of February, 1892, said Munroe assigned the note and mortgage to defendant bank as security for the payment of a note of \$1,000 then borrowed by Munroe from the bank. Prior to receiving said assignment and to the loaning of said money by the bank, its cashier, for the purpose of ascertaining the value of the property, and also whether said Glovers had any set-off or other defense to the note and mortgage, went with Munroe to the residence of George W. Glover, and thereupon said Munroe, without the hearing of the cashier, stated to Glover that he (Munroe) had bought the note and mortgage from plaintiff. Thereupon, said cashier told said Glover that the bank was about to loan to Munroe \$1,000 upon the note and mortgage which he and Mrs. Glover had given, and asked how much he was owing on it, and if it was all right, to which Glover replied that \$1,300 was due on the mortgage, and it was all right. Glover did not then know that Munroe had been named in the note and mortgage as payee, but believed that the note and mortgage had been purchased by Mun-The representation was made without any intent to mislead the bank, and in the honest belief that Munroe had bought the

note, and had the right to hypothecate it. The court failed to find whether the bank loaned the money to Munroe, and took the assignment in good faith, without notice of plaintiff's equities. The evidence shows, however, without contradiction, that the appellant acted in entire good faith, without knowledge that plaintiff had any claim to the debt, or that Munroe had ever been her agent, or that she had been the owner of the land.

The first question which presents itself is whether there was a valid delivery of the deed. There was an agreement in writing, in which the terms of the sale were fully stated. The Glovers, therefore, knew perfectly well that the deed was not to be delivered until the note and mortgage were executed to plaintiff. Munroe was a special agent, and the possession of the deed under the circumstances had no tendency to show ostensible authority. The delivery of the deed was therefore in violation of the power of the agent. Schultz v. McLean, 93 Cal. 329, 28 Pac. 1053, is not opposed to this conclusion. In that case the purchaser did not know of any conditions in regard to the delivery of the deed, other than those with which he had complied. He had made an offer for the land. The agent of the grantors notified him of the acceptance of his offer. As a matter of fact, according to the finding, the grantees did not accept the offer, but asked further consideration. The agent falsely told the purchaser that his offer was accepted, and the grantors that their counter offer was accepted. The deed was then passed, each party believing upon terms he had proposed. The misunderstanding was through the fraud of plaintiff's agent. The vendors and vendee met several times during the negotiations. It was held that the agent was enabled to accomplish the fraud in consequence of the negligence of the grantors. They were therefore compelled to bear the loss. Plaintiff here has been guilty of no neglect. Nor can I see how the case differs as to the appellant. The claim is that because Munroe was the agent of plaintiff, and was placed in a position where he could consummate the fraud because of such agency. therefore plaintiff must bear the loss. There may be language in some of the cases which would sanction this broad statement of the rule. The rule, however, is not peculiar to the law of agency, but is general. Generally, it is stated as in our Code: "Where one of two innocent parties must suffer by the act of a third, he by whose negligence it happened must be the sufferer." Civ. Code, § 3543. The statement is slightly self-contradictory, but really, I think, states the true rule. Beyoud this, I see no justice in it. The fact that one has been placed by my act in a position which will enable him to defraud another does not make me liable,-not even if I have trusted a dishonest man, and thereby raised his credit. If I lend my horse to one who proves to be a rogue, and he, taking advantage of his possession, sells the horse, the purchaser cannot hold me for it. But it was not even the trust reposed in Munroe by plaintiff that placed in his hands the instrument which enabled him to defraud appellant. Her instructions were explicit, and were well known to the only parties with whom he was authorized to deal. Whatever, therefore, may be the rights of the bank, as against Glover, I think it plain that plaintiff is entitled to the first lien upon the property to secure her debt of \$1,300.

But the case is very different between Glover and the bank, assuming, as we must, that the bank took the security without notice. The note was nonnegotiable, and naturally the obligor could interpose any defense against a purchaser which he had against the payee named. But the bank, before taking the security, sent its agent to Glover, and, after informing him of the contemplated loan, inquired if he had any defense, and was informed by Glover that he had none. is found that Glover did not then know that the note had been originally given to Munroe, but believed that plaintiff had assigned it to Munroe. Even had such been the fact, it was a lack of diligence to assure the bank that Munroe's title was all right upon Munroe's word that he had bought the note. But there was gross negligence in the execution of the note. I do not mean to say that Glover could not have defended against Munroe, though some of the cases seem to go that far. But it is the precise case provided for in the maxim quoted,-that, when one of two innocent men must suffer, he shall bear the loss whose negligence has occasioned it. There would be very little use in having written instruments if there were no presumption that when one signs such he does so knowing what he is signing. Men do not usually execute such papers until they have carefully examined them. It must be, therefore, that to execute them without such care is negligence. The business of the world could hardly be carried on upon any other hypothesis. There was no fiduciary relation between Munroe and Glover. On the contrary, their interests were adverse. It appears further that Munroe practiced no arts to induce Glover to sign without reading. The mortgage and note were filled out at Glover's house, and in his presence. The note was a printed form, and with only a few blanks to fill, one of which necessarily was the name of the payee. When they were finished and ready to sign, Munroe did not volunteer to read them, but handed them to Glover and requested him to read them. Glover said his eyes were bad, and requested Munroe to do so. It is hard to believe, under such circumstances, that Munroe contemplated any such deceit as the court finds. The notary, the only really disinterested witness, testified that the note and mortgage were correctly read. There was, however, conflicting testimony, and the court finds that they were

incorrectly read. But Glover had no right to trust his adversary, and, when the question is whether he or an innocent party must suffer for his negligence, he must bear the Hawkins v. Hawkins, 50 Cal. 558; Blaisdell v. Leach (Cal.) 35 Pac. 1019; Plummer v. Bank, 90 Ind. 386; 2 Herm. Estop. \$ 1004.

As there is no finding upon the question raised as to the good faith and want of notice of the bank, the case should be remanded, with directions to find whether or not the bank took the note as security without notice of the facts tending to show its invalidity. This fact may be found upon the evidence already taken, with such further evidence upon that subject as the parties may see fit to submit. If the court finds for the appellant upon that subject, the plaintiff should be allowed a preferred lien for \$1,300 and interest, as provided in the contract of sale, and the bank should be allowed to retain the lien of its mortgage, subject to plaintiff's lien, to the extent of its debt against Munroe.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the cause is remanded, with directions to find whether or not the bank took the note as security without notice of the facts tending to show its invalidity. This fact may be found upon the evidence already taken, with such further evidence upon that subject as the parties may see fit to submit. If the court finds for the appellant upon that subject, the plaintiff should be allowed a preferred lien for \$1,300 and interest, as provided in the contract of sale, and the bank should be allowed to retain the lien of its mortgage, subject to plaintiff's lien, to the extent of its debt against Munroe.

104 Cal. 30

PALMER et al. v. LAVIGNE et ux. (No. 19.394.)

(Supreme Court of California. Sept. 8, 1894.) MECHANIC'S LIEN - FOR WHAT GIVEN - CLAIM-SUFFICIENCY—PLEADING.

1. Code Civ. Proc. § 1183, providing that all persons and laborers of every class performan persons and incorers of every class perform-ing labor on the construction, alteration or re-pair of any building shall have a lien therefor, includes work done in moving a building. 2. Where a statute requires a lien claim to

state "the name of the owner or reputed owner if known," a claim which states that it was to be paid by "J. L., who was and still is the reputed owner" of the land, and that J. L. and M. L. are the reputed owners of the building on

which the claim rests, is sufficient.

3. Where copy of a lien claim made part of a complaint on foreclosure states that the contract was made with the wife, and the complaint itself states that the claimant "entered into a contract with the defendants," i. e. the wife and the husband, the complaint is demurrable as ambiguous and uncertain.

When the claim and notice of lien stated that the contract on which a lien is based was made with the wife, and the complaint alleges that it was made with both husband and wife,

that it was made with both husband and wife, the variance is fatal to the admission of the lien claim and notice in evidence.

5. Under Code Civ. Proc. § 1192, which provides that "every building constructed on any land with the knowledge of the owner shall be held constructed at his instance and subject to lions unless each owner within three days rosts. liens unless such owner within three days posts a notice disclaiming responsibility," liens may be created on a homestead without the joint action of husband and wife.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by J. D. Palmer and another against John E. Lavigne and Mary C. Lavigne to foreclose a mechanic's lien. Judgment for plaintiffs, and defendants appeal from an order denying a new trial. Reversed.

Aitken & Smith, for appellants. Works & Works, for respondents.

SEARLS, C. This is an action to foreclose a mechanic's lien upon a dwelling house and the land adjacent thereto, taken under the Code of Civil Procedure, to secure the sum of \$60, due the plaintiffs as copartners and as original contractors for moving the house upon which the lien is claimed from San Diego to the ranch described in the complain. Plaintiffs had judgment of foreclosure, from which judgment, and from an order denying a motion for a new trial, defendants appeal.

The defendants are husband and wife, and the real estate upon which the lien was foreclosed is the homestead of the defendants under the laws of the state of California. Defendants filed separate demurrers to the amended complaint, differing in some respects, but each averring that the complaint does not state facts sufficient to constitute a cause of action. The first point made by appellants is that, under section 1183 of the Code of Civil Procedure, plaintiffs were not entitled to a lien for moving a building. Their contention is that the section specified only gives such lien for labor performed or materials furnished in the construction, alteration, or repair, either in whole or in part, of a building, and that labor performed in removing a building from one point to another is not within the scope or intent of the statute. So much of section 1183 as is essential to the question is as follows: persons and laborers of every class performing labor upon or furnishing materials to be used in the construction, alteration, addition to or repair, either in whole or in part, of any building * * * shall have a lien upon the property upon which they have bestowed labor or furnished materials." We regard the construction of appellants as being erroneous. "All persons and laborers of every class performing labor upon," etc. Manifestly the preposition "upon" refers to and has for its objective the noun "building," and is to be read as though the word "building,"

with its qualifying word "any," followed immediately after the word "upon." The lien to material men is only given to those who furnish materials to be used in the construction, alteration, addition to, or repair of, the building, etc.; that to laborers is given to all who perform labor upon it, whether technically coming within the definition of construction, alteration, etc., or not. The case of Trask v. Searle, 121 Mass. 229, cited and relied upon by appellants, is not in point, for the reason that the statute of Massachusetts varies from our own. It is in part as follows: "Any person to whom a debt is due for labor performed or furnished, or for materials furnished and actually used in the erection, alteration or repair of any building or structure upon real estate," etc. As will be observed, there the lien for labor is given for those who have performed or furnished labor in the erection, alteration, or repair of the building, while our statute gives a lien to all laborers who have performed labor upon the building, etc. It follows that the point is not well taken.

The next point is that there is no sufficient statement in the lien which is attached to the complaint of the ownership or reputed ownership of the defendants in the property sought to be foreclosed. The language of the lien is, after stating the manner and time of payment, the last of which, it is averred, was to be paid out of the wages of "John Lavigne, her husband, who was, and still is, the reputed owner of the said Lavigne ranch." And as to the building which was moved upon the ranch, it is averred the defendants, Mary C. and John E. Lavigne, are the reputed owners. This was sufficient. The statute only requires the claim of lien to state "the name of the owner or reputed owner if known," which was done.

The demurrer of defendant Mary C. Lavigne to the amended complaint specifies that said complaint is ambiguous, in that it cannot be determined therefrom whether the contract alleged in the complaint "to have been entered into by the plaintiffs and the defendants, or one of them, was made by the defendant Mary C. Lavigne, or by the defendant John E. Lavigne, or both;" that it cannot be ascertained therefrom whether plaintiffs seek to hold this defendant under an alleged contract made with her, or on account of some interest which she holds in the land. There are also separate specifications of uncertainty, and that it is unintelligible, for the same causes set out under the head of ambiguity. The statement in the claim of lien attached to and made a part of the complaint is that the contract was made with Mary C. Lavigne, and that the "contract was made with the full knowledge and consent of John E. Lavigne, and the work was carried on with his full acquiescence." The allegation of the complaint is that plaintiffs "made and entered into a contract with defendants," etc. The defendants are John E. Lavigne and Mary C. Lavigne. It has been said that when the allegations of a complaint are inconsistent with an exhibit attached, demurrer for ambiguity and uncertainty is well taken. Mendocino Co. v. Morris, 32 Cal. 145; Frazer v. Barlow, 63 Cal. 71; Malone v. Gravel Co., 76 Cal. 578, 18 Pac. 772; Water Co. v. Baker, 95 Cal. 268, 30 Pac. 537. The fact that a contract was made with Mary C. Lavigne, and that John E. Lavigne had knowledge of it, consented thereto, and acquiesced in the work under it, did not make it his contract. The defendant Mary C. Lavigne had a right to know whether it was sought to charge her upon a contract made with her individually, or upon a joint contract entered into with her and the other defendant. Her personal liability, in the one case, for any residue after exhausting the property covered by the lien, would be quite different from that in the other. We think the complaint was both ambiguous and uncertain. The demurrer, having specifically and separately stated these causes of demurrer, and the reasons therefor, should have been sustained, and the order overruling it was erroneous.

There is nothing in the point made by appellants that a mechanic's lien cannot be created upon the homestead, except by the joint action of the husband and wife. See section 1192, Code Civ. Proc. Walsh v. McMenomy, 74 Cal. 356, 16 Pac. 17, was decided upon a construction of section 1241 of the Civil Code, as it stood prior to the amendment of March 9. 1887, and has no application to the law as it at present exists. A homestead is free from forced sale, except as provided by the statute. Among the cases in which it may be sold under execution, precisely as though it was not impressed with the homestead character, are those under judgments obtained upon debts secured by "mechanics', contractors', subcontractors,' artisans', architects', builders', laborers' of every class, material men's, or vendors' liens on the premises." The claim and notice of lien was offered in evidence, and objected to, among other things, upon the ground of variance for like reasons with those stated in the demurrer. The objection was overruled, and defendants excepted. The variance was fatal. Malone v. Gravel Co., at page 581, 76 Cal., and page 772, 18 Pac.; Reed v. Norton, 90 Cal. 592, 26 Pac. 767, and 27 Pac. 426; Cox v. McLaughlin, 63 Cal. 207. The judgment and order appealed from should be reversed, and the court below directed to sustain the demurrer of Mary C. Lavigne to the amended complaint.

We concur: VANCLIEF, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the court below directed to sustain the demurrer of Mary C. Lavigne to the amended complaint. 108 Cal. 506

QUINT v. HOFFMAN et al. (No. 18,306.) (Supreme Court of California. Sept. 7, 1894.)

Department 1.

Order striking out a portion of a former opinion. 37 Pac. 514.

PER CURIAM. It appearing to the court that the question discussed in the opinion in the above case as to the validity of the tax levied by the board of directors of the irrigation district is not necessarily involved in the disposition of the appeal upon its merits, it is hereby ordered that such portion of the opinion of the court as contains a discussion of the aforesaid question be, and the same is, stricken therefrom. It is further ordered that the word "judgment" in the concluding sentence of said opinion be stricken out, and the word "order" inserted instead thereof.

104 Cal. 49

BEAN v. STONEMAN et al. (No. 19,396.) (Supreme Court of California. Sept. 10, 1894.) IRRIGATION-CONTRACT TO FURNISH WATER-CON-STRUCTION - COVENANTS RUNNING WITH THE LAND.

1. A grantor conveyed a portion of a tract of land, and also conveyed to the grantee a cer-tain proportion of all the water rising on the tract, and covenanted to suffer the water to flow to the grantee's line through a trench which flow to the grantee's line through a trench which the grantor was at the time using. There was no way provided for measuring the water at the grantee's line, but it was to be taken from a reservoir on the granter's land, being permitted to flow to the grantee in an "augmented head" once in 10 days. Held, that the place of delivery of the water was at the reservoir, and not at the grantee's line, he having an easement in the trench for that purpose.

2. On abandonment of the trench by the grantee it was the duty of the grantee to keep

rantor it was the duty of the grantee to keep

it in repair.

3. The "augmented head" provided for must be limited to the capacity of the trench at the reservoir, and any change in the delivery of the water from the reservoir, provided the discharge still equaled the full capacity of the trench at the reservoir, was permissible.

4. The covenant for the delivery of the water was a covenant running with the land.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Action by C. F. Bean against Mary O. H. Stoneman and another. There was a judgment for plaintiff, and defendants appeal. Reversed.

A. Brunson, for appellants. Sheldon Borden and Anderson & Anderson, for respondent.

HAYNES, C. This is an action to recover damages for a failure to furnish water for irrigation, whereby it is alleged the orange and other trees, corn, and vegetables of the plaintiff were injured or destroyed. A jury trial was had, and resulted in a verdict for plaintiff for the sum of \$4,580. Defendants

moved for a new trial, which was denied, and this appeal is from the judgment and the order denying a new trial.

In 1873 the defendant George Stoneman was the owner of a ranch then and now known as the "Stoneman Ranch," upon a portion of which were springs and water sources, the waters from which were collected in a reservoir constructed upon the ranch, and from which the water, or a portion of it, was conducted through a ditch for the purposes of irrigation. In March of that year he sold and conveyed to Barrows and Furrey 18 acres of land, part of said Stoneman tract, together with a certain portion of the waters rising upon the unsold part of the ranch. The covenant contained in the deed relating to the water right is as follows: "And the party of the first part, for the consideration aforesaid, hereby conveys, bargains, and grants, and agrees to deliver and suffer to flow, to the parties of the second part, their heirs and assigns of said aboveconveyed lands, an amount of water equal to two-fortieths (2-40) of all the waters rising upon the lands of the party of the first part, so far as such waters can be brought to the northern line of the above-conveyed lands by the present ditch, or by such further ditch or flume as the party of the first part may hereafter construct: said amount of water to be delivered so that the parties of the second part, their heirs and assigns, shall, if by them required, have water for irrigation, as often at least as once in every ten days: provided, that in lieu and stead of receiving such amount and proportion of water by the ditch or flume of the party of the first part, the right is hereby granted to the parties of the second part, at their option, to take such quantity and proportion of water from the reservoir about to be constructed by said Stoneman in front of his house, and to conduct the same thence onto the above-conveyed lands by an underground pipe through the intervening lands of the party of the first part, at the expense of the parties of the second part, and in a careful manner, and without injury to trees, vines, and other improvements on said intervening lands; and for the purpose of the laying of said pipe the right of way and entry is hereby granted."

At the date of this conveyance the parcel sold was not improved, but the ditch above mentioned was constructed to the land sold, and was used for irrigating other lands of the grantor; the length of the ditch, or distance from the reservoir to the parcel sold. being about one mile and a quarter. The plaintiff became the owner of the 18 acres so conveyed to Barrows and Furrey, in June, 1887, together with said water right. Prior to 1891 the water was discharged from the reservoir into the ditch through a square, wooden box or flume, which passed through the embankment or dam near the bottom of the reservoir, and which was closed by a

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Cal.Rep. 35-37 P.-58

gate; the dimensions of the box being about ; 14x16 inches. In the winter of 1890-91, a portion of the dam was washed out, when the box was found to be decayed, and was replaced with an eight-inch steel pipe. From 1873 to 1891, whenever the lot now owned by plaintiff required irrigation, the water was turned into the ditch in what is termed an "augmented head;" that is, the two-fortieths to which the lot was entitled did not flow into the ditch continuously, but was permitted to accumulate until needed, when it would be discharged in a volume approximating the capacity of the ditch. The evidence shows quite clearly that, if the water to which plaintiff is entitled were permitted to flow continuously into the ditch, it would be absorbed by the ditch, and no part of it would reach plaintiff's land. Prior to 1890, Mrs. Stoneman, who succeeded to the unsold portions of the ranch, as well as her husband before the conveyance to her, irrigated a vineyard upon the ranch, containing from 120 to 140 acres, through the same ditch; but in 1890 the vineyard was destroyed by a disease which attacked the vines, and after that the defendants used no water through that ditch, their orange orchard and ornamental grounds being irrigated through another channel from the same reservoir. Mr. Graves owns a place in the vicinity of plaintiff's lot, and he also obtained water for irrigation from defendant's reservoir, but his water was conveyed through an iron pipe. In 1894, Mr. Hall, who then owned the lot now owned by plaintiff, and a Mr. Anderson, who owned land in that vicinity, were permitted to tap Mr. Graves' pipe, and obtain water for irrigation through it. Mr. Hall used that source entirely until he sold to plaintiff, and the plaintiff thereafter used it almost exclusively until 1890, when the license was revoked. From these causes, together with the destruction of defendants' vineyard, the ditch was little used in 1890, and it was not attempted to be used in 1891. until on or about the 4th of June, when the plaintiff undertook to obtain water through it to irrigate his land. Shortly before this attempt he applied to Mrs. Stoneman to clean out and repair the ditch, which she declined to do, and the plaintiff thereupon did that work. Upon turning the water into the ditch the first day, the water flowed down the ditch about halfway to plaintiff's land. the next effort a little water reached the plaintiff towards night, and another attempt brought the water a little earlier, but not in sufficient quantity to do much good, the greater part of it being taken up by the ditch. The failure to obtain sufficient water is attributed by plaintiff to the insufficient size of the pipe by which the water is discharged from the reservoir into the ditch, and to a perforated hood placed over the upper end of it, and a hydrant through which It is discharged at the lower end. The quantity of water rising upon the ranch and flow-

ing into the reservoir was found by measurement to be 38 miners' inches.

The principal question in the case involves the construction of the covenant in the deed from Stoneman to Barrows and Furrey, hereinbefore quoted, and is directly presented by the following instruction given to the jury: "By the deed of George Stoneman to Barrows and Furrey, said Stoneman agreed to deliver the water at the northern line of the 18-acre tract, as far as said water could be brought to that point by means of the ditch then extending to said land. By this agreement it is incumbent on said Stoneman and his successors to keep said ditch in reasonably good repair." We think the court erred in this instruction as to the place where the water is to be delivered, and as to the obligation to keep the ditch in repair, though it is conceded that the same duty and liability which rested upon George Stoneman now rest upon Mrs. Stoneman, who has succeeded to his estate by a subsequent grant, and that appellants' contention that the covenant was personal, and did not run with the land. and become obligatory upon Mrs. Stoneman, cannot be sustained. The quantity of water granted by the deed is two-fortieths of all the water rising upon the ranch, and no more. The water so granted was intended to be taken, and, except as to the water procured through the pipe of Mr. Graves, had been taken, through the ditch above mentioned. The two-fortieths of the 38 inches rising above the reservoir is a fraction less than 2 inches; and, as a loss is necessarily sustained in conveying water through an open ditch, if defendant is required to deliver that quantity at the north line of plaintiff's land, it is evident that a greater proportion than two-fortieths must be used. What such excess must be depends upon the character of the soil or earth in which the ditch is constructed, the care taken in its preservation, and the frequency or constancy of its use. The testimony of Mr. Purcell was to the effect that in a ditch kept in the best condition the loss was equal to about 25 per cent.; while the effort of plaintiff to procure water through this ditch in June, 1891, showed almost an entire loss. In this connection it may be noticed that the grant, instead of designating the quantity of water in inches, specifies the proportion of the water rising on the ranch, and thus strongly suggests, if it does not positively show, that the water was apportioned to the entire ranch, each parcel as sold taking only its proportion; and, if so, the loss in conveying the water to the different portions must be borne by such portions, else the loss must be borne by the defendants, leaving a part of the land remaining in their ownership without water,-a result that could not have been contemplated or intended. This, we think, is conclusive of the quantity to be delivered, there being nothing in the language of the grant inconsistent with it. As

to the place of delivery it also has a material bearing. It will be observed that the grant does not expressly state where it is to be delivered, nor how the quantity is to be ascertained. No means or mode of measurement was provided at the north line of plaintiff's land, nor was any measurement at that place ever used, so far as the record shows. It was to be taken from the reservoir. At that place the capacity of the reservoir, the quantity of water flowing, and the gate by which it was discharged, each or all together, furnished at least an approximate mode of ascertaining the quantity, and, in the absence of an express agreement or manifest intention to the contrary, it must be held to be the place of delivery. The place of delivery being at the reservoir, the covenant was that Stoneman would "suffer to flow to the parties of the second part * * * an amount of water equal to two-fortleths, * * so far as such waters can be brought to the northern line * * * by the present ditch, or by such further ditch as the party of the first part may hereafter construct." The place of the sale and delivery of the water being at the reservoir, here was the grant of an easement for its conveyance to plaintiff's land, through which the grantor covenanted he would "suffer the water to flow" over his intervening land. The grantee or owner of the easement is bound to keep it in repair, and this applies as well to water ditches as to private ways. Quinlan v. Noble, 75 Cal. 250, 17 Pac. 69; Durfee v. Garvey, 78 Cal. 546, 21 Pac. 302. In Prescott v. Williams, 5 Metc. (Mass.) 429, a case cited in Durfee v. Garvey, supra, it was said: "The duty of making repairs, and the labor necessary for keeping the water course in a state fit for use, rests wholly upon him who claims an easement on his neighbor's land: and, as a general rule, easements impose no obligation upon those whose lands are thus placed in servitude to do anything." See, also, Godd. Easem. pp. 285, 443. The owner of the servient estate can do no voluntary act to destroy or impair the easement, and hence the grant would not permit the destruction of the ditch then in existence, unless another should be provided, or the grantee should obtain the water from the proposed new reservoir, by a pipe to be laid at the grantee's expense. The fact that the grantor was using this ditch at the date of the grant could not of itself impose upon him the obligation to always continue its use, and the grant contained no express covenant that he would do so, or that he would keep the ditch in repair.

As to the change made by defendant from the wooden flume to the steel pipe, the court correctly charged the jury that she was not bound to maintain precisely the same system of discharging the water from the reservoir; but, in the view we have taken as to the place of delivery, the latter part of the instruction should be modified. The testimony of the engineer who made the change was that the area of the pipe is 501/4 square inches; that the former dam was low, and at the time the pipe was put in the dam was raised "pretty near five feet;" and that, with a full reservoir, the outlet end of the pipe would discharge 206 miners' inches, and that the capacity of the ditch is about 150 miners' inches, and that the pipe would carry the full flow of the water (that is, the full flow of the water as it rose in the canon) when the pipe was just covered, and, as the head was raised, the discharge would be increased. Whatever an "augmented head" or an "augmented flow" may be held to be, as applied to this case, we think that it must at least be limited by the capacity of the ditch; and by that we mean the capacity of the ditch to carry the water at the upper part of it, and before it is diminished by seepage. If, therefore, the steel pipe which replaced the wooden flume is capable of supplying the capacity of the ditch at or near the head, certainly no more can be required of the defendants; and the duty rests upon the plaintiff to put and keep the ditch in such condition that it will convey the water his needs require, or adopt some other mode of conveying it. A simple calculation will show the quantity of water to which the plaintiff is entitled. The deed requires that he shall have it at least once in every 10 days. entire flow is 38 inches. If the entire flow for 10 days were accumulated, it would equal 880 inches for 1 day. The two-fortieths, or one-twentieth, of that is 19 inches constant flow for 24 hours, to which quantity the plaintiff is entitled; or, if delivered in 12 hours. it would be 38 inches, or the natural flow of the water rising in the casion for 12 hours in each 10 days.

Whether the hydrant attached to the lower end of the pipe is of sufficient capacity to discharge that quantity of water in 12 hours or less, is a question of fact which ought to be capable of exact ascertainment. The testimony of Mr. Purcell, the engineer who put in the pipe and hydrant, based upon calculation, and not upon actual measurement of the water discharged, would tend to show that the discharge, when the reservoir was full, was largely in excess of 38 miners' inches, and equal to the capacity of the ditch; while the plaintiff contends that the quantity discharged was much less than formerly. While the manner in which the water was formerly delivered may be conclusive of the question as to plaintiff's right to receive the water in an augmented head instead of a continuous flow of two-fortieths, it is not conclusive of the extent of the augmented flow; but the covenant must have a reasonable construction, since the plaintiff's right is not based upon prescription, but upon a written contract, which requires the water to be delivered "at least once in ten days:" but, while the covenant does fix a limit to the quantity that can be used every 10 days,

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it does not determine, in terms, whether that quantity shall be discharged in 24 hours, or in 12, or in any less number of hours. that can be said, as an abstract proposition of law, is that it should be discharged in such volume that, the ditch being in good condition, it will give the plaintiff a reasonable use of the water; not, however, in such volume as a larger ditch would carry, nor such as might be used by a large force of men distributing it, nor yet requiring a larger flow to compensate for the loss of water by reason of the ditch not being in proper condition. The evidence shows, we think, that the ditch, at the times the plaintiff attempted to use it, was in bad condition; and, if the failure to obtain sufficient water for irrigation was fairly attributable to that cause, the plaintiff was not entitled to recover.

The amendment to the complaint was within the discretion of the court, and did not prejudice the defendants, and their motion for a nonsuit was properly overruled, inasmuch as there was evidence tending to show that the means of discharging the water from the reservoir into the ditch was inadequate. The plaintiff was not required to elect upon which count he would proceed, and the ruling of the court thereon was right, and evidence was properly received under paragraph 6 of the complaint.

The remaining specifications of error, so far as the same are important or likely to arise upon a new trial, are sufficiently noticed and controlled by the general discussion of the controlling questions in the case. We think the judgment and order appealed from should be reversed, and a new trial granted.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial granted.

4 Cal. Unrep. 788
PERKINS v. SUPERIOR COURT OF FRESNO COUNTY. (No. 15,711.)

(Supreme Court of California. Sept. 10, 1894.)

Appeal from Justice—Filing of Bond.

An appeal will not be dismissed because the bond was not filed within 30 days after the rendition of the judgment by a justice of the peace, if the bond was delivered and left at the office of the justice, but was not received or marked "Filed" by him until 2 days after the 30 days.

In bank.

Petition by one Perkins for a writ of prohibition against the superior court of Fresno county to prevent proceedings on appeal. Writ denied.

Warlow & Hargrove and Wm. Grant, for petitioner. Miles Wallace, for respondent.

BEATTY, C. J. The petitioner moved the superior court to dismiss the appeal f.om

a judgment rendered in his favor by a justice of the peace. The ground of the motion was that the undertaking on appeal had not been filed within 30 days after rendition and entry of the judgment. The superior court denied the motion, and this is a petition for a writ to prohibit further proceedings upon the appeal. It appears from the allegations of the petition that ample evidence was adduced at the hearing of the motion to warrant the superior court in finding that the undertaking was delivered and left at the office of the justice of the peace within the 30 days, and that it was not received by him, or marked "Filed," until two days after that time because of his absence from his office and from the county. If this was the case the superior court has jurisdiction of the ap-Writ denied.

We concur: McFARLAND, J.; GAROUTTE, J.; FITZGERALD, J.

DE HAVEN, J.: I concur in the judgment.

SAN LUIS OBISPO COUNTY v. FELTS et al. (No. 19,426.)

(Supreme Court of California. Sept. 10, 1894.)
POLL TAX — COMPENSATION FOR COLLECTION —
RIGHTS OF COUNTY ASSESSOE—COMPENSATION—
INCREASE DUBING TERM.

1. Const. art. 13, § 12, provides that the state poll tax "shall be paid into the state school fund." Const. art. 9, § 6, provides that the "entire revenue derived from the state school fund shall be applied exclusively to the support of primary and grammar schools." Held, that the word "exclusively" confines the use of school funds to the grammar and primary schools, to the exclusion of other schools mentioned in the same section, and does not forbid the use of any of the poll tax to pay the expenses of its collection.

2. Pol. Code. § 3862, providing that "the assessor for services in the collection of poll taxes shall receive the sum of 15%," and section 1857, providing that no assessor shall receive pay for collecting or handling school money, "provided that said assessor shall receive 15% of the collections by him of poll taxes," are not in conflict with Const. art. 13, § 12, which provides that the poll tax "shall be paid into the state school fund."

3. Act March 31, 1891, \$ 216, allows county assessors compensation for the collection of poll taxes, and, as the last expression of the legislative will, controls all former legislation on the subject, and renders nugatory the effect of the act of March 10, 1891, so far as it requires the assessor to pay all fees for services to the

county treasurer.

4. Pol. Code, § 2652, authorized the levy of a poll tax for road purposes, and allowed the road overseer 15 per cent. for collecting it. St. 1891, p. 478, transferred the duty of collecting the tax to the county assessor. Held, that the latter statute, though passed during the term of office of an assessor, did not conflict with Const. art. 11, § 9, which prohibits any increase of compensation to county officers during their term of office, since it merely allowed the previously established percentage for the collection of poll taxes, and increased the assessor's work in the proportion in which it increased his pay.

In bank. Appeal from superior court, San Luis Obispo county; V. A. Gregg, Judge.

Action by San Luis Obispo county against J. M. Felts and others, sureties on his bond, to recover certain percentages of the poll tax withheld as compensation for collection. Judgment for plaintiff, and defendants appeal. Reversed.

E. P. Unangst and Wilcoxon & Bouldin, for appellants. F. A. Dorn, for respondent. H. C. Dillon, Dist. Atty., amicus curiae. Dudley & Buck, amicus curiae, for assessors of seven other counues. H. A. Barclay, for Los Angeles assessor.

BEATTY, C. J. This is an action brought by the county against the county assessor and his sureties to recover the amount of certain percentages of personal property taxes, and of the state and road poll taxes, claimed and withheld by him as his legal compensation for making the collec-The complaint contains three counts. tions. -the first, for \$350, being 6 per cent. of the personal property tax; the second, for \$350, being 15 per cent. of the state poll tax; and the third, for \$310, being 15 per cent. of the road poll taxes. On the first cause of action the superior court gave judgment for the defendants. On the second and third causes of action the judgment was in favor of the plaintiff, and from this part of the judgment the defendants appeal. In support of their appeal the defendants cite various provisions of the Political Code and the county government law, which clearly authorize the assessor to retain as his compensation for his services 15 per cent. of all poll taxes collected by him; but the respondent contends that, as to the state poll tax, all these provisions are in conflict with the mandate of the constitution which appropriates that tax exclusively to the support of the public schools; and, with respect to the road poll tax, the contention is that no law in existence prior to the election of this assessor gave him the collection of the road poll tax, and to allow him a percentage for collecting it under a law passed subsequent to his election would be to increase his compensation contrary to the inhibition of the constitution against any increase of the compensation of public officers after their election. section of the constitution cited by counsel for respondent in support of its contention is section 12 of article 13, which reads as follows: "The legislature shall provide for the levy and collection of an annual poll tax of not less than two dollars on every male inhabitant of this state over twenty-one and under sixty years of age, except paupers, idiots, insane persons, and Indians not taxed. tax shall be paid into the state school fund." In connection with this they also cite section 6 of article 9, which reads as follows: "The public school system shall include primary and grammar schools, and such high schools,

evening schools, normal schools and technical schools as may be established by the legislature, or by municipal or district authority; but the entire revenue derived from the state school fund and the state school tax shall be applied exclusively to the support of primary and grammar schools."

It is upon the last clause of the latter section that particular reliance is placed, and especially the word "exclusively," therein contained, which, it is contended, clearly evinces an intention on the part of the framers of the constitution that no part of the proceeds of the state poll tax shall ever be diverted to the payment of the expense of collecting it. We think, however, that the whole force of this word is directed to the point that the state school funds must only be applied to the support of primary and grammar schools to the exclusion of the other classes of schools which may be established by the legislature, or by municipal or district authority. If we are right in this view, the only remaining question is whether the statutes referred to are in conflict with section 12 of article 13. The question, in other words, is whether, by that section, the legislature is deprived of the power to make the poll taxes pay the expense of their own collection?

As bearing upon this question, it is material to note the fact that from the very beginning of legislation in California, until the adoption of the present constitution, the collectors of poll taxes were always authorized to retain a percentage of their collections as compensation for their services. The various statutory provisions on this subject are cited in the briefs of counsel, but we deem it sufficient in this place to refer only to sections 3839, 3862, and 1857 of the Political Code, as they existed from its adoption in 1872 up to the adoption of the constitution in 1879, in which the substance of the earlier statutes is embodied. It is material, we say, to note this uniform course of legislation, because the framers of the new constitution must be presumed to have been familiar with it; and we are therefore entitled to expect that, if they intended to effect a radical change in the system, their purpose will be found plainly and unequivocally expressed. We do not, however, see anything in either of the sections of the constitution above referred to, or in both combined, which clearly deprives the legislature of the power to make the poll taxes pay the expense of collection. It is fair and reasonable and just that they should be charged with such expense, and indeed the fact that they are exclusively a state tax makes it peculiarly appropriate that the agents for their collection should be compensated by a percentage of their collection, rather than out of the salary or general funds of the counties. that the legislature might abuse the power claimed is no argument against its existence. Most if not all of the unquestioned powers of the legislature are capable of being abused.

but there is no presumption that they will be; and, as to this particular matter, no change has been made in the rule that had existed for nearly 30 years before the adoption of the present constitution, and which has scarcely been questioned during the 15 years that have since elapsed. Independent of authority, we should feel little hesitation in holding upon these grounds that the law in question here is entirely consistent with the constitution, and this conclusion is only strengthened by reference to the cases decided in other states having similar constitutional provisions. Besides the cases in which it has been held that it is only just that every tax should bear the necessary expense of its collection, the case of Shaver v. Robinson, 59 Ala. 195, is directly in point, and clearly sustains the validity of this law. State v. Donnelly, 20 Nev. 214, 19 Pac. 680, involves the same principle, and is decided the same way. And, while it appears that several other states have similar constitutional provisions and similar legislation, the validity of such legislation does not seem to have been questioned. The case cited and relied upon by the respondent and by the learned judge of the superior court as sustaining a contrary view will be found, on careful examination, to involve no constitutional question, but to have been decided altogether upon a construction of the statutes of Indiana, by which it was expressly provided that the fees of officers for collecting, managing, and disbursing the tuition fund should be paid by the counties. State v. Commissioners of St. Joseph Co., 90 Ind. 362. Our conclusion is that the statutes in question are not in conflict with section 12 of article 13 of the constitution.

But counsel for respondent further contends that the only law under which Felts can claim a percentage of poll taxes was passed after his election, and therefore it is, as to him, inoperative, by reason of section 9 of article 11 of the constitution, which prohibits any increase of compensation of county officers after their election, or during their term of His argument is that the enactment of section 4334 of the Political Code, on March 10, 1891, and subsequent to the election of Felts, operated a repeal by implication of the various statutory provisions then in force allowing compensation for collecting poll taxes, and that Felts can claim nothing under the law thereafter enacted. We think it very doubtful, in the first place, whether there is any such necessary conflict between the terms of section 4334 of the Political Code and the laws in question as to operate a repeal by implication; but, assuming that there was such direct conflict that both could not operate together, no repeal took place, because the amendment to the Code did not take effect until 60 days after its passage, before which time the county government law had been passed, and took effect March 31, 1891. St. 1891, p. 295. This · was the last expression of the legislative will,

and must prevail (Goodwin v. Buckley, 54 Cal. 295), and it allows the compensation claimed. See section 216. For these reasons, we conclude that the superior court erred in its judgment as to the percentage of state poll taxes.

As to the road poll tax, that is a tax collected under the law, and not, as assumed in respondent's argument, by virtue of the county ordinance passed subsequent to the election of Felts. By section 2652 of the Political Code the supervisors of each county are authorized to levy a poll tax not exceeding three dollars: and by the same law the road overseer, when charged with the duty of making the collection, was allowed 15 per cent. of the amount collected for his services. Section 2654. By an amendment to section 2652, which took effect in January, 1893, the duty of collecting this tax was transferred to the county assessor (St. 1891, p. 478); and it was no increase of his compensation, within the sense of the constitution, to allow him for those collections the previously established percentage for the collection of all poll taxes. In other words, if a law is in existence at the time an officer is elected, which gives him a certain compensation for performing a certain service, it is no violation of the constitution to pass a subsequent law, under which he is compelled to perform the same service oftener than before, for, although the gross income of the office may thus be increased, the compensation of the officer has not been increased, in the sense of the constitution. The rule is the same, first and last, i. e. a certain sum for a certain service,-compensation in proportion to duty, -the very rule which it was the design of the constitution to establish. The part of the judgment appealed from is reversed.

We concur: McFARLAND, J.: HARRI-SON, J.; FITZGERALD, J.: DE HAVEN, J.

104 Cal. 67 ROBERTS v. GEBHART et al. (No. 19,398.) (Supreme Court of California. Sept. 12, 1894.) Public Lands-Selection by State-Approval BY SECRETARY OF INTERIOR.

1. Where the selection of land by a state in lieu of other land has never been approved by the secretary of the interior, a purchaser from the state has no equity as against one who holds patent for the lands, though issued with notice of his prior claim.

2. The decision of the land commissioner in

vacating a selection of land made in lieu of other land by a state is final where the state does not appeal, though the reason assigned for

such order is insufficient.

3. Where the purchaser of lands selected in lieu of other land by a state has notice of an order vacating the selection, and fails to appeal therefrom, but permits another to perfect a homestead claim to the land, such laches will have him from any relief. bar him from any relief.

Appeal from superior court. Department 2. San Bernardino county; George E. Otis, Judge.

Action by Nathan P. Roberts against Sherman W. Gebhart and others. From a judgment for defendants, and from an order overruling a motion for a new trial, plaintiff appeals. Affirmed.

John D. Pope and D. K. Trask, for appellant. Rolfe & Rolfe and Goodcell & Leonard, for respondents.

DE HAVEN, J. The state of California, on May 16, 1885, upon the application of the plaintiff, filed with the register of the proper United States land office its selection of the land described in the complaint in lieu of a portion of a certain thirty-sixth This selection was approved by the register of the United States land office, and on July 25, 1885, the state issued to the plaintiff a certificate of purchase of said land. On July 16, 1885, the commissioner of the general land office canceled the state's selection, giving as his reason for such action that the land in lieu of which the selection was made had already served as the basis of a prior selection by the state, and on the 23d of the same month the state was notified of such cancellation. No appeal was ever taken from this ruling of the commissioner. On July 23, 1886, the defendant Gebhart was allowed to enter the same land as a homestead entry under the laws of the United States, and on September 22, 1887, he was permitted to commute his homestead entry, and to make final proof and payment for the land. It further appears that in September, 1888, the commissioner of the general land office discovered that the order of July 16, 1885, canceling the selection made by the state. was based upon a mistake of fact, and said order of cancellation was thereupon rescinded, and the state's selection reinstated upon the records of the general land office. discovery of this mistake seems to have been induced by a letter written to the commissioner by the attorney for the plaintiff some time after the month of August, 1886. November 11, 1890, the commissioner again ruled that the state's selection must be canceled because of the fact that the entry of the defendant Gebhart had been perfected after the former cancellation of such selection, and before the order for its reinstatement. Upon an appeal herefrom, taken by the plaintiff to the secretary of the interior, this latter decision of the commissioner of the general land office was affirmed, and thereafter the United States issued to the defendant Gebhart its patent for the land in controversy. The plaintiff seeks by this action to obtain a judgment and decree that he is the equitable owner of the land, and that the defendant Gebhart holds the legal title thereto in trust for him, and that the other defendants, claiming under defendant Gebhart as mortgagees, accepted their mortgages with notice of plaintiff's equitable right to the land. The defendants recovered judgment in the superior court, and the plaintiff appeals.

1. It is argued in behalf of plaintiff that one who first initiates proceedings to acquire the legal title to public land has the superior right thereto, if he does or offers to do all that the law requires of him in order to entitle him to a patent therefor; and if, by the wrong or mistake of the officers of the land department, he fails to secure the legal title from the government, and a patent is issued to another, with notice of his prior rights, a court of equity will, under such circumstances, protect the first applicant by decreeing that the person who has thus taken the legal title conveyed by the patent holds such title in trust for him who was first in time in the commencement of proceedings to acquire such title. abundant authority for this proposition. Lytle v. Arkansas, 9 How. 314; Buckley v. Howe, 86 Cal. 596, 25 Pac. 132; Lindsay v. Hawes, 2 Black, 554; Johnson v. Towsley, 13 Wall. 72; Shepley v. Cowan, 91 U. S. 330. But we are of the opinion that the facts of this case are not such as to entitle the plaintiff to invoke this equitable rule. In the first place, the selection made by the state upon application of the plaintiff was not approved by the secretary of the interior, and therefore such attempted selection did not give to the state any legal or equitable right to the land therein described. In the case of Buhne v. Chism. 48 Cal. 471, this court, in passing upon the effect of such a selection, and the necessity for its approval by the secretary of the interior, said: "We think the approval of the secretary of the interior was essential to a valid selection and location by the state; and that it was incumbent on the plaintiff to show affirmatively that he had approved it. The act of March 3, 1853, provides in terms that the selection shall be subject to his approval, and we have no authority to dispense with it. This condition was doubtless inserted for the reason that, in the opinion of the highest officer of the land department, the land might be required in the future for public uses; and it was intended that he should exercise his judgment in the premises before the selection should be valid." It is true the question in that case related to the legal title of the land there in controversy, but the reasoning of the court will go far to support the position that such a selection, when the secretary of the interior has acted upon and refused to approve it, does not confer even an equitable right upon the state, or upon one claiming under it, such as would authorize or justify a court of equity in reviewing the grounds or basis for such refusal. It is the consent of the United States, as manifested by the approval of the secretary of the interior, which gives legal efficacy to the application or selection made by the state; and without such approval neither the state nor its grantee is in a position to call in question any future disposition which the United States

may make of the land embraced in the attempted selection. In Wisconsin Cent. R. Co. v. Price Co., 133 U. S. 496, 10 Sup. Ct. 341,—a case in which the question of title to a selection of lieu land under a grant made to the state by congress to aid in constructing a railroad was involved, the act making the grant requiring the selection to be approved by the secretary of the interior,-the court held: "The act of the secretary of the interior in approving the selection of indemnity lands by a railroad land grant company to supply deficiencies in selections within the place limits is judicial, and until it is done the company has no equitable right in the selected tracts; and this rule is not affected by the fact that such a refusal was given under a mistake of law, and was subsequently withdrawn, and an assent given." The above quotation is taken from the syllabus, but it correctly states the decision of the court upon the point; and the court, in the course of its opinion, uses this language, which is entirely applicable here: "The approval of the secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial, but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land granted to the company, which were to be supplied from indemnity lands; and, in the second place, whether the particular indemnity lands selected could be properly taken for those deficiencies. In order to reach a proper conclusion on these two questions, he had also to inquire and determine whether any of the lands in the place limits had been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. * * * Until the selections were approved, there were no selections in fact, only preliminary proceedings taken for that purpose, and the indemnity lands remained unaffected in their title."

2. But, even if it should be conceded that the plaintiff, by virtue of his application, and the selection made by the state, is in a position to call in question the grounds of the decision of the secretary of the interior in refusing to approve the state's selection, the concession would not help him, for, in our opinion, the action of the secretary ought to be sustained for the reasons stated by him in affirming the decision of the commissioner. In that decision the secretary said: "It is asserted by counsel for Gebhart that the state had notice, July 23, 1885, of your decision of July 16, 1885. This is not denied. The local officers were directed to give the state notice. Under these circumstances, and in the absence of any showing to the contrary, it will be assumed that notice was given of that decision. If the state was dissatisfied with the order for cancellation of that date, it should have appealed; and in failing to do so that action should have been final, although the reason assigned in that order may not have been sufficient. But in any event, I do not see that the appellant, Roberts, has any cause for complaint. He says, in his affidavit, that he knew of the order of July 16, 1885, canceling the state's selection in August, 1886. Granting that this was the first information he had or the state had, he then had sixty days in which to appeal. This information was within forty days after Gebhart made his homestead entry, and, the land then being subject to entry by your order under the land laws of the United States, it was his (Roberts') privilege to contest the entry of Gebhart on the ground of prior settlement. Again, he allowed Gebhart to make final proof and payment for the land a year after he had knowledge of the order, without protest. It will be assumed that he had personal knowledge of Gebhart's claim, as it is shown that both parties were actually residing on the land from the date of Gebhart's entry to his final proof. So that it would seem appellant has slept on whatever rights he may have had." In these views we entirely concur. Judgment and order affirmed.

We concur: FITZGERALD, J.; McFAR-LAND, J.

104 Cal. 85

WILLIAMS et al. v. WILLIAMS et al. (No. 18,309.)

(Supreme Court of California. Sept. 13, 1894.)
FINDING—ACCOUNTING.

In an action for a settlement of a mining copartnership, a finding that certain defendant copartners are indebted to the "copartnership" does not authorize a judgment that the sum be paid to "plaintiffs."

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by Mrs. M. Williams and others against John W. Williams and others. There was a judgment for plaintiffs, and defendants appeal. Reversed.

A. J. Ridge, for appellants. J. M. Walling, for respondents.

McFARLAND, J. This is an action brought by five tenants in common of a mining claim against four other tenants in common in said claim, for a partition of the mining claim, and the settlement of a mining copartnership. Judgment was rendered generally for plaintiffs, and defendants appeal from the judgment on the judgment roll alone.

We do not see anything necessary to be noticed in any of the points made by appellants except the last one, to wit, that the findings do not support the judgment, because the former shows that each of the defendants is indebted in a stated amount to the partnership, while the judgment declares that each defendant is indebted to the plaintiffs in the said amount of money, and de-

crees that the said amount of money owing by each defendant to the partnership be paid to the plaintiffs. It is quite probable that the words "to the partnership," in the findings, were placed there inadvertently; but we must take the record as we find it. Of course, a finding that certain copartners are each indebted in a stated amount to the copartnership does not warrant a judgment that the same amount be paid to the partners. For this reason the judgment must be reversed.

Respondents move to dismiss the appeal upon the ground that the judgment was satisfied before the appeal was taken, but the affidavit on file does not show that fact. The motion to dismiss is therefore denied. The judgment is reversed.

We concur: FITZGERALD, J.; DE HA-VEN, J.

104 Cal. 81

In re CARRIGER'S ESTATE. (No. 15,515.) (Supreme Court of California. Sept. 13, 1894.) REVIEW ON APPEAL—DISORPTION OF COURT.

An order granting a new trial will only be reversed for an abuse of discretion.

Department 2. Appeal from superior court, Sonoma county; R. W. Crawford, Judge.

Proceedings for the probate of the will of William W. Carriger. There was a verdict for contestant, Kate C. Carriger, that the will was executed by testator while under undue influence; and, from an order granting a new trial, contestant appeals. Affirmed.

Wm. S. Barnes, Dunne & McPike, and J. P. Rogers, for appellant. Barclay Henley and S. V. Costello, for respondent.

McFARLAND, J. The alleged last will of William W. Carriger, deceased, having been proposed for probate by the executor therein named, a contest thereof was made by Kate C. Carriger, the widow of the deceased, upon the grounds: First, that the deceased was not of sound and disposing mind and memory at the time the will was made; and, second, that the will was made under the undue influence of Alfred Boggs Carriger, a brother of deceased. Nine special issues were presented to a jury. The first issue was this: "Was said William Carriger, at the time of the making of said will, a man of weak mind, vacillating, and easily led?" To this the jury answered, "No." The next seven issues so presented were about intermediate probative facts, and were answered by the jury favorably to the contestant. The ninth and last issue, which contained the pith of the charge of undue influence, was as follows: 'Did the said William W. Carriger, at the time of the making of the will in question, understand and know what he was about, and does it express his real wishes, and dispose of his estate in accordance with

his own independent judgment and desire, entertained by him at the time of its execution?" To this the jury answered, "No." The proponent moved that the verdict be set aside, and for a new trial, and the court below granted the motion, and ordered a new trial. From the order granting a new trial the contestant appeals.

The motion for a new trial was based upon alleged errors of law occurring at the trial, and upon the insufficiency of the evidence to justify the verdict, the particulars of said insufficiency being fully set forth. The order of the court below granting the motion for a new trial does not state the ground upon which it was based. It must be sustained, therefore, if it be justified on any of the grounds upon which the motion was made. We will pass over the alleged errors of law, which do not seem to be of vital importance, and assume that the motion was granted for insufficiency of the evidence to justify the verdict. Taking this view of the case, we see no good reason for disturbing the order appealed from. When the judge of a trial court is satisfied that a verdict is not warranted by the evidence, he should set it aside; and when he does so his order granting a new trial will not be reversed, unless it appears to this court that he had no reasonable and just ground for holding that the verdict was against the weight of the evidence. The nere fact that there is some conflicting evidence on the points at issue does not preclude him from exercising the supervisory power of granting a new trial, which is clearly given him. Dickey v. Davis, 39 Cal. 569; Sherman v. Mitchell, 46 Cal. 580; Irving v. Cunningham, 58 Cal. 306; Breckenridge v. Crocker, 68 Cal. 403, 9 Pac. 426; Bronner v. Wetzlar, 55 Cal. 419; Pierce v. Schaden, Id. 408; Phelps v. Mining Co., 39 Cal. 410; Peters v. Foss, 16 Cal. 358; Curtiss v. Starr, 85 Cal. 376, 24 Pac. 806. This court, will, of course, reverse orders denying or granting new trials in extreme cases. No absolute rule of universal application can be formulated. This court has approximated such a rule, as nearly as may be, by saying that a motion for a new trial is addressed to the sound, legal discretion of the trial judge, and that an order granting or refusing it will not be disturbed unless it appears that there has been a manifest abuse of discretion. See cases above cited. Such language has been used by nearly every justice who has sat on this bench, and it is not open to just adverse criticism.

It would serve no useful purpose to recite here the evidence given at the trial of the case at bar. The most that could be said of it favorable to the contention of appellant is that it was somewhat conflicting. But it would be preposterous to say that the evidence was of such a character that the judge, in holding it insufficient to warrant the verdict, stepped out of his legitimate province, exceeded his real powers, and manifestly abused his discretion. The will in ques-

tion was made by a man in the prime of life, and in the full possession of his mental pow-He went alone to a lawyer's office, and, after some consultation, directed him to prepare his will according to his instructions then given. In a day or two he returned alone to the lawyer's office, and, the will having been prepared according to his instructions, he then and there executed it in accordance with the forms of law. The occupant of a neighboring office was called in, who, with the lawyer, signed as subscribing witness. Neither his brother Boggs nor any other relation or person was with the testator upon these occasions. To set aside a will made under these circumstances is a serious matter, and a verdict having that effect should be closely scrutinized by the trial judge. The upsetting of wills is a growing evil. In the case at bar the judge may well have thought that the verdict was founded (insensibly, perhaps) more upon the jury's own notion of what the will ought to have been, than upon a conclusion from the evidence that the instrument in question did not express the testator's own wishes, and is not. therefore, his will. The order appealed from is affirmed.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

104 Cal. 186

MONTGOMERY v. SANTA ANA & W. RY. CO. (No. 19,277.)

(Supreme Court of California. Sept. 13, 1894.)
RAILBOAD IN STREET—RIGHTS OF ABUTTING OWN-ER—EJECTMENT—WHEN LIES.

1. Civ. Code, § 1112, provides that "a transfer of land bounded by a highway passes the title to the soil of the highway to the center thereof." Held, that where land is acquired by a city, the owner of land abutting on a street, though owning to the center of the street, cannot complain of its use for railroad purposes conducive to the public good, and not interfering with his right to its use as a highway.

2. Ejectment cannot be maintained by an abutting owner against a railroad company operating its road on his half of a public street under permission from the city, he having no present right of possession, of which he has been deprived.

3. A railroad operated in a public street imposes no greater burden on the abutting property by carrying freight than by carrying passengers only.

In bank. Appeal from superior court, Orange county; J. W. Towner, Judge.

Ejectment by Victor Montgomery against the Santa Ana & Westminster Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Jas. G. Scarborough, for appellant. Victor Montgomery, in pro. per.

PER CURIAM. This is an action of ejectment to recover possession of a strip of land in the city of Santa Ana, county of Orange.

Plaintiff had judgment, from which, and

from an order denying a motion for a new trial, defendant appeals.

Defendant, by its answer, set up two separate defenses. In the second of these it set out (1) that it is a corporation with power to construct and operate a steam railroad for the transportation of freight and passengers from the city of Santa Ana to Westminster, across, along, and upon any street, avenue, or highway; (2) that a strip of land 30 feet in width off the entire north side of the land described in the complaint was and is a public street or highway in said city of Santa Ana, under the control of and in the possession of the board of trustees of said city; (3) that said board of trustees, by ordinance, authorized and licensed defendant to construct and operate a railroad through and over said street, for carrying freight and passengers in cars to be propelled by dummy or motor engines; (4) that it constructed its road on said street, and operated it as provided in said ordinance; (5) that it has not excluded plaintiff or others from the street, and has only used it for the purpose aforesaid, and in common with the public, and has not impaired said street, or curtailed the use thereof by others, etc. To this defense plaintiff demurred, upon the ground that it did not state facts sufficient to constitute a defense. The demurrer was sustained by the court, and defendant declined to amend as to this defense, and the action of the court in sustaining the demurrer is urged as error.

The whole proposition involved in this case may be put thus: Can the owner in fee of land abutting upon a public street in an incorporated town maintain an action of ejectment against a railroad company organized and existing for the transportation of freight and passengers from said town to a neighboring town, which company, under and by virtue of an ordinance of the trustees of the first-designated town empowering it to do so, has constructed and is using a railway track upon and over said public street, and upon the side or half thereof adjoining the land of such abutting owner? The question is stated thus for the reason that, while the evidence in the case, consisting of the deed to respondent and the city map together, show that his land abutted upon the street in question, viz. Second street, in the city of Santa Ana, yet by section 1112 of the Civil Code "a transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway to the center thereof, unless a different intent appears from the grant." There is nothing in the evidence to indicate the contrary, and hence we must presume respondent owns to the center of the highway or street, subject only to the right of the public to an easement or right of way for street purposes therein and thereto. All streets are highways, but not all highways are streets. Common Council v. Croas, 7 Ind. 9; City of Lafayette v. Jenners,

10 Ind. 74; Clark v. Com., 14 Bush, 166. In other words, there is a wide distinction between a highway in the country and a street in a city or village, as to the mode and extent of the enjoyment, and, as a sequence, in the extent of the servitude in the land upon which they are located. The country highway is needed only for the purpose of passing and repassing, and as a general rule, to which there are a few needed exceptions, the right of the public and of the authorities in charge is confined to the use of the surface, with such rights incidental thereto as are essential to such use. In the case of streets in a city there are other and further uses, such as the construction of sewers and drains. laying of gas and water pipes, erection of telegraph and telephone wires, and a variety of other improvements, beneath, upon, and above the surface, to which in modern times urban streets have been subjected. These urban servitudes are essential to the enjoyment of streets in cities, and to the comfort of citizens in their more densely-populated It has sometimes been suggested that a distinction is to be made between cases in which streets are laid out and opened upon property belonging to the corporation, and those in which streets become such by dedication, or by condemnation proceedings under the right of eminent domain upon compensation being made; but the consensus of modern opinion seems to be that no such distinction properly exists, and that "whether the corporation be the owner of the fee of the streets in trust for the public, or whether it be merely the trustee of the streets and highways as such, irrespective of any title to the soil, it has the power to authorize their appropriation to all such uses as are conducive to the public good, and do not interfere with their complete and unrestricted use as highways." People v. Kerr, 27 N. Y. 202; City of Cincinnati v. White's Lessee, 6 Pet. 432; Thomp. Highw. p. 7; Elliott, Roads & S. p. 305. It is said by Elliott, in his work on Roads and Streets, at page 299, that "it is doubtful whether, of all servitudes, there is one so broad and comprehensive as that of a city in its streets." It authorizes the use of the street for the track of a street-car company under license by the city authority, without compensation to the owner of the fee. Finch v. Railway Co., 87 Cal. 598, 25 Pac. 765.

A "street railway" has been defined as "a railway laid down upon roads or streets for the purpose of carrying passengers." Elliott, supra, 557. It is further said by the same author that "the distinctive and essential feature of a street railway, considered in relation to other railroads, is that it is a railway for the transportation of passengers, and not of freight." It is said to exclude the idea of the carriage of freight, and that a railroad over which heavily-laden freight trains are drawn cannot be considered a street railway. Street cars are little more

than carriages for transportation of passengers, propelled over fixed tracks, to which their wheels are adapted, and as a convenient, comfortable, and economical mode of conveyance, their use has become well-nigh universal in cities, and as they add, when properly constructed, little or nothing to the burdens of the servient tenement, their use is upheld without the necessity of compensation to the abutting owner. The use of a public street, however, for an ordinary railway for the transportation of freight and passengers, it has been said by the highest authority, imposes a new burden upon the street, not contemplated in its dedication, and therefore the user cannot be indulged without compensation to the abutting owner of property upon such public street. We are at a loss for any good reason for this distinction, or to see why the transportation of freight by modern and improved methods is not equally entitled to encouragement with the transportation of passengers. The essential wants of the citizen demand the former equally with the lat-If there is any difference in the burden imposed upon the street, it is in degree, and not in kind. The great highways of England were constructed, not so much for the convenience of passengers as for the transportation of freight. In the infancy of commerce, when trade and traffic by land was insignificant in volume, when the sumpter horse, which answered to our modern pack mule, answered all the purposes of transportation for goods, footpaths, bridlepaths, and lanes served all needed purposes; but with the growth of inland commerce, and the need of greater facilities for the interchange of commodities, the use of wheeled vehicles, and, as a means thereto, the highway, as we know it, became a necessity. The Appian Way, commenced 312 B. C., which has provoked the admiration of the world, was entitled to commendation for its roadway 16 feet in width, constructed for the transportation of burdens, while the paths of 8 feet on each side of it for foot passengers, and upon which the Roman legions were wont to march, were unpaved. In the construction of modern highways, urban and suburban, the great difficulty and the prominent object has been to build and adapt them, by grade, width, and structure of roadbed, to the carriage of freight. Yet we are told in effect that, so far as modern methods are concerned,-so far as ease, speed, and economy are involved,-improvements are to be limited to the transportation of passengers; that cars with wheels adjusted to move upon fixed tracks, when applied to the transportation of passengers, are within the contemplated objects in view in opening a road or street, and therefore add nothing material to the burden of the servitude of the abutting landowner, while a precisely similar structure, adapted to the transportation of freight, adds an additional burden, of a different character, to the servitude, and cannot be tolerated without compensation to the abutting owner. An interminable string of heavy drays may thunder through the street from early morning until set of sun, a menace to all who frequent the thoroughfare, and an inconvenience to all dwellers thereon; but the cars of a railway, which move usually but a few times a day, and with infinitely less annoyance to the public, upon tracks so adjusted to the surface as to occasion little or no inconvenience, cannot be tolerated. We fail to appreciate the philosophy of the distinction. On the contrary, we affirm that, when a public street in a city is dedicated to the general use of the public, it involves its use, subject to municipal control and limitations, for all the uses and purposes of the public as a street, including such methods for the transportation of passengers and freight as modern science and improvements may have rendered necessary, and that the application of these methods, and indeed of those yet to be discovered, must have been contemplated when the street was opened and the right of way obtained, whether by dedication, purchase, or condemnation proceedings, and hence that such a user imposes no new burden or servitude upon the owner of the abutting land. The object of the user being within the conceded rights of the public, the methods of its accomplishment are subject to legislative control, and subject, also, to an action for damages by any abutting owner, whether or not he may be vested with the fee to the center of the street, whose right of ingress and egress, or his right to light and air, shall be interfered with.

The thirteenth subdivision of section 862 of the municipal government act of this state authorizes the boards of trustees of municipalities of the sixth class, of which Santa Ana is one, "to permit, under such restrictions as they may deem proper, the laying of railroad tracks and the running of cars drawn by horses, steam or other power thereon * * * in the public streets." world moves. Legislation in recent times has kept pace with the progress of the age. The trend of judicial opinion, except where overshadowed and incrusted with stare decisis, is to a broader and more comprehensive view of the rights of the public in and to the streets and highways of city and country; and, while carefully conserving the rights of individuals to their property, the courts have not hesitated to declare the shadowy title which the owner of the fee holds to the land in a public street or highway, during the duration of the easement of the public therein, as being subject to all the varied wants of the public, and essential to its health, enjoyment, and progress. In Paquet v. Railway Co., 18 Or. 233, 22 Pac. 906, which was an action to enjoin a steammotor railway company from constructing and operating its road upon a street in the city of Portland and upon a county road

outside the city, abutting upon both of which the plaintiff owned land, with the fee in him vested to the center of the street and road, and where no compensation had been made to plaintiff, the court in its opinion, by Thayer, C. J., in deciding the cause against plaintiff, said: "The establishment of a public highway practically divests the owner of a fee to the land upon which it is laid out, of the entire present beneficial interest, of a private nature, which he has therein. It leaves him nothing but the possibility of a reinvestment of his former interest in case the highway should be discontinued as such. This view, I am aware, is contrary to the ancient doctrine that the owner of the fee owned the land subject only to such public uses, and that he had a right of action when the use was diverted to a different purpose. Such a doctrine may have been applicable where the ownership was merely subject to a right of way over the land; but where, as in modern cases, it is devoted exclusively to the purposes of a public thoroughfare, and the control thereof is committed to legally constituted authorities charged with the duty of maintaining it for such purpose, the doctrine becomes a vague theory, and should be laid away among the antiquities of the past age." McQuaid v. Railway Co., 18 Or. 287, 22 Pac. 899, enunciates a like doctrine. In Henry Gauss & Sons Manuf'g Co. v. St. Louis, K. & N. W. Ry. Co. (Mo. Sup.) 20 S. W. 658, the supreme court of Missouri held, in substance, that the construction and operation of an ordinary steam railroad at grade in a public street under municipal authority is not a new public use of the street, for which compensation may be demanded by abutting owners, as in the case of property "taken or damaged," within the meaning of the constitution. The court said: "When land is dedicated generally, and without restrictions, or condemned, for a public street, in a town or city, the owner of the abutting lots, who secures the benefit of the street, and persons also who purchase and improve property thereon, hold their property rights subject to all the uses to which the street can be lawfully subjected by the public. New uses in the improvement in the mode of travel and transportation are constantly arising. When there is no restriction on the public use, new modes of use may be adopted, which are consistent with the proper use of the street, without the consent of abutting owners, though such new uses may interfere somewhat with their own convenient use of the street. * * * For any damages that may be caused by an unlawful or negligent maintenance of the track in the street, or by negligent use of engines or movement of trains, defendant will be liable in an action for damages." This decision is in line with the decisions in that state. In Iowa a like doctrine prevails. In Barney v. Keokuk, 94 U. S. 324,-which was ejectment in the United States court for the

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district of Iowa, to recover certain premises within a public street in Keokuk, occupied with railroad tracks, buildings, sheds, etc.,upon error to the supreme court of the United States, that tribunal held that although no permanent obstruction, like a depot building, could be erected on the streets of a town, yet it is held in that state (Iowa) that they may, by public authority, be occupied by railway tracks without the consent of the adjacent proprietors, and without compensation, whether the fee of the streets, as in that case, be in him or in a third person. court further held that there was no substantial difference between streets in which the legal title is in private individuals, and those in which it is in the public, as to the rights of the public therein. Kucheman v. Railway Co., 46 Iowa, 366. In New Jersey it is held: (1) That the legislature has power to authorize the use of a public highway for the purpose of a railway. (2) That the legislature must be the judges as to the benefit to the public, and to their authority the public and individuals must submit. The authority to use a public highway for the purpose of a railroad, retaining the use of such highway for all ordinary purposes, is not such a taking of private property for public purposes as requires compensation to the owner of the fee of the adjacent lands. as is contemplated by their constitution. (4) That the easement of the highway is in the public, although the fee is practically in the adjacent owner. "It is the easement only which is appropriated, and no right or title of the owner is interferred with." Morris & Essex R. Co. v. Mayor, etc., of Newark, 10 N. J. Eq. 352. In Spencer v. Railroad Co., 28 W. Va. 406, which was a bill in equity to restrain defendant from constructing and operating an ordinary steam railroad over a public street, the fee of which was in plaintiff, under a license from the municipal authorities, the court used the following language: "Admitting she (the plaintiff) owns the fee to the middle of Seventh street opposite her lot, as she contends is the fact, she still owns the same, and neither her title or possession is in any manner disturbed by the railroad company. It has always been subject to the easement of the public to pass and repass over it and to use it as a street: and, subject to this easement, she has as much the enjoyment and possession of the whole of Seventh street as she ever had. What the railroad company has taken it has taken from the town council of Point Pleasant,a mere easement,-and it has taken nothing from the plaintiff, and therefore, under West Virginia authorities referred to, she is entitled to no injunction." In Railroad Co. v. Sawyer, 92 Ill. 377, the supreme court of Illinois held that the public authorities who have the superintendence and control of the public roads may authorize travel on them by the means of a railroad, and, where a railroad company has constructed its road upon and

along a public road, such use and possession is a matter between the road authorities and the railroad company, and the right cannot be questioned in an action of ejectment by the owner of the land over which the public road has been established.

This being an action of ejectment to recover a specific piece or parcel of land, and it appearing from the stipulation of the parties that the alleged ouster consisted only in the entry by the defendant upon a public street, and the construction of a railroad track thereon, no question of damage to property, other than to such public street, within the purview of section 14 of article 1 of the constitution of this state, can arise.

We may admit that the views herein expressed are in conflict with the doctrine enunciated in Railroad Co. v. Reed, 41 Cal. 256, and Muller v. Railway Co., 83 Cal. 240, 23 Pac. 265, and it does not necessarily follow that ejectment will lie, if the facts set out in the answer are true. The cases above quoted were to recover damages. The cases of Weyl v. Railroad Co., 69 Cal. 203, 10 Pac. 510, and Finch v. Railway Co., 87 Cal. 597, 25 Pac. 765, in which ejectments were upheld, were cases in which the defendants were mere intruders upon the public street, without valid license from any authorized body. The rule, as defined in Mahon v. Road Co., 49 Cal. 270, is regarded as the true one in cases of ejectment for injuries like the one complained of here. It was said in that case: "The exclusion of the plaintiff from entering on the land, except on the payment of a toll, and then only for the purpose of passing over the same, was a disselsin." In the present case the answer to which the demurrer was sustained averred: "That this defendant has not excluded the plaintiff, or any one else, from said street, or any part thereof, nor does it claim to hold said street, or any part thereof, exclusively from the plaintiff, or any one else whomsoever; but this defendant only claims the right to use the portion of said street actually occupied by said track in common with the public, under and by virtue of said ordinances of the said board of trustees of said city, and not otherwise." The action of ejectment is a possessory action, in which the plaintiff must show himself entitled to the present possession, and that he has been deprived thereof. Anything which deprives a plaintiff of his present right of possession will deprive him of the remedy of ejectment. The case of Redfield v. Railroad Co., 25 Barb. 54, is on all fours with the present case; and the court there held that the claim of an easement was not a claim of title, and that the mere user of such easement by license of the public, without excluding others from a like user, did not amount to an ouster for which ejectment would lie,-intimating, but without deciding, that trespass was in such a case the proper remedy. Railroad Co. v. Sawyer, supra, is to like effect. The municipal authorities, as trustees of the public, are in possession of the public streets, and hold them for the uses of the public as effectually as they do or may the public buildings of the municipality. A writ of restitution which should put the plaintiff in possession of the street, except as one of the public, would constitute him guilty as a trespasser, or of a nuisance, or of erecting a purpresture, as the facts might determine. It has been said that a writ which authorized A. to be placed in possession of real property, subject to the possession of B., is an absurdity. Where A. enters upon a public street and constructs a railroad without authority from the municipal authorities, ejectment will lie, as was held in Weyl v. Railroad Co. and in Finch v. Railway Co. This rule proceeds upon the theory that, as defendant does not justify under one having a right to possession, it matters not, as to him, that another than the plaintiff may have a better right than either of the parties to the action. A reversioner may maintain an action for an injury to his reversionary right, but cannot recover possession until the limited estate lapses. So the holder of the title to a public street, the possession of which is held for the public, may maintain an action for damages to his property therein, but, as against one who has taken no possession thereof, and is only in the exercise of an easement therein which is conferred by the municipal authorities in pursuance of their power, and which is valid as to the public, and which will expire with the easement of the public, of which it is a part, should not be permitted to maintain ejectment for a violation of his property rights, if any, but should be remitted to an injunction to restrain, or, if the injury is consummated, to an action for damages, or to proceedings to abate as a nuisance, as the case may be.

It follows that the court below erred in sustaining the demurrer to the answer of the defendant. The judgment is reversed, and the court below directed to overrule the demurrer to defendant's second defense, set out in his answer.

Neither BEATTY, C. J., nor DE HAVEN, J., participated in the foregoing decision.

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KRAFT v. WILSON. (No. 18,281.)
(Supreme Court of California. Sept. 14, 1894.)
UNAUTHORIZED ACT OF AGENT—RATIFICATION BY
PRINCIPAL—ACQUIESCENCE.

1. As the ratification of an agent's act is equivalent to a prior command, a finding that an agent had authority to do an act is sustained by evidence that his principal ratified such act.

2. The question of ratification of an unauthorized act of an experience of features.

thorized act of an agent is a question of fact.

3. Plaintiff purchased from defendant's sonin-law certain stock, part of which belonged to him and defendant and part to defendant and his son, and all of which were running on the same ranch, and credited the amount on the

son-in-law's account with him. Defendant, being told of the sale, gave other stock to his son, to satisfy him, but did not say anything to plaintiff, who had previously purchased stock from the son-in-law under similar circumstances, as was known to defendant. Defendant took an assignment from his son-in-law of all his interest in the stock on the ranch, and made several payments on what he himself owed plaintiff, and for which he had given his note, and also told him that his son-in-law had plenty of property to pay his debt, and at last gave him a mortgage two years after the sale to secure a balance he owed plaintiff. Held, that defendant, who had become the assignee of his son's interest, could not deny the son-in-law's authority to sell the stock belonging to defendant and his son.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Action by Herbert Kraft against H. C. Wilson. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Johnson & Chase and Reddy, Campbell & Metson, for appellant. N. P. Chipman and L. V. Hitchcock, for respondent.

SEARLS, C. This is an action upon a promissory note made by the defendant December 1, 1888, for \$7,981, payable to plaintiff or hisorder one day after date, with interest at 9 per cent, per annum, and in case of a suit for the collection thereof with 5 per cent. upon the amount found due as attorney's fees. Plaintiff claims a balance due of \$3,838, besides interest, and \$191.90 as attorney's fees and costs. Defendant answered, admitting the execution and validity of the note, and set up two counterclaims, aggregating \$5,937.50. These counterclaims were disallowed by the court, and judgment rendered in favor of plaintiff, from which, and from an order denying defendant's motion for a new trial, he appeals.

The whole case turns upon the validity of defendant's counterclaims. The cause was tried by the court without a jury, and the facts as found, bearing upon the questions involved, although lengthy, are essential to an understanding of the case, and are as follows:

"(1) That said C. G. Alexander is a son-inlaw of defendant, and was so related to defendant ever since 1880; and the said H. F. Wilson was a son of H. C. Wilson, and that said H. F. Wilson is now deceased.

"(2) That the defendant owns, and has for many years owned, a large body of land in Warner valley, in the state of Oregon, used as a stock ranch, upon which he raised horses, mules and cattle.

"(3) That some years prior to 1883 the defendant and C. G. Alexander entered into a contract, by the terms of which the defendant let Alexander have charge of a number of mares and cattle. Alexander was to run these animals on the said Warner Valley ranch, and at the expiration of the lease or contract was to return to the defendant the same number of animals he had originally received; that is, to make the old stock good.

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and the balance, or the increase, was to be owned equally by the defendant and C. G. Alexander. In 1883 the defendant and Alexander had a settlement under the terms of their contract. All the animals at that time were branded with the 'heart' brand. In this settlement the animals that were counted out to make the old stock good were branded with the 'bar-heart' brand, to distinguish them from what might be termed the increase. The defendant then turned over to his said son, H. F. Wilson, all animals branded with the 'bar-heart' brand upon a contract by which said H. F. Wilson was to run the 'barheart' stock on the said Warner Valley ranch on shares, to pay all the expenses of running them, and at the end of the contract make the old stock good, and divide the increase between his father, the defendant, and himself. The 'heart' brand animals, of which C. ·G. Alexander was the owner of one-half, were then turned over to the said C. G. Alexander under a contract by which he was to run them on shares on the Warner Valley ranch, pay all the expenses of running them, and divide the increase equally between himself and the defendant, H. C. Wilson. All the stock in which H. F. Wilson was interested with defendant, and that in which C. G. Alexander was interested with the defendant.the animals branded with the 'heart' brand and those branded with the 'bar-heart' brand, -ran promiscuously upon the Warner Valley ranch.

"(4) Accounts for supplies for the ranch were run at various stores in which supplies for all the ranch and all the stock upon it were charged, without any attempt to segregate the expenses incident to running the stock that H. F. Wilson had on shares from the expenses of the stock that C. G. Alexander had on shares.

"(5) From 1883 to 1889 H. F. Wilson was most of the time on the Warner Valley ranch, and while there had chief control of affairs. About 1889 he left, and did not return. A hard winter came, and destroyed 90 per cent. of the stock. H. F. Wilson and his father had no settlement, and H. F. Wilson, after the hard winter, practically abandoned the Warner Valley enterprise.

"(6) From the year 1884 up to the bringing of this action H. F. Wilson, C. G. Alexander, and H. C. Wilson did a large banking business with H. Kraft, the plaintiff. H. F. Wilson created an individual indebtedness with the plaintiff. C. G. Alexander created a large individual indebtedness with the plaintiff, and H. C. Wilson had an individual indebtedness with the plaintiff. In 1884, at the request of H. C. Wilson, an account was opened with H. Kraft under the name of H. C. Wilson and Alexander. The account ran along, until in March, 1886, it had grown quite large, amounting to over \$7,000, when the defendant gave a note to the plaintiff, signed H. C. Wilson and Alexander,' in settlement of the account to that date. After this, checks continued to be drawn against the H. C. Wilson and Alexander account up to December 1, 1888. In September, 1886, H. C. Wilson paid the note in full of March, 1886. December 1, 1888, the amount of the H. C. Wilson and Alexander account had reached the sum of \$7,981. On that day H. C. Wilson, at the request of plaintiff, gave his individual note for that amount, and the account of H. C. Wilson and Alexander was credited with the same amount, and closed. This note of December 1, 1888, is the one upon which this action is brought.

"(7) In the meantime the individual account of C. G. Alexander with the plaintiff had been growing from year to year. Some settlement of accounts had been made by Alexander by giving his individual notes. In September, 1890, he owed H. Kraft in all about \$17,000.

"(8) In August, 1890, there was upon the Warner Valley ranch a large number of horses, mules, and cattle. The stock was in three different brands; some branded with a 'heart,' some with a 'bar-heart,' and some branded 'A. X.' H. C. Wilson and C. G. Alexander each owned an undivided one-half interest in the 'heart' brand animals. H. C. Wilson and H. F. Wilson each owned an undivided half interest in the 'bar-heart' brand animals, and C. G. Alexander owned the 'A. X.' brand animals.

"(9) In August, 1890, C. G. Alexander was in Warner Valley in charge of the ranch and all the stock on it, regardless of brands. During all the year 1890, H. C. Wilson resided, and for many years prior thereto had resided, in Tehama county, California, in which county H. Kraft also resided, and also H. F. Wilson. The defendant went to the Oregon ranch once or twice a year, and there remained from one to three weeks.

"(10) In August, 1890, 49 head of mules from the Warner Valley ranch were at Lakeview, Oregon, in possession of one Hereford, and held by him under a chattel mortgage signed 'Wilson & Alexander,' to secure a debt of over \$2,100, due Cogswell & Ross, of Lakeview, jointly owned by H. C. Wilson and C. G. Alexander. The signatures thereto were written by Alexander, and at the time of their execution H. C. Wilson did not know of their execution.

"(11) In August, 1890, the plaintiff, being desirous of having something paid on the C. G. Alexander indebtedness to him, sent a man by the name of Estes to buy mules of Alexander, and credit the amount agreed to be paid upon Alexander's indebtedness. Estes, in pursuance of his employment, bought of Alexander 33 mules branded with a 'barheart,' 29 mules branded with a 'heart,' and 12 mules branded 'A. X.' For part of these mules he agreed to pay eighty dollars per head, and for a part eighty-five dollars per head. \$2,100 were paid in cash to release the mules that were in pledge in Lakeview, Oregon, which mules were a part of his pur-

chase, and the balance of the purchase price was credited on the individual indebtedness of C. G. Alexander to plaintiff.

"(12) After the purchase of said mules they were driven to Tehama county, California, and delivered to the plaintiff.

"(13) After the sale of the said mules, and after they had been delivered to the plaintiff, defendant, in September, 1890, went to Oregon, and had an interview with C. G. Alexander, at which time he was informed of the sale of the mules to plaintiff, and also as to what disposition had been made of the proceeds.

"(14) Defendant, H. C. Wilson, then took a bill of sale from C. G. Alexander of all his interest in the stock on the Warner Valley ranch in part payment of a large indebtedness due him (defendant) from Alexander.

"(15) Upon his return to Tehama county soon after, defendant had an interview with his son, H. F. Wilson, in which, for the purpose of preventing H. F. Wilson from informing plaintiff that he (H. F. Wilson) had an interest in a part of the mules sold to him by Alexander, he (defendant) let H. F. Wilson have mules of his to satisfy him (H. F. Wilson) for the mules Alexander had sold, and thereby prevent his (H. F. Wilson) saying to the plaintiff that Alexander had sold to plaintiff mules he had no authority or right to sell

"(16) In November, 1890, defendant, at the request of plaintiff, gave to plaintiff a crop mortgage for the full amount of the note now being sued upon. After the execution of this mortgage defendant paid upon the said note as follows: July 11, 1891, \$320.62; August 26, 1891, \$1,833.05; December 26, 1891, \$3,592.66; in all, \$5,746.33.

"(17) June 5, 1891, defendant Wilson was again at Warner Valley, Oregon, and had an interview with C. G. Alexander, at which time Alexander gave to defendant a letter addressed to H. Kraft, in the following words and figures: 'Warner, June 5, 1891. H. Kraft: The mules I sold you last year, one-half of thirty-three head of "hearts," sixteen and a half, and the thirty-one "bar-hearts," I had no right to sell. Please turn them over to H. C. and H. F. Wilson. C. G. Alexander.' In a few days thereafter defendant returned to Tehama county, where he then resided, and where he has resided for many years, bringing the above letter with him. He did not deliver it to plaintiff nor inform him of its contents, but kept it until a day or two before this case was commenced, to wit, until January 21, 1892, when he handed it to one of his attorneys, who afterward read it to Mr. Kraft.

"(18) On June 21, 1891, C. G. Alexander and the plaintiff had a settlement, and on that day C. G. Alexander mailed to the plaintiff a new note for what he then owed the plaintiff. In arriving at the amount of this new note, what was agreed to be paid for the mules (less \$2,100) had been deducted from

the total indebtedness of the said Alexander, and the note was sent for the balance. Alexander signed this new note, and on the 22d day of June, 1891, inclosed it in a letter, and it reached the plaintiff in due course of mail.

"(19) During the summer and fall of 1891 defendant continued to make payments on the note now in suit, and several times had the plaintiff's bookkeeper figure up the amount due. As late as November 14, 1891, plaintiff wrote to defendant about the balance then due on note in suit, and told him he was getting tired of waiting for his money. In response to this letter, defendant came up and said he was not ready to sell the wheat. Prices were not high enough to suit. He would like to hold on a little longer. Had plaintiff's bookkeeper figure up how much the wheat would bring at a certain price, and how much that note amounted to, and talked about turning over some wheat that Harry had as further security. He didn't say a word at that time about H. Kraft owing him anything for mules. Again, after the 28th of December, in response to another letter from the plaintiff, the defendant came up again. He told Kraft, the plaintiff, that Harry was going to let him have the wheat, and he was going to sell it. and pay the money in, and talked about some wool he had-something he was going to turn also. On December 26, 1891, the defendant sent to plaintiff wheat receipts amounting to \$3,599.66, for which he was given credit on the note in suit. This left a sum due to plaintiff from defendant, H. C. Wilson, much less in amount than the sum now claimed in the said defendant's counterclaim to be due from the said plaintiff to the said defendant.

"(20) At no time from August 9, 1890, to January 22, 1892, did defendant make any claim for the mules, or intimate that C. G. Alexander had done anything he did not have full authority to do." The foregoing are special findings, and are in addition to the general findings in the case in which it is found that Alexander had authority to sell the mules, etc.

From the findings, the court below concluded as matter of law "that the defendant. by his subsequent acts, conduct, and silence, as set forth in the above findings, has ratified the sale of all the mules sold by Alexander to the plaintiff, and should not now be permitted to question the validity of said sale." The propriety of this conclusion involves the important question in the case. "Ratification is the adoption of a previously formed contract, notwithstanding a vice which rendered it relatively void; and, by the very nature of the act of ratification. confirmation, or affirmance, the party confirming becomes a party to the contract." Herm. Estop. p. 1157. Where ratified by the principal, the unauthorized act of his agent is as binding upon him as though previous authority had been conferred upon

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such agent. The subsequent ratification has a retrospective effect, and is equivalent to a prior command. To say that an agent entered into a contract without authority from his principal, and that the principal subsequently ratified such contract, is, in legal intendment and effect, the equivalent of saying the agent was duly authorized to make the contract. The question of whether a contract made by an agent, or by one purporting to be such, has been ratified or adopted by the principal is one of fact, to be determined by a jury or by the court sitting in lieu thereof. Therein it differs from an estoppel in pais, which is a legal consequence,-a right arising from acts or conduct. Bigelow, Estop. (4th Ed.) p. 447. A full knowledge by the principal of all the material facts is a prerequisite to a finding that such principal has by his silence, acts, or declarations, in fact adopted the contract. Whart. Ag. § 65. The evidence which will authorize an assumption of ratification is or may be anything which convinces the mind of the intention on the part of the principal to adopt or approve the act, thus: (1) A principal who permits an unauthorized agent to act for him, and who stands by without interference while third persons deal with such agent as agent, cannot afterwards dispute the authority of such agent. (2) Silence of the principal when informed that the agent has entered into obligations in his name indicates acquiescence. (3) Proof of ratification may be inferred. We may infer ratification when the acts and conduct of the principal are inconsistent with any other theory than that he intended to ratify the transaction. It may be said, generally, that any act, conduct, or declaration from which an intent on the part of the principal to adopt the act of the agent appears is sufficient. Ratification being, as before stated, a fact, and the court having found thereon in favor of plaintiff, such finding must be upheld if supported by the evidence. The language of the general finding is "that said O. G. Alexander had authority to make said The retrospective effect of a ratification is to place the contract and the contracting parties in the same position as though previous authority had been given; hence, if there was in fact proof of such ratification, the court was authorized to find the authority as stated in the finding.

Turning to the record, and we think the findings have substantial support in the evidence. Twelve of the mules purchased by plaintiff from Alexander were the property of the latter, and no question can arise as to them. As to the 33 mules included in the same purchase, owned by defendant and Alexander jointly, there was certainly evidence tending to show that Alexander had authority to make the sale, and hence to support the finding of the court to that effect. That Alexander held a power of attorney from the defendant, authorizing him to trans-Cal.Rep. 35-37 P.—59

act all business at the ranch in Oregon, seems conceded. The precise date at which this power was revoked (if revoked at all by the defendant) is left in doubt. Alexander, testifying as a witness, says: "I thought I had authority from H. C. Wilson to sell to Kraft or to any one else his half interest in the mules branded with the straight 'heart.' My opinion is based upon previous actions between us, and business matters. I had authority at one time so to sell—that is, up to three or four years ago-two years ago. It was a power of attorney to transact any and all business for him and in his name. It embraced everything, I supposed. Whether it embraced the stock or not, I do not know. It was a written authority. I have not the instrument. I had authority about eight years. It ceased about two years ago, when Mr. Wilson put that notice in the paper that he would not be responsible for any person in this county." Wilson himself testified that he published the notice in the paper after the sale of the mules to plaintiff. It is true, the extent of the authority under this power does not clearly appear, but, as I do not find that the defendant, who testified at length on his own behalf, and referred to the power, denies that it authorized a sale of stock, it is believed the court below was warranted in finding from all the circumstances that as to the mules branded with a "heart" Alexander had authority to sell. As to the mules branded with what is called a "barheart," and which were owned by defendant and his son, H. F. Wilson, no previous authority in Alexander to sell appears, and the sole question presented is as to the fact of ratification by the defendant, who is the assignee of his son, of all the interest of the latter therein. To discuss the testimony at length in support of the finding can subserve no useful purpose beyond the decision of the present case, and as the conclusion is irresistible that, although there is a substantial conflict in the testimony, there is yet such a showing in favor of the ratification by defendant of the sale that this court is not warranted in disturbing the finding.

If, however, it be conceded that where one has wrongfully taken the property of another, and sold it, not as agent, but on his own account, mere silence on the part of the owner does not confirm the sale, and that the confirmation must rest upon some consideration upholding it, or upon an estoppel,-a question upon which the authorities are divided,-still the evidence and the special findings are, as it is believed, sufficient to uphold the judgment. It is not the silence alone of the defendant, relied upon, but the care which he took to prevent knowledge of the true state of the case from coming to the plaintiff; his payments made upon the promissory note, when, if he claimed what he now sets up as a counterclaim, there was nothing due thereon; his giving a chattel mortgage to secure the amount due

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upon the note; his silence for nearly a year and a half, with full knowledge of all the facts, coupled with his declarations to plaintiff, as disclosed by the evidence, that Alexander was perfectly good for the amount he owed the plaintiff, had plenty of property, etc., at a time when he, the defendant, had an assignment of all of Alexander's interests in the stock, whereby plaintiff was lulled into security, and to take a new note extending credit to Alexander; and other minor circumstances indicating an intention to abide by the action of his son-in-law in the sale which the latter had made. That the testimony as to some of these facts was conflicting does not authorize us to discard the findings. Taken together, they bring the case within the rule enunciated by the lord chancellor before the house of lords in Cairncross v. Lorimer, 7 Jur. (N. S.) 149, where he said: "I believe, in the laws of all civilized nations, that if a man, either by words or by conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct." Or, as was said in Nicholson v. Hooper, 4 Mylne & C. 179, by Lord Cottenham: "A party claiming a title in himself, but privy to the fact of another dealing with the property as his own, will not be permitted to assert his own title against a title created by such other person, although he derives no benefit from the transaction." That defendant, in the face of the testimony to the numerous sales made by Alexander of stock from the ranch, was aware that the latter "was dealing with the property as his own," cannot be doubted. Plaintiff had previously purchased stock from Alexander under circumstances that may reasonably be assumed to have been known to the defendant, yet the latter offered no objection. Indeed, it appears from some of the testimony that defendant, his son, and Alexander in many respects acted as ostensible partners in all the stock, and in other respects acted as though they were severally owners of it.

Numerous objections were made to the introduction of testimony and to the refusal of the court to permit questions to be answered, but I fail to see that any of the errors assigned to the rulings of the court in this respect are well founded. A large number of these exceptions are based upon the action of the court touching testimony going to show that defendant and Alexander were copartners in the stock and in the business of conducting the ranch. As the court did not find a partnership to exist between the parties, such exceptions become unim-

portant. The exception urged in the brief of appellant, founded upon the refusal of the court below to permit defendant to testify as to how the account stood between Alexander and himself after witness received an assignment of Alexander's interest in the stock, is of no moment, for the reason that in answer to the very next question defendant was permitted to answer that the stock assigned to him did not pay his demand against Alexander by \$30,000. So, too, the objection that defendant was not permitted to testify that his only knowledge of the sale was that Alexander had sold the stock as his own, and not as agent for defendant, was immaterial, for the reason that all the testimony tended to show that, whatever the authority of Alexander may have been as to a portion of the stock sold, he in fact sold it in his own name, and not in the name of or as the agent of defendant; and there is nothing in the findings in conflict therewith. There are other exceptions to evidence, but they are of no greater moment than those noticed, and need not be reviewed. The judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

JENNINGS v. JENNINGS et al. (No. 18,278.) (Supreme Court of California. Sept. 21, 1894.) MORTGAGE BY GUARDIAN TO WARD — VALIDITY — DELIVERY—SATISFACTION.

1. The individual mortgage of a guardian of a minor to his ward to secure a debt due from him to the estate is good as against a subsequent mortgage, though the debt is secured by the guardian's bond, and there is no order of court fixing the amount thereof.

order of court fixing the amount thereof.

2. Where the guardian of a minor's estate makes his individual mortgage to his ward, to secure a debt due from him to the estate, has it recorded, and then delivers it to the mother of the minor, to be kept for him, there is a sufficient delivery.

3. A mortgage given by a guardian to his ward cannot be satisfied by the guardian without authority of court, and without payment of the debt.

Commissioners' decision. Department 2. Appeal from superior court, Tehama county; John F. Ellison, Judge.

Action by W. O. Jennings, Jr., by his guardian, against W. O. Jennings, Sr., Frank G. Waterhouse, and others, to foreclose a mortgage. Judgment was rendered for plaintiff, and defendant Waterhouse appeals. Affirmed.

Holl & Dunn, for appellant. A. M. McCoy, H. P. Andrews, and James P. O'Brien, for respondents.

BELCHER, C. On March 5, 1887, W. O. Jonnings, Sr., was appointed guardian of the

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estate of his minor son, W. O. Jennings, Jr., and thereafter he duly qualified and entered upon the discharge of his duties as such guardian. On the 23d day of the same month he received for and on account of his said ward the sum of \$1,000 in money, which he thereafter held and used until April 9, 1889. On the last-named day he executed to his ward his promissory note for \$1,204.17, being for the said \$1,000 and interest thereon to that date at the rate of 10 per cent. per annum, compounded annually, and also a mortgage upon certain real property to secure payment of the note; and on the same day he caused the mortgage to be properly recorded in the records of the county, and shortly thereafter delivered both the note and mortgage to the mother of the boy, to be kept by her for him. On April 28, 1890, while he was still the guardian of the boy, he undertook to satisfy and discharge the said mortgage, and to that end made and entered upon the margin of the record thereof an indorsement as follows: "State of California, County of Tehama—ss.: Full satisfaction of this mortgage is hereby acknowledged this 28th day of April, A. D., 1890. W. O. Jennings, by Guardian of W. O., Junior. Attest: W. R. Hall, Recorder." On July 21, 1890, he and one Barnes executed to Frank G. Waterhouse their joint promissory note for \$2,500, and a mortgage on the premises covered by the mortgage to the boy, and certain other real property, to secure payment of said note, which mortgage was also duly recorded. He continued to be the guardian of his son until August 19, 1891, when, by an order of court, he was removed, and his letters of guardianship were vacated and annulled. And at the same time A. J. McClure was duly appointed guardian in his place, and he was by the court ordered and directed to turn over to McClure all the property and estate belonging to his said ward. On March 21, 1892, W. O. Jennings, Jr., by his guardian, A. J. McClure, commenced this action to foreclose his mortgage of April 9, 1889, alleging, among other things, that the note secured thereby was due and wholly unpaid; that the attempted satisfaction of the said mortgage was invalid and void, and made without any authority or power in the said W. O. Jennings, Sr., so to do, and without any consideration whatever; and that the interest of the defendant Frank G. Waterhouse in the said premises, as mortgagee, was subsequent and subject to the lien of plaintiff's mortgage. The defendant Waterhouse demurred to the complaint upon several grounds, and his demurrer was overruled. He then answered, denying many of the averments of the complaint, and, among others, that the attempted satisfaction of plaintiff's mortgage was invalid and void, and setting up his own note and mortgage, and praying that they be adjudged to be a first lien upon the premises described in the complaint. After trial the court found the facts very fully, and, among others: "That the aforesaid satisfaction undertaken to be made and purporting to be made, and the said indorsement upon the margin of said record, were made and executed without any order or other authority of the court so to do, and without the said indebtedness, or any part thereof, having been paid, discharged, or in any way satisfied; and the said purported satisfaction of mortgage and the said indorsement upon the margin of said record were, and each of them was, wholly invalid and void, and of no legal force and effect. * * * That the said mortgage is now, and at all times since the said 9th day of April, 1889, has been, in full force and effect upon and against the land contained and described therein. That neither said note nor mortgage, nor any part of the principal sum therein mentioned, nor of the interest thereon, has ever been paid, and said mortgage has never been paid nor satisfied nor discharged." That the note and mortgage set up in plaintiff's complaint in this action were made for a valuable consideration, and were delivered as in these findings hereinbefore stated; and said note and mortgage were accepted by the mother of plaintiff for and on behalf of plaintiff, and it is for the interest of plaintiff that he should accept and receive said mortgage." Judgment was accordingly entered foreclosing the plaintiff's mortgage, and directing the sale of the mortgaged premises; and the application of the proceeds, after paying costs, expenses, and attorney's fees, to the payment of the amount found due the plaintiff; and from this judgment the defendant Waterhouse appeals.

1. The demurrer was properly overruled. The complaint stated facts sufficient to constitute a cause of action, and was not obnoxious to any of the objections raised to it.

2. The appellant contends that the note and mortgage were given to secure payment of money already secured by the guardian's bond, and hence were without consideration; and also that when the mortgage was made the accounts between the guardian and his ward had not been settled, and the amount of the indebtedness established, by a competent court, and therefore the mortgage never had any validity. This contention cannot. in our opinion, be sustained. The note and mortgage were given for money which was the property of the mortgagee, and for which the mortgagor was personally responsible. This constituted a sufficient consideration for making the papers, and the fact that the mortgagor was the guardian of the estate of the mortgagee, and had given a guardian's bond, did not in any way affect the question. He had a right to give further security if he chose to do so. Nor was it necessary that the amount of the indebtedness be fixed and determined by any court in order to give validity to the mortgage.

3. The appellant further contends that the note and mortgage never became valid and

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binding obligations, because fhey were never delivered to any person authorized to receive them for the plaintiff. This contention is also, in our opinion, untenable. The case shows that the papers were properly executed, and the maker at once caused the mortgage to be duly recorded, and then delivered them both to plaintiff's mother for him. This, under the decisions in this state and elsewhere, constituted a sufficient delivery. In De Levillain v. Evans, 39 Cal. 120, the question arose as to the acceptance of a deed of gift of certain real property, and it was held that, "if the donee be of mature years, he will be presumed to have accepted it, if it be for his advantage, unless the contrary appears;" and that, "if the donation be to a minor, and to his advantage, the law accepts it for him." In Wedel v. Herman, 59 Cal. 515, it is said: "But it is contended that the court below erred in overruling objections made to the offer in evidence of the deed to the plaintiff from his father, on the ground that it was not delivered. The deed was produced by the plaintiff. It was a deed from father to son. It showed that it had been duly acknowledged and recorded at the request of the grantor, and these constituted sufficient proof of delivery." In Cecil v. Beaver, 28 Iowa, 241, the court, by Dillon, C. J., said: "Where the deed to a child is absolute in form and beneficial in effect, and the grantor and father voluntarily causes the same to be recorded, this is, in law, a sufficient delivery to the infant, and the title to the lands will pass thereby. In such case actual, manual delivery and a formal acceptance are not necessary." And see, also, Rivard v. Walker, 39 Ill. 413; Mitchell v. Ryan, 3 Ohio St. 377; Spencer v. Carr, 45 N. Y. 406; Gregory v. Walker, 38 Ala. 26.

4. The only other question which need be considered is that relating to the attempted satisfaction of the mortgage by the mortgagor. A similar question arose in the case of Aldrich v. Willis, 55 Cal. 81. In that case Henry M. Willis received and appropriated to his own use money belonging to his infant daughter, Amelia. For the money he executed to Amelia his promissory note, and a mortgage to secure its payment, which he caused to be duly recorded. Subsequently, "acting as guardian," he entered upon the margin of the record a satisfaction of the mortgage, and then mortgaged the property to another party. At the time he received the money, and up to the time of the trial, ne was acting as guardian of Amelia, but in fact he was not the guardian of her estate, never having received letters of guardianship, nor qualified as such. In department, this court, by McKinstry, J., said: "Nevertheless, Henry M. Willis was a trustee, holding the money of the infant, Amelia, Jr., which came into his hands in trust for her. The mortgage executed by him to secure such moneys was altogether for her benefit. and the fact that it is set up in her answer

by her guardian ad litem, and relied uponherein, constitutes sufficient proof of delivery to and acceptance by her." And it was held that the mortgage was not satisfied, but was still in full force and effect. On petition for rehearing in bank, the court, by Thornton, J., delivered an opinion, concurred in by four other justices, in which, referring to the language above quoted, it is said: "To which we desire to add: 'And this must be so, since, if it [the mortgage] had not been for the benefit of the infant, the court below, it must be presumed, as it had control over the conduct of the guardian ad litem, would not have allowed him to set it up." And the opinion closes with the following statement: "Whether Henry M. Willis was guardian or not we consider immaterial. The same result follows whether he (Willis) was or was not the general guardian of the infant, Amelia Willis." It is earnestly claimed for appellant that the language last above quoted was entirely obiter, and should be disregarded; but we cannot see it in that light. Conceding that the statement was not necessary to a decision of that case, still we think it declared the law applicable to the case correctly. To hold otherwise, and say that a guardian, without any authority of court, and without the payment of the indebtedness, can, at his pleasure, satisfy and release a mortgage given by him to his ward, might greatly endanger the estates of wards, and lead to results not contemplated or authorized by law. Applying the rule declared in that case to this, it must be held that Jennings, Sr., under the circumstances shown, had no right to satisfy the mortgage to his ward, and that the attempted satisfaction of it was ineffectual and void. We find no errors in the record calling for a reversal, and therefore advise that the judgment be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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HOUSE v. LOS ANGELES COUNTY. (No. 19,404.)

(Supreme Court of California. Sept. 13, 1894.) BOARD OF SUPERVISORS—CONTRACTS—ULTRA VIRES.

The appointment by the board of supervisors of a county of an agent to procure the redemption of lands sold to the state for taxes, and to collect the amount of such taxes due the county, with an agreement to pay him a commission on the amount collected, is ultra

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinney, Judge.

Action by R. F. House against Los Angeles county to recover for services rendered in collecting delinquent taxes. A demurrer to the complaint was overruled, and, defendant refusing to plead further, judgment was ren-

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dered for plaintfiff, and defendant appeals. Reversed.

H. C. Dillon, for appellant. McLachlan & York, for respondent.

PER CURIAM. This action was brought by R. F. House, the respondent here, to recover \$460.56 for services rendered to the county of Los Angeles in the collection of money on account of delinquent taxes, in cases where real property had been sold to the state of California, and no redemption had. The plaintiff, in his complaint, sets out a contract in writing entered into on the 15th day of December, 1891, between him and the comptroller and attorney general of the state of California, in which the latter appointed the former to collect and cause to be collected, or cause to be redeemed, or to cause the payment of all moneys necessary to redeem, all property sold to the state for taxes from 1870, down to and including the forty-second fiscal year, and to take all necessary steps to cause said property to be redeemed; to serve all notices, etc. In consideration of which said House was to receive (1) all fees allowed by law for notices served; (2) such sum as the state board of examiners may allow on all moneys collected and paid to the county for the state, not exceeding 15 per cent. of the amount collected, etc. The appointment was for the territory embraced in what now composes the counties of Los Angeles and Orange. The complaint further avers that on or about December 29, 1891, the board of supervisors of the county of Los Angeles passed a resolution, of which the following is a copy: "Whereas, the state of California, through and by E. P. Colgan, state comptroller, and W. H. H. Hart, attorney general, has entered into a contract with R. F. House to proceed and cause to be collected from owners what may be due on account of sales of real estate heretofore made to the state for delinquent taxes, agreeing with him to pay him such percentage on such collections as the state board of examiners may allow, not to exceed fifteen per cent. (15 %) on the amount of such collection, it is therefore resolved, that the county of Los Angeles shall pay to said House such percentage on the amount of all redemptions as the state board of examiners may allow, not to exceed fifteen per cent. on such sum: provided, that such payment and allowance can be legally made; the said House to prepare and provide all necessary and proper books for the transaction of the above matter, which said books shall be at all times open to the examination of the county auditor of this county, its board of supervisors, and such persons as may be designated; the said books, on the expiration of said contract, to be by said House deposited with the county auditor, and become the property of the county. All of the matters and things above provided for to be done and performed without expense of any kind to this county; said commission, however, not paying the costs of any suit ordered brought." The plaintiff entered upon the discharge of the duties specified in his agreement with the state and the resolution of the board of supervisors, and between December 1, 1892, and April 30, 1893, by virtue of his appointment and employment, caused to be collected and paid into the county treasury for the use and benefit of Los Angeles county the sum of \$3,070.28, to 15 per cent. of which he claims to be entitled, amounting to \$460.-56, as compensation for his services. He further avers that the state board of examiners allowed him 15 per cent. on the state's portion of the taxes so collected during said period, which has been paid; that his claim for \$460.56, duly verified, was presented for allowance to the board of supervisors of the county of Los Angeles on July 22, 1893, which claim was disallowed by the board, whereupon, and in due time, tuis action was brought. Defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and, defendant refusing to answer, final judgment was entered in favor of plaintiff for \$460.56 and costs, from which judgment the defendant appeals.

We have searched in vain among the general permanent powers conferred by the county government act upon boards of supervisors, and for other and special authority, either express or implied, under which the board of supervisors of the county of Los Angeles was authorized to enter into the contract with the respondent involved in the resolution set out in the complaint. Counties are bodies corporate and politic, and have such powers as are specified in, and such other powers as are necessarily implied from the powers conferred by, the act of March 31, 1891, entitled, "An act to establish a uniform system of county and township governments." St. 1891, p. 295: "Its powers can only be exercised by the board of supervisors, or by agents and officers acting under their authority, or authority of law." Section 2. By the fourth section of the act, it is entitled to: (1) "Sue and be sued." (2) "To purchase and hold land within its limits." (3) "To make such contracts and hold such personal property as may be necessary to the exercise of its powers." (4) "To manage and dispose of its property as the interests of its inhabitants may require." (5) "To levy and collect such taxes, for purposes under its exclusive jurisdiction, as are authorized by law." Among the general permanent powers conferred upon the board of supervisors by the twenty-fifth section of the act are, "under such limitations and restrictions as are prescribed by law:" (1) "To supervise the official conduct of all county officers, and officers of all districts and other subdivisions of the county charged with the as-

sessing, collecting, safekeeping, management or disbursement of the public revenue; see that they faithfully perform their duties, direct prosecution for delinquencies," etc. (13) "To levy taxes upon the taxable property of their respective counties for all county purposes," etc. (17) "To direct and control the prosecution and defense of all suits to which the county is a party, and to employ counsel to assist the district attorney in conducting the same"

We must bear in mind that all the powers conferred upon the boards of supervisors, whether express or implied, are to be exercised "under such limitations and restrictions as are prescribed by law." Under the power conferred to levy taxes for county purposes, it might be, in the absence of other legislation, plausibly contended that the power to collect the taxes so levied, without which the levy would be of no avail, would be implied as a necessary corollary of the express power conferred. Where, however, a power is conferred by statute, and the mode of its exercise is also prescribed, the mode prescribed is usually held to be the measure of the power. The whole course of proceeding, from the levy of the tax to its collection, is confided to certain officers designated by the statute, whose duties, and the time and manner of their discharge, are specified by the law. The board of supervisors, by virtue of the power conferred upon it, may supervise the official conduct of the officers designated to assess for purposes of taxation, and to collect and disburse the taxes, to the extent of requiring them to faithfully discharge their duties under the law, and direct their prosecution for failure so to do; but the board cannot add to those duties, or relieve the officers from their discharge, as provided by statute. When taxes become delinquent, and real property is sold and purchased by the state for nonpayment thereof, it rests with the latter to determine, at its option, whether or not it will apply for a deed thereof. Like any other purchaser, it may desire a redemption to be had, or it may prefer to become the owner of the property, with a view to a more advantageous disposition. The owner may redeem land so purchased by the state, or not, at his option. at any time before the latter has disposed of it. The board of supervisors has no voice in the matter, and cannot intervene to accelerate or retard a redemption. If a redemption is made by the owner, it can only be by applying to the auditor for an estimate and certificates of the amount due, and by presenting such certificates, with the money specified therein, to the county treasurer, and procuring from the latter receipts showing the payment of such amount, which he must file, etc. Every step in the process is defined. and the officer or person by whom it is to be taken is designated. Nothing is left to the supervisors to do, or to cause to be done, except to see to it that the officers do their duty as it is nominated in the statute. Having no authority to act in the premises, and there being no right given by law to authorize them to appoint an agent who was or could be authorized to act, the attempted appointment by the resolution set out in the complaint was ultra vires, in the extreme sense of the term. What could the respondent possibly do under such an appointment? Simply nothing. He could not collect redemption money, or receipt for it. He could not, as the agent of the county, give notice to the owners of applications on the part of the state to procure deeds to lands purchased by it. This right or duty belonged to the state, and could only be exercised by it. We are of opinion that the board of supervisors, in the absence of positive law authorizing it so to do, cannot, in any case, appoint an agent to exercise powers which it cannot itself exercise. In the exercise of powers conferred upon it, it may appoint agents to discharge ministerial duties not calling for the exercise of reason or discretion, but cannot go beyond this, and delegate to others duties, the discharge of which, calling for the use of reason and discretion, are regarded as public trusts. Scollay v. Butte Co., 67 Cal. 249, 7 Pac. 661. We do not, however, base our decision upon the ground that the duties devolving upon respondent are of such a character as called for the exercise of discretion and judgment, but upon the broader ground that, the statute having confided these duties to the officers specially designated by law for their discharge, the supervisors have no authority, express or implied, in the premises, and hence that the contract was beyond the jurisdiction conferred upon the board. Smith v. Los Angeles Co., 99 Cal. 628, 34 Pac. 439; El Dorado Co. v. Meiss (Cal.) 34 Pac. 716; People v. Johnson, 95 Cal. 472, 31 Pac. 611. The case of Lassen Co. v. Shinn, 88 Cal. 510, 26 Pac. 365, was one in which Shinn and Maston, attorneys at law, were employed by the supervisors to collect from the state moneys due the county of Lassen on account of the keeping by the latter of indigent persons, and the contract for their payment was upheld. The decision went upon the ground that the county being entitled to recover the money, and the board being authorized to appoint attorneys, and the business such as might be supposed to require the services of attorneys, their acts were within the scope of their powers. It will be seen from the foregoing statement that there is a broad distinction between the underlying principle involved in that case and this. Here the board sought to confer powers upon its agent which it did not, and could not be presumed to, possess, because confided to other hands. -to contract for the performance of acts, no one of which could its agent perform, for like reasons. The only reason that can be urged in favor of such appointment must be, we think, that in case of the redemption

of property purchased by the state the county becomes entitled to its pro rata share of the money paid, and hence is interested in having property so situated redeemed from the tax sale. The answer to it, if any is required, must be that if the laws which define the methods for redemption in anywise retard the process they should be amended, and that while they exist in their present form the process of redemption cannot be hastened, or rendered more effective, by ignoring them and the ministers designated for their execution.

These views render it unnecessary to pass upon the validity of the contract between respondent and the state comptroller and attorney general. The judgment is reversed, and the court below directed to sustain the demurrer to the complaint.

104 Cal. 86

PEOPLE v. KILVINGTON. (No. 21,033.) (Supreme Court of California. Sept. 13, 1894.) HOMICIDE-BY OFFICER IN MAKING ARREST-EVI-DENCE-PROVINCE OF JURY.

1. On indictment of an officer for murder while attempting to make an arrest, where the facts are undisputed, it is for the court to say whether defendant had reasonable ground to believe that deceased had committed a felony.

2. An officer who sees one running at night, pursued by another, shouting, "Stop thief!" has reasonable ground to believe that a felony has been committed.

3. Whether an officer is guilty of criminal negligence in shooting one whom he is attempting to arrest, and who he has reason to believe has committed a felony, is a question for the jury.

4. On indictment of an officer for killing one whom he was attempting to arrest, and who he believed had committed a felony, evidence that deceased was in that locality on lawful business is inadmissible.

In bank. Appeal from superior court, Santa Clara county; W. G. Lorigan, Judge.

George Kilvington was indicted for murder, and convicted. From a final judgment, and from an order denying a motion for a new trial, he appeals.

The defendant, George Kilvington, was informed against by the district attorney of Santa Clara county for the crime of murder, alleged to have been committed at said county on the 3d day of May, 1892, by the felonious killing of one Henry Schmidt. The defendant was convicted of manslaughter, and adjudged to be punished by imprisonment in the state prison of the state of California, at San Quentin, for the term of seven years. This appeal is from the final judgment, and from an order denying a motion for a new

It appears that the defendant was night watchman in Chinatown, San Jose, and was, as the court instructed the jury, a police officer of the city of San Jose. On the night of the 3d day of May, 1892, he had been at Chinatown with one Henry Burgess, for the purpose of showing the latter through a cannery. On their return from the cannery, about 9 o'clock in the evening, and when on Taylor street, they heard some one cry, "Stop thief!" two or three times, and upon looking around they observed two men running across a vacant lot or open ground fronting on the street northerly and diagonally to their course, in a direction which, if continued, would have taken them across defendant's line of travel 20 feet or more ahead of defendant and his companion. The two men running were not together, but one was in advance, and the other pursuing him, and crying out, "Stop thlef!" according to the testimony of the defendant. The night was dark, but the parties were visible at some distance. Defendant ordered the man in advance to stop, and repeated the order two or three times. The order was not obeyed, but the stranger threw up his hands, when, as defendant claims, he saw something in his hands, and he drew his own pistol and fired, killing the man, who at the time was, say, 30 feet distant. The man fell upon his face, and upon examination proved to be one Henry Schmidt, and he had no weapons upon his person. Defendant did not, so far as appears, recognize deceased before firing the fatal shot, and did not consider himself in danger, but, as he testifies, intended to arrest the deceased, and for the purpose of intimidating and stopping him attempted to shoot over his head, but, the deceased being upon higher ground, about two or three feet, the ball entered his neck. Upon this point the defendant testified: "My object in ordering him to stop was to see why he was running away; what he had done. I thought he was some criminal, some thief, some sneak thief, or something of that kind, that time of night, to see a man running, and another man chasing him, calling, 'Stop thief!' I intended to find out,-to investigate,-and see what it was. I had every cause to believe by the calling of 'Stop thief!' that he was a criminal, and my object was to arrest him. I fired to intimidate him, and I endeavored to shoot over his head. * * * I heard a man call 'Stop thief!' and 1 couldn't tell whether this man had stolen a loaf of bread or robbed a bank." in another part of his testimony he said: "For all I know, this man might have committed a murder, or robbed some one. I don't know what he was guilty of. I could not judge. All I know the man was running after another, hollering, 'Stop thief! stop thief!" The man in pursuit of the deceased was one William H. Howard. The testimony of the latter was lengthy, but may be epitomized as follows: He was passing the house of one Mrs. Hayford, when the deceased ran out of the back yard, and the witness, thinking he was a criminal, pursued him, crying "Stop!" or "Stop thief!" for some distance, with the result as above stated.

Wm. P. Veuve, for appellant. V. A. Scheller and Spencer & Burchard, for the People.

DE HAVEN, J. (after stating the facts). There was no conflict in the evidence as to the circumstances under which the defendant killed the deceased, and, in order to determine whether his act was excusable or not, it was necessary for the jury to consider, first, whether the defendant was justified in attempting to arrest the deceased at all; and, if so, whether the act of shooting merely for the purpose of intimidating, and thus causing the deceased to stop, and without any intention of killing or wounding him, was or was not criminal negligence. It was important to the defendant to have these questions, and the law in relation to each, clearly and separately stated to the jury. The court correct-Iv instructed the jury that a peace officer has the right, without a warrant, to arrest any person in the night, when the officer has reasonable ground to believe that such person has committed a felony. Pen. Code, \$ 836; Burns v. Erben, 40 N. Y. 463. But the court erred in the manner in which it submitted the question of probable cause to the jury. Upon this point the court gave the following instruction: "It is for the jury to determine from all the facts and circumstances of the case whether the defendant had reasonable cause to believe that a felony had been committed by the deceased. If you find from the evidence that he had such cause for belief, you will then determine whether, in the attempt to arrest the deceased, he used only such means as were necessary to prevent the escape of the deceased, and to effect his arrest." This instruction submitted to the jury the entire question in reference to the existence of probable cause upon the part of the defendant to arrest the deceased, and that body was called upon, not only to find whether the facts relied upon by the defendant to show such probable cause were true, but also, if true, to determine whether or not they were legally sufficient for that purpose. The instruction was erroneous, as it is not the province of the jury to decide in any case whether the facts and circumstances which they may find established by the evidence are sufficient to constitute probable cause. This principle of law is now settled beyond doubt or controversy, as a reference to a few of many cases which might be cited on that point will show. "This question of probable cause, or reasonable ground for suspicion, whether it arises in actions for malicious prosecution or false imprisonment, is one of law, unless the evidence out of which it arises is conflicting, in which event it is the duty of the court to instruct the jury what facts, if established, will constitute probable cause, and submit to them only the question as to such facts." Burns v. Erben, 40 N. Y. 463; Bulkeley v. Keteltas, 6 N. Y. 384; Masten v. Deyo, 2 Wend. 425; Pangburn v. Boll, 1 Wend. 345; Driggs v. Burton, 44 Vt. 124; Panton v. Williams, 2 Adol. & E. (N. S.) 169. And the supreme court of this state, in Harkrader v. Moore, 44 Cal. 152, in passing upon the same question, said: "The authorities are substantially uniform that the question of probable cause, however presented, is a question of law, and therefore one to be determined by the court. When the facts in reference to the alleged probable cause are admitted or established beyond controversy. then the determination of their legal effect is absolute, and the jury are to be told that there was or was not probable cause, as the case may be. When, however, the facts are controverted and the evidence is conflicting, then the determination of their legal effect by the court is necessarily hypothetical, and the jury are to be told that if they find the facts in a designated way, then that such facts, when so found, do or do not amount to probable cause." The same rule is also announced in Grant v. Moore, 29 Cal. 614; Fulton v. Onesti, 66 Cal. 575, 6 Pac. 491; and in the late case of Ball v. Rawles, 93 Cal. 222, 28 Pac. 937, where the whole question is elaborately discussed.

As already stated, the facts in this case were undisputed, and the court ought, therefore, to have instructed the jury as to their sufficiency in law to justify the defendant in attempting to arrest the deceased; that is, whether they were legally sufficient to induce a reasonable belief in the mind of the defendant that the deceased had committed a felony. The defendant requested the following charges upon this point: "Twelve. The court instructs the jury that, if the defendant saw the deceased running at night, pursued by Howard, and Howard was crying out 'Stop!' or 'Stop thief!' and the deceased, on being ordered to stop by the defendant two or three times, and refusing to do so, but continuing his flight, then the defendant had reasonable cause to believe the defendant [deceased] had committed a felony." "Fourteen. The court instructs the jury that the uncontradicted evidence in this case shows that the defendant had reasonable cause to believe, at the time of the killing, that the deceased had committed a felony." The refusal of these instructions presents the most important question of law arising upon this appeal, as it is manifest that, if either one had been given (the facts recited in the first one being established without any conflict whatever in the evidence), the inquiry of the jury would have been restricted to the single question whether the defendant exercised due care and caution in what he did in attempting to effect the arrest of the deceased; or, stated in another form, the question before the jury would have been, was the shooting in the direction of deceased, for the mere purpose of intimidation, without any intention of killing him, an act of criminal negligence upon the part of the defendant? The refusal of the court to thus narrow the inquiry was clearly prejudicial to

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the defendant, if, under the undisputed facts, he had, in the judgment of the law, probable cause to arrest the deceased; and this brings us to the consideration of the question, did the defendant, in view of the facts as presented to him at the time, have reasonable or probable cause to believe that the deceased had committed a felony? There is a substantial agreement in the decisions of the courts as to what constitutes probable cause or reasonable cause such as will justify one in arresting or prosecuting another upon a criminal charge; and perhaps as clear and comprehensive a statement of the rule as can be found is that of Shaw, C. J., in Bacon v. Towne, 4 Cush. 217. "There must be such a state of facts," said he, "as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty." Applying this rule to the facts of this case, we think it must be held that the defendant had reasonable cause to believe that the deceased may have committed a felony. It is true, the deceased was not charged in terms with the commission of a felony, but this was not necessary in order to justify the defendant in entertaining a reasonable suspicion that he was guilty of a felony. It was night. The deceased was fleeing, pursued by a person who was shouting, "Stop thief!" This was, in effect, a charge that the deceased had committed a theft of some kind, and the defendant had just as much reason to suspect or believe that the deceased may have committed robbery or burglary or grand larceny as to suppose that his pursuer only meant by the cry of "Stop thief!" to charge him with petit larceny. The defendant was called upon to act promptly, and, as the language used by the witness Howard was broad enough in its popular sense to import a charge of felony, the defendant was justifled in attempting to arrest the deceased. An officer who would refuse to arrest a person fleeing and pursued under the circumstances disclosed in this case, because the charge was not more direct and specific as to the commission of a felony, would be justly censurable for a neglect of official duty. In considering this question of probable cause upon the part of the defendant to arrest the deceased, we are to look only at the facts and circumstances presented to him at the time he was required to act. The defendant did not recognize the deceased before he fired, and the fact that the latter was an innocent and respectable citizen, and who may have been fleeing from an assailant, cannot be allowed to affect the question we are now discussing. It is only necessary to add upon this point that, in our opinion, the court ought to have instructed the jury that the defendant had the right, under the circumstances established by the evidence, to arrest the deceased, leaving the jury to determine the further question whether the act of shooting the deceased in attempting to

effect such arrest was or was not an act of criminal negligence upon the part of the defendant. This latter is purely a question of fact, and its determination must be left to the sound judgment and discretion of the jury, and in the decision of which question the defendant is entitled to the benefit of any reasonable doubt arising upon the evi-

The court also erred in admitting the evidence of the witnesses Schloss and Weissel tending to show that deceased went down to the place near where he was shot on that particular night on lawful business. This fact was wholly irrelevant. The defendant knew nothing of the matter, and did not recognize the deceased at the time of the shooting. Under such circumstances the evidence was wholly irrelevant, as it threw no light whatever upon the question whether the defendant was justified in attempting to arrest the deceased under the circumstances as actually presented to him; nor did it have any bearing upon the question whether or not the defendant was guilty of criminal negligence in shooting the deceased.

The motion of defendant to set aside the information was properly denied, and the court did not err in refusing to give the instructions numbered 2, 3, 15, 18, and 24, requested by the defendant. We do not deem it necessary to notice the other points discussed in the brief of counsel. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; FITZGER-ALD, J.; McFARLAND, J.; HARRISON, J.; GAROUTTE, J.; VAN FLEET, J.

(4 Cal. Unrep. 789)

SAN FRANCISCO & FRESNO LAND CO. v. BANBURY, County Treasurer, et al.1 (No. 19,370.)

(Supreme Court of California. Sept. 13, 1894.) TAX SALE-PURCHASE BY STATE - NOTICE TO RE-DEEM-VALIDITY-PAYMENT OF FEB.

1. Where the state is the purchaser of land at tax sale, the comptroller and the attorney general have no authority to give notice for

the state of an intention to apply for a deed.

2. There being no statutory provision for the disposition of a fee for notice of intention to apply for a deed of lands sold to the state for taxes, it must be taken as the legislative intent that no such fee should be charged.

Department 1. Appeal from superior court, Los Angeles county; Walter Van Dyke. Judge.

Action by the San Francisco & Fresno Land Company against J. Banbury, as treasurer of Los Angeles county, and others, to compel the acceptance of money paid for the redemption of land sold for taxes. Judgment for defendants, and plaintiff appeals. Reversed.

Holdridge O. Collins (James M. Allen and McAllister & Frohman, of counsel), for appellant. Spencer G. Millard, for respondents. 1 Reversed in banc. See 39 Pac. 439, 106 Cal. 129.

HARRISON, J. In June, 1892, the plaintiff, as the owner and successor in interest of 67 lots of land in McPherson's addition to the town of McPherson, formerly in the county of Los Angeles, but now in the county of Orange, sought to redeem them from a sale for delinquent taxes, made to the state of California March 12, 1889, and for that purpose tendered to the defendant Banbury, as treasurer of the county of Los Angeles, the sum of \$225.60. It is conceded that this amount of money was sufficient to effect the redemption, unless the sum of \$3 for each lot, amounting to \$201, for giving the notice of an intention to apply for a deed and the affidavit therefor, fixed as a fee for giving such notice by section 3785 of the Political Code, should also have been tendered. The county auditor, in his estimate of the amount to be paid for redemption, included this item in the certificates issued by him under the provision of section 3817, Pol. Code, and the treasurer refused to accept the amount tendered, or to give to the plaintiff the certificates named in said section. The plaintiff thereupon brought this action to compel the treasurer to accept the sum tendered as above, and to give to it the triplicate receipts prescribed by the aforesaid section 3817. The cause was tried in the court below and judgment rendered for the defendant, from which, and from an order denying a, motion for a new trial, the plaintiff has appealed.

Several questions are discussed in the briefs of counsel, but the conclusion which we have reached upon one of these questions renders it unnecessary to determine the others. In May, 1892, the defendant House, acting under the direction of the state comptroller, gave the notices referred to in section 3785, Pol. Code, and filed his affidavit thereof with the tax collector of Los Angeles county. These several notices were signed, "State of California, by R. F. House, Agent," and in the affidavit of service filed with the tax collector House stated that he was the "agent for the purchaser of the property described in the foregoing notice." House also testified at the trial that prior to the date of giving the notice "he had been appointed by the state of California, through the state comptroller and attorney general, and was authorized to serve notices to cause the redemption of property sold to the state for taxes." The question here presented is not the right of the state to the issuance of a deed, but the right of the delinquent taxpayer to redeem the land struck off to the state under the provisions of section 3773 of the Political Code, and this right depends upon his compliance with the requirements of the statute in that behalf, the particular questions here presented being whether there was a tender of a sufficient amount of money to effect the redemption. It is insisted by the defendants that the plaintiff, in addition to the amount tendered by it, should have also tendered \$3 for each of the notices given by House, amounting to \$201 in all; while the plaintiff insists that the notice given by House was without authority of law, and consequently that the item of \$3 for giving such notice was not a part of the "costs and expenses of the redemption." Section 8817 of the Political Code provides that, when the state has become the purchaser of land sold for delinquent taxes, the person whose estate has been sold, or his successor in interest, may redeem the same by paying the amount of taxes due thereon at the time of the sale, with interest thereon, and any other taxes then delinquent thereon, together with a sum of money equivalent to the taxes that would have been subsequently assessed; "and also all costs and expenses, and 25 per cent. penalty which may have accrued by reason of such delinquency and sale, and the costs and expenses of such redemption." Unless the item of three dollars for giving the notice is a part of the "costs and expenses" which have accrued "by reason of the delinquency and sale," the plaintiff was under no obligation to tender it to the treasurer in order to effect a redemption from the sale. Section 3785 makes provision for the issuance of a deed to the purchaser in case there is no redemption from the tax sale, and requires that before making application for a deed the "purchaser" must serve upon the owner of the property purchased a written notice, containing certain statements, and that for the service of said notice and making an affidavit thereof the "purchaser" shall be entitled to receive the sum of three dollars, "which sum of three dollars shall be paid by the redemptioner at the same time and in the same manner as other costs, percentages, penalties, and fees are paid." The notice thus required is to be served by the purchaser, or by some one in his behalf, whom he has authorized to serve it. Such notice, served by a stranger, without any authority from the purchaser, would not satisfy the requirements of the statute, or entitle the purchaser to insist upon a payment or tender of the three dollars, in order that a redemption might be effected; and the rule in this respect is the same whether the state or an individual is the purchaser. The state can act only through officers or agents, and the duties of its officers or agents must be defined by statute, and the officer or agent who would give this notice must show his authority therefor under some statute. We have not been cited to any statute which confers upon either the comptroller or attorney general the right to appoint an agent for the purpose of giving this notice, or to take any step in reference to the issuance of a deed to the state for the property which may be struck off to it under the provisions of section 3775 of the Political Code. The duties of each of the above-named officers are defined in the Political Code,—those of the comptrol-

ler in sections 483 to 444, and those of the attorney general in sections 470 to 475,-and in neither of these sections can there be found any authority for either of these officers to give the above notices, or for the appointment of an agent to give the notices in behalf of the state. The provision in section 433, making it the duty of the comptroller "to superintend the fiscal concerns of the state," only designates him as the accountant of the state's finances, and does not give to him any function recognizing the same until the money over which he is to exercise a supervision or control has come into the hands of the treasurer, or some fiscal agent of the state, or has become an obligation in favor of the state, for which the state is entitled to an immediate enforcement. The duty imposed upon this officer by virtue of subdivision 16 of this section, "to direct and superintend the collection of all moneys due the state, and institute suits in its name for all official delinquencies in relation to the assessment, collection, and payment of the revenue," arises only when the moneys thus to be collected are "due the state," and after there has been some official delinquency in relation to the collection or payment of the revenue. But, if the state has become the purchaser of land at a delinquent tax sale. the tax has been extinguished by the sale, and the state, instead of being a creditor of the taxpayer, or entitled to receive any money due to it for taxes, has acquired an interest in the land, which is to be divested only by some affirmative action on the part of the delinquent taxpayer. The care and direction of the state's interest in land would naturally fall to the department of the surveyor general; but, whether that officer has been intrusted with any function in reference to the lands purchased at a delinquent tax sale, or whether the state has failed to make any provision in reference thereto, it is clear that neither the comptroller nor the attorney general has been intrusted with the duty of guarding the state's interest therein.

It is not the policy of the state to increase the burdens of taxation beyond the necessary cost of collection, or to impose any greater burdens in a redemption from a delinquent tax sale than is necessary to secure the payment of the original tax. All matters of taxation are resolved in favor of the taxpayer, and express statutes should be found for each item of cost to be imposed upon him. There is no provision of law for the disposition of the three dollars claimed herein as a fee for giving the notice. Neither the comptroller nor the attorney general is entitled to it as a fee, or as a compensation for any official duty; nor, if the state is entitled to receive it, are they authorized to give it to any agent they may select for the purpose of serving the notice. Section 3816 provides that "the original tax and the twenty-five per cent. and interest paid in redemption shall be apportioned between the state

and county in the same proportion that the; state tax bears to the county tax," and then declares, "the moneys received for delinquencies shall be paid to the county," and makes no provision for the disposition of: this item. If the legislature had intended that the state, like any other purchaser, should be entitled to charge and receive this, item of three dollars, it would have made: some provision that it should be paid to it. out of the redemption money, and not that, it should be paid to the county. We are of: the opinion that the amount tendered by the. plaintiff was sufficient for the purpose of: redeeming the lands in question, and that. the treasurer should have received the money, and issued to it the certificates authorized. by the statute. The judgment and order: denying a new trial are reversed.

We concur: DE HAVEN, J.; VAN: FLEET, J.

104 Cal. 126

RANDALI, v. DUFF et al. (No. 15,718.)
(Supreme Court of California. Sept. 14, 1894.)

APPEALABLE ORDER—DISMISSAL.

1. An order of the trial court ordering judgment to be entered as directed by the supreme court, and the judgment as modified, are appeal-

able.

2. An appeal cannot be dismissed, on motion, on the ground that it is frivolous, as the record must be examined to determine its merit.

In bank. Appeal from superior court, Humboldt county; G. W. Hunter, Judge.

Action by A. W. Randall against Julia K. Duff and others. From an order modifying the judgment as ordered by the supreme court, and from the judgment as modified, plaintiff appealed. Defendants move to dismiss the appeal. Denied.

S. M. Buck and W. C. Belcher, for appellant. W. L. Duff, H. S. Foote, and L. D. Mc-Kisick, for respondents.

PER CURIAM. Motion to dismiss the appeal herein on the following grounds: "(1) That the action of the lower court in modifying the judgment or decree in said action, as directed by the supreme court, was a ministerial act only, and one in which the lower court had no jurisdiction, and is not an act or order from which an appeal will lie. "(2) That the judgment or decree rendered in said action on the 3d day of June, 1892. and modified as directed by the supreme court on the 3d day of March, 1894, by the superior court, is a final judgment in said action, already approved and passed upon by the supreme court as a final determination of said action, and no further appeal lies therefrom. That the so-called order from which plaintiff has appealed is not an appealable order." When this case was last here on appeal (101 Cal. 82, 35 Pac. 440). the judgment of the court below was "affirmed in all respects, except as to the mat-

ter of interest, as to which the judgment was reversed and the cause remanded to the superior court, with direction to amend its decree by allowing interest to the plaintiff down to March 1, 1892, and by reducing the judgment against him correspondingly." present appeal is taken from the order of the court below modifying the judgment as to the matter of interest, and from the judgment as modified. It may be true, as claimed, that the order and judgment appealed from were made and amended as directed by this court, and that the appeal is frivolous and vexatious, and was taken merely for the purpose of delay; but that is a matter which can only be determined by an examination of the record on appeal, and this, we have held will not be done on a motion to dismiss an appeal. In People v. McNulty, 95 Cal. 594, 30 Pac. 963, it was held that to dismiss an appeal "upon the ground that it is frivolous is to refuse to consider its merits, and therefore there can be no dismissal of an appeal on the ground that it is without merit, for to reach this conclusion the merits must be considered and the record must be examined." To the same effect is Howell v. Howell, 101 Cal. 115, 35 Pac. 443. As the order modifying the judgment and the judgment as amended are both appealable, it follows that the motion to dismiss the appeal herein should be denied. So ordered.

DE HAVEN, J., being disqualified, did not participate.

104 Cal. 40

HUMPHREYS v. BLASINGAME. (No. 18,256.)

(Supreme Court of California. Sept. 8, 1894.)

RIGHT OF WAY — ACQUIREMENT BY PRESCRIPTION

—EVIDENCE—PAYMENT OF TAXES.

1. Plaintiff owned two tracts of land, separated by land of defendant. For five years before defendant purchased the land, plaintiff had used a road over it, connecting his tracts, and continued to do so for eight years thereafter, without asking defendant's permission, and without opposition on his part. Held, that the evidence sustained a finding that plaintiff had used the road under a claim of right, and not by permission of defendant, so as to perfect his easement by occupancy.

2. On an issue as to whether plaintiff had acquired a right of way over defendant's land by five years' use thereof, the deeds under which each holds are competent evidence to show the ownership of the tracts of land involved, and the dates of transfer.

3. Payment of taxes is not necessary to enable one to acquire title to a right of way which is not assessed separately from the land.

Commissioners' decision. Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by J. C. Humphreys against A. A. Blasingame. There was a judgment for plaintiff, and defendant appeals. Modified.

Sayle & Coldwell, for appellant. C. C. Merriam, for respondent.

HAYNES, C. Plaintiff is the owner of about five acres of land, upon which he resides, and is also the owner of 160 acres separated from the residence parcel by intervening lands of the defendant, over which the plaintiff chaims a right of way between his two parcels. The defendant having denied the plaintiff's right, and closed up the way, this action is brought to establish plaintiff's right, and to recover damages, and for an injunction. The cause was tried by the court without a jury, and the plaintiff had findings and judgment, and the defendant appeals from the judgment and an order denying a new trial.

The court found that plaintiff had been for 13 years and more the owner of the parcel mentioned, and that defendant, for a period of 8 years, had been the owner of said intervening land. The fourth finding is as follows: "That, for the period of thirteen years and upwards, plaintiff and his grantors have, under claim of right, continuously and adversely to all the world, and uninterruptedly. held, had, and used said right of way, and a certain roadway along the right of way above described, for travel by wagon and team, and of sufficient and ample width for such purpose." Other findings describe the way by courses and distances; that plaintiff is the owner of it; the interruption of the use by defendant: that plaintiff has sustained damage in the sum of five dollars; and that the acts of defendant prevent the use of plaintiff's larger tract. The findings are attacked upon the ground that they are not justified by the evidence.

Plaintiff had occupied his 5-acre lot for 17 years, and became the owner of the 160-acre tract about four years later, and used the way in controversy during all the time since becoming the owner of the latter tract. The 160-acre tract was patented by the United States to William Lowery in 1876, and from that time, if not before, the way in question was used by its owner. Defendant's land was acquired from the government by one Pitman, who afterwards sold and conveyed to E. T. Lowery, the brother of William; and this way was used during the ownership of Pitman and Lowery, and when defendant became the owner. Appellant insists that plaintiff used the way without any claim of right, and was permitted to do so by the defendant as a matter of neighborly accommodation, and that the way was one used by the defendant and his predecessors for the uses of the land now owned by defendant. There is no conflict in the testimony, as given by the witnesses, as to the facts of the use. It is with the facts inferred from the use under the circumstances detailed by the witnesses that appellant finds fault. But these inferred facts are as fully within the domain of the jury, or of the court sitting without a jury, as the facts from which they are inferred. The plaintiff testified that he found the way in existence when he bought the five acres:

that the way passed by defendant's house, and that portion of it between defendant's house and the Toll-House road was used by defendant and others, and that he supposed he had a right of way through there; that he used it from the time he acquired the 160 acres, to haul wood and hay and his farming implements, whenever he had occasion; that the fact that he owned the 160 acres, and that the road had always been there, gave him the right; that the right was never questioned until defendant closed the gate the preceding December; and that he never had occasion to tell defendant, until then, that he had such right, because the question never came up between them. In Thomas v. England, 71 Cal. 460, 12 Pac. 491, it is said: "To perfect an easement by occupancy for five years, the enjoyment must be adverse, continuous, open, peaceable. It must be adverse, and under claim of legal right so to do, and not by the consent, permission, or indulgence, merely, of the owner of the alleged servient estate. This is quite obvious in cases where the consent, permission, or li-cense is expressly given. But it is no less true where the permission or license is implied, as it may well be from the facts and circumstances under which the use was enjoyed. The question is one for the jury, or for the court sitting as such, to determine as a fact, in the light of the relations between the parties, and all the surrounding circumstances." We think the evidence sufficient to support the finding that the way was used by plaintiff for more than the statutory period under a claim of right, and that the use was not merely permissive. He had used it five years or more before defendant acquired the property, and was so using it when defendant acquired it. The use could not, therefore, have originated in defendant's permission, either express or implied; and the fact that defendant made no objection, nor any inquiry as to plaintiff's right, is quite as significant of an admission of such right as it is of a mere permissive use, while the fact that plaintiff never asked permission to use the way is at least suggestive of a claim of right to use it. Other circumstances might be referred to which tend to strengthen the conclusion reached by the learned judge, but, as we see no ground upon which his finding can be set aside, it is not necessary to do so.

Several exceptions were taken to the admission and exclusion of evidence.

The ownership of the different parcels of land involved, and the dates of transfer, were material, and the deeds were competent evidence as to each of those facts.

The other exceptions related to the possibility or impossibility of reaching plaintiff's 160-acre tract otherwise than over the way claimed, the difficulties to be encountered, the distance, and other matters of like

character. We think the evidence given by plaintiff upon these questions tended to shed light upon the question of plaintiff's claim to a right of way, though it seems to have been supposed by plaintiff that the difficulties of reaching his land by any other route were such as gave him a right of way of necessity across defendant's land, rather than a right by prescription. That he was mistaken upon a question of law does not affect the fact that he claimed a right to cross defendant's land by a road which he found in existence when he purchased the 160-acre tract. But, however that may be, if these rulings had been in favor of defendant, it could not have changed any finding or the result of the case; and therefore, if it be conceded that the court erred, the defendant was not prejudiced.

Counsel for appellant cites cases to the point that plaintiff's possession must have been hostile, and that such hostile possession must have amounted to an ouster of defendant. Plaintiff's use of the way under a claim of right was necessarily hostile, but it need not amount to an ouster or exclusion of the defendant from a right to use the way. The use of the way, if without right, is a trespass, which would have given the defendant a right of action; and that is all that is necessary to set the statute running, so far as a right of action is concerned. Hanson v. McCue, 42 Cal. 303; Ditch Co. v. Crane, 80 Cal. 183, 22 Pac. 76; Sullivan v. Zeiner, 98 Cal. 347, 33 Pac. 209. So the payment of taxes is necessary to the successful assertion of title by adverse possession, as provided now by statute; but that requirement does not apply to a mere easement, which is not separately assessed for the purposes of taxation.

It is further contended by appellant that the judgment is too broad, because it includes the right to use the way for driving over it cattle, sheep, and other stock; and, as respondent does not seriously object to this contention, the judgment should be modified in this respect.

We advise that the order appealed from be affirmed; that the judgment be modified so as to exclude the right of the plaintiff to use the way for driving cattle, sheep, hogs, or other stock, in herds, bands, droves, or when loose and not under control, and, as thus modified, it be affirmed, and that the costs of this appeal be taxed to appellant.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the judgment appealed from be modified so as to conform to the said opinion, and that as modified the judgment and order appealed from be affirmed, at the cost of appellant. (2 Okl. 409)

TERRITORY V. DAY.

(Supreme Court of Oklahoma. Sept. 8, 1894.)

CASE-MADE—AMENDMENT OF AMENDMENT—WHEN
ALLOWED—CRIMINAL LAW—PRESENCE OF ACCUSED—RECORD.

An amendment of a case-made, presented to the trial judge for signature and settlement, cannot be such as to contradict the records of the court.

ords of the court.

2. In a criminal prosecution for a felony, the defendant must be actually present during the trial, and when his personal presence is necessary, in point of law, the record must show the fact. It is not allowable to indulge in the presumption that everything was rightly done, to the extent of presuming that the defendant was present.

(Syllabus by the Court.)

Appeal from district courf, Logan county; before Justice Frank Dale.

George W. Day was convicted of false pretenses, and appeals. Reversed.

S. D. Decker and C. R. Buckner, for appellant. A. H. Huston, Co. Atty., for the Territory.

SCOTT, J. This is a criminal action prosecuted by the territory of Oklahoma by indictment returned by the grand jury of Logan county on the 23d day of March, 1893, against George W. Day, charging him with having obtained from one Edward Much the sum of \$400 by means of false pretenses. The defendant was arraigned upon the charge on March 27, 1893, and entered a plea of not guilty, a general demurrer to the indictment having been overruled by the court. But before the demurrer was passed upon the county attorney dismissed the second count of the indictment, and the case proceeded to trial on the first count. On the 5th day of October, 1893, the defendant was tried, and found guilty as charged in said first count of the indictment, and on the 11th day of November, 1893, sentenced to the penitentiary at Lansing, Kan., for the period and term of two years. From this judgment the defendant appealed to this court, and asks a reversal thereof, presenting 15 assignments of error. Scarcely any of these alleged errors require the serious consideration of the court, were it necessary, after an examination of the record of this case, to pass upon them.

The fourteenth assignment of error charges that the defendant was not present at every step during the trial. This, if true, in any case, is reversible error, for it is the right of every defendant, in a criminal prosecution against him for a felony, to be present in open court at all times during the pendency of his trial. St. Okl. 1893, § 5147. This is not only a statutory right, but a constitutional one, and one, too, that cannot be waived. Lewis v. U. S., 146 U. S. 370, 13 Sup. Ct. 136. The defendant is not only required to be present, but it must appear affirmatively upon the records of the court that he was present. These two propositions are too well

settled to admit of reasoning to the contrary. It is fatal error. Hopt v. People, 110 U. S. 574, 578, 579, 4 Sup. Ct. 202; Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761; Prine v. Com., 18 Pa. St. 103, 104; Hooker v. Com., 13 Grat. 763, 766; Dyson v. State, 26 Miss. 862–382. To dispose of this feature of the case, it is only necessary to ascertain from the record if the assignment of error mentioned states the truth. If it does, it is useless to consider the other questions raised in this case.

In support of his motion for a new trial the appellant introduced the court record to establish his contention that it does not show affirmatively that he was present during the trial, and a certified transcript is made a part of the case-made, and is before us for consideration. Without setting out the record at length, it appears that the presence of the defendant is affirmatively shown in court only when his plea of not guilty was entered, and subsequently when brought before the bar of the court for the pronouncement of judgment. The record of the court presented indisputably shows this to be a fact. The territory seeks to avoid this by the suggestion of amendments. The trial court allowed suggestions of amendment to the case-made, when presented for signature and settlement, showing that the defendant was in fact present at each time when the records of the court show that proceedings in such cause were had. To the allowance of these amendments the defendant at the time excepted, and the point is properly before us for consideration. We know of no rule that will allow even a judge to contradict the solemn records of the court. On the one hand we have a transcript of the court records, showing one state of facts, and on the other we have an allowance of an amendment by the judge of the court transcripts presented, contradicting the court record. We can hardly believe that the trial judge had opportunity to seriously consider this proposition, or at least it is evident that the distinction between the amendment of the court record and the amendment of the case-made was rendered apparent to him when such amendments were allowed. Clearly, the amendments to the case-made could not properly be allowed until the record itself had been amended. Certainly, the casemade cannot contain more than the record, because from the record and proceedings of the court the case must be made. If an amendment of the court record were sought, a different proceeding would be necessary, and a different question involved. A leading principle that pervades the entire law of criminal procedure is that, after an indictment is found, nothing shall be done in the absence of the prisoner. While this rule has at times, in cases of misdemeanors, been somewhat relaxed, yet in felonies it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during the trial. It would be contrary, to the dictates of humanity to. |let him waive the advantage which a view of his sad plight might give him, by inclining the hearts of the jurors to listen to his defense with indulgence; and it appears to be well settled that where the personal presence is necessary, in point of law, the record must show the fact. Thus, in a Virginia case, the records showed that on two occasions during the trial the prisoner appeared by attorney, and there was nothing to show that he was personally present on either day in court. This was probably the result of mere inadvertence in making up the record. yet the court must look only to the record as it is. It is the right of any one, when prosecuted on a capital or criminal charge, to be confronted with his accusers and witnesses; and it is within the scope of this right that he be present, not only when the jury are hearing his case, but at any subsequent stage, when anything may be done in the prosecution, by which he is to be affected. And in a Pennsylvania case it was held that the record must show affirmatively the prisoner's presence in court, and that it was not allowable to indulge the presumption that everything was rightly done until the contrary appears. Lewis v. U. S., 146 U. S. 372, 13 Sup. Ct. 136; Prine v. Com., 18 Pa. St. 103, 104; Dunn v. Com., 6 Pa. St. 384; Ball v. U. S., 140 U. S. 118, 11 Sup. Ct. 761, supra. From the record it does not appear affirmatively that the defendant has been afforded his constitutional right of presence during the trial. It may be -and more than likely is-true that the defendant was in fact present at all times, and that the error is an inadvertence in making up the record when his case was called for consideration; but it would be a dangerous precedent to establish, for the court to assume such to be the truth, and thus give its assent to a conviction where the records fail to show that the defendant was actually present on his trial, thereby saying to the world that the trial of the defendant may take place, in this territory, in his absence, in violation of a sacred and humane constitutional, as well as a statutory, immunity. As before stated, this point being fatal, a consideration of the other assignments of error becomes unnecessary. The cause will accordingly be reversed, and remanded to the court below for a new trial. It is so ordered. All the justices concurring.

PEOPLE'S BANK v. DALTON.

(Supreme Court of Oklahoma. Sept. 7, 1894.)

Usurious Interest-When Recovered Back.

The provision of our statute regulating usury, which provides: "When a greater rate of interest has been paid than twelve per cent. per annum, the person paying it, or his personal representative, may recover the excess from the person taking it. or his personal representative, in an action in the proper court' (Laws 1893, c. 16, art. 6, § 9),—is not contrary to public policy, but is valid, and authorizes the recovery back of usurious interest paid in excess of 12 per cent. per annum, the maximum legal rate. (Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John H. Burford.

Action by Adeline L. Dalton against George Nower, Fred Warnicke, and Rose Smith, partners, doing business under the firm name of the People's Bank, to recover usurious interest paid by plaintiff on certain notes to such bank. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Kane & Jones, for appellants. Noffsinger & Nagle, for appellee.

BIERER, J. Adeline L. Dalton, the defendant in error, brought this action against George Nower, Fred Warnicke, and Rose Smith, partners, doing business under the firm name of the People's Bank, on the 10th of July, 1893, to recover the usurious interest paid upon two certain promissory notes made by her to the People's Bank; that is, to recover all interest paid on said notes in excess of 12 per cent. per annum. The complaint was in two paragraphs, and described the notes in detail, and stated the amount of interest paid on each note, and showed that \$105.19 in interest had been paid on said two notes in excess of 12 per cent. per annum. To this complaint the defendants filed a general demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendants. This demurrer was overruled, and, the defendants failing and refusing to further plead, judgment was rendered in the plaintiff's favor for the sum of \$105.19.

There is no claim made that the right to maintain this action is not given by our statute concerning usury, but the contention of plaintiffs in error is that that part of the statute which gives the party paying usurious interest the right to recover all of the interest paid in excess of 12 per cent. is contrary to public policy, and void. Section 9 of article 6 of chapter 16 of the Laws of Oklahoma of 1893, which is the same provision as is contained in the Laws of Oklahoma of 1890, is as follows: "Sec. 9. A person taking, receiving, retaining, or contracting for any higher rate of interest than the rate of twelve per cent. per annum, shall forfeit all the interest so taken, received, retained or contracted for; it being the intent and meaning of this section not to provide a forfeiture of any portion of the principal. When a greater rate of interest has been paid than twelve per cent. per annum, the person paying it, or his personal representative, may recover the excess from the person taking it, or his personal representative, in an action in the proper court." There is no contention that the first part of this statute, prohibiting the taking, receiving, retaining, or contracting for usurious interest, is

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contrary to public policy, nor that statutes in general which regulate rates of interest and prohibit usury are contrary to public policy. This claim seems scarcely to have been raised in this country during the last three-quarters of a century, since the very learned opinion of Chancellor Kent in the case of Dunham v. Gould, 16 Johns. 368, wherein such a contention would seem to have been forever set at rest, and wherein the learned chancellor showed that usury laws had been a part of the regulations of all nations and people, whether civilized or barbarian, for more than 3,000 years, and have subserved the highest principles of public policy. Since that decision, the principal contention has been as to whether or not, in the absence of a statute giving to the person who has paid the usurious interest the right to recover it back, such right existed; and upon this question the courts have held both ways, many of the courts holding that this right existed at common law, and without a statute, and some of the courts holding to the other doctrine. In the case of Wheaton v. Hibbard, 20 Johns. 291, the supreme court of New York said: "It is undeniable that a party who has paid excessive interest may, at common law, recover the excess, in an action for money had and received. The law considers the borrower rather as a victim than an aggressor. The statute prohibits usury, in order to protect needy and necessitous persons from the oppression of usurers, who are eager to take advantage of the distress of others, and who violate the law only to complete their ruin. In such a case the maxim of 'potior est conditio defendentus,' has never been applied." This was declared to be the law by Chancellor Kent in Palmer v. Lord, 6 Johns. Ch. 95; also in Bank v. Wood, 53 Vt. 491; and also in the case of Musselman v. McElhenny, 23 Ind. 4. In summing up the law on this question, Parsons on Contracts, (volume 3, p. 128) says: "So, if he has paid money on a usurious contract, and sues for its repayment, it seems that he will recover so much as he has paid usuriously, but no more; that is, he will not recover the legal interest which he has paid on a usurious contract. Courts were at first inclined to deny the right of a party paying usurious interest to recover back any portion of the money so paid, on the ground that both parties to such a transaction were in pari delicto, and the party paying the money parted with it freely; so that the maxim 'volenti non fit injuria' would apply. But this is not so now, the rule being that above stated; and the distinction has been taken between statutes enacted on general grounds of policy and public expediency, in which each party violating the law is in pari delicto, and entitled to no assistance from a court of justice, and those laws enacted to protect weak or necessitous men from being overreached, defrauded, or oppressed, in which event the injured party

may have relief extended to him; and the whole purport and reason, both of the law of usury and the great mass of decisions under it, indicate that the lendor on usury is regarded as the oppressor and the criminal, and the borrower as the oppressed and injured." Lawson, in his recent work on the Principles of the American Law of Contracts (section 54), says: "For instance, by the statutes of usury, taking more than a certain interest is declared illegal and the contract void; but, as these statutes were made to protect needy persons from the oppression of usurers, the party actually doing what the law prohibits, viz. paying usury, may bring an action for the excess of legal interest." And he cites ample authority to support this doctrine, and also gives the minority holdings on this question.

Thus, it will be seen that, even without the latter part of this section of our statute on usury, we would have to hold against some of the best law of our country if we held that a party paying usurious interest might not recover it back. If it is so in accord with public good, with public harmony, with public policy, that a person may not retain the tainted fruit of giving illegal vent to one man's cupidity, and taking a prohibited advantage of another man's unfortunate necessity, how can it be held to be against public policy for the legislature to provide a statutory remedy for the redress of the wrong committed in taking usurious interest? Upon what principle of public policy can it be held that the legislature has a right to prohibit the doing of that which is universally declared to be wrong, and has no right to provide specific redress for the wrong? On what principle of public policy has the legislature the right, which is declared by the highest authority to be as universal as the laws themselves, and as old as the ages, to prohibit the taking of interest beyond an amount which moral justice will permit and the unfortunate condition of the borrower can endure, and yet has not the right to give an ample remedy to prevent the open and constant violation of such enactment? If the legislature has the right, which is conceded, to prevent the taking of usurious interest, why has it not the right to give relief against the retaining of it? There is no principle of public policy that is violated in this enactment. The very idea of public policy is perverted when the assertion is made that this beneficial law of our statute providing for the recovery of usurious interest paid is contrary to public policy. Public policy is "the principle under which freedom of contract or private dealings is restricted by law for the good of the community." Black, Law Dict. It is also defined to be "that principle of the law which holds that no one can lawfully to that which has a tendency to be injurious to the public, or against the public good." 19 Am. & Eng. Enc. Law, 565. This statute is adopted from the laws of Dakota,

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and was followed in that territory, and the same relief afforded as that claimed by defendant in error in this case in the case of Wood v. Cuthbertson, 3 Dak. 328, 21 N. W. This provision of our usury statute, however, is not an old principle recently enacted into the laws of this country. This old principle of the common law was enacted in New York, February 8, 1787. It was provided in that enactment that, where a higher rate of interest shall have been paid than the limit provided by law, the borrower may recover back the excess in an action of debt, at law, within one year next after payment: and, if such action was not brought within one year by the person paying the usury, it might then, within a year thereafter, be brought by any person, one molety going to the person bringing the action, and the other going for the use of the poor of the town where the offense was committed. See Palmer v. Lord, supra.

Although this enactment has been statutory law in this country for a century, we are cited to no case in which the parties have even had the hardihood to contend that it was an excessive exercise of legislative authority. The very authorities cited by plaintiffs in error recognize the right of the legislature to provide for the recovery of usurious interest paid. The case of Blain v. Willson, which is a decision cited from the supreme court of Nebraska, reported in 49 N. W. 224, is the latest case cited by the plaintiffs in error in support of their contention that usurious interest voluntarily paid cannot be recovered back. In this case the court held that the interest could not be recovered back, because the statute regulating interest and defining usury only provided as a remedy that, "if a greater rate of interest than is hereinbefore allowed shall be contracted for or received or reserved, the contract shall not, therefore, be void; but if, in any action on such contract, proof be made that illegal interest has been directly or indirectly contracted for, or taken or reserved, the plaintiff shall only recover the principal, without interest, and the defendant shall recover costs: and, if interest shall have been paid thereon. judgment shall be for the principal, deducting interest paid;" and the court held that, the legislature having provided this remedy, it was exclusive of all others. The court said: "The meaning of the statute is that the plea of usury can only be set up in a suit upon the usurious contract. The borrower can refuse to pay, and, when action is brought against him, he can plead his defense." Again, in this case, the court say: "While the courts of the states hold that, where usurious interest has been paid, it may be recovered, it will be found that the cases in which such holdings have been made arose under statutes which either expressly state or clearly imply that an action may be brought by the borrower to recover usurious interest paid. It is obvious that decisions

under statutes materially different from ours are wholly inapplicable to the case now before the court. * * * Usury is a creature of the statute, and it prescribes the remedy. * * * If the legislature had intended that usurious interest, voluntarily or involuntarily paid, should be collected, it would have so provided." In that case the court clearly recognized the legislative right to provide a specific remedy, such as our legislature has, against the retaining of usurious interest paid. The courts have gone much beyond what it is necessary for us to hold in this case, affirming the validity of this statute giving the right to recover back usurious interest paid, and hold that money paid under a prohibited contract may be recovered. In the case of Richardson v. Kelly, 85 Ill. 491, the court enforced a statute of that state passed in 1845, authorizing the recovery, by an action of debt, detinue, assumpsit, or trover, of any sum or sums of money, or other valuable thing, amounting in the whole to the sum of \$10, which shall be lost by playing at cards, dice, or any other game or games, which shall have been paid or delivered by the person losing, and held that a horse which had been lost on a wager on a race might be recovered without regard to whether it was voluntarily delivered up to the winner after being lost or not. In the case of Parkersburg v. Brown, 106 U. S. 487. 1 Sup. Ct. 442, the supreme court of the United States held that property delivered upon a prohibited contract could be claimed and recovered. The court there said: "To deny a remedy to reclaim it is to give effect to the illegal contract. The illegality of that contract does not arise from any moral turpitude. The property was transferred under a contract which was merely malum prohibitum, and where the city was the principal offender. In such a case the party receiving may be made to refund to the person from whom it has received property for the unauthorized purpose the value of that which it has actually received." This was held without any statute specifically authorizing a recovery. There is no foundation. either upon principle or authority, for the contention that the legislative enactment in question is contrary to public policy. The judgment of the court below is affirmed, with costs against appellants. All of the justices concurring.

BURFORD, J., not sitting.

TERRITORY v. GATLIFF.

(Supreme Court of Oklahoma. Sept. 7, 1894.)
FELONIOUS ASSAULT — INDICTMENT — DUPLICITY—
INSTRUCTIONS — SELF-DEFENSE — REASONABLE
DOUBT — INTEREST OF DEFENDANT — ARGUMENT
OF COUNSEL—SEPARATION OF JURY.

1. An indictment which charges that the defendant unlawfully attempted to commit a violent injury upon the person of the prose-

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cuting witness, and then proceeds to state facts constituting the crime of assault with a deadly weapon with intent to kill, is not objectionable for duplicity. The words referring to an attempt, not being sufficient to charge a criminal attempt under the statute, may be disregarded

as surplusage.

2. The court instructed the jury that if one of the defendants shot the prosecuting witness while he was in the act of sticking a hatchet into the head of the other defendant, the brother of the defendant making the assault, the assaulting defendant honestly believing that his brother would lose his life or receive great bodily injury unless he committed the act constituting the alleged assault. Held, that this was sufficient, and it was unnecessary to give an instruction to the effect that it was the duty of one of the defendants to defend his brother from injury.

3. This court will not review the action of the district court in giving, or refusing to give, instructions upon particular matters in evidence where the evidence is not made a part of the

record on appeal.

4. It is unnecessary for the trial court to give a special instruction upon the question of reasonable doubt when the court has given proper definition of a reasonable doubt in its general charge to the jury.

5. An instruction of the court which charged the jury, among other things, that they should take into consideration the fact that the defendants were interested parties, in determining the weight that should be given to their tes-

ing the weight that should be given to their tes-timony, was not improper.

6. An instruction to the jury to the effect that, if such acts were being done by the per-son assaulted as would lead the assailant to honestly believe that his brother would receive his death or great bodily injury from the per-son assaulted unless the assailant committed the shooting complained of, then the assailant would be justified in shooting to defend his brother, contains nothing of which the defendant can complain.

7. An assault with intent to do bodily harm 7. An assault with intent to do bodily harm without justifiable or excusable cause is included in the charge laid in an indictment of assault with intent to kill; and, under our statute which provides that the jury may find the defendant guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, the defendant may be found guilty of the lesser offense of an assault with intent to do bodily harm.

8. It is not error for the court to fail to instruct the jury that the defendant may be found guilty of a lesser offense included within the indictment, and which it is not shown that the ev-

idence tends to prove.

9. It is not error for the trial court to refuse to grant a new trial on account of improper language used in the closing argument by the prosecuting attorney, where the language could not necessarily prejudice the defendant, when the trial court directed the jury to disregard such statements. such statements.

10. Where new trial was asked in the court below on the ground that one of the jurymen separated a short distance from his fellows, and separated a short distance from his fellows, and wherein there was conflicting evidence upon the question of the separation, and the court refused a new trial, held, we will not disturb this

(Syllabus by the Court.)

Appeal from district court, Payne county; before Justice E. B. Green.

Reese Gatliff was convicted of an assault on Earl Bee Guthrey, by shooting without justifiable cause, and with intent to injure said Guthrey, and he appeals. Affirmed.

George P. Uhl and W. B. Williams, for appellant. C. A. Galbraith, Atty. Gen., for the Territory.

BIERER, J. The defendants were indicted at the April term, 1892, of the district court of Payne county, charged with an assault upon Earl Bee Guthrey, by shooting him in the left hand and left hip with a shotgun, with intent to kill and murder; and upon trial the defendant Reese Gatliff was found guilty of an assault upon said Earl Bee Guthrey, by shooting without justifiable cause, and with intent to injure said Earl Bee Guthrey. The indictment upon which trial was had was as follows: "In District Court in and for Payne Territory of Oklahoma vs. Reese Gatliff, William Gatliff, Defendants. Of the April term of the district court of the first judicial district of the territory of Oklahoma, within and for Payne county, in said territory, in the year of our Lord one thousand eight hundred and ninety-two, the grand jurors, having been first duly chosen, selected, impaneled, sworn, and charged to inquire of offenses against the laws of the territory of Oklahoma committed within said county, in said territory of Oklahoma, upon their oaths aforesaid, in the name and by the authority of the territory of Oklahoma, do find and present that at and within said Payne county, in said territory, on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and ninety-two, Reese Gatliff and William Gatliff, late of the county aforesaid, on the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and ninety-two, in the county of Payne and territory of Oklahoma, aforesaid, did then and there unlawfully, knowingly, willfully, and feloniously attempt to commit a violent injury upon the person of one Earl Bee Guth-They, the said Reese Gatliff and Wilrev. liam Gatliff, were then and there each of them persons of sound mind, and did then and there have a present ability to then and there commit said violent injury; that is, they, the said Reese Gatliff and William Gatliff, did then and there, unlawfully, knowingly, feloniously, purposely, and with premeditated malice, shoot, fire, and discharge towards, at, against, and into the left thigh and left hand of the body of the said Earl Bee Guthrey one certain shotgun, which he, the said Reese Gatliff and William Gatliff, then and there in their hands had and held, and which shotgun was then and there loaded and charged with gunpowder, leaden balls, shot, and bullets; and the said Reese Gatliff and William Gatliff, with said shotgun so loaded and charged as aforesaid, and in their hands so held and had as aforesaid, did then and there shoot, fire, and discharge said shotgun at, towards, against, and into the body and person of the said Earl Bee Guthrey, with intent then and there and thereby them, the said Earl Bee Guthrey, unlawfully, feloniously, purposely, wrongfully, willfully, and know-

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ingly, and with premeditated malice, to kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of Oklahoma. Frank A. Hutto, County Attorney." The defendants demurred to the indictment, and saved exception to the overruling thereof.

The only question presented against the sufficiency of the indictment is that it charges two crimes,-one of an attempt to commit a felony, under section 2568 of the Laws of Oklahoma of 1890; and the other of an assault with intent to kill, under section 2125 of the same statutes. This objection is not well taken. In so far as the indictment contains language referring to an attempt, it is only of the incipient acts of the crime actually charged, and follows this with a statement of the real and completed crime charged in the indictment. The attempt—the effort to commit the crime charged is shown to have been successful, to have resulted in the commission of the principal crime set out in the indictment. It was a successful attempt, which, followed up, constituted the crime. A criminal attempt—that is, the crime of the felonious attempt to commit a crime—is only committed when the attempt has failed; and, when the attempt fails, the crime of attempt is committed. When the attempt succeeds, the principal crime has been committed. The language of this indictment before the words "that is, they," is preliminary and unnecessary to the constitution of the crime charged. The indictment would have been good without it. This language in the indictment referring to the attempt is not sufficient to charge a criminal attempt, because it does not charge the acts by which the crime of attempt was committed, nor does it charge the effort and the failure. The indictment does fully charge the commission of the crime of an assault with intent to kill; and where an indictment charges one offense properly and sufficiently, and is uncertain or insufficient as to another charge, this language as to the other charge may be rejected as surplusage. Smith v. State, 85 Ind. 553; State v. Corrigan, 24 Conn. 286; Com. v. Balkom, 3 Pick. 281; Com. v. Arnold, 4 Pick. 252; Burchard v. State, 2 Or. 78.

The defendants complain because the court refused an instruction that it was the duty of Reese Gatliff to prevent Earl Bee Guthrey from striking William Gatliff on the head with a hatchet, even to the extent of taking the life of said Guthrey. There is a statement in the record that the defendants offered evidence tending to show that, when Reese Gatliff shot Earl Bee Guthrey with a shotgun, Earl Bee Guthrey was about to strike William Gatliff, his brother, on the head with the sharp part of a hatchet, William Gatliff then being in a personal rencounter with P. H. Guthrey, the father of Earl Bee Guthrey. The court instructed the jury that if Earl Bee Guthrey was about to

strike William Gatliff with a hatchet, and Reese Gatliff honestly believed that Bee Guthrey would kill William Gatliff unless he (Reese Gatliff) shot Earl Bee Guthrey, then Reese Gatliff would be justified in his act. This instruction was properly given, and it was unnecessary for the court to instruct the jury as to what the duty of Reese Gatliff was as to the defense of William Gatliff. Reese Gatliff was not being prosecuted for misprision of a felony by failing to prevent a felonious assault upon William Gatliff. He was prosecuted and convicted of making an inexcusable assault upon Earl Bee Guthrey. The question in the case was not as to whether Reese Gatliff was obliged to shoot Earl Bee Guthrey, but the question was as to whether he was justified in shooting him. It was a question of excuse, and not of obligation; and, when the court instructed as to the law upon the alleged justification of the otherwise admittedly felonious assault, this was all that was necessary.

The court was asked to give several instructions to the effect that if the Guthreys had had the Gatliffs indicted and arrested before the commission of the alleged assault. for the purpose of compelling them to submit to the designs of the Guthreys, then the jury might take this into consideration in determining who brought on the affray; and also to the effect that if the town of Payne Center, where the offense is claimed to have been committed, had been platted, under regulations of the land department, into streets or public highways, the burden of proof that the highway where the offense is claimed by the defendants to have been committed, and which it is claimed the Guthreys were obstructing, had been vacated, would be upon the prosecution. The defendants also excepted to the giving of an instruction that the jury should consider the record of conviction of certain witnesses of misdemeanor, as touching upon the credibility of the witnesses. The evidence in the case is not in the record, and there is no statement of it to show that the defendants had ever been arrested by the Guthreys, and nothing to show that Payne Center had been platted under government regulations or otherwise; and there is nothing to show that any of the defendants' witnesses had been convicted of a misdemeanor, or that this instruction in any way affected the defendants; and, where the evidence is not in the record, this court will not review errors assigned upon the giving or refusal to give instructions based upon the particular parts of the evidence in the case.

There was no error in the court's refusing to give the instruction asked by the defendants defining a reasonable doubt. The court instructed the jury "that a reasonable doubt, as used in these instructions, is such a doubt, in the mind of a reasonable man, as causes him to stop and hesitate and say, 'I am not satisfied,' when acting with reference to the

graver and more important affairs of life. It is not a mere possibility of the innocence of the defendants; but if the jury, from a careful consideration of all the evidence and facts and circumstances in proof in the case, can say that they have an abiding conviction of the truth of the charge made in the indictment, then they are satisfied beyond a reasonable doubt, and should find the defendants guilty." This was a proper statement to the jury of what the law means by a reasonable doubt. Sack. Instruct. Juries, 715. And it was unnecessary for the court to give the instruction asked by the defendants, although the instruction asked by them on this question was substantially the same as that given by the court; and it would have been unnecessary repetition, in no way assisting the jury to have given it. A court may properly refuse a special charge asked when it is embodied in its own instructions. Morrow v. State (Tex. Cr. App.) 26 S. W. 395.

The court properly instructed the jury that they were the sole judges of the facts in the case, and of the credibility of the witnesses, and of the weight to be given to the testimony of any of the witnesses; that, in determining the credibility of any witness and the weight to be given to the testimony of such witness, the jury should consider the interest of such witness in the event of the suit, his or her prejudice or ill feeling, his or her deportment or manner on the witness stand, and all other facts and circumstances in proof in the case touching the credibility of the witness; and that, in determining the credence and weight to be given to the testimony of the defendants, the jury should consider the fact that they were the defendants, and the interest which they had in the event of the suit, with all other facts and circumstances in proof in the case touching their credibility, and then give their testimony such credence and weight as the jury shall think it deserves. It is not improper for the court to instruct the jury that the testimony of the defendant in a criminal case is to be weighed by the same rules that govern the testimony of other witnesses, and the defendant is always an interested party, and the interest which a witness has may always be taken into consideration in determining the weight to be given to such testimony.

There is absolutely nothing in the defendants' objection to the thirteenth instruction given by the court. It was to the effect that if Earl B. Guthrey was about to strike William Gatliff on the head with a hatchet, in such a way as to endanger his life, as was claimed by the defendants in their justification, and the defendant Reese Gatliff "honestly believed that his brother, William Gatliff, would lose his life or receive great bodily injury from the assault of the said Earl Bee Guthrey with such hatchet, and then and there shot the said Earl Bee Guthrey for the purpose of saving the life of William Gatliff, or to prevent his receiving great

bodily injury, in such case the shooting was justifiable, and the defendants would not be guilty of the crime charged in the indictment." There is nothing in this instruction of which the defendant Reese Gatliff could complain. It extended the right of self-defense which a person had at common law to defend with force an assault upon his master, servant, parent, child, husband, or wife, and was in favor of the defendants upon a question about which there is some dispute,as to whether the right of self-defense of a member of one's own family extends to the defense of a brother. The situation must have been such, in any event, as to lead de-dendant Reese Gatliff to honestly believe that his brother would suffer great injury unless he disabled or killed his brother's assailant, before Reese Gatliff would be justifled in shooting.

The defendants were indicted, charged with an assault with intent to kill, under section 2125 of the Statutes of Oklahoma of 1890, and the defendant Reese Gatliff was convicted of an assault with intent to do bodily harm, and without justifiable or excusable cause, under section 2155 of the same statute. The defendants assign error in the court's instructing the jury that the latter of these offenses is a lesser one than, and included within, that of the former. The means prescribed in these two sections by which the offense may be committed are in substance identical, and the material difference lies only in the difference of intent. In the one the assault is with intent to kill; in the other it is with intent to do bodily harm. The offenses are both of the same character, the assault with intent to do bodily harm being embraced within and lesser than that of assault with intent to kill. An assault with intent to kill necessarily includes an assault with intent to do bodily harm, for a person cannot be killed without bodily harm being done. Section 5683 of the Statutes of 1850 provides: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense." The offense of an assault, without justifiable or excusable cause, with intent to do bodily harm, being included within the charge of an assault with intent to kill, the jury were at liberty to find the defendant guilty of either of the offenses charged, as the evidence would justify. State v. Burwell, 34 Kan. 312, 8

Objection is made to the instructions because the court did not instruct the jury that they might find the defendants guilty of an offense as low as that of a simple assault. While it is true that a defendant may be indicted for murder, and found guilty of an assault and battery (State v. O'Kane, 23 Kan. 244), yet it is unnecessary, under an indictment for murder or for an assault with intent to kill, that the court should instruct the

jury that the defendant may be found guilty of an assault and battery, much less of simple assault. If the evidence tended to show that the defendant was guilty of an assault with intent to kill, or of an assault with intent to do bodily harm, or was innocent, as we must presume, in the absence of the evidence and on the record before us, that it did, it would be improper for the court to instruct the jury that the defendant might be found guilty of some lesser offense, and one of which the evidence did not tend to prove him guilty. State v. Mize, 36 Kan. 187, 13 Pac. 1; State v. Mowry, 37 Kan. 369, 15 Pac. 282. It is unnecessary for the court to give an instruction that the defendant may be found guilty of a lower offense where the evidence tends to prove only the greater. Steiner v. State (Tex. Cr. App.) 26 S. W. 214.

Defendants asked a new trial in the court below, on the ground of improper language used by the county attorney in the closing argument to the jury. The improper language claimed to have been used by the county attorney was: "It was stated on the streets that some members of the jury were not honest men, but he [the county attorney] thought otherwise, and believed every member of the jury to be an honest man:" and "they are offering to bet on the streets that this jury will hang, but I believe you will all be fair and candid, and bring in a verdict in a very short time." The county attorney denies the use of this language as stated in the affidavits, but admits part of the statements in a modified form. While it was out of place and improper in the argument to make any such statements, and did not comport with the proper province of the prosecuting attorney in arguing the case to the jury, yet there is nothing in the language which would necessarily prejudice the jury against the defendants; and, as the court properly advised the jury to disregard these improper statements, we cannot perceive how any injury resulted to the defendants, and it was not erroneous for the court to refuse a new trial on this account. State v. McCool, 34 Kan. 617, 9 Pac. 745; Shular v. State, 105 Ind. 289, 4 N. E. 870.

The defendants also moved for a new trial on the ground that one of the jurors was allowed to separate a short distance from the other members of the jury at one time, while they were, late in the evening, being taken to supper. It is claimed in the affidavits of the defendants that one of the jurges did separate, and was seen talking to an outside person, some 40 feet away from the body of jurymen. The name of the particular juryman who thus separated, or of the person with whom he talked, is not given by any of the affidavits presented on behalf of the defendants; and all of the four bailiffs who were placed in charge of the jury, and the only bailiffs who had the jury in charge, swore that at no time during the trial of the . case was any one of the jurymen permitted to separate from his fellows; and, the trial court having found against the defendants, we will not disturb its finding.

Finding no error in the record, the judgment of the court below is affirmed. All of the justices concurring.

(2 Okl. 484)

GARDENHIRE et al. v. GARDENHIRE. (Supreme Court of Oklahoma. Sept. 7, 1894.) Appeal — Review — Objections Waived—Find-ING OF FACT—SUFFICIENCY — PRESUMPTIONS — DIVORCE—ALIMONY—LIBN—PRIORITY.

1. Where errors are assigned in the petition 1. Where errors are assigned in the petition in error, but are not mentioned in the argument or brief of counsel, and are not relied upon in the argument or brief for the reversal of the judgment complained of, they will be deemed waived and abandoned, and will not be regarded by the supreme court.

2. A general finding includes a finding of all the necessary facts to constitute the claim of the party in whose behalf the decree is rendered.

dered.

3. Where the pleadings upon which the cause was tried in the court below are not brought up with, and made a part of, the record, we must presume that the issues were such as upon which the court could render the judgment which it did.

4. Under the diverce law of this territory adopted by the legislature in 1890, the court, in rendering a decree for alimony, having the parties and the property before the court, might render a decree granting the plaintiff alimony, and adjudging that the same be a prior lien to that of a chattel mortgage given by the husband to one of the defendants before the court, upon the personal property of the husband, in fraud of the rights of the wife.

(Syllabus by the Court.)

Appeal from district court, Payne county; before Justice Frank Dale.

Action by Nellie Gardenhire against Clyde Gardenhire and Jacob Gardenhire for a divorce from Clyde Gardenhire and alimony, and to declare the judgment for alimony a lien on all of defendant Clyde's personal property, superior to the lien of a mortgage by such defendant to defendant Jacob Gardenhire. There were decrees for plaintiff, and defendants appeal. Affirmed.

Neal & Clark and C. R. Buckner, for appellants. R. A. Lowrey, for appellee.

BIERER, J. The plaintiffs in error bring this cause here on appeal from the judgment of the district court of Payne county, in which two decrees were entered against these plaintiffs in error (defendants below), one granting Nellie Gardenhire, the defendant in error, a divorce from Clyde Gardenhire, one of the plaintiffs in error, and the other granting \$500 permanent alimony to the plaintiff below, Nellie Gardenhire, and \$500 to be held in trust for her minor child. of which she was given the custody. Judgment was also rendered against the defendant Jacob Gardenhire declaring that the decree for alimony was a prior lien upon all of Clyde Gardenhire's personal property, including certain personal property mortgaged to the defendant below, Jacob Gardenhire. An order for temporary alimony, as shown by the record, was entered on May 5, 1893. On August 31, 1893, a decree of divorce was granted Nellie Gardenhire from Clyde Gardenhire, and the cause continued until November, 1893, for further trial upon the question of alimony, at which time the judgment for alimony was rendered, and the decree entered against both of the plaintiffs in

No part of the pleadings in the district court or of the evidence offered upon the trial is brought to this court with the petition in error. The only parts of the record In the case which are brought to this court are the several decrees for temporary alimony, for divorce, and for permanent alimony. The plaintiffs in error, in their pleadings here, assign several errors as grounds for the reversal of the judgments of the district court, but in their brief but one ground is relied upon for a reversal in this cause; and where errors are assigned for reversal of a decree of the lower court, but are not noticed in argument or relied upon in the brief of counsel, they will not be regarded or referred to by this court in determining the cause, and will be considered as waived and abandoned. Wilson v. Fuller, 9 Kan. 176. The only ground relied upon by plaintiffs in error in their brief for a reversal of the judgment of the court below is found in the following language in their brief: "The court decrees a prior lien on property under mortgage from Clyde Gardenhire to Jacob Gardenhire. The court declared it should be a prior lien on the property covered by the mortgage, without canceling the mortgage or finding that it was a fraudulent mortgage. Liens arise by operation of law. The court can only declare the law. If the law gives no lien, the court cannot." As we take it, there are two propositions of law suggested in this singly connected statement: First, that the findings of the court are not sufficient to warrant the judgment that the decree for alimony granted Nellie Gardenhire should be a prior lien to that of the chattel mortgage on certain property of the defendant Clyde Gardenhire, in favor of the defendant Jacob Gardenhire; second, that, under the law, in no phase which this case could have assumed could the court render such a decree granting to Nellie Gardenhire a priority of lien on the property of Clyde Gardenhire. Both of these positions are untenable. The journal entry of the court, and which, as we have shown, is the only part of the record brought here and relied upon, contains the following, among other matters: "Now, to wit, on this 1st day of December, 1893, this cause came on to be heard on the application of plaintiff for alimony, and to set aside the chattel mortgage given by Clyde Gardenhire to Jacob Gardenhire for the sum of \$1,000. The plaintiff appeared by her attorneys, and the court, having

heard the evidence, and being fully advised in the premises, finds for the plaintiff, allows her the sum of \$500 as alimony, * and this judgment is made a first and prior lien on all Clyde Gardenhire's personal property, including the property mortgaged to Jacob Gardenhire." These findings and this decree are the material parts of the journal entry from which the question presented must be decided. The findings are a general finding in favor of the plaintiff below, and against the defendants; and it was not necessary that the court should have made any special findings of fact in the case, unless the same were asked for by the defendants, and, it not being shown that any request was made, the presumption is that it was not. If it was necessary that the court should have determined that the chattel mortgage given by Clyde Gardenhire to Jacob Gardenhire upon Clyde Gardenhire's personal property was fraudulent as to the claim for alimony of Nellie Gardenbire, then such finding is included within the general findings of the court. A general finding is a sufficient finding as to all the necessary facts to entitle the party to the decree given. Bixby v. Bailey, 11 Kan. 359.

We state the second question as we do above because the presumptions of law are all in favor of the correctness of the judgment of the court below; and if a decree is rendered, and the pleadings in the case are not brought to this court with the record, the presumption is that the pleadings and issues were such as would fully justify the determination of the court, so far as the pleadings and issues could do so. Buecher v. Casteen, 41 Kan. 141, 21 Pac. 112. And, as the evidence has not been brought with the record to this court, we also assume that the judgment was fully supported by the evidence in the case, leaving the only question one of law,-as to whether or not such a judgment could, in any reasonable phase which the pleadings, issues, and evidence could have assumed, have been rendered. This action, for divorce and for alimony. must originally have been brought under the Code of Civil Procedure of 1890, adopted for this territory, and which remained in force until August 14, 1893, because the record shows an order for alimony in the case on May 5, 1893. Section 19 (general section 4978) of article 31 of chapter 70 of the Code of Civil Procedure of 1890 provides: "Sec. 19. The court shall make such decree for alimony in all cases contemplated by this act, as the circumstances of the case shall render just and proper; and such decree for alimony heretofore made or hereinafter made, shall be valid against the husband. whether asked for in the petition or given by the judge on default." This section vests a very comprehensive equitable power in the court. It shall make such decree for alimony as the circumstances of the case, as shown to the court by the evidence on the trial, render

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just and proper. Section 16 of the same article and chapter provides: "Sec. 16. Pending a petition for divorce, the court or the judge thereof in vacation, shall make and by attachment enforce such orders for the disposition of the persons, property and children of the parties as may be deemed right and proper. * * *" And as the journal entry shows that, when the judgment complained of was rendered, both Clyde Gardenhire and Jacob Gardenhire were before the court as defendants, and were represented by counsel, and that a certain chattel mortgage given by Clyde Gardenhire to Jacob Gardenhire, for the sum of \$1,000, on the property of Clyde Gardenhire, was under consideration and before the court for determination, and as the presumptions are all in favor of the action of the court, we must presume now that such a state of affairs concerning the property of Clyde Gardenhire was brought to the attention of the court as required it, at or prior to the determination of the cause, to make an order, under section 16, referred to, concerning the disposition of the property of Clyde Gardenhire. and to prevent his improperly or fraudulently; disposing of his personal property, to the prejudice of the plaintiff in that action; and when the parties were all before the court, and the court had jurisdiction of the persons and of this property by proper proceeding, as we must now presume, it was manifestly proper by the decree, in disposing of the property then in litigation and of the interests of the parties before the court, to determine the priority in which claims against his (Clyde Gardenhire's) property should be paid. The statute referred to gives the court power to enforce, and of course to first make, such order for the disposition of the property of the parties as may be deemed right and proper. If the court had power, pending the case, to make an order as to the disposition of the property, would it not then, in the exercise of the power given it to make such decree as the circumstances of the case seemed to warrant, have the power and the right, and would it not be the duty of the court, to adjudge, when all parties were before it, as to whether a certain lien upon property should be prior or subsequent to that of the decree for allmony? If the court might make a complete disposition of the property of the parties, might it not make a partial disposition by way of declaring priority of claims against the property? The greater certainly includes the lesser. A lien against property is less than the entire ownership, and the right to declare a lien is less than the entire disposition. If the right under such statutes as ours then in force to prevent the disposition by a husband in a divorce suit of his property by a fraudulent mortgage is denied, then the statute may be evaded, and its provisions entirely nullfied, by making such a fraudulent disposition of property as we presume from the general

findings of fact in favor of the plaintiff below the court found in this case. The pleadings not being brought before us by the plaintiffs in error, we presume the allegations therein were sufficient to warrant the court in exercising the equitable authority and power as is indicated by the judgment were exercised; and if such facts were shown to the court as warranted it, as we presume they were, in reaching out its protecting hand to restrain the fraudulent disposition of this property, then it would be the duty of the court, in making the final disposition of the cause, not to simply dismiss the plaintiff with a decree for alimony, and to let the property go from the custody of the court into the hands of the party who had shown an interest in defeating the plaintiff's claim, but to make such a decree concerning the property then before the court as would give to the plaintiff the relief which the court intended; and in doing this the court certainly might very properly order that the decree for alimony be paid before the property should again go back into the hands of one or both of the defendants, who might be, and no doubt were, interested in defeating the plaintiff's claim for alimony.

In the case of Busenbark, v. Busenbark, 33 Kan. 572, 7 Pac. 245, under the divorce law in force in this territory since August 14, 1898, and which seems to give no greater power to the court to see that right and justice is done parties than the statute of 1890, under which this action was brought, the plaintiff there brought an action for divorce against her husband, and joined in the same action numerous other defendants. The petition asked for a divorce and for alimony, and also asked, among other things, that certain judgments granted the son and daughter of the defendant be held fraudulent, and that a sale of real estate of the husband, under executions issued upon said personal judgments, be enjoined. The parties to the divorce proceeding were held to be in equal wrong, but the court, in rendering judgment, decreed that each of the parties be allowed jointly to have possession and occupancy of certain of the real estate, and that the plaintiff have the issues, rents, and profits of a part of the land. It was claimed in the supreme court that this judgment was erroneous; and the court held that under the statute the judgment was proper, and in passing on the case, among other things, said: "If the power existed in the trial court to make any dispositon of any part of the property of the husband for the benefit of the wife, the order of the court was just and reasonable." We think the same of the case at bar. court being vested with the authority to decree alimony in favor of the wife, and having all the parties and these transactions before it, it also had the right to make such further order and decree upon the issues then before the court as would give effect to the decree rendered, and not permit parties, by fraudu-

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lent conduct and transactions, to render a decree futile. Courts of equity do not sit to do useless things, and render decrees that will be no relief to the parties complaining; and where all the matters are before the court, as we presume they were in this case, the court had the power to render such proper decree, under a law such as the court was then administering, as would do ample right and justice. An authority squarely in point in this case is that of Damon v. Damon, 28 Wis. 510, in which the court says: "The remaining question is whether the complaint states a cause of action against the appellant; or, stated in another form, the question is whether, in an action by a wife for a divorce and for alimony, it is competent to join as a defendant therein a party who knowingly and without consideration took a conveyance of the husband's property before the action was commenced, but after the cause of action accrued, for the fraudulent purpose of defeating a recovery of alimony in such action. We are of the opinion that this question must be resolved in the affirmative. We do not perceive how in such cases the court can fully adjudicate upon and enforce the rights of the wife to alimony, or to a portion of her husband's estate, if she prevails in the action, unless the court has power to bring before it as a party any person who has taken a conveyance from the husband of the very property in question, for the purpose of defrauding the wife of her rights. How else can the court compel him to surrender the property thus fraudulently acquired? The learned counsel for the appellant argues, and with much plausibility, that the wife must wait until she obtains her decree of divorce and for alimony, and then she may bring into court the fraudulent grantee of the property out of which her alimony is to be collected, and compel him to disgorge. But why delay until he has an opportunity to dispose of the property and leave the country? It is urged that the power of the court in these divorce cases is limited; that it cannot exercise full equity powers, but only such as are conferred by the statute; and, inasmuch as the statute does not expressly provide that third parties may be made defendants in divorce suits, that, therefore, no person can be made a defendant in those actions other than a party to the marriage contract. We do not so understand the statute. We think that when the court is empowered to award alimony to the wife out of the husband's estate; to adjudge to her property, or the value of it, that came to her husband by reason of their marriage; to sequester his personal estate, and the rents and profits of his real estate, to enforce compliance with its judgment; and to divide and distribute the whole estate between the parties,-that the power to bring before it, as a party defendant in the same action, any person who is attempting fraudulently to keep the estate, over which the court has

diction of the court, and out of the reach of its judgment, must necessarily follow." It is true that in this case, as in the case of Busenbark v. Busenbark, the property affected by the decree was real estate; but if the court has authority to take charge of the real estate of a party, to bring before the court fraudulent transferees of the same, and make a decree for alimony prior and superior to the claims in the land of fraudulent transferees, certainly there can be no reason why the court might not also determine that a decree for alimony should have precedence as against the rights of a fraudulent mortgagee of personal property. There is no meason why the court should have power to make such decree when the property is real estate, and not have power to make a like decree when the property is personal property. is not the kind of property that gives the court jurisdiction to make the decree, but the facts and circumstances, as they should be administered upon well-defined principles of law and equity. The statute of Wisconsin on the subject of divorce, under which the court made this decision in the case of Damon v. Damon, is not quoted; but, while, from the reference made in the decision thereto, it seems to have been more specific than ours it certainly does not vest a broader discretion in courts of equity than that of section 19 of article 31 of our Code, referred to. There could be no broader statute than that which gives the court the power to make such a decree in all cases "as the circumstances of the case shall render just and proper." Many other decisions to the same effect as this might be cited to show that the decision of the court is supported by both principle and authority.

Nor was it necessary, in decreeing that plaintiff's judgment for alimony be a prior lien to that of the chattel mortgage given to Jacob Gardenbire on the property of Clyde Gardenbire, that this chattel mortgage should have been canceled. The decree of the court was not that this personal property be given to Nellie Gardenhire, but it was only that she have a lien thereon; and, when this lien was satisfied, of course any other lien given by Clyde Gardenhire, and which was adjudged subsequent to the decree in favor of Nellie Gardenbire, would remain in full force and operation. The chattel mortgage may have been fraudulent so far as the rights of Nellie Gardenhire were concerned, and yet be entirely valid as between Clyde Gardenhire and Jacob Gardenhire. There is nothing to show that any party to this case asked of the court that the chattel mortgage should be canceled. In any event, this action of the court would not be a matter of which Jacob or Olyde Gardenhire could complain, as against Nellie Gardenbire. If the mortgage should have been canceled, which we do not believe is true, the fact that a less judgment was asked for against the defendants than that such absolute control, away from the juris- | which was actually rendered would not give

them ground for complaint. It is only when a judgment is rendered against a party which goes beyond what the law warrants that he may complain to this court. Finding no error, the judgment of the district court must be affirmed. All of the justices concurring.

DALE, C. J., not sitting.

(2 Okl. 476)

HURST v. SAWYER.

(Supreme Court of Oklahoma. Sept. 7, 1894.) Pleading - Demurror - Ejectment - General DENIAL - TITLE OF PLAINTIFF - WHEN SUFFI-CIENT.

A demurrer filed to a pleading as an en-tirety, when the pleading contains several para-graphs, must be overruled, if there is one good

paragraph in the pleading.

2. In an action of ejectment all defenses.

legal and equitable, may be proven in evidence under a general denial.

3. In an action of ejectment the plaintiff must recover on the strength of his own title. Action of ejectment lies to recover lands held under lease for a term of years.

5. In an action of ejectment the plaintiff must show that the defendant unlawfully, and without right, keeps the plaintiff out of possession, before the plaintiff can recover in the ac-

tion. 6. In an action of ejectment the plaintiff must have a right to the possession of the land at the time of the commencement of the ac-

tion.

(Syllabus by the Court.)

Appeal from district court, Canadian county: before Justice John H. Burford.

Action of ejectment by Hamlin W. Sawyer against James D. Hurst. From a judgment for plaintiff, defendant appeals. Reversed.

Forrest & Gunn, for appellant. Dille & Smook and Blake & Blake, for appellee.

.BIERER, J. Hamlin W. Sawyer, the appellee, filed his complaint in ejectment in the district court of Canadian county on the 25th day of February, 1893, against the defendant, to recover the possession of certain school land, described as the N. W. ¼ of section 36, township No. 12 N., of range No. 5 W., in Canadian county, and for damages against the defendant for the withholding of the possession of said land from the plaintiff by the defendant. The plaintiff alleged his estate in said land to be that of a tenant for a term of years, under a lease of said land from the governor of Oklahoma territory, approved by the secretary of the interior, and alleged that the defendant was unlawfully keeping the plaintiff out of possession, to the plaintiff's damage in the sum of \$400. The defendant answered in two paragraphs, which answer, omitting the caption, is as follows: "The above-named defendant, answering plaintiff's complaint, admits that the certain tract of land described in plaintiff's complaint is school land, that said defendant has occupied the same since November, 1891, and that the said plaintiff obtained a lease thereof from the governor of Oklahoma territory, but said defendant denies each and every other allegation in plaintiff's complaint set forth. (2) And, making paragraph 1 a part of this paragraph 2, the same as if again repeated, for further answer and defense, by way of new matter, defendant alleges and says that he has been in possession, had valuably improved, and cultivated the said land for the purpose of the support of his family since before the 2d day of May, 1890; that upon each occasion when said land was offered for lease to the highest bidder, in accordance with the act of congress providing for the leasing of the same, and with the proclamation of the acting governor issued and promulgated thereunder, he, the said defendant, became and was the highest bona fide bidder therefor: that at all times thereafter he has been prepared to comply with all lawful requirements to perfect and obtain his said lease; that the plaintiff herein knew of these facts. and knew of defendant's rights in and to said lands, but, with intention of speculating upon the same, privately obtained from the then acting governor of Oklahoma a lease therefor, contrary to the rules for said leasing made and published by said governor, and while defendant was still endeavoring to perfect his said lease in accordance with said rules." To this answer of the defendant the plaintiff interposed a demurrer, which was by the court sustained, to which the defendant excepted; and a judgment was rendered against the defendant, in favor of the plaintiff, for the possession of the land, and for \$300 damages. The judgment contains the language of a judgment by default, and is treated by both parties, in their briefs, as a judgment rendered upon default, so far as it pertains to the right to the possession of the land in controversy, on account of defendant's failure to plead over after demurrer to his answer was sustained.

The first objection to this judgment, urged by appellant, is that the court erred in sustaining plaintiff's demurrer to his answer. The demurrer was a general demurrer to this answer of the defendant, on the ground that it did not state facts sufficient to constitute a defense to the cause of action set forth in plaintiff's complaint; and the question thus presented is as to whether or not any defense was contained in this answer of the defendant. If there was, then the action of the court was error, for when a demurrer is filed to a pleading as an entirety, when the pleading consists of several paragraphs, it must be overruled, if there is one good paragraph in the pleading. Bayless v. Glenn, 72 Ind. 5; Romine v. Romine, 59 Ind. 346. The first paragraph admits that the tract of land described in plaintiff's complaint is school land; that defendant has occupied the same since November, 1890; and that the plaintiff obtained a lease thereof from the governor of Oklahoma territory,—and then contains a

denial of each and every other allegation in the plaintiff's petition set forth. Section 6, art. 32, c. 70, of the Code of Civil Procedure of 1890, adopted from the state of Indiana, and under which this case was tried, provides: "Sec. 6. The answer of the defendant may contain a denial of each material statement or allegation in the complaint, under which denial the defendant shall be permitted to give in evidence every defense to the action that he may have, either legal or equitable." Under this statute, and under the decisions thereon by the supreme court of Indiana, all defenses, legal and equitable, may be proven and given in evidence under a general denial. East v. Peden, 108 Ind. 92, 8 N. E. 722. The first paragraph of the answer, then, containing a general denial of all the allegations of the plaintiff's complaint, excepting certain ones which were admitted, was a sufficient pleading, upon which the defendant could make any legal or equitable defense, unless the pleading also contains an admission of all of the things which it was necessary for the plaintiff to prove before he could recover the possession of the tract of land sued for in the action. It matters not that, in some subsequent paragraph, defendant's answer might not contain a statement of facts that would entitle him to the possession of the land, for in an action of ejectment the plaintiff must recover on the strength of his own title. Shipley v. Shook, 72 Ind. 511. This action was brought as an action of ejectment, and the facts set up in the plaintiff's complaint show a case wherein an action of ejectment will lie. Under our statute an action of ejectment lies to recover land held for a term of years. Duchane v. Goodtitle, 1 Blackf. 117. And, this being an action in ejectment, the defendant's general denial put in issue all of the matters which are put in. issue by such a pleading in such an action. The allegations of the second paragraph of defendant's answer were not in any way an admission of the matters which plaintiff set up as a basis of his right to recover the possession of this tract of land, but were evidently intended to be pleaded in support of defendant's right to retain the possession of the land which the plaintiff claimed. These allegations cannot in any way be construed as admitting the allegations of plaintiff's complaint, so as to leave nothing to be tried under a general denial.

Do, then, the admissions contained in the first paragraph admit all of the matters which plaintiff was bound to prove? If they do not, then a general demurrer should not have been sustained to the answer. Section 5, art. 32, c. 70, Laws Okl. 1890, provides: "Sec. 5. The plaintiff in his complaint shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession." It will be observed from this statute that in an action of ejectment one of the necessary al-

legations of the complaint is that the defendant unlawfully keeps him (the plaintiff) out of possession, and this has been held to be one of the matters which the plaintiff must show before he is entitled to judgment against the defendant. Lotz v. Briggs, 50 Ind. 346. examination of this answer nowhere reveals the fact that defendant, either directly or indirectly, ever admitted that he unlawfully kept the plaintiff out of possession of this He specifically denies every allegation of plaintiff's complaint, except such as he specifically admits. The plaintiff's complaint contains an allegation that the defendant "has at all times unlawfully kept the plaintiff. and now unlawfully keeps him, out of possession of said premises, and plaintiff is entitled to the immediate possession thereof." This answer, then, containing a general denial, denies one of the material allegations which the plaintiff was bound to prove. Furthermore, the defendant nowhere admits that the lease which plaintiff made was at the time of the commencement of the action, in February, 1893, in full force and effect; but, being a general denial, it denies this fact. It denies that the plaintiff, by virtue of his lease, which he set up, did then and at that time have any right to the possession of this land; and the plaintiff must have the right to the possession of the land at the time of the commencement of the action, or else he is not entitled to recover. Inge v. Garrett, 38 Ind. 96. The defendant, by a general denial, denying the plaintiff's right under his title by the lease set up in the complaint, it would be incumbent on the plaintiff to show that his right to the land, by virtue of the lease, existed at the time of the bringing of this action; and the defendant, in defense, might show that the plaintiff had forfeited his lease, or that the lease had been canceled or set aside. The admission that the lease was ence made was not an admission of its validity at the time of the bringing of the action for possession under it.

These two matters, at least,—that is, that the plaintiff had such a right of possession at the commencement of the action as to entitle him to recover possession of the land. and that the defendant unlawfully kept the plaintiff out of the possession of this land .were put in issue by that part of the first paragraph of this answer which contains a general denial; and this being true, and there being in no part of this answer any admission of these material facts, the answer did state a defense, and the demurrer thereto should have been overruled. As this ruling of the court in sustaining the demurrer of the plaintiff to the answer of the defendant was erroneous, and necessitates a reversal of this case, it is unnecessary to consider the other errors assigned. The judgment of the court below is reversed, at the cost of the appellee. All the justices concurring.

BURFORD, J., not sitting.

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COLLIER V. TERRITORY.

(Supreme Court of Oklahoma. Sept. 7, 1894.) JUSTICES OF THE PEACE-PROBATE COURT -CRIM-INAL JURISDICTION—CONSTITUTIONAL LAW—JURY OF SIX MEN.

1. Justices of the peace in this territory have no jurisdiction to try and determine actions of misdemeanor, except in cases where justices of the peace are specifically given jurisdiction of the offense; and, this jurisdiction not having been specifically given, a justice of the peace has no jurisdiction to try and determine a cause arising under sections 1, 13, and 14 of article 54 of chapter 25 of the Oklahoma Statutes of 1893.

2. Probate courts have no jurisdiction to try and determine criminal actions upon com-plaint, and without information, except in those cases where such jurisdiction is specifically giv-

en to justices of the peace.
3. A law of the legislature of this territory sha law of the legislature of this territory which provides that cases which the justice's court has power to hear and determine may be tried before a jury of 6 men, and where it gives the defendant the right of appeal to the district court, where he may be tried by a jury of 12 men, is not unconstitutional.

(Syllabus by the Court.)

Appeal from probate court, Pottawatomie county.

R. M. Collier was convicted of a misdemeanor, and appeals. Reversed.

C. J. Wrightsman, Keaton & Turner, and C. R. Reddick, for appellant. C. A. Galbraith, Atty. Gen., and E. B. Munday, Co. Atty., for the Territory.

BIERER, J. This is an appeal from a judgment of the probate court of Pottawatomie county, Okl. T., rendered against the defendant, adjudging him guilty of a misdemeanor, and sentencing him to pay a fine of five dollars and costs, and be committed to the county jail until such fine and costs are paid, upon a trial had upon a complaint filed in said court, which complaint is in words and figures as follows, to wit: "Territory of Oklahoma, County of Pottawatomie. Before me, J. H. Daugherty, probate judge in and for said county, personally appeared H. G. Beard, who, being duly sworn, on oath says that heretofore, on the 11th day of May, A. D. 1893, at and in said county, one R. M. Collier did unlawfully, wrongfully, willfully, and maliciously commit the crime of trespass by then and there cutting down and destroying timber, to wit, trees, standing and growing upon the lands of Etta B. Beard, and by then and there maliciously severing from said land and injuring a post and wire fence attached thereto, all of which such said trespassing was done as aforesaid without the consent of the owner of said land and other property thereto attached; said land being a certain lot in the town of Shawnee, in said county of Pottawatomie. Contrary to law, and against the peace and dignity of the territory of Oklahoma. H. G. Beard. Sworn to and subscribed before me, this 11th day of May, A. D. 1893. J. H. Daugherty, Probate Judge." The action was prosecuted upon this complaint before a jury of six men, without any information having been filed by the county attorney. A motion is made to dismiss the appeal here, the principal grounds of which are that no notice of appeal was given, and that the record was not signed and filed in the court below, as required by law. Pending this motion, leave to amend and perfect the record was asked. which leave was granted; and the amendments made now show that notice of the appeal was served on the county attorney and upon the probate judge, as required by law. and that the record was properly served upon the county attorney, and signed by the probate judge, and filed in the court below, as provided for in cases of appeal; and the motion to dismiss the appeal is therefore overruled.

Two questions of law are properly presented by the record in this case to the court for its determination: First. Did the probate court have jurisdiction to try and determine this cause upon the complaint filed, without an information filed by the county attorney? Second. Was the jury by which the defendant was tried a legal jury, it being composed, over the objection of the defendant, of six instead of twelve jurors, as provided for by the justice's procedure acts in force in this territory at the time this case was tried? These are the two questions that are the basis of the errors assigned by the appellant, and he contends that both of these questions should be answered in the negative. Under the complaint in this case as above given, the defendant must have been prosecuted for a violation of one of the three following provisions of the Statutes of Okiahoma of 1893, to wit: Section 1, art. 54, c. 25, p. 516: "Every person who maliciously injures, defaces or destroys any real or personal property not his own, in cases other than such as are specified in the following sections, is guilty of a misdemeanor, and in addition to the punishment prescribed therefor, he is liable in treble damages for the injury done, to be recovered in a civil action by the owner of such property or public officer having charge thereof." Section 13: "Every person is guilty of a misdemeanor who willfully commits any trespass by either: First Cutting down or destroying any kind of wood or timber, standing or growing upon the lands of another; or, driving or riding through, into, or across any cultivated hedge or tree row, or any grove of ornamental trees or orchard of fruit trees growing upon the land of another, or in any other manner injuring the same. *" Section 14: "Every person who shall wantonly or maliciously cut, dig up. or injure any timber set out, planted, cultivated, or growing naturally, or who shall wantonly or maliciously open, let down, throw down, or prostrate any fence, gate, or

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bars, belonging to any enclosure of any description of cultivated and growing timber, or tears down or opens any such fence, gate, or bars, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by imprisonment in the county jail not exceeding thirty days, or by fine not exceeding one hundred dollars, or by both such fine and imprisonment, and shall be liable in damages to the party injured." This prosecution was manifestly attempted to be had under one or the other of these sections of our statutes, for there appear to be none other of which the alleged acts were a violation. It will be seen that under sections 1 and 13 the acts prohibited are constituted a misdemeanor, without any punishment being specifically designated in these sections therefor, and that under section 14 a punishment is provided, which is not more than \$100 fine, or imprisonment in the county jail not exceeding 30 days, one or both, at the discretion of the court. A part of section 14, art. 1, c. 25, p. 423, St. Okl. 1893, provides: "Sec. 14. Except in cases where a different punishment is prescribed by this Code or by some existing provisions of law, every offense declared to be a misdemeanor is punishable by imprisonment in the county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or both such fine and imprisonment." It is manifest, then, that under whichever of these three sections, 1, 13, or 14, of art. 54, c. 25, this prosecution was intended by the territory to be had, the offense was a misdemeanor, and the punishment therefor might be \$100 fine and 30 days' imprisonment in the county jail. It might be this by the last of the three sections, and could exceed that under the first two.

Has the probate court jurisdiction to try and determine such a misdemeanor upon complaint made by any person, without an information filed by the county attorney? Section 7, art. 15, c. 18, p. 365, St. Okl. 1893, provides: "Sec. 7. All criminal actions prosecuted in the probate court shall be brought in the same manner as similar actions in the justices' courts; or shall be upon information of the county attorney based upon a sworn complaint, and shall be under his direction and control. . . " It will be seen that, by this part of section 7 referred to, the probate court has jurisdiction of actions prosecuted in two forms or modes: The prosecution may be upon complaint in the same or similar manner as actions are prosecuted in the justices' courts, or it may be upon information of the county attorney. Under this section, the probate courts having been given jurisdiction over prosecutions of actions in the manner in which the same or similar actions are prosecuted in justices' courts. then, in determining the question in issue, it is necessary to determine what actions may be tried and determined upon complaint in justices' courts; and if justices of the peace

are given power to hear and determine a cause like the one in issue upon complaint, without the intervention of the county attorney by information, then the probate court had jurisdiction to try and determine this action; and, if the justices' courts had not jurisdiction to try and determine said cause, then the probate court had none in this case. This statute has been ratified by act of congress, and gives to probate courts, in this respect, the same jurisdiction which is granted by law to justices' courts to try causes upon complaint of any party. By section 9 of the organic act (see St. Okl. 1893, p. 42), the judicial power of this territory is vested in the supreme court, district courts, probate courts, and justices of the peace; and the jurisdiction of these several courts, including that of justice of the peace, is as limited by law, excepting that justices of the peace would not have jurisdiction of any matter where the title or boundaries of land may be in dispute. or where the debt or sum claimed exceeds **\$**100. This organic act left the jurisdiction of justices of the peace within this territory to be determined by the legislature, except that the legislature might not give jurisdiction to the justices' courts to hear and determine certain actions which come within the prohibitory part of this section 9 of the organic act. The only other reference in the organic act to the jurisdiction of justices of the peace. so far as it may be claimed to affect this cause, is the following language, contained in section 11 of said act: "The supreme and district courts of said territory shall have the same power to enforce the laws of the state of Nebraska hereby extended to and put in force in said territory as courts of like jurisdiction have in said state; but county courts and justices of the peace shall have and exercise the jurisdiction which is authorized by said laws of Nebraska: provided, that the jurisdiction of justices of the peace in said territory shall not exceed the sum of one hundred dollars." And under the laws of Nebraska, which were put in force by the organic act, justices of the peace, who were magistrates under such laws of Nebraska. were given jurisdiction concurrent with the district court "in all cases of misdemeanor in which the fine cannot exceed one hundred dollars, and the imprisonment cannot exceed three months, except as otherwise provided by law." See Comp. St. Neb. 1889, p. 1060, c. 29, § 314. And it may be contended that under this provision of the Nebraska statutes and of our organic act justices of the peace are given the jurisdiction which is sought to be exercised by the probate court in this case. This, however, does not necessarily follow. for the reason that by this same section 11 of the organic act the statutes of Nebraska, which were put in force in this territory. and which include the provision of the Criminal Code referred to, were "extended to and put in force in the territory of Oklahoma until after the adjournment of the first session

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of the legislative assembly of said territory." ! And this provision of the organic act, giving the supreme and district and probate or county and justices' courts power to enforce these laws of Nebraska, were not intended to be an extension of the jurisdiction of those courts, and to fix the jurisdiction of justices of the peace courts for all time to come in this territory, but were only intended as a power to enforce the laws of the state of Nebraska as "extended to and put in force in said territory;" and, of course, whenever the laws of Nebraska ceased to operate in this territory, then the specific jurisdiction which was given by the organic act in accordance with, and to the extent of, and to be determined by, the laws of the state of Nebraska, would cease when those laws ceased to operate, and the jurisdiction and procedure of justices' courts after the laws of Nebraska ceased to operate would have to be determined by other provisions of the organic act and the laws made by the legislative assembly of the territory of Oklahoma in accordance therewith; and as, by the express provisions of the organic act, these laws of the state of Nebraska would cease to operate on the adjournment of the first session of the legislative assembly of this territory, and as the first session of the legislative assembly adjourned on the 24th day of December, 1890, the jurisdiction of the justices' courts, so far as the same relates to this cause, must be determined by the provisions of our statutes subsequently in force.

This action was begun and tried in the probate court in May. 1893, and the general provisions of our statutes at that time in force relating to the jurisdiction of justices of the peace in criminal cases were the following: Section 3, art. 1, c. 71, p. 934, Laws Okl. 1890: "Sec. 3. These courts shall have criminal jurisdiction to try and determine all cases of misdemeanor committed within their respective counties not indictable, where the punishment is a fine not exceeding one hundred dollars, or imprisonment in the county jail for a period not exceeding thirty days, or both such fine and imprisonment. And as to all public offenses which are indictable, they have the power of committing magistrate." Section 5, art. 2, c. 68, p. 931, Laws Okl. 1893: "Sec. 5. Justices of the peace shall have power and jurisdiction throughout their respective counties, as follows: First, as committing magistrates, under the provisions of this chapter as provided in the chapter in relation to criminal procedure before justices; and, second, to exercise such lawful jurisdiction, to try and determine petit misdemeanors, not indictable, as by the organic law and said justice's procedure, or other laws, is now, or may hereafter be, conferred upon them." Section Section 7, art. 1, c. 68, p. 929, Laws Okl. 1898: "Sec. 7. Every public offense must be prosecuted by indictment, except: * * * Third. Offenses tried in justices' and police courts in cases concerning which lawful jurisdiction,

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without the intervention of a grand jury, is or may be conferred upon said courts." was manifestly the intention of the legislature, as expressed in these three sections of the statute, that the jurisdiction of justices of the peace in criminal matters, where the offenses were made indictable under the statute, should be that of a committing magistrate, and that justices of the peace should have no jurisdiction to try and determine offenses that were indictable. The intention of the legislature that justices of the peace should not have original jurisdiction to try and determine indictable offenses could not be more plainly expressed than it is by the language of these three sections. They all exclude the idea that justices of the peace may try and determine such cases as are indictable. Two of them express, however, a purpose on the part of the legislature to give to justices of the peace jurisdiction to try and determine such cases as justices of the peace are by some law of the territory given specific jurisdiction to hear and determine without indictment. Now, what offenses under the Criminal Code are indictable? Section 3, art. 2, c. 68, of the Code of Criminal Procedure of 1893 provides: "Sec. 3. The district court has jurisdiction: First, To inquire, by the intervention of a grand jury, of all public offenses committed or triable in the county or subdivision for which the court may be held." It will be seen from this section, which is a part of the same Criminal Code as said section 7 of article 1 and section 5 of article 2 of chapter 68, above referred to, that all public offenses are indictable, and that all offenses under our law may be prosecuted by indictment of a grand jury returned in the district court. The only reasonable construction of these provisions of the criminal procedure acts and of the acts relating to the general criminal jurisdiction of justices of the peace is that they were intended to have merely the jurisdiction over criminal offenses of a committing magistrate, unless by some "other laws" justices of the peace were given jurisdiction to try and determine the same. This procedure provides that all criminal offenses may be prosecuted in the district court, by the intervention of a grand jury,-that is, that they are indictable; but at the same time and in the same chapter, and in one instance in the same article, and in the other in the immediately preceding article, the legislature expressed the intention of giving justices of the peace jurisdiction to hear and determine such offenses as by other laws or by other enactments they are specifically given the power to hear and determine. Section 3, art. 1, c. 71, p. 934, Laws Okl. 1890, does not give this power, because it provides that the cases of misdemeanor therein referred to, and which are not indictable, may be tried and determined; and by the express provision of the Criminal Code, with which this section must be construed, all such misdemeanors as those which

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might come within the provisions of this section are expressly made the subject of indictment; for the statute says that the "district court has jurisdiction to try, by the intervention of a grand jury, all public offenses," and "all public offenses" would certainly include all misdemeanors, and all misdemeanors being indictable, and the justices of the peace being given jurisdiction to try only a specific class of misdemeanors which are not indictable, that class of misdemeanors being indictable, justices' courts would not have power to hear and determine the same. Likewise, section 1, art. 1, c. 69, p. 1026, Laws Okl. 1893, does not give justices of the peace the jurisdiction claimed in this case, for it provides: "Section 1. The criminal procedure relating to the jurisdiction and duties of justices of the peace as committing magistrates; direct the mode of proceeding, when an information, verified by oath, is laid before them of the commission of a public offense triable on indictment." It is true there are other provisions of this Code of Criminal Procedure provided for justices of the peace that do prescribe the mode of hearing and determining cases, by jury or otherwise, before justices of the peace; but this only prescribes the mode of trial, and does not define the cases that may be tried. The legislature, by the provisions of section 5, art. 24, c. 25, Laws Okl. 1893, which article is the one referring to assault and battery, gave to justices of the peace jurisdiction to try and determine the cases arising thereunder; and this is, as we think, one of illustrations of the specific cases which the legislature meant justices of the peace might have power to hear and determine without indictment, where the jurisdiction was given by "other laws," or "in cases concerning which lawful jurisdiction * * * is or may be conferred upon" justices' courts. Construing all of the statutes together, we hold that justices of the peace have not power to try and determine any criminal action excepting such as they are by specific enactment given power to try and determine. There is no provision of law by which justices of the peace are given jurisdiction to try and determine any of the offenses described in article 54 of the Laws of Oklahoma of 1893, relating to crimes and punishment, and of which sections 1, 13, and 14, referred to, are a part; and, this being true, the conclusion necessarily follows that the probate court of Pottawatomie county had no jurisdiction to try and determine this case.

At the time this case was tried by a jury of six men, before the probate judge, exercising the powers and authority of a justice of the peace of this territory, the law provided, in criminal cases, that either party was entitled to a trial of such cases that might be tried and determined before a justice of the peace, by a jury composed of six men. Was that law valid? is the second question asserted in the negative by the defendant. A part of ar-

ticle 6 of the amendments to the constitution of the United States provides that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury." This constitutional provision is undoubtedly applicable to judicial proceedings in this territory. But has the legislature, by enacting that persons prosecuted in justices' courts, in cases where justices of the peace are by specific enactment given power to try and determine the same, when they demand a trial by jury, shall be tried by a jury of 6 men, instead of 12 (as such jury was composed at the common law), taken away the right which all persons in this territory enjoy under the federal constitution to a trial by jury? The same Justice's Code of Criminal Procedure provides that any defendant who is convicted and against whom judgment is rendered in the justice's court may appeal to the district court of the county, where he shall enjoy a trial anew upon questions of law and fact, or of fact alone, in said cause; and the Code of Procedure for the district court, in both civil and criminal cases, affords the fullest opportunity for trial by jury of 12 men.

This question has been so frequently passed upon by courts and law writers that there is little more necessary than to observe what they have held upon the subject. Thompson, in his valuable work on Trials, in a note to section 3 of volume 1, in referring to the right of a trial by a jury of 12 men under our constitutional provisions entitling a defendant to a trial by jury, says: "But, as justices of the peace do not form any part of the ordinary judicial machinery of the common law, it is held that such constitutional provisions do not inhibit the legislature from authorizing a jury of less than twelve in justices' courts, especially since the right to a jury of twelve men is secured in the unlimited right of appeal to a superior court of record." In the case of Work v. State, 2 Ohio St. 297, the supreme court of that state says: "We do not intend to imply a doubt of the constitutionality of the act allowing juries before justices of the peace, composed of six men. Wherever facts are to be found in any proceeding in which a jury was not required by the common law, a jury of any number may be authorized, within the discretion of the legislative body. Juries did not belong to these inferior courts at the common law: and, so long as an appeal is provided for the commonlaw courts from their determinations, it is clear no constitutional objection can arise. whether facts are found by the magistrate or by the aid of a jury by any number of men. These questions were long since settled in Emerick v. Harris, 1 Bin. 416, and other cases in Pennsylvania." This case is cited and approved in Norton v. McLeary, 8 Ohio St. 205. The same conclusion is reached in State v. Beneke, 9 Iowa, 203, where the court says: "We must regard it as within the power of this people, when forming their

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fundamental law, to provide that a jury should consist of six in inferior courts, and that such courts should try inferior offenses, leaving the way open to a jury of twelve, by appeal." Mr. Thompson, in support of his note above given, also cites cases showing that this doctrine is upheld in New York, Michigan, and Illinois. In Re Rolfs, 30 Kan. 758, 1 Pac. 523, the supreme court of Kansas held that where the law authorized a police judge to hear and determine, without a jury, alleged violations of city ordinances, and where the party was given the right of an appeal to the district court, where a trial by a jury could be enjoyed by the defendant, the defendant's right of a trial by jury was not taken away, and such an act was not un-These authorities fully susconstitutional. tain the doctrine that if a defendant is given the right of appeal, under reasonable regulations, from the judgment of conviction had before a justice's court to the district court or common-law court, in which he may have a trial before a lawful jury, the law providing for a trial by a jury of less than 12 men in the action in the justice's court does not deprive him of his enjoyment of the right of trial by jury. Although tried without a jury in the justice's court or police court, if he may enjoy or have access to the right of trial by jury by simply appealing the cause to the common-law court, his right of trial by jury is not abridged. Our justice's procedure does give the defendant easy access to the district court by appeal, and the district court affords the trial by jury. We therefore hold that our statute providing for a trial by a jury of six men in criminal cases in justices' courts is constitutional.

For the error committed in trying the defendant upon a complaint, without an information filed by the county attorney, in this case, the judgment of the probate court must be reversed, at the cost of the territory, with directions to discharge the defendant, unless he is proceeded against by information filed by the county attorney within 10 days after the receipt of the mandate in this cause. All the justices concurring.

(2 Okl. 458)

HEALY v. LOOFBOURROW, County Treasurer, et al.

(Supreme Court of Oklahoma. Sept. 7, 1894.)

Appealable Order—Granting Writ of Prohibition by Judge—Appeal—Review—Objections not Raised Below.

1. An appeal will not lie to this court from the action of the judge of the district court, granting a writ of prohibition at chambers, before final judgment in the action.

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2. As a general rethe supreme court of this territory will not consider, for the first time, on appeal, questions not presented in the cause in the court below.

(Syllabus by the Court.)

Appeal from district court, Beaver county; before Justice John H. Burford,

Action by George H. Healy against O. J. Loofbourrow, county treasurer, Frank D. Healy, sheriff, and the board of county commissioners, of the county of Beaver, Okl. T., to restrain the collection of certain taxes. From an order of the district court prohibiting the probate judge from further considering such action, plaintiff appeals. Dismissed.

Talcott Ormsbee, for appellant. C. H. Bigbee, for appellees.

BIERER, J. There is nothing before this court at this time for its consideration, upon the merits in this case. It appears from the record that a writ of prohibition was issued by order of the judge of the second judicial district, at chambers, prohibiting Carter Tracy, probate judge of Beaver county, Okl. T., from hearing an action, and prohibiting George H. Healy from prosecuting an action, in the probate court of Beaver county, to restrain the defendants from proceeding to collect certain taxes levied against the plaintiff, George H. Healy; and the writ required an answer to be made by the defendants in said cause, in the district court, on or before the 8th day of May, 1894. This writ was granted on the 6th day of December, 1893, and an appeal was filed in this court on the 8th day of January, 1894. No judgment has ever been rendered in said cause in the district court of Beaver county, nor does it appear that any motion has ever been made by the judge of the probate court of Beaver county, or by the plaintiff in this case, or by any other person, to set aside the action of the district judge at chambers, in granting the writ of prohibition against the probate judge, prohibiting him from hearing said cause, and against George H. Healy, prohibiting him from prosecuting said cause. This is not a final judgment or order, from which an appeal may be taken to this court. No final judgment has ever been rendered, and probably, if the contention of the plaintiff upon the questions of law-which we in no way decide in this case—is correct, and the same is brought to the attention of the district court, no final judgment ever will be rendered against the party appealing, and he will have no cause to complain in this court. No final judgment having been rendered in this cause, this appeal will not lie. Railroad Co. v. Brown, 26 Kan. 443.

There is another reason why the action of the district judge, complained of, cannot be reviewed here. The writ of prohibition was granted at chambers, without notice, and without any appearance on the part of the probate judge of Beaver county, or on the part of this appellant; and they have not, so far as the record shows, made any motion or any application of any kind to the district court, or the judge thereof, to set aside this order. The questions he raises have never in any way been raised in the district court, or before the judge, in order that the district court, or the district judge, might first

pass upon the same; and this court will not, as a general rule, consider, for the first time, on appeal, questions not presented in the cause in the court below. Such a practice would not only be unnecessarily burdensome upon the supreme court, but would be entirely unfair to the district courts. Railroad Co. v. Miblman, 17 Kan. 224. For these reasons the appeal will be dismissed. All the justices concurring.

BURFORD, J., not sitting.

BERRY et al. v. SMITH, Sheriff.
(Supreme Court of Oklahoma. Sept. 8, 1894.)

APPEAL—REVIEW—INCORRECT STATEMENT OF
RECORD.

This case was originally decided, with the fact in view, as shown by the record, that no bill of exceptions had been filed, nor had exceptions to the giving of instructions been saved, as provided by section 19, p. 842, St. 1890; and the record being incorrectly stated by the appellant in his motion for a rehearing, legal questions sought to be raised as applicable thereto will not be considered.

(Syllabus by the Court.)

Appeal from district court, Cleveland county; before Justice John G. Clark.

On motion for rehearing. Motion denied.

Berry & Hess and Amos Green & Son, for appellant. Leslie P. Ross and Herod & Widmer, for appellee.

SCOTT, J. On February 2, 1894, this court affirmed the judgment of the court below in this case. 35 Pac. 576. On the 23d day of February, 1894, the appellants filed a motion for review and rehearing, assigning in said motion three alleged errors which could appropriately have been stated in one. The appellants complain that it was error for the court to hold that unless exceptions were saved to the giving of instructions, as provided by section 19, p. 842, St. 1890, that it is the duty of the court to overrule a motion for a new trial and to set aside the verdict of the jury, assigning the giving of such instruction as erroneous, notwithstanding the law might have been incorrectly stated in such instruction. Appellants further argue that the provision of the statute referred to is only a cumulative method of saving exceptions to instructions without a bill of exceptions, and does not take away the right to except to the giving of instructions at the time they are given by the court, and afterwards, within the time provided, embodying the same in a bill of exceptions signed by the court and made a part of the record, all of which appellants allege was done in this case. It is contended also that the instructions, or such ones as are complained of, were excepted to, and exceptions preserved, and properly and legally brought before the court, and should have been considered under the assignment of error filed in the case. The statements of the record, by the appeliants, are untrue. There is not an exception

of any kind saved in the record, from first to last. The record utterly fails to disclose an exception of any kind to the giving of instructions; hence, it is unnecessary for the court to discuss the legal propositions attempted to be raised. Indeed, a further discussion would not only be fruitiess, but bad taste, since the truth of the appellants' contention is clearly disproved 17 the record in the case. This case was originally decided by this court, having in view the fact, as shown by the record, that no bill of exceptions had been filed; and it is a surprising thing to the court that the appellant makes any such contention in his motion for a rehearing. Neither had exceptions been saved to the giving of instructions, as proved by section 19, p. 842, St. 1890, and in the absence of either, or in the absence of exceptions of any kind, the court can do nothing except as stated in our former decision. There is no question presented in the motion for a rehearing worthy of any further attention of this court. The motion will therefore be denied. All the justices concurring.

FIRST NAT. BANK OF ARKANSAS CITY v. JONES et ux.

(Supreme Court of Oklahoma. Sept. 7, 1894.)
PLEADING—COMPLAINT—WRITTEN INSTRUMENT AS
EXHIBIT—VARIANCE—DEMURRER.

1. Where a written instrument is the foundation of a civil action, the original, or a copy thereof, should be filed as an exhibit to the pleading, and in case of variance between the pleading and the exhibit the exhibit must control. The instrument is held to be a part of the complaint, and a failure to file the original, or a copy thereof, is fatal to the case on demurrer.

2. In this case there is a fatal variance be-

2. In this case there is a fatal variance between the pleadings and the exhibit, and the demurrer should have been sustained.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John H. Burford.

Action by the First National Bank of Arkansas City, Kan., against James Jones and wife, on a promissory note, and to foreclose a mortgage. Judgment for plaintiff. Defendants appeal. Reversed.

T. G. Cutlip, for appellants. Noffsinger & Nagle, for appellee.

SCOTT, J. On the 21st day of October, 1892, the First National Bank of Arkansas City, Kan., filed its complaint in the district court of Kingfisher county against James Jones and Nancy A. Jones, containing allegations as follows: "That on the 25th day of June, 1891, by their promissory note, a copy of which is filed herewith and made a part of this complaint, promised to pay to A. V. Alexander the sum of \$944.04 six mouths thereafter, with interest from date at the rate of ten per cent. per annum, payable at the First National Bank of Arkansas City, Kan.; that on the —— day of —— A. V. Alexander indorsed said note to H. P. Farrar, as cashier of the First National Bank

of Arkansas City, for the use and benefit of said bank, and said bank is now the legal holder of said note; that on the 25th day of June, 1891, to secure the payment of said note, the defendants executed to A. V. Alexander their mortgage, a copy of which is filed herewith and made a part of this complaint; that said mortgage was executed to secure the payment of the aforesaid note; that there is now due and unpaid on aforesaid note the sum of \$862.32 Wherefore, plaintiff demands judgment for \$862.32, and asks that said mortgage be foreclosed, and the real estate described therein, or such part thereof as may be necessary to secure plaintiff's claim and costs, be sold for that purpose, and for all other proper relief." To this complaint is attached the following exhibit: "944.04. Arkansas City, Kansas, June 25th, 1891. Six months after date, for value received, I promise to pay to the order of A. V. Alexander nine hundred forty-four & 04/100 dollars, with interest from date at the rate of ten per cent. per annum, payable at the First National Bank of Arkansas City, Kansas. Due, ---. [Signed] James Jones. Nancy Jones." The mortgage was executed by James Jones and Nancy A. Jones to A. V. Alexander, and is the usual form of realestate mortgages, and was at said time a valid lien against the real estate therein de-

On the 4th day of November, 1892, defendant Nancy A. Jones moved the court to set aside the service upon her, alleging several grounds. The court permitted the officer to amend his return, and the motion was overruled. Upon this question we think the court committed no error.

On the 5th day of November the defendants filed a demurrer, alleging the complaint of the plaintiff to be uncertain, indefinite. and insufficient, and not to contain facts sufficient to state a cause of action, and assigned as special grounds the following: "First, because the complaint does not show when the note sued on was indorsed to H. P. Farrar; second, because the complaint does not show that H. P. Farrar ever indorsed said note to the plaintiff; third, because the complaint does not show that said note was indorsed for a valuable consideration; fourth, because the copy of the said note filed herewith does not show any indorsement or credit; fifth, because said complaint does not show that the mortgage therein mentioned was ever delivered by defendant to said Alexander; sixth, because said complaint does not show that said mortgage was ever recorded; seventh, because said complaint does not show that demand for payment has ever been made on the defendants on said note." This demurrer the court overruled, to which defendants excepted. In considering the points raised in this case, the overruling of the demurrer is the only one, in the judgment of the court, necessary to discuss.

We think the demurrer should have been

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sustained. It will be observed that the complaint alleges that the note in question was assigned by A. V. Alexander, the payee thereof, to one H. P. Farrar, as cashier, for the use and benefit of the First National Bank of Arkansas City; that a true copy of said note is filed with and made a part of said complaint. Upon examination of the note, it shows that it is payable to the order of A. V. Alexander, and contains no assignment or indorsement of any kind. There is a direct variance between the complaint and the exhibit, and the question arises, upon the consideration of the demurrer, which should control,—the exhibit or the complaint. action was commenced while the Indiana Code was in force in Oklahoma, and the authorities in that state declare that the original instrument, or a copy thereof, pleaded, must be filed with and made a part of such pleading, where the written instrument is the foundation of the action, and if there is a variance between the exhibit and the complaint the copy or exhibit must control. The statute upon which these authorities are based reads: "When any pleading is founded upon a written instrument or on an account. the original, or a copy therof, must be filed with the pleadings. A set off or counterclaim is within the meaning of this section." Some states having the same statute hold that the instrument is no part of the complaint, upon the ground that the filing of a copy of an instrument takes the place of profert at common law. The courts of Indiana, however, do not so hold. The statute just quoted is not considered as making profert of the instrument necessary by filing a copy with the pleadings. The instrument is held to be a part of the complaint, and the failure to file the original or a copy, where it is the foundation of the action, is fatal to the case on demurrer. 1 Work, Pl. & Pr. § 415; Mercer v. Hebert, 41 Ind. 459; Seawright v. Coffman, 24 Ind. 414; Price v. Railroad Co., 13 Ind. 58; Herren v. Clifford, 18 Ind. 411; West v. Ditching Co., 19 Ind. 458; Westfall v. Stark, 24 Ind. 377; Spaulding v. Baldwin. 31 Ind. 376; Plowman v. Shidler, 36 Ind. 484; Hamrick v. Craven, 39 Ind. 241; Galbreath v. McNeily, 40 Ind. 231; King v. Insurance Co., 45 Ind. 43; Cook v. Hopkins, 66 Ind. 209; Pennsylvania Co. v. Holderman, 69 Ind. 18; Brown v. State, 44 Ind. 222. Not only is the written instrument regarded as a part of the pleadings, in Indiana, but its terms cannot be varied or changed by its averments. Where there is a variance between the pleadings and the exhibit filed, the exhibit must control. 1 Work, Pl. & Pr. § 415; Stafford v. Davidson, 47 Ind. 319; Crandall v. Bank, 61 Ind. 349; Carper v. Garr, 70 Ind. 212; Hurlburt v. State, 71 Ind. 154; City of Elkhart v. Simonton, 71 Ind. 7; Bayless v. Glenn, 72 Ind. 5; Cress v. Hook, 73 Ind. 177; Mining Co. v. Casteel, 73 Ind. 206. If the exhibit must control, then it is useless for the complaint to allege assignment, transfer, or indorsement of the instrument, unless the copy set out shows the same thing. The

copy of the note, and also the note; set out in the complaint, are all executed in favor of A. V. Alexander, and both fail to show that Alexander ever assigned, transferred, or indorsed the note or mortgage to any person, copartnership, or corporation. The copies themselves fail to disclose how the plaintiff can be in possession of them. If Alexander indorsed or transferred said note to plaintiff. then the exhibit should show that fact. If the plaintiff became the owner of the note by some transaction in which the actual indorsement was not made, it should have been so pleaded, and proved as any other fact. The demurrer admits everything alleged in the complaint to be true, as a rule; but in a case of this kind, where the exhibit controls, only that shown in the exhibit can be taken as true, because of the variance between the pleading and exhibit.

If the exhibit controls, can the court renderjudgment as prayed for in the complaint? Obviously, this cannot be done, for the action is instituted by the First National Bank of Arkansas City, and the exhibit shows the note to be due and payable to A. V. Alexander; hence, if judgment were to be rendered at all, it would necessarily be rendered in favor of Alexander. Thus we think the demurrer should have been sustained, and so hold.

There are two reasons for not discussing other points raised in the brief. One is that it is unnecessary to the determination of this case; and the other, that the record is in such an incomprehensible and unintelligible condition as to make a clear discussion of them impossible. The judgment of the lower court will therefore be reversed, and the case remanded for further proceedings. It is so ordered. All the justices concurring.

BURFORD, J., not sitting, having presided in the court below.

REDMAN v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 8, 1894.)

CRIMINAL LAW—APPEAL—ADJOURKMENTS — FAILUHE TO ADMONISH JURY — NEW TRIAL — EVI-

DENCE—PRESENCE OF ACCUSED—RECORD.

1. It is the general rule that all reasonable presumptions and intendments will be made in force of the present of a trial court.

favor of the proceedings of a trial court.

2. If the court has failed to admonish the jury upon adjournments as required by law, a motion for a new trial on that ground should allege such failure, and the motion for new trial should be supported by competent evidence showing that fact.

3. After a careful reading of the record, held, that it shows affirmatively the presence of the defendant at every step of the trial, and that all the proceedings of the trial court were regular.

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(Syllabus by the Court.)

Appeal from district court, Lincoln county; before Justice A. G. Curtin Bierer.

Henry A. Redman was convicted of manslaughter, and appeals. Affirmed, L. E. Payne and H. R. Thurston, for appellant. George Gardner and D. N. Frazier, for the Territory.

SCOTT, J. On the 23d day of May, 1893, the grand jury of Lincoln county returned an indictment against Henry A. Redman, charging him with the murder of one Lou Redman, his wife. On the 2d day of June, 1893, a demurrer was filed to the indictment, which the court overruled. Trial took place on the 15th day of February, 1894. The jury returned a verdict finding him guilty of manslaughter in the first degree. On the same day he filed a motion for a new trial, alleging: "(1) The verdict is contrary to the evidence. (2) The verdict is contrary to the law. (3) Because no verdict sufficient in law has been found by the jury. (4) For errors of law occurring at the trial, and excepted to at the time." This motion the court overruled, and on the 15th day of February, 1894, he filed his motion on arrest of judgment, which was likewise overruled; and on the 17th day of February, 1894, he was sentenced by the court to imprisonment in the penitentiary at Lansing, Kan., for a period of ten years, with two years off, being the period of his incarceration in jail awaiting trial. To all of which exceptions were taken, and the case comes to us for review.

One of the errors alleged is that the record fails to show that the court admonished the jury upon each adjournment as required by law, and State v. Mulkins, 18 Kan. 16, is cited. This case, unless read carefully, is likely to prove misleading. Upon a careful examination thereof, it clearly fails to sustain the contention of the appellant. If it were true that the court actually failed to admonish the jury as required by section 5660, St. Okl., it would be error, without doubt, whether the jury had been kept in charge of officers or not. Before it is error the fact must be established that the admonition was not given. In State v. Mulkins, supra, it appeared by competent proof that the court failed to admonish the jury, and it was held error, which is the law. In the absence of proof to the contrary the proceedings of a court are presumed to have been regular and in due form of law, except where a constitutional right is involved, such as presence during the trial. If it were a fact that the court did not admonish the jury, appellant should have set that fact out in his motion for a new trial, and supported the charge by competent evidence. Then, unless the prosecution could have shown that his rights had not been substantially prejudiced, the motion should have been sustained. The mere charge of error of law occurring during the trial, and excepted to, not supported, is insufficient. In State v. Mulkins the defendant filed a motion for new trial, setting forth among other things that the jury had been allowed to separate without being admonished by the court; that there was miscon-

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duct of the jurors during the time of such separation. At the time of the hearing an affidavit of one of the jurors was read in evidence by the defendant, which affidavit stated, among other things, that a person who had heard one of the witnesses testify said to the juror that if he were on the jury he would hang the old rascal; that he was guilty, and ought to be hung. The trial court refused to grant a new trial, and the case was appealed to the supreme court. The court held that the question of prejudice to the defendant's rights had been properly raised, and the burden of proving that his rights had not been substantially prejudiced was upon the prosecution, and therefore, if the state did not show by competent evidence that the defendant's rights had not been prejudiced, it would be presumed that they had been. This distinction is clearly drawn in the opinion. The court say: "Of course, if shown affirmatively by the facts in the case, or by the facts brought into the case at the time of the hearing of the motion for a new trial, that nothing transpired, during the irregular separation of the jury, prejudicial to the defendant's rights, then the court would not err in overruling the motion. This view of the question, of course, throws the burden of proving that no prejudice occurred by reason of the failure of the court to admonish the jury, upon the state." In the case at bar the motion for a new trial simply contained the charge of "error of law occurring on the trial," and no affidavit or other evidence was offered to show such failure. In the absence of direct proof to the contrary, we must presume that the court below admonished the jury as required by law, and did all that was necessary to be done. The presumption is that the court duly admonished the jury as to their duty. Evans v. State, 7 Ind. 271; State v. Palmer, 40 Kan. 474, 20 Pac. 270; Elliot, App. Proc. \$ The rule that all reasonable presumption and intendment will be made in favor of the ruling of the trial court is one of the best-settled and most recently applied rules in appellate procedure. Prilliman v. Mendenhall, 120 Ind. 279, 22 N. E. 247; Rapp v. Kester, 125 Ind. 79, 25 N. E. 141; Bishop v. Village of Goshen, 120 N. Y. 337, 24 N. E. 720; Walters v. Tefft, 57 Mich. 390, 24 N. W. 117; Morisey v. Swinson, 104 N. C. 555, 10 S. E. 754; Chestnutt v. Pollard, 77 Tex. 86, 13 S. W. 852; Elliot, App. Proc. § 710; Kennedy v. McNichols, 29 Mo. App. 11.

The objection is raised that the court erred in admitting the testimony of Jennie Watt, stenographer, from her shorthand notes, reproducing the testimony of S. B. Macklin, deceased, given on a former trial of appellant on the same indictment. The testimony complained of, as shown by the record, is as follows: "Q. Now, you may state what the testimony of Mr. Macklin was on that trial, to which you have just referred. (Objected to by defendant as incompetent, irrelevant, and immaterial, no proper foundation being laid for the evidence,

and because the evidence of the witness does: not show that she recollects the testimony of said Macklin. The court overruled the motion, and to the ruling the defendant duly excepts.) Q. Do you remember his testimony? A. I remember it as I have refreshed my memory from my notes, only. Q. After having refreshed your memory from your notes, state as fully as you can what he testified in regard to the matter. A. He testified that he had guarded Mr. Redman some two or three days after his arrest, and that he talked to him about his daughter Lizzie, and said he was terribly afraid that they would get around her and get her to testify something that would convict him, and that he asked the witness Macklin to go to her, and see her, and form an idea as to what she was going to swear to. That is about all he testifled to on that point, that I remember. (Defendant moved to strike out the evidence of the witness, as incompetent. The court overruled the objection. Defendant excepts to the ruling.)" The defendant should have interposed his objection to the question asked by the prosecution, and not have waited until it was propounded and answered, and then moved to strike it out. The question was not misleading, or the answer different from what the question implied it would be. If the witness had responded by evasion, or had stated what the question did not call for, the motion to strike out would have been. proper, and should have been sustained. but where a question material, relevant, and competent is propounded, and no objection. interposed, and the witness answers properly, a motion to strike out will not be sustained. The further objection is raised that the record does not show affirmatively that the defendant was present during the trial, and especially when the verdict was received. We have carefully read the record, and think it is sufficiently shown that the defendant was present at every step in the trial. He was present on the 6th day of February, when his counsel presented a motion for a continuance; on the 10th day of February, when his trial was commenced; and on each day thereafter, until his trial was concluded and the jury had returned with their verdict. We can see no error in this assignment.

We are unable to find any error in this case, though the questions involved have been diligently considered. Fifty-six errors are alleged in the ruling of the court upon the admission of evidence, suppression of depositions, and the refusal of instructions offered by the defendant; and we have, with unusual patience and application, carefully examined them all. But, after this thorough search and review, we can find no good reason for a reversal of the case, and a further discussion of the questions raised would result in nothing useful to the appellant, the prosecution, or the public. The judgment of the lower court will be affirmed, and the appellant ordered to be forthwith conveyed to the penitentiary, in accordance with the judge ment of the lower court, as therein pronounced. It is so ordered. All the justices concurring.

BIERER, J., having presided in the court below, not sitting.

BERRY et al. v. HILL et al.
(Supreme Court of Oklahoma. Sept. 8, 1894.)
JUDGMENT AFFIRMING REPORT OF REFERES—
WHEN DISTURBED.

Unless manifest error appears in the record of a case before this court on appeal from the judgment of a district court affirming the report of a referee, the judgment must be affirmed.

(Syllabus by the Court.)

Appeal from district court, Cleveland county; before Justice Frank Dale.

Action by Hill, Fontaine & Co. against Thomas E. Berry and A. A. Berry, on account. Judgment for plaintiffs. Defendants appeal. Affirmed.

Thomas E. Berry and Amos Green & Son, for appellants. Ross & Caruthers, for appellees.

SCOTT, J. This is an action on account, for the sum of \$391.02, against Thomas E. Berry and A. A. Berry, partners doing business as Berry Bros. at Norman, Cleveland county, Okl. T. On the 23d day of May, 1892, the appellees (plaintiffs below), Hill, Fontaine & Co., filed their complaint, attaching thereto a duly-verified account in the sum stated. The appellants (defendants below), on the 5th day of October, 1892, filed an answer, first denying each and every allegation of the complaint, except such facts alleged as might be admitted in such pleading: then, as a further defense, setting up a counterclaim of \$2,062.20. The allegations of the counterclaim were, in substance, that in the month of September, A. D. 1890, the appellants, at the special request of appellees, consigned cotton to appellees, and were authorized to attach bills of lading and draft for not to exceed 80 per cent. of the market value of said cotton, as quoted to them daily by the price current furnished by appellees; that the agreement implied and understood was that the parties should continue said business through the cotton-shipping season of 1890, 1891, and 1892; that in pursuance of said agreement the appellants did consign and ship to appellees, during such period, 249 bales of cotton, worth at the time of delivery in St. Louis, after deducting freight, storage, commissions, etc., the sum of \$12,375.58, and that appellees agreed to hold or sell said cotton subject to the order of appellants; that appellants directed and ordered appellees to sell their said consignment of cotton promptly upon arrival at St. Louis, Mo., but that they willfully and fraudulently, and in violation of their said agreement, failed, refused, and neglected to sell said cotton, holding a large portion of it for some two or three months, and thereupon charged said appellants storage to the amount of 75 cents per bale per month; that during said time cotton gradually declined in price, to the amount of two cents per pound. After stating debits and credits, appellants allege appellees were indebted to them in the sum of \$2,062.20, with interest at the rate of 7 per cent. per annum from the 7th day of October, A. D. 1891, and prayed judgment accordingly. On the 15th day of October, 1892, by agreement, Sidney Denham was appointed by the court as referee to take the testimony in the case, and state therefrom an account between the parties, and make due report thereon to the court. The referee, thereupon, after hearing the testimony of all the parties, submitted his findings of fact and conclusions of law to the court; reporting in favor of the appellees in the sum of \$391.02, as prayed for in their complaint. On the 25th day of December, 1893, the court (Judge Frank Dale presiding) rendered judgment affirming the referee's report, except an allowance of \$40 by him as attorney's fees. The appellants thereupon prayed an appeal, which was granted; and the case was signed and settled by the court on the 18th day of November, 1893, and the record filed here on the 5th day of December, 1893.

The appellants present several assignments of error for the consideration of the court, all general in their character, but have filed no brief in support thereof; and the court is guided in the consideration of the case only by the record, as presented. The court has fully and carefully examined the record, and feels entirely convinced that the findings of the referee's report, and the judgment of the court rendered thereon, are fully justified by the evidence in the case. The appellants fail to bring up the entire evidence considered by the referee. However, unless the record does contain all the testimony taken and considered in this case, the court cannot consider any part of it. Smith v. Gill, 10 Kan. 74; Gallober v. Mitchell, Id. 75; Clark v. Hall, Id. 81; O'Brien v. Creitz, Id. 202; Insurance Co. v. Duffy, 2 Kan. 347; Cooper v. Armstrong, 4 Kan. 30; McGrew v. Armstrong, 5 Kan. 284; Topeka v. Tuttle, Id. 425; Hale v. Bridge Co., 8 Kan. 466; Turner v. Hale, Id. 38; McIntosh v. Commissioners, 13 Kan. 177. From all we have before us, we are unable to see that there was any error in the proceedings in the court below, and unless manifest error does appear the judgment must be affirmed. It is so ordered. All the justices concurring.

SMITH et al. v. BANK OF KINGFISHER. (Supreme Court of Oklahoma. Sept. 8, 1894.)

APPEAL—REHEARING—WHEN DENIED.

No new question having been prese

No new question having been presented by this motion for a rehearing, the court reaffirms the doctrine as heretofore announced in this case.

(Syllabus by the Court.)

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Appeal from district court, Kingfisher county; before Justice A. J. Seay.

On rehearing. Motion denied.

For report of decision on appeal, see 35 Pac.

W. A. McCartney and Hobbs & Kane, for appellants. Noffsinger & Nagle, for appellee.

SCOTT, J. On the 3d day of March, 1894, the court affirmed the judgment of the lower court in this case, and directed that it be enforced accordingly. 85 Pac. 955. On the 18th day of April, 1894, the appellants filed a motion for a rehearing, setting forth five alleged grounds of error, all of which go to the same effect, challenging the entire decision of the court. The court decided that as an invariable rule, where a bill of exceptions is filed after the close of the term at which a judgment was rendered, it must affirmatively show on its face that it was presented within the time allowed; and, further, that as a general rule, while parol evidence is competent, it is not of itself, unaided by any other note or memorial, sufficient to authorize a nunc pro tunc order; that it might be competent, yet insufficient. In brief, the appellants challenge the entire doctrine thus announced by the court, and, in their argument, cite numerous authorities, none of which are sufficient to convince us that there was any error in our conclusions. A re-examination of all of the cases cited and of all the questions involved in the case convinces us of the correctness of our former decision. The appellants state, in addition to this, that the appellee did not save an exception to the findings of Justice Burford in signing and settling the case, and that, therefore, this question cannot be considered on appeal. This is a mistake. Exception was properly taken, preserved, and presented to the court. It follows then that the motion for rehearing must be denied. All the justices concurring.

(2 Okl. 490)

BURKE et al. v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 7, 1894.) CONTEMPT — WHAT CONSTITUTES — PROCEDURE-POWER TO PUNISH—RIGHT TO JURY TRIAL—JUDICIAL NOTICE—APPEAL—REVIEW OF FACTS STATUTES OF UNITED STATES-WHEN APPLY TO TERRITORIAL COURTS.

1. The legislature did not purpose, by the provisions of the criminal statutes which make certain contempts of court a misdemeanor pun-ishable by indictment, to take away from the court the power to punish such contempts in the usual manner.

The power to punish for contempt is in-herent in all courts of record.

3. The legislature has not power, in the absence of constitutional provisions, to limit or regulate the inherent power of the courts to punish for contempt.

4. The party accused has no right of a trial

by jury in a contempt proceeding.

5. Courts take judicial notice of their own proceedings, and in a contempt proceeding, where the contempt consists of an improper publication concerning matters pending in court,

the publication being admitted, the court may determine all the necessary facts without other evidence of what occurred in court than the court's judicial knowledge, and without the ne-cessity of a formal trial, including the introduc-

tion of evidence.
6. On appeal from a judgment in a contempt proceeding, only questions of law will be considered, and questions of fact will not be re-

considered, and questions of fact will not be reviewed.

7. The act of March 2, 1831, and which is embodied in section 725 of the Revised Statutes of the United States, limiting the power of the courts of the United States to inflict summary punishment for contempt of court, is not applicable to the courts of this territory, these courts not being one of the courts of the United States to which this provision of the acts of congress is applicable.

8. Publications made in a daily newspaper,

8. Publications made in a daily newspaper, while a matter is pending in court, as to whether or not a certain report presented by the grand jury shall be received by the court, or returned to the grand jury for further proper action and correction, to the effect that the actions of the judge seemed to indicate that he intended to withhold the report, and that if the judge persisted in carrying out such intention, by sup-pressing the report of the grand jury, the act might be characterized as a flagrant violation of the people's rights, and charging by direct im-plication that the action of the court "is an effort to browbeat the grand jury, an effort to bend the grand jury to the will of the judge," and "a serious matter," constitute a contempt of court.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice Henry W. Scott.

J. J. Burke and E. E. Brown were convicted of contempt, and they appeal. Affirmed,

On the 23d day of February, 1894, an information sworn to by W. H. Ebey, clerk of the district court of Oklahoma county, Okl. T., was filed in the district court of said county, charging defendants, J. J. Burke and E. E. Brown, with contempt of court in the publication of two certain articles in the Times-Journal, a daily newspaper published Oklahoma City, and in writing a certain letter to the judge of the district court, the writing of the letter being a part of the commission of contempt. The allegations of the information are all substantially contained in the findings of fact hereinafter given. The defendants, after demurring to the information, and after the demurrer was overruled, filed their answer, denying that the publication of the articles set out in the information related to matters pending in court, denying that the statements in the articles were inaccurate or untrue, and denying the legal effect of these publications, and the letter written the judge of the court. The defendants, in their answer, admitted the publication of the articles, and the writing of the letter referred to, to the judge of the court, and alleged "that since the publication referred to in the information said Henry W. Scott, judge of the district court. had announced in open court, to the grand jury, that the matters and things in the paper or report contained were not matters or things within the jurisdiction of the grand jury or of said court." The answer contained

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a specific paragraph as follows: "Fourth. For a further defense to the matters and things in the said information alleged, these defendants allege the truth to be that, as publishers and proprietors of the newspaper referred to in the information, they published the facts that the grand jury had returned to the Honorable Henry W. Scott, as the judge of said court, a paper which was neither an indictment nor accusation in writing against a public officer, but what was supposed to be a report of some kind or nature, as a matter of public news to patrons, as well also as the facts that the judge had not made public the contents of the paper up to the hour of going to press of that edition of the defendants' paper, as well also of the fact that the defendants, as enterprising and energetic caterers to a news-loving and enlightened public, had addressed a respectful letter to the Honorable Henry W. Scott, requesting to be permitted to give to its patrons the contents of said paper so handed in by the grand jury as aforesaid, as well also as the fact that, up to the hour of going to press of said edition, no answer had been received from the honorable judge. The defendants further say that they published the criticisms and animadversions upon the judge's actions and refusals hereinbefore specified, believing that they were the proper subject of criticism and newspaper comment, and without any intention or desire to in the leastwise interfere with, hinder, delay, impede, warp, or control the administration of justice in said court, or to in any wise affect the action of the grand jury or of said judge in the administration of justice, and not seeing how said criticisms could have any such effect, and not intending to reflect upon the integrity of said judge, the Honorable Henry W. Scott, in the administration of any of the affairs of his said office, or the conduct of said court."

The record shows that after defendants filed their answer, and "after hearing the defendants fully, and the argument of counsel, and being fully advised in the premises, the court made the following findings of fact:

"First. That the district court of the third judicial district of Oklahoma territory, sitting in and for the county of Oklahoma, in the territory of Oklahoma, was in session on the 21st day of February, 1894, and had been so in session for a long time before then, under the law, and is to so remain in session for a long time thereafter.

"Second. That the grand jury for said county was also in session on said 21st day of February, 1894, long before, and thereafter.

"Third. That said grand jury, on said 21st day of February, 1894, returned into court the matters remaining in their hands as a territorial grand jury, and reported that they had no further business in their hands.

"Fourth. That among the matters returned by said grand jury at that time was a return, report, and proceedings of their examination of the jall and poorhouse, with the recommendations concerning the jail, and their proceedings in the premises. Accompanying said report, return, and proceeding, and as a part thereof, was matter entirely foreign to the subject of said report and return, which foreign matter cast mere reflections upon certain individuals and persons.

"Fifth. That, at the time of the reception by the court of said report and return, a hasty reading of the matter led the court to doubt the propriety of placing it on the records thereof; and the court at said time was engaged in the trial of a jury case, and it was not thought proper to delay the trial to take the time to consider the report and the return, or that part of it deemed to be objectionable; and the court directed the grand jury that, as they had to report on the 23d day of February next thereafter as a jury for the United States, they would not be discharged as a territorial grand jury until that time.

"Sixth. That such action as to said grand jury was taken to enable the court to refer to said report, and return back to the jury in the meantime, if the court concluded it should be so referred back.

"Seventh. That on the morning of the said 23d day of February, 1894, the court referred said report and return back to the grand jury, with instructions to separate the foreign matter from the matter on the jail and poorhouse, and make further return to the court, and further instructed the grand jury that, if they were in possession of sufficient evidence of crime on the part of any persons or individuals whomsoever, to return to the court an indictment or accusation in form of law, so that the court could have the matter judicially investigated, and the guilty party punished.

"Eighth. That the 22d day of said February, 1894, was a legal holiday, and the court was not in session on that day.

"Ninth. That on the morning of said 22d day of February, 1894, the said article set out in the complaint herein was published by the defendants in their newspaper, the Oklahoma Times-Journal, printed, published, and circulated in Oklahoma City, Oklahoma county, and territory of Oklahoma, and read as follows, to wit:

"'Extraordinarily Injudicial. Yesterday forenoon the grand jury filed into court, and the foreman handed the judge a package of papers. The judge looked them over carefully, and one paper he seemed to scan a second time. Then he turned to the foreman, and asked, "Who prepared this report?" Mr. Trosper, foreman of the grand jury, answered, "A committee composed of Mr. Welch, Mr. McCartney, and myself." The extraordinary question caused every attorney in the court room to start with surprise, and further developments were await ed with interest. The grand jury announced. through their foreman, that they had con-

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pleted their labors as a territorial grand jury: but, notwithstanding that fact, Judge Scott held them until Friday,-for what purpose, nobody seems to be able to surmise. A representative of the Times-Journal met Mr. Ebey, district clerk, down on the street, an hour after the court scene, and asked permission to go into his office and copy the grand jury report. Mr. Ebey seemed very willing to render the favor asked. As soon as he could do so, the Times-Journal representative went to the district clerk's office to copy the report. He was informed by Mr. Ebey that the report was not on file, and stated, further, "The judge informed me that he did not think he would allow the report to be made a part of the record of the clerk's office." The Times-Journal man left the clerk's office almost dumbfounded. Thinking, however, that there might be some mistake, and that the judge was holding it merely for examination, the following note was addressed to him: "Judge Henry W. Scott— Dear Sir: It has been our custom to publish in full all grand jury reports upon the condition of the county and acts of the county officials. We therefore ask you to permit us to make a copy of the report filed this forenoon in time for publication in to-morrow morning's issue of the Times-Journal. If you will leave the report with the district clerk in time to be copied before the hour of closing his office, you will greatly oblige us. Respectfully, Burke & Brown, per B." A Times-Journal representative was at the clerk's office at 5 o'clock, and again at 5:45, but no report had been filed. At that time the judge was on the bench, we presumed, so no effort was made to see him. Other pressing business prevented further effort to secure the report. Although every act seems to indicate that Judge Scott intends to withhold that report, we cannot believe that he really meant all that his remark to the district clerk conveyed. If Judge Scott persists in carrying out the intentions expressed to District Clerk Ebey, of suppressing the report of the grand jury, the act may rightly be characterized as the most flagrant violation of the rights of the people ever undertaken in Oklahema. The report made by every grand jury is a statement to the people of the county of the condition of the county affairs, and the acts of county officials. It is no business of the judge's whether it is a laudatory report, or one of severe denunciation of unbusiness-like methods, so long as it is the honest expression of the grand jury. The judge has no right to say of what character that report may partake, and if the report suggest corruption, or loose business methods, it is the judge's moral duty to commend the grand jury for its moral courage in daring to inquire into the affairs of the county without fear or favor. A suppression of that report is an ef-

fort to browbeat the grand jury. It is an affort to bend the grand jury to the will of the judge. Such an attempt is a serious one; Judge Scott does not recognize how serious.'

"Tenth. That said article related to the report, return, and proceedings of said grand jury, which, as above stated, was held by the court under advisement, and was so published while it was so held by the court.

"Eleventh. That said article was published with the intent to coerce the court to place the objectionable matter in said report, return, and proceedings upon the records thereof, and as a matter of law the court finds that the publication of the article complained of are calculated and were intended by the said J. J. Burke and E. E. Brown to impede and obstruct and embarrass the administration of justice in said court, and to impeach the integrity of said court, and the judge thereof.

"Twelfth. That on said 21st day of February, 1894, and while the said court was so in session, and while certain matters, things, and proceedings were pending before the said grand jury and the said court, and were being held under the advisement and consideration of the said court as aforesaid, the said defendants, J. J. Burke and E. E. Brown, and each of them, executed and caused to be delivered by mail, and by the use of a special delivery stamp, to the judge of the said court, a certain letter, which said letter is in words and figures as follows, to wit: 'Okla. City, Feb. 21st, 1894. Judge Henry W. Scott, Oklahoma City, O. T.-Dear Sir: It has been our custom to publish in full all grand jury reports upon the condition of the county and the acts of the county officials. We therefore ask you to permit us to make a copy of the report filed this forenoon in time for publication in to-morrow morning's issue of the Times-Journal. If you will leave the report with the district clerk in time to be copied before the hour of closing his office, you will very greatly oblige us. Respectfully, Burke & Brown, per B.' The court further finds that the said report, return, and proceedings of said grand jury was made in said court between the hours of eleven and twelve o'clock a. m. of said 21st day of February, and that the said letter was delivered to said court by special delivery messenger, in open court, while the judge was on the bench, and in the midst of a jury trial, between the hours of two and three o'clock p. m. of said 21st day of February, 1894, and that the court thereupon abated the trial for a moment, for the purpose of signing a receipt book of said special delivery messenger; that said letter related to matters, things, reports, returns, and proceedings then and there pending before said court and jury, and was then and there executed and delivered for the purpose and with

the intent of affecting and coercing the action and decision of the said court while the said court had the said matter under advisement, and of obstructing and impeding the proceedings thereof, and for the purpose and with the intent of then and there impeaching the integrity of the judge of said court.

"Thirteenth. That the defendants J. J. Burke and E. E. Brown are guilty of contempt of this court.

"I do therefore consider, order, and adjudge that you, the said J. J. Burke, and you, the said E. E. Brown, and each of you, are guilty of contempt of this court, and it is therefore the judgment, sentence, and order of this court that you, the said J. J. Burke, and you, the said E. E. Brown, and each of you, be imprisoned in the county jail of Oklahoma county, and territory of Oklahoma, for the period of ten days, beginning at noon this day, the 25th day of April, 1894, and that you, the said J. J. Burke, and you, the said E. E. Brown, and each of you, pay a fine of two hundred and fifty dollars (\$250) into this court, and into the hands of the clerk thereof, to be applied and directed as required by law in such cases made and provided, and that in default of the immediate payment of said fine adjudged against you, and each of you, that you, the said J. J. Burke, and you, the said E. E. Brown, be, and it is hereby ordered and adjudged that you and each of you be, further imprisoned in the jail aforesaid until you, the said J. J. Burke, and you, the said E. E. Brown, and each of you, pay the said fine, and that a commitment and warrant of authority issue forthwith, and be placed in the hands of the sheriff of Oklahoma county, to carry this judgment into immediate effect and execution.

"In witness whereof, I have hereunto set my hand this 25th day of April, 1894. [Signed] Henry W. Scott, Judge of the Third Judicial District of the Territory of Oklahoma, within and for Oklahoma County."

The court, after making these findings, and before judgment, gave the defendants an opportunity to purge themselves of contempt, in the following language: "To show the desire of this court to exercise its magnanimity, even at this late hour, in the face of the flagrancy of the manifold contempt of these defendants, as well as to render indisputable evidence of their continued perversity if this proffer of magnanimity is refused, I will now ask them if they have any offer of retraction or apology to make before proceeding further." To which the defendant Brown answered: "All of these matters alleged to be contempt of court were published in the absence of Mr. Burke. He was out of the city, and knew nothing about them, and was not in the city until two days after. I have no apology to make." The defendant Burke

replied: "May it please your honor, I have no apology to make. I am one of the publishers of the Times-Journal, of course, and I shall take medicine along with the other parties." Thereupon, the court sentenced the defendants to pay a fine of \$250 each, and to be committed to the county jail for a period of 10 days. From this judgment the defendants appeal.

Reddick, Louis & Snyder and Horace Speed, for appellants. C. A. Galbraith, Atty. Gen., J. H. Woods. Co. Atty., Green & Strang, and Huger Wilkinson, for the Territory.

BIERER, J. (after stating the facts). The plaintiffs in error rely upon four propositions for the reversal of the judgment of the court below, which we will consider in their order:

"First. The offense charged should have been presented by indictment." Section 2039 of the Statutes of Oklahoma of 1893 provides: "Every person guilty of any contempt of court of either of the following kinds is guilty of a misdemeanor: * * *." The part of this section not embodied in the quotation makes such conduct as that complained of here a misdemeanor; and it is contended by the plaintiffs in error that as the acts of the parties charged constituted a misdemeanor, and as it is such a misdemeanor as may be prosecuted by indictment, the district court had no power whatever to proceed with the prosecution under an information. This contention is untenable, for two reasons. In the first place, the language of the statute itself shows a clear intention on the part of the legislature not to make contempts of court exclusively punishable by prosecutions by indictment. The act evinces no intention on the part of the legislature to take away from the court a power which it already had to punish contempts of court in the summary manner of such proceedings. The legislature simply provided that contempts of court were also misdemeanors. It declared that an offense against the court, of a certain prescribed kind, was also an offense against the public. This was proper legislation, and in no way affected the court's power to punish, by the ordinary proceedings, such contempts. The legislature undoubtedly intended that the judge of the court whose offices were transgressed, whose dignity was offended, and whose integrity was impeached should not be the only person to determine whether such acts should be prosecuted. Such conduct is often overlooked by the courts when the acts are a serious injury to the public. The diffidence of courts to take up for investigation and punishment matters which are aimed, not only at the cour in its public capacity, but also in its individuality, often permits such transgressions as contempts of court to be overlooked and allowed to go unnoticed by the judges of the courts, and the public welfare, the morals, the good behavior,



and the proper consideration of a community for governmental functions are thereby often greatly injured. The legislature intended that the public itself might also have a right to prosecute these offenses,-not to take away a power which the court already had to punish the offender, but to prescribe a means in addition to that already possessed for such punishment. We not only do not think the legislature, by this enactment, intended to take away the power of the courts of this territory to punish by summary proceedings for contempt of court, but this statute could in no way have that effect. The power to punish for contempt of court is inherent in all courts of record. Ex parte Robinson, 19 Wall. 505; In re Millington, 24 Kan. 214; People v. Stapleton (Colo. Sup.) 33 Pac. 167; Middlebrook v. State, 43 Conn. 257; Tyler v. Hamersley, 44 Conn. 393; Holman v. State, 105 Ind. 513, 5 N. E. 556; Fx parte Terry, 128 U. S. 289, 9 Sup. Ct. 77. The organic act (section 9) vests in the courts of this territory chancery as well as common-law jurisdiction, and this carries with it the power to punish for contempt. This is a constitutional provision for this territory, and the grant of legislative power in the organic act vests in the legislature no right to take away any of the inherent powers of the court. The legislature has no power, in the absence of a constitutional provision, to regulate or limit the inherent powers of a court to punish for contempt. Middlebrook v. State and Tyler v. Hamersley, supra; Rap. Contempt, § 11.

The defendants' second allegation of error in the court below is in not granting a trial by jury. This contention of the defendants in the court below (plaintiffs in error here) is also untenable. A party accused in a contempt proceeding has not the right of a trial by jury, and a denial of the right of trial by jury on such a hearing does not infringe the constitutional provision guarantying the citizen the right of trial by jury. Gandy v. State, 13 Neb. 445, 14 N. W. 143; Ex parte Grace, 12 Iowa, 208; Rap. Contempt, § 112.

The third allegation of error is: "The plaintiff was entitled to have the evidence against him produced, and an opportunity to refute it." The information charged the defendants with a contempt of court, and they were required to answer this information. The information charged the commission of a contempt of court, in that the defendants did certain acts, by publishing the articles complained of in their newspaper while the matter referred to was pending in court and undetermined. These acts were not denied. The defendants admitted the doing of them, but sought to excuse themselves from the consequence of the acts by the denial, consisting of legal conclusions, and by the allegation of matters which could in no way be a defense. All of the matters of fact which the court found were matters that were either admitted by the defendants' answer, or of which the court could take judicial knowl-

edge. The false charges made by the defendants were with reference to certain matters which were proceedings of the court. The court knew the truthfulness or the falsity of all of the things referred to as well as, if not better than, any witness could. It certainly knew its own court proceedings as well as any other person. No other person could know them any better than the court itself. The courts take judicial knowledge of their own proceedings, and of whatever is done in court, within the limits of their jurisdiction. 1 Greenl. Ev. § 6. On this subject the supreme court of Wisconsin, in the case of Brucker v. State, 19 Wis. 539, says: "The determination, therefore, depends chiefly upon whether we can take judicial notice of our former order. If we cannot, it seems, upon the record before us, that the objection is well taken; but, if we can, then our conclusion would be different. We are inclined to the opinion that, for the purpose of this objection, we can take such notice, and that the former record and order may be considered. The objection is that the cause had not been remitted. Whether it had or not, the record and proceedings upon the former writ, always before this court, are certainly the best evidence, and we think they may be examined for the purpose of ascertaining the fact." If the court may take judicial knowledge of its own record proceeding, might not the court in this case take judicial knowledge of whether the court was in session on a particular day; what it was doing at the time; as to whether or not the grand jury made a report; as to what that report contained; as to whether the report was one which the court should receive or not; as to whether the defendants wrote a letter to the court, which they admit writing and sending, and which the court received, and the time the court received it; and as to what the court did when this report was presented; and as to what action the court took upon it; and as to when the action was taken? Evidence would not have assisted the court in making a finding on these questions, and there was no necessity for taking any evidence. In the case of Hunter v. Railroad Co., 116 N. Y. 615, 23 N. E. 9, the court said: "Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved, and the apparent justice of the case." The issue involved in this case being one only as to the court's own proceedings. the fact that the defendants, by newspaper articles, had attacked the propriety thereof, being admitted, and the only remaining element to the completion of the offense being one of motive on the part of the defendants in the publication, and that being one which must be gathered from the acts committed and the manner of committing the acts, was one which the court could and had the right to judicially determine from the facts within its judicial knowledge. In the case of Middlebrook v. State, 43 Conn. 257, it was held that a formal trial and judicial hearing were not necessary in a contempt proceeding. On this question the court said: "If it was necessary that the judgment should be preceded by a trial, and the facts found upon a judicial hearing, as with ordinary criminal cases, it would be otherwise. But in this proceeding nothing of the kind was required. The judicial eye witnessed the act, the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and, the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment." The only material matters of fact disputed by defendants' answer, if in fact any necessary ones were disputed at all, were matters which the court might determine without evidence outside of the court's proceedings being offered, and whether the court correctly determined them or not is not for our consideration. In a case of this kind, questions of law only will be examined on appeal. In the case In re Pryor, 18 Kan. 72, the party was prosecuted for sending a contemptuous and insulting letter to the judge of the court, concerning a matter then pending. That was a case much akin in principle to the one at bar, in that neither in that nor in this case were the parties charged with contempt in open court, in the real presence of the court, but their written language and charges were concerning matters then pending in court. The able jurist. Justice Brewer, after reviewing the matter of the conduct of an attorney towards the court, and of the court's consideration of expressions which may, in the moment of disappointment, slip from the lips of a disappointed attorney, and which the court will not always regard as a contempt, said: "We make these suggestions, not as intimating that such has been the prior conduct of the attorney in this case, for we neither know nor have heard anything, outside of this single matter, which reflects at all upon him. We do it simply to indicate that the wisdom or necessity of the court's action is not always disclosed by the single matter apparent in the record, and that, therefore, in a matter like this, involving personal conduct towards the court, a large regard must be paid to its discretion. If the language or conduct of the attorney is insulting or disrespectful, and in the presence-real or constructiveof the court, and during the pendency of certain proceedings, we cannot hold that the court exceeded its power by punishing for contempt." In the case of Tyler v. Hamersley, 44 Conn. 393, the supreme court of that state, in defining the extent to which an appellate court would review the proceedings in a contempt case, said: "In the second place, the proceedings upon which the judgment was rendered should not be reviewed, except so far as may be necessary to determine whether the court, in rendering the judgment, acted within the sphere of its jurisdiction. Every court must, of necessity, possess the power to enforce obedience to its lawful orders and judgments, and punish contempts of all kinds against its authority. It is only when it acts without its jurisdiction that its proceedings in such cases will be interfered with or questioned by a superior tribunal. The principle upon which courts proceed in such cases is clearly stated in the celebrated case of Burdett v. Abbot, 14 East, 1150, and the case of People v. Sturtevant, 9 N. Y. 263. In the former case, Lord Ellenborough, in the course of an able and interesting opinion, observed that, if a commitment appeared to be for a contempt of the house of commons generally, he would neither in the case of that court nor any other superior court inquire further; but if it did not profess to commit for a contempt, but for some matter which could by no reasonable intendment be considered as a contempt of the court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law or natural justice, he would look at it and act upon it as justice might require, from whatever court it might profess to have proceeded. In the case of People v. Sturtevant the rule laid down by the court was that 'a party proceeded against for disobedience to an order or judgment is never allowed to allege as a defense for his misconduct that the court erred in its judgment. He must go further, and make out that in point of law there was no order and no disobedience, by showing that the court had no right to judge between the parties on the subject." In the case of Com. v. Newton, 1 Grant, Cas. 453. the court said: "The courts having a limited jurisdiction in contempts, every fact found by them is to be taken as true, and every intendment is to be made in favor of the record, if it appears to us that they proceeded within, and did not exceed, their jurisdiction." In the case of Holman v. State. 105 Ind. 513, 5 N. E. 556, the supreme court, with reference to the force and effect to be given to the statement of the judge upon matters that occurred in court, said: "As that statement is confined to matters that occurred in open session, and in the presence of the judge, we must treat it as importing absolute verity."

The fourth objection of the plaintiffs in error to the correctness of this judgment is "that the facts stated constitute no offense, and no contempt of court." Appellants contend that the offense, if such it was, committed by them against the court below, was not one for which they could be prosecuted in a contempt proceeding, because the acts alleged to have been committed were not contempts, under the provisions of the act of March 2, 1831. It is contended that this act, which is now embodied in the provisions of section 725 of the Revised Statutes of the United States, is applicable to the courts of

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this territory, and restricts the inherent power of the court in contempt proceedings, and gives no power to punish as for the commission of a contempt in a case of this kind. This act of March 2, 1831, is not applicable to territorial courts, and does not limit the inherent power given by congress to this court to punish contempts against its authority. The act of March 2, 1831, with reference to the courts to which it applies, is as follows: "That the power of the several courts of the United States to issue attachments, * * *." Now, are the district courts of this territory one of "the several courts of the United States," as contemplated by this act? That territorial courts are not constitutional courts, as contemplated by this language, but are mere legislative courts, has been held both before and since the act of March 2, 1831. This was so held in the case of Insurance Co. v. Canter, 1 Pet. 511-546, decided by the supreme court of the United States in 1828; and it was so held in Mc-Allister v. U. S., 141 U. S. 174, 11 Sup. Ct. 949, decided in 1891. And it has been so often held as to leave it no longer a question even for discussion. The acts which refer to the several courts of the United States do not apply to the courts of the territories, and such provisions are only made applicable to the territorial courts in such respects as they are expressly so made by act of congress. The cases of Ex parte Robinson, 19 Wall. 505, and Ex parte Terry, 128 U.S. 289, 9 Sup. Ct. 77, are not in conflict with this holding. In neither of these cases was it held that this limitation on the inherent power to punish for contempt of court possessed by the United States courts extended beyond the circuit and district courts of the United States. The language in Ex parte Robinson, to the effect that this act applies to all courts, should not be taken as a construction of the supreme court, making it applicable to all courts within the United States, but should be taken in connection with the matter then under consideration; that is, the application of this act of congress to the courts of the United States. There can be no dispute that this act, in terms, does apply to all courts of the United States; but the United States supreme court suggested, in the case of Ex parte Robinson, the doubt as to whether it could even be made to apply to the supreme court of the United States, because its powers were derived from the constitution. determination in Ex parte Robinson was no broader than that this act applies to the circuit and district courts of the United States; and, in Ex parte Terry, to the circuit courts of the United States. A determination, however, that it applied to all courts of the United States, which is broader than that given it in these cases, would not make this act applicable to the territorial courts, because they are not courts of the United States, within the now well-understood meaning of this language in

judicial decisions and acts of congress. The change of the language in section 725 of the Revised Statutes of the United States, in respect to courts to which this provision of March 2, 1831, is applicable, from "the several courts of the United States," in the original enactment, to "the said courts," in the Revised Statutes, in no way affects the contention. There is nothing in the language of the Revision making any change in the courts to which its provisions are applicable, and nothing to indicate that congress intended to change the scope of this provision. Section 725, too, is contained in a chapter of the Revised Statutes which refers exclusively to United States courts, and in no part or paragraph refers to territorial courts. In any event, in the case at bar the contempt against the court was not committed while the court was exercising any of the jurisdiction given to the courts of the United States, and which is by the organic act given also, in the particular respects, to the district courts of this territory. The record in the case shows that the court was sitting as the territorial district court of Oklahoma county, and not as a United States court for that county, when the contempt was committed. While the court was so sitting, it was not in the exercise of any power, authority, or jurisdiction of a United States court; and even if it should be held that the act of March 2, 1831, applied to the district courts of this territory when they were sitting in the exercise of the jurisdiction of United States circuit and district courts, it could not be so held when the court was sitting in the exercise of its common-law jurisdiction, as a territorial court.

The acts committed by the defendants in the publications of these articles do constitute a contempt of court. The acts of the defendants, both in writing the letter and in making the publications, were committed for the purpose of forcing, by the strong arm of the public press, the judge of the court to make public a document which he had not adjudged could be received as an indictment or an accusation, and which he afterwards adjudged was not in proper form to be received as a report, as an accusation, or as an indictment of the grand jury, and an instrument concerning which the court then had under consideration the question as to whether it should be accepted, or returned to the grand jury with further directions. It was a charge, by strong implication, if not by direct statement, that the judge intended to withhold the report of the grand jury, and then charged that the withholding of the same "is an effort to browbeat the grand jury." It contains a direct statement that the action which the court was taking was "an effort to bend the grand jury to the will of the judge. Such an attempt is a serious one; Judge Scott does not realize how serious,"-intending thereby to cast reflection upon the purpose of the judge in his consideration of the matter then before the court, and attributing a tyrannical and insincere motive to his action. This matter was before the court for its consideration, and had not been determined, at the time those publications were made. The fact that the court afterwards determined that the return or presentment or report of the grand jury could not be received gave the court none the less jurisdiction of the matter, and made it none the less a matter pending in court at the time the defendants sought to force a particular decision upon the question as to whether or not he would receive this report. Cases are often determined by the court holding that the matter is not properly presented, or that the court has no jurisdiction of the subjectmatter or proceeding. This, however, is not a denial of the fact that the court had jurisdiction of the case or proceeding then pending. The case or the proceeding is as much before the court, and involves as much of judicial action, when the court holds that the matter is improperly presented, or even if the court has no jurisdiction of the subject-matter of the action, as it is when the case is determined upon the merits. There was nothing improper or unusual in the court's taking time to consider whether an instrument presented by the grand jury should be accepted by the court. The court is not bound to receive and accept from the grand jury everything which it may present. One of the legal and judicial steps to be taken before any return of the grand jury becomes an indictment, accusation, or report is that it must be presented to and received by the court; and the court has a right, before accepting and receiving it, to return it to the grand jury, or to receive it, as the court thinks proper. This required judicial action. The court being in session—being engaged in the trial of a case—when this return was made by the grand jury, and it appearing, upon such a hasty perusal as the court could then make, that it was out of the usual form, it was not only the power, but it was the duty, of the court to take the matter, and give it fair and candid consideration, before passing judgment upon its propriety and validity. Until it was received by the court, it still remained among the secret proceedings of the grand jury, and one which neither the court nor the grand jury itself had a right to make public. The judge being engaged in the trial of a cause before a jury, and which must necessarily have required his attention at that time,—the next day being a legal holiday,-it was not at all improper for the judge to take the matter of receiving this report under consideration until February 23d. Pending this consideration, it was not the judge's duty-indeed, it would have been improper for him-to have permitted the report to have been published until he had concluded that it was in proper form to be received, and until it had been received, as the report of the grand jury, or as an accusation or as an indictment. If it were the latter, it would assuredly be improper to make its contents known by publication until the accused had been apprehended. Any other procedure would convert the newspaper from a beneficent avenue of public thought, intelligence, and information, and the agency that has done more to speed the perfection of the proud and intelligent civilization of the nineteenth century than any other force in Christendom, into the warning sentinel of the felon. If the proceedings of the grand jury were to be published before indictments or accusations could be received, or even before warrants could be issued and arrests made thereupon, "Escape" would be the defendant's plea more often than "Not guilty." is therefore the policy of the law that these matters should be kept secret until they have passed a certain stage of judicial investigation and official action; and the court's strict obedience to this policy of the law could furnish no ground for public criticism, anathema, or vilification, and especially when such charges were made for the purpose of influencing the court's action on a matter then pending. The language of Exhibit B of the information-"If Judge Scott persists in carrying out the intention expressed to District Clerk Ebey, of suppressing the report of the grand jury, the act may rightly be characterized as the most flagrant violation of the rights of the people ever undertaken in Oklahoma"-was a direct and flagrant attempt by a newspaper publication to force the judge to receive from the grand jury, and make public, a document, the proper form of which he was then judicially considering. The defendants show from these publications that they knew that the matter was under consideration; that they knew that the judge was seriously considering or questioning the propriety of receiving this report. These articles were a newspaper attempt to influence judicial action. This is the most dangerous of all forces that may be brought to bear against the purity and sanctity of judicial action. To attempt to influence the decisions of the courts by scurrilous publications made during the pendency of a proceeding is more dangerous to pure and unbiased judicial action than an effort to break down the court by charges of wrong and infamy. The latter may affect the standing of the court in the community, while not particularly affecting the court itself. The former may affect a judgment or a determination which the court should make unbiased and uninfluenced by anything save that which is presented in the cause. With the extraordinary kind of newspaper conduct indulged in by the defendants in this case, it was high time for the court to purge this baleful influence from its forum by the severest punishment which a court could inflict, if necessary. The allegation of

defendants' answer that these publications were made as a criticism and animadversion on the judge's action, but without any intention or desire to interfere with the offices of the court, or to reflect upon the honor or integrity of the judge, in no sense presented a justification for their actions. As was said of such language in the answer of the defendants in the contempt case of People v. Stapleton (decided by the supreme court of Colorado) 33 Pac. 167: "It would be a very pleasant way to dispose of this proceeding for us to accept those oft-repeated assurances that respondents did not intend or design, by their publications, to convey the impression that this court had been actuated by unworthy motives or controlled by dishonorable influences in the Connor Case. But it would be an affectation of credulity on our part to profess to believe such assurances. It is the province of the court to interpret and construe written language. * * * It is an elementary rule of construction that a writing consisting of common words shall be interpreted and construed according to the ordinary meaning of the words employed. The articles complained of contain only common words, and it would be a perversion of their ordinary meaning to hold that the words, as used, were not designed to charge and impute unworthy motives." If anything further than the language published was necessary to show the intention and purpose of the defendants, in publishing these articles, to ascribe to the action of the court dishonorable and corrupt motives, and to attempt to influence the action of the court, it was shown by the defendants, in open court, when this matter was under consideration, and when the court offered to exercise its magnanimity. even in the face of all of the conduct of the defendants, if they would retract these improper publications, when the impropriety of their action was called squarely to their attention. With the falsity of the statements of the publications made being shown by the findings of the court, they stood up in open court, and admitted their publication. but refused to retract anything therefrom. To say, after such actions, that the wrongful conduct and intention of these defendants was not manifest, is an affront to candor and intelligence. There is no question about the wrongfulness of the publications, nor of the viciousness of the defendants' intentions.

We decline, in this case, to give character to a manufactured sentiment by joining in the too often repeated discussion of a perverted application of our beneficent heritage of freedom of speech and liberty of the press. During these occasions, when crime stalks abroad cloaked in the garb of liberty, and when the assassin of our highest and noblest institutions of civil government would audaciously bid the hand of justice bestow reward for punishment too long deserved, we are reminded of the historic words of Madame Roland, "Oh, Liberty! how many crimes are

committed in thy name!" and resolve that the shield of the innocent shall not be the weapon of the guilty. The judgment of the court below is affirmed, with costs. All the justices concurring.

SCOTT, J., not sitting.

STATE ex rel. McNAMEE v. SPINNER, County Recorder. (No. 1,412.)

(Supreme Court of Nevada. Oct. 8, 1894.)

LOCAL AND SPECIAL LAWS — ACT FIXING SALARY
OF JUSTICE.

St. 1891, p. 35, fixing the salary of a justice of the peace of Eureka township, is not a local or special law regulating county and township business, within the inhibition of Const. art. 4, § 20.

Application for writ of mandamus by F. R. McNamee against William Spinner, ex officio auditor of Eureka county. Writ granted.

Thomas Wren, for relator. Peter Breen, Dist. Atty. for respondent.

BELKNAP, J. This is an application for a writ of mandamus requiring the respondent, as ex officio auditor of Eureka county, to audit and allow the relator's claim for salary as justice of the peace of Eureka township. At the session of the legislature in the year 1891, an act was passed allowing the justice of the peace of Eureka township a salary of \$60 per month, in lieu of fees. St. 1891, p. 35. The only question is whether the legislature had the power to adopt a special law applicable to the incumbent of this office. The objection is that the law is special and local, regulating county and township business, contrary to the provisions of section 20 of article 4 of the constitution. The authority to enact special laws fixing the compensation of county officers has been frequently exercised by the legislature. No judicial question as to the constitutionality of such legislation had been made until the case of State v. Fogus, 19 Nev. 247, 9 Pac. 123, was decided. In that case the power of the legislature to adopt laws of this nature was upheld. That decision was followed and approved in the case of Mining Co. v. Allen, 21 Nev. 325, 31 Pac. 434. It would seem that these cases should have settled the question adversely to the relator's contention but the constitution itself has been amended since the decision in State v. Fogus, and, as amended, removes, in terms, all restrictions upon the legislature upon the subject of compensation of county and township officers. The amendment is as follows: "Sec. 20. The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say; * * regulating county and township business * * *. But nothing in this section shall be construed to deny or restrict the power of the

legislature to establish and regulate the compensation and fees of county and township officers. * * *" Let the mandamus issue.

MURPHY, C. J., and BIGELOW, J., con-

SOYER et al. v. GREAT FALLS WATER

(Supreme Court of Montana. Sept. 24, 1894.) DEATH BY WRONGFUL ACT-CAVING IN OF DITCH -EVIDENCE-PROOF OF MARRIAGE-NONSUIT.

1. In an action for the death of an employe of defendant through the caving in of earth while digging a ditch, evidence as to the character of the soil, and defendant's means of knowledge thereof, was admissible to show that props and braces should have been furnished for the safety of the workmen.

2. In an action by decedent's wife and children for his death, the measure of damages is the amount which he would probably earned during his life for their benefit.

3. To determine the measure of damages in an action for the death of one upon whose support plaintiffs were dependent, evidence as to the age of the deceased at his death is admissible.

4. In an action for the death of plaintiff's husband, evidence of one who knew deceased and plaintiff from infancy, and was present when the marriage was announced, and knew that they lived together as man and wife, and acknowledged that relation, establishes a prima facio consent the relation, establishes a prima facie case as to the relation of the deceased to the plaintiff during life.

5. In determining the question of nonsuit for want of evidence those issues are regarded as proved which the evidence tends to prove.

Appeal from district court, Cascade county; Charles H. Benton, Judge.

Action by Helena Soyer, Johanna Soyer, Francis Soyer, Maria Soyer, and John Soyer, by Frank Seliska, guardian ad litem, against the Great Falls Water Company, to recover damages for the death of Joseph Soyer while in the employ of the company. Judgment for defendant, and plaintiffs appeal. Reversed.

James Donovan, for appellants. Leslie & Downing, for respondent.

PEMBERTON, C. J. This is an action for damages for personal injuries, instituted in the court below by the plaintiffs, who are the widow and minor children of Joseph Soyer, deceased. The complaint alleges that the defendant, a corporation, was on the 30th day of October, 1891, the owner of and engaged in the construction of certain water mains in the city of Great Falls; that the said Joseph Soyer was employed by said company as a common day laborer in excavating and constructing the water mains and ditches of said company; that on account of the character of the ground through and in which said water mains and ditches were being constructed it was the duty of said company to prop or crib said ditches with timbers, to prevent the same from caving in on the said Soyer, who was engaged in digging in and constructing the same; that said Soyer was wholly ignorant of the character and condition of the ground; that said company knew the character and condition thereof, or could have known the same by the exercise of due care and prudence; that said company was guilty of negligence in not properly cribbing and supporting said ditches with timbers to prevent the same from caving; that by reason of such negligence on the part of said company the said ditch caved, and the side thereof fell upon and killed the said Soyer; that said Soyer was without fault or negligence in the premises; that said plaintiffs were wholly dependent upon said Soyer for support, education, etc., he being the husband of plaintiff Helena Soyer, and the father of the other plaintiffs, who are minors. The complaint asks for damages in the sum of \$10,000. The answer denies all the material allegations of the complaint. At the conclusion of plaintiffs' testimony defendant moved the court for a nonsuit, upon the principal ground, seemingly, that "the evidence fails to show that there was at any time during the prosecution of said work any necessity for propping up or bracing the walls of said ditch." The court sustained this motion, and entered judgment in favor of defendant for costs, and from this judgment this appeal is prosecuted.

It appears from the record that said ditch, in which Soyer was working for the company, did cave upon and kill him, as alleged in the complaint. The plaintiffs sought to show that the character and condition of the soil or ground through which the ditch was being run were such that the cave occurred because the sides and walls thereof were not propped or braced, as alleged in the complaint. The court refused to permit them to prove that the walls were not propped or braced until they had first shown the necessity therefor. This action of the court is assigned as error. How could plaintiffs better show the apparent necessity for propping and bracing the ditch than by showing that it caved without such support? It was competent to show the character and condition of the soil or ground through which the ditch ran, in order that the court or jury might determine whether propping and bracing were necessary to the safety of the persons working therein, and to determine whether the company was guilty of negligence in failing to prop and brace the same, as alleged in the complaint. We think it was competent to show fully the condition and character of the ground through which the ditch ran; the knowledge of the company, or the means of knowledge of the company. of these conditions and character of the ground; and its failure to prop and brace the ditch, if it was necessary so to do,-in order to determine whether or not the company was guilty of negligence, as alleged in

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the complaint. We think the action of the court in this regard was clearly error.

The court refused to permit the plaintiffs to prove the age of Soyer at the time of his death. Upon the age of the deceased largely depended the question of the measure of damages in this case. "The measure of damages is the amount which the deceased would probably have earned during his life for their [plaintiffs'] benefit, taking into consideration his age, ability, and disposition to work, and his habits of living, and expenditures." Telephone Co. v. Varnau (Pa. Sup.) 15 Atl. 624; Schaub v. Railroad Co. (Mo. Sup.) 16 S. W. 924; Castello v. Landwehr, 28 Wis. 522. This holding of the court was manifestly error.

We think the court also erred in excluding the evidence of plaintiffs offered to show that the deceased was the husband of plaintiff Helena Soyer, and the father of the other plaintiffs, as alleged in the complaint. The evidence of persons who had known deceased and Helena Soyer from their infancy, and had known their children from their birth, who were present in church when their marriage was announced, who knew that they lived and cohabited together as man and wife, that they always treated and acted towards each other as man and wife, who always declared and acknowledged that relation to exist between them, and who acknowledged and treated their children as parents usually do their offspring, certainly tends, in our opinion, to establish these relations. This evidence was sufficient at least to establish a prima facie case upon the question as to the relation deceased sustained to the plaintiffs in his lifetime. Code Civ. Proc. subd. 4, § 642.

In determining the question of nonsuit for want of evidence to support the allegations of the complaint and authorize a recovery the law regards the issues proved which the evidence tends to prove. The evidence offered by plaintiffs, and excluded by the court in this case, clearly tended to prove the issues tendered in the complaint, and should have been admitted.

There are assignments of error in the record of less importance than these already noted, but we do not consider it necessary to treat them in detail. The judgment appealed from will be reversed, and the cause remanded for new trial. Reversed.

HARWOOD and DE WITT, JJ., concur.

NIXON v. NIXON.

(Supreme Court of Montana. Sept. 24, 1894.)
Contempt—Nonpayment of Alimony.

It is error to refuse to hear a petition by one committed for contempt for nonpayment of alimony, which sets up inability to pay the same, and prays a modification of the order for alimony. Appeal from district court, Silver Bow county; William O. Spears, Judge.

Action by May Nixon against S. M. Nixon for divorce. Defendant was ordered to pay alimony pendente lite, and counsel fee. Part of the alimony was paid, but not the fee. On an order to show cause, defendant was committed for contempt. He filed a petition to modify the order for alimony and vacate the order committing him for contempt, on the ground that he was unable to pay the alimony. The court refused to hear the petition, and, from an order dismissing it, defendant appeals. Reversed.

John W. Cotter, for appellant.

PEMBERTON, C. J. This is a suit for divorce, instituted in the second judicial district court, in which this appellant is defendant. On the 12th day of August, 1893, the court made an order requiring and directing the defendant to pay plaintiff the sum of \$40 per month as alimony pendente lite. It seems that defendant complied with this order until March, 1894. On February 19th the court made an order directing the defendant to pay plaintiff \$60 as counsel fee. Defendant having failed to pay plaintiff the alimony allowed and ordered to be paid for the month of March, 1894, and subsequent thereto, as well as said counsel fee, he was ordered to appear and show cause why he should not be adjudged guilty of contempt of court; and, having so appeared, he was on the 28th day of April, 1894, adjudged guilty of contempt of court for not complying with the said orders of court, and committed to the county jail of Silver Bow county until said alimony and counsel fee should be paid. On May 18th the defendant filed in court his petition and affidavit praying that the order adjudging him guilty, and committing him to the county jail for contempt of court, be modified, vacated, and set aside. This petition alleges that defendant had complied with said order to pay alimony until and for the month of February, 1894; that thereafter he was and has been wholly unable to comply therewith, or with the order to pay counsel fee; that he has no money or property whatever; that the only reason why he has not complied with said order is his inability to do so; that he is now confined in the county jail, and will be so confined in jail indefinitely, unless permitted to purge himself of contempt by showing his inability to obey the order of court in the premises. On motion of the plaintiff the court dismissed and refused to hear this petition "for the reason that the defendant was in contempt of court, and could not be heard until he had purged himself of said contempt." From this order, dismissing and refusing to hear defendant's petition, this appeal is prosecuted.

In State v. Second Judicial District Court (Mont.) 36 Pac. 757, which was a proceeding in certiorari in aid of habeas corpus, in this court, instituted by this appellant to be dis-

charged from custody under the order now involved in this appeal, this court said: "If the relator herein had made a regular application for a reduction of the alimony to the district court in which the suit was pending, he would have presented all of this showing as to his want of faculty to pay the alimony; that plaintiff could have rebutted such showing, and the court would then have determined whether the alimony should be re-On such determination an order duced. would be made, from which the defendant could have an appeal, and on such appeal this court would have made a review. But, as the matter is now before us, the question of reduction of the alimony has never been tried or determined in a proper proceeding by the district court, nor was there opportunity offered to so try and determine." In the case just cited this court held that a modification of the judgment for alimony should have been sought by a proceeding for that purpose. It appears from the record that the appellant, by filing his petition for a modification or the vacation of the judgment for alimony, was proceeding in accordance with the views of this court, as announced in State v. Second Judicial District Court, supra. By filing his petition for such relief he tendered an issue of fact involving his faculty or ability to comply with the order of the court. The allegations of the petition could have been denied by the plaintiff in the case, and then the court could have proceeded to try the issue as to appellant's ability to pay the alimony and fee he had been ordered to pay. It seems hardly in consonance with reason or law to punish a man for not doing that which he has not the ability to do, or to punish him, without a hearing, for not doing that which he declares he is powerless to do. The order of the lower court appealed from is reversed, and the cause remanded, with directions to proceed in accordance with the views herein expressed. Reversed.

HARWOOD and DE WITT, JJ., concur.

STATE ex rel. WOODS et al. v. TOOKER, County Clerk.

(Supreme Court of Montana. Sept. 24, 1894.)

AMENDMENT OF CONSTITUTION - PROCEDURE.

Compliance with Const. art. 19, § 9, requiring the secretary of state to publish proposed amendments in full for three months before the election to be held for their ratification, is essential to the validity of any amendment; article 3, § 29, making all the provisions of the constitution mandatory, unless expressly declared to be otherwise.

Mandamus by T. G. Woods, Nickolas Kessler, and Sherwood Wheaton against John S. Tooker, clerk and recorder of Lewis and Clarke county, to compel the filing of certificates of nomination as commissioners. Denied.

The relators ask a writ of mandamus, directed to the respondent, as county clerk and recorder of Lewis and Clarke county, requiring him, in pursuance to the ballot law (Acts 16th Leg. Sess. Laws 1889, p. 135), to file in his office the certificate of the relators' nomination for the office of county commissioner of said county. The petitioners set forth that on September 4, 1894, an assemblage of delegates of the Republican party was duly held, and that at such assemblage the three relators were duly nominated for such office of county commissioner. The formal acts of making the certificate of nomination by the proper officers of the convention are set forth in the petition. It is then alleged that said certificate was duly presented to the respondent for filing, and that he refused, and still refuses, to file the same. The respondent's answer admits all the matter alleged in the petition, and gives his reason for refusing to file the certificate, based upon the following facts: The nominations for said office of county commissioner were for the purpose of electing persons to that office, under the provisions of an alleged amendment to the constitution; and that there is in fact, no such amendment, and, there being no such amendment, there will be no vacancy in the office of county commissioner, in said county, to be filled at the ensuing election; and that, therefore, there is no duty enjoined by law upon the county clerk and recorder to file any certificate of nomination for such office by any political party.

The question presented to this court is whether the constitutional amendment proposed by the legislative assembly by act approved February 23, 1891, and voted upon by the electors at the general election in November, 1892, became, and now is, a part of the constitution. The facts in relation to the alleged adoption of the proposed amendment are as follows: The state constitution, adopted October 1, 1889, contains the following: "In each county there shall be elected three county commissioners, whose term of office shall be four years. A vacancy in the board of county commissioners shall be filled by appointment by the district judge of the district in which the vacancy occurs." 16, § 4. The act of the legislative assembly referred to, approved February 23, 1891, provides as follows: "Section 1. There shall be submitted to the qualified electors of the state, at the next general election, the following amendment to the state constitution: Section 4, art. 16, shall be amended so as to read as follows: Sec. 4. In each county there shall be elected three county commissioners, whose term of office shall be four years; provided, that the term of office of those elected to succeed those elected October 1, 1889, shall expire on the first Monday in January, 1895; and, provided further, that at the general election to be held in November, 1894, one commissioner shall be elected for a term of two years, and two commis-

sioners for a term of four years. A vacancy in the board of county commissioners shall be filled by appointment by the district judge of the district in which the vacancy occurs." The constitution provides, as to amendments of that instrument, as follows: "Amendments to this constitution may be proposed in either house of the legislative assembly; and if the same shall be voted for by twothirds of the members elected to each house, such proposed amendment, together with the ayes and nays of each house thereon, shall be entered in full on their respective journals; and the secretary of state shall cause the said amendment or amendments to be published in full in at least one newspaper in each county (if such there be), for three months previous to the next general election for members to the legislative assembly; and at said election the said amendment or amendments shall be submitted to the qualified electors of the state for their approval or rejection, and such as are approved by a majority of those voting thereon shall become part of the constitution. Should more amendments than one be submitted at the same election, they shall be so prepared, and distinguished by numbers, or otherwise, that each can be voted upon separately; pro vided, however, that not more than three amendments to this constitution shall be submitted at the same election." Article 19. § The fact as to the publication of the amendment proposed by the act of February 23, 1891, is that it was published by the secretary of state in the newspapers as required, but for two weeks before the election of 1892 only, and for no longer period. The question now presented is whether the publication of the proposed amendment for only two weeks caused the attempt to adopt the amendment to be wholly a failure.

Alex C. Botkin, for relators. C. B. Nolan, for respondent.

DE WITT, J. (after stating the facts). Counsel for relators has presented to us the general rules as to when statutes should be construed to be mandatory and when directory, and has argued, upon their analogies, that the provision of our constitution which requires a proposed amendment to that instrument to be published for three months is directory only, and that a disregard of the provision is not fatal to the adoption of the amendment. The reports are full of decisions which have applied these principles as to the construction of certain provisions of statutes, but we need not enter upon an elaborate examination of these principles, for we believe that in considering the provisions of the constitution for amending that instrument we are entering upon a somewhat different field. We cannot better introduce this consideration than by quoting from Judge Cooley, whose language we find cited, and his doctrine largely followed, by the courts which have

treated the subject of the construction of constitutional provisions. Judge Cooley says: "But the courts tread upon very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes to the provisions of a constitution. Constitutions do not usually undertake to prescribe mere rules of proceeding, except when such rules are looked upon as essential to the thing to be done; and they must then be regarded in the light of limitations upon the power to be exercised. It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims, and fix those unvarying rules, by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end. Especially when, as has been already said, it is but fair to presume that the people in their constitution have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, and with a view to leave as little as possible to implication. There are some cases, however, where the doctrine of directory statutes has been applied to constitutional provisions; but they are so plainly at variance with the weight of authority upon the precise points considered that we feel warranted in saying that the judicial decisions as they now stand do not sanction the application." Pages 94, 95. "And we concur fully in what was said by Mr. Justice Emmot in speaking of this very provision, that 'it will be found, upon full consideration, to be difficult to treat any constitutional provision as merely directory, and not imperative." Cocley, Const. Lim. (4th Ed.) p. 99. At another place in the same work this distinguished authority on constitutional law says: "But the will of the people to this end [that is, amending a constitution can only be expressed in the legitimate modes by which such a body politic can act, and which must either be prescribed by the constitution whose revision or

amendment is sought, or by an act of the legislative department of the state, which alone would be authorized to speak for the people upon this subject, and to point out a mode for the expression of their will in the absence of any provision for amendment or revision contained in the constitution itself." Page 39, § 30. In another place in the same work we find the following language: "The fact is this: that whatever constitutional provision can be looked upon as directory merely is very likely to be treated by the legislature as if it was devoid even of moral obligation, and to be, therefore, habitually disregarded. To say that a provision is directory, seems, with many persons, to be equivalent to saying that it is not law at all. That this ought not to be so must be conceded; that it is so we have abundant reason and good authority for saying. If, therefore, a constitutional provision is to be enforced at all, it must be treated as mandatory. And if the legislature habitually disregard it, it seems to us that there is all the more urgent necessity that the courts should enforce it. And it also seems to us that there are few evils which can be inflicted by a strict adherence to the law so great as that which is done by a habitual disregard, by any department of the government, of a plain requirement of that instrument from which it derives its authority, and which ought, therefore, to be scrupulously observed and obeyed." Page 183, \$ 150.

The court of appeals of Texas, in construing a constitutional provision, uses the following language: "In considering the subject, we think it necessary to first determine whether, in the construction of the organic law, we may, as we might in the construction of a statute, apply the distinction between directory and mandatory provisions, or whether we must construe all provisions of the organic law to be mandatory." Hunt v. State, 22 Tex. App. 397, 3 S. W. 233. The opinion of that court then refers to cases which have held constitutional provisions to be directory, and continues in the following language: "But, notwithstanding these decisions are by able courts, the great weight of authority seems to be the other way, holding that the courts nor any other department of the government are at liberty to regard any provision of the constitution as merely directory, but that each and every of its provisions must be treated as imperative and mandatory, without reference to the rules distinguishing between directory and mandatory statutes." 22 Tex. App. 398, 3 S. W. 233. The opinion then cites Judge Cooley as we have quoted him above, and continues: "In our own state we know of no instance in which a constitutional provision has been held to be directory merely. This court has held more than once that constitutional provisions are always mandatory, and has adopted the doctrine laid down by Judge Cooley, which we have quoted above. Cox

v. State, 8 Tex. App. 254; Holley v. State, 14 Tex. App. 505. We believe this to be the sound and only safe doctrine. It seems to us that the rule which gives to the courts and other departments of the government a discretionary power to treat a constitutional provision as directory, and to obey it or not, at their pleasure, is fraught with great danger to the government. We can conceive of no greater danger to constitutional government, and to the rights and liberties of the people, than the doctrine which permits a loose, latitudinous, discretionary construction of the organic law. 'We are taught by the constitution itself that those who administer this government are divided into three co-ordinate departments; each of these can only act within its own limited sphere, and they, respectively, are the servants of the sovereign power, the people. There is no power above the people. There is no discretionary power granted in the constitution for either of these departments, nor for all of them united, to exercise a discretionary expansion and flexible power against its rigid limitations, even though such limitations were imposed by improvident jealousy. If abuse exists by reason of defects in the constitution, present or prospective, the true source of authority, the people, have the power, and doubtless the wisdom and patriotism, to correct them; and this, in the American idea, is the safe and only depository.' Potter's Dwar. St. & Const. p. 665.

* * * Upon the weight of authority, and, to our minds, upon the soundest of reasons, we conclude that the provision of the constitution under consideration, and all other provisions of our constitution, are mandatory, and can in no case be regarded as directory merely, to be obeyed or not, within the discretion of either or all of the departments united of the government." 22 Tex. App. 399, 400, 3 S. W. 233. See, also, Opinion of the Justices, 6 Cush. 573.

It would seem that the framers of our constitution had in mind the views of Judge Cooley, for they did not leave the language of the constitution open to the construction of courts, but set the matter at rest by the following provision: "The provisions of this constitution are mandatory and prohibitory. unless by express words they are declared to be otherwise." Const. art. 3, § 29. The court is therefore relieved from much responsibility in the construction of the organic law. The question is not before us whether the requirement of the constitution that notice of a proposed amendment shall be published for three months is mandatory or directory. The constitution construes itself in this regard, and, as remarked in the opening of this opinion, we seem to be in a somewhat different field than that suggested by relators' counsel as to the construction of statutes.

It being settled that the provision under consideration is mandatory, the inquiry re-

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maining seems to be, what is the consequence of disobedience to the mandate of the constitution? Is the proposed adoption of the amendment nullified, or is the disobedience of the constitution to be treated as simply an omission by the secretary of state? A constitution differs from a statute in that a statute must provide the details of the subject of which it treats, whereas a constitution states general principles, and builds the substantial foundation and general framework of the law and government. It is true that it is a subject of general remark that the modern tendency of constitution makers is to somewhat depart from this practice; but the distinction between a statute and a constitution, as above suggested, certainly remains, and it is still true that constitutions do not generally descend into details. But when we find this practice departed from, and we observe a constitution going into details, such action is significant. Again referring to the eminent constitutional authority above quoted, we repeat: "It is the province of an instrument of this solemn and permanent character to establish those fundamental maxims and fix those unvarying rules by which all departments of the government must at all times shape their conduct; and if it descends to prescribing mere rules of order in unessential matters it is lowering the proper dignity of such an instrument, and usurping the proper province of ordinary legislation. We are not, therefore, to expect to find in a constitution provisions which the people, in adopting it, have not regarded as of high importance, and worthy to be embraced in an instrument which, for a time at least, is to control alike the government and the governed, and to form a standard by which is to be measured the power which can be exercised as well by the delegate as by the sovereign people themselves. If directions are given respecting the times or modes of proceeding in which a power should be exercised, there is at least a strong presumption that the people designed it should be exercised in that time and mode only; and we impute to the people a want of due appreciation of the purpose and proper province of such an instrument when we infer that such directions are given to any other end." Pages 94, 95. Thus Judge Cooley holds that if we find in a constitution that which some may undertake to argue should be held to be unessential, it was not intended to be unessential by the people in enacting the provision. See, also, Paving Co. v. Hilton, 69 Cal. 510, 11 Pac. 3, citing Koehler v. Hill, 60 Iowa, 554, 14 N. W. 738, and 15 N. W. 609, citing Cooley as above.

The Kansas supreme court, in a case before it, said: "The two important vital elements in any constitutional amendment are the assent of two-thirds of the legislature and a majority of the popular vote. Beyond these, other provisions are mere machinery and forms. They may not be disregarded, because by them certainty as to the essentials is secured; but they are not themselves the essentials." Prohibitory Amendment Cases, 24 Kan. 700. In reviewing this Kansas case, the supreme court of California uses the following language: "That the elements mentioned by the learned justice are important and vital cannot be doubted, but that they are the only important and vital elements cannot be conceded. The learned court here assumes, without any reason, that entering on the journals is not vital and important. The convention which framed the constitution of Kansas, and the people who adopted it and made it their paramount law, thought otherwise. This is plainly apparent from their inserting other elements in their constitution. It would be a rash assertion, and one which no sound principle of constitutional law sustains, that the words, 'such proposed amendments * * * shall be entered on the journal,' were inserted in the constitution of Kansas to be observed or not, as the legislature or any other department of the government of that state should think proper. If this is form and machinery, it is form and machinery established by the constitution. It is not unsubstantial and nonessential, but a part of the instrument, which all officers are sworn to support, as much as any other portion of the constitution; for when an oath is taken to support the constitution it embraces the whole instrument. These provisions may not be disregarded, for the reason, says the court, that by them certainty as to essentials is secured. We can conceive of no stronger reason why they should be regarded by legislators and courts. The constitution makers inserted them for that reason. They, in effect, ordain and declare that no other mode or form of machinery is permissible to secure certainty in doing the act permitted. Declaring that those requirements are nonessential is in effect saying that the convention which framed the constitution, and the electors which ratified their action, spent their time in framing and inserting in their organic and paramount law nonessential and unimportant provisions." Paving Co. v. Hilton, 69 Cal. 499, 500, 11 Pac. 3. We also find the following language used by the supreme court of Alabama: "We entertain no doubt that to change the constitution in any other mode than by a convention every requisition which is demanded by the instrument itself must be observed, and the omission of any one is fatal to the amendment. We scarcely deem any argument necessary to enforce this proposition. The constitution is the supreme and paramount law. The mode by which amendments are to be made under it is clearly defined. It has been said that certain acts are to be done, certain requisitions are to be observed, before a change can be effected. But to what purpose are these acts required, or these requisitions enjoined, if the legislature, or any other department of

the government, can dispense with them? To do so would be to violate the instrument which they are sworn to support, and every principle of public law and sound constitutional policy requires the courts to pronounce against every amendment which is shown not to have been made in accordance with the rules prescribed by the fundamental law." Collier v. Frierson, 24 Ala. 109.

In considering the provisions of our own constitution, and in the light of the decisions, we are clearly of the opinion that the requirement to publish notices of a proposed amendment for three months is not only mandatory, but that it is an essential provision, and that it must be obeyed. may add further that it seems to us to be a prudent and expedient provision. This requirement of the constitution provides a method for amending that instrument. It is also provided that the constitution may be amended, or a new one compiled, by a convention. Const. art. 19, § 8. This method, of course, is not now under consideration. But it may be said with us as it was said in Pennsylvania: There are only three methods by which a constitution may be changed: First, the method by amendment, as provided in article 19, \$ 9; second, by convention, as provided by article 19, § 8; and, third, by revolution. Wells v. Bain, 75 Pa. St. 39. The first method was attempted. But that method was not followed as prescribed. Instead, another method was followed; that is, a method identical with that provided in article 19, \$ 9, except that the advertisement was for two weeks only, and not for three months. As remarked in California, the constitution framers ordain and declare that no other form or mode or machinery is permissible to secure certainty in doing the act permitted. It is also held in the Alabama case, above cited, that an amendment cannot be made by a method other than that provided. We therefore have this situation: The method for amendment is provided by the solemnity of the constitutional enactment, and another method of amendment has been attempted to be invoked. We can see no other result but that such attempt is nugatory, and of absolutely no avail. The California supreme court, in constraing the provision that all of the constitution of that state should be mandatory and prohibitory, said: "We will add here that under our constitution no question can be made whether the provision in it for its amendment is mandatory or directory. That question is settled by the constitution itself, which ordains in the most solemn form and manner that each and all of its provisions are mandatory and prohibitory, unless by express words declared to be otherwise. Article 1, § 22. This section, in our judgment, not only commands that its provisions shall be obeyed, but that the disobedience of them is prohibited." Paving Co. v. Hilton, 69 Cal. 512,

11 Pac. 8. The Alabama case is also to the same effect,-that, if a method other than that provided is adopted, the attempt is nugatory. We also find it said in End. Interp. St. § 433, as follows: "It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, and that where an act requires a thing to be done in a particular manner, that manner alone must be adopted." If it is held that the command to the secretary of state to publish a proposed amendment for a certain period is nonessential, and may be disregarded, why may not the legislative department of the government follow the same practice, and disregard the requirement that the proposed amendment shall be voted for by two-thirds of the members elected to each house, or the requirement that the proposed amendment, with the ayes and nays of each house, shall be entered in full on their respective journals? If one requirement is nonessential, why is not another? And who is to say what is essential and what is not? And by what rules are such distinctions to be made? The constitution does not itself make them. The framers of that instrument made no distinction in the requirements. They made them all mandatory; and, if a court commences to nullify their commands by construction, we do not know where the court would commence, or where it would end, or where it would draw the line which the constitution says shall not be drawn.

We have felt wholly satisfied that the omission to publish the proposed amendment, as required by the constitution, is fatal to its adoption; but we have considered the question at perhaps some length, and have quoted from the authorities with much liberality, because this is the first time that such a question of construction has been before us. We cannot but be of opinion, with Judge Cooley, that we would be treading upon extremely dangerous ground were we to hold that a solemn constitutional provision was simply directory and nonessential when we face the express mandatory language of the provision, and also the additional and separate command of the constitution that the provision is mandatory. The command of the constitution is in no uncertain voice. We cannot misunderstand it. We cannot do other than render to it the obedience which our duty demands. It provides that an amendment may be adopted by certain methods. Those methods were not employed. Another method was resorted to. That method accomplished nothing. The amendment was not adopted. There being no amendment to the constitution, there are no offices of county commissioners in Lewis and Clarke county to be filled at the election to be held in November, 1894, and there is therefore no duty enjoined by law upon the county clerk and recorder of that county to file any alleged certificates of

nomination for such offices. The writ of mandamus is therefore dismissed.

PEMBERTON, C. J., and HARWOOD, J., concur.

STATE ex rel. LLOYD v. ROTWITT, Secretary of State.

(Supreme Court of Montana. Oct. 2, 1894.)

Constitutional Law — Location of Capital — Special Law—Mandamus to Officers.

1. Act March 6, 1891, providing for the submission to a vote of the question of the permanent location of the seat of government, is not a local or special law within the constitutional inhibition.

2. Where an officer, in advance of the time fixed by law for the performance of certain duties, refuses to perform them, mandamus at once lies to compel a performance at the proper time. Harwood, J., dissenting.

Mandamus to compel Louis Rotwitt, secretary of state, to certify to the clerk of each county the question of the choice between the cities of Helena and Anaconda for the permanent seat of government, as required by Act March 3, 1891. Writ denied.

W. W. Dixon and M. Kirkpatrick, for relator. Henri J. Haskell, Atty. Gen., for respondent.

DE WITT, J. This is a hearing upon the return of an alternative writ of mandamus. The alternative writ of this court was issued September 24th, commanding the secretary of state to perform certain acts, or show cause, on September 27th, why he should not be required so to do. The question involved is the refusal of the secretary of state to do certain acts alleged by relator to be his duty, enjoined by the ballot law of 1889 (Laws 16th Sess. p. 135). To arrive at an understanding of the question presented, the following facts may be stated: The constitution of the state provides: "At the general election in the year one thousand eight hundred and ninety-two, the question of permanent location of the seat of government is hereby provided to be submitted to the qualified electors of the state, and the majority of all the votes upon said question shall determine the location thereof. In case there shall be no choice of locution at said election, the question of choice between the two places for which the highest number of votes shall have been cast, shall be, and is hereby submitted in like manner, to the qualified electors at the next general election thereafter: provided, that until the seat of government shall have been permanently located the temporary seat of government shall be and remain at the city of Helena." Const. art. 10, § 2, p. 39. The second legislative assembly, on March 6, 1891, and before the first vote upon the question of the permanent location of the seat of government was to be had, passed "An act providing for the submission of the question of the permanent location of the seat of government." See 2d Sess. Laws 1891, p. 291. This act differs in some details from the general ballot law of 1889 (16th Sess. Laws 1889, p. 135). These details will be noted below. The affidavit filed, upon which the application was made, and upon which the alternative writ of mandamus was issued, is as follows, in full:

"In the Supreme Court of the State of Montana. State of Montana, County of Lewis and Clarke-ss.: Charles F. Lloyd, being first duly sworn, deposes and says: That he is a resident of the county of Silver Bow, state of Montana, and is a citizen of the United States and of the state of Montana. and is a duly-qualified elector and taxpayer of said state. That under and by virtue of the provisions of section 2, article 10, of the constitution of the state of Montana, the question of the permanent location of the seat of government of the said state was duly submitted, at the general election held in the said state in the year 1892, to the qualified electors thereof. That more than two cities or towns of the said state of Montana were voted for at the said election, but neither of the places voted for received a majority of all the votes cast upon the said question, and there was no choice of location at the said That Helena and Anaconda, two of the cities of the said state of Montana, voted for at the said election, received the highest number of votes cast at the said election, and the question of choice between the said two cities—that is to say, the question as to which one of the said two cities shall become the permanent seat of government of the said state-is directed by the constitution thereof to be submitted to the qualified electors of the said state at the general election to be held therein on the sixth day of November, 1894. That Louis Rotwitt is the secretary of state of the state of Montana, duly elected, qualified, and acting. That by section 14 of the act of the legislature of the former territory of Montana, entitled 'An act to provide for printing and distributing ballots at the public expense, and to regulate voting at territorial and other elections,' approved March 13, 1889, which is a law of said state, it is, as afflant is informed and believes, made the duty of the said Louis Rotwitt, as such secretary of state, not less than thirty days before the said election last above named, to certify to the clerk of each county in the said state of Montana the said question of choice between the said cities of Helena and Anaconda for the permanent seat of government, aforesaid, and it is thereby made the duty of the clerk of each county to include the same in the publication which he is directed to make by the tenth section of said act; and it is further, by said act, made the duty of the clerk of each county to provide and have printed for the use of the electors of his county the regular general ballots for said election, and to have printed on the said ballots the said question, in such form as will enable the electors to vote thereon in the manner provided by the said act; and it is further provided by said act that ballots other than those printed by the said county clerks, respectively, according to the provisions of said act, shall not be cast or counted in any election. This affiant is informed and believes that the said Louis Rotwitt, as secretary of state aforesaid, does not intend to comply with, and will not comply with and observe, the provisions of the above-recited act of March 13, 1889. That he does not intend to and will not certify said question of choice between Helena and Anaconda, aforesaid, to the county clerks, as required by said act; and that he intends and is about to prepare and have printed a ballot other than the general official ballot which said clerks are required by said act to prepare and have printed,-that is to say, a separate ballot upon said question of choice between said cities,and that he intends to distribute the same in sufficient quantities to said clerks as official ballots, to be by said clerks distributed for the use of the electors of their respective counties in voting upon said question. said Rotwitt intends, and will, unless otherwise directed by this court, proceed in the matter of said election under the provisions of the act of the legislature of the state of Montana entitled 'An act providing for the submission of the question of the permanent location of the seat of government,' approved March 6, 1891; whereas, affiant is advised, and alleges, that the said act last named is unconstitutional and invalid, and that the said act of March 13, 1889, heretofore referred to, is the law which should govern the action of the said secretary in the submission of the said question to the electors of Montana, and under which the said secretary should proceed to perform the duties required of him by law. Affiant is advised that said contemplated and intended action of the said Louis Rotwitt, secretary of state, aforesaid, is illegal, and not in conformity with the requirements of the law of Montana in such case made and provided. This affiant states that he has demanded, to wit, on the 24th day of September, 1894, of the said Rotwitt, secretary of state aforesaid, that as such secretary he conform to and observe the requirements of the said act of March 13, 1889; but that he, the said Rotwitt, refused, and still refuses, to do so, and refuses to certify said questions of choice to said clerks, and declares his intention to prepare, have printed, and distribute said separate ballot as the official ballot upon said question, for the use of the electors throughout said state at said election. That by the provisions of said act of March 13, 1889, the said secretary of state is required to certify to said county clerks the said question of choice, not less than thirty days before the said election, to wit, on or before the 6th day of.October, 1894; and it is therefore necessary that the validity of the action intended to be taken by the said secretary, as hereinbefore set out, should

be determined by the court as speedily as possible. That there is no plain, speedy, and adequate remedy in the ordinary course of law. Wherefore he prays that this honorable court may order the issuance of an alternative writ of mandate, commanding said Rotwitt, as such secretary of state, immediately after the receipt of said writ, to certify said question of choice to the clerk of each of the counties of the state of Montana, as required by the said act of March 13, 1889, and to conform in all respects in the submission of said question to the requirements of said last-mentioned law, or to show cause, at such special time and place as the court may appoint, why he has not done so. Charles F. Lloyd.

"Subscribed and sworn to before me this 24th day of September, A. D. 1894. [L. S.] Benjamin Webster, Clerk of the Supreme Court, State of Montana."

The alternative writ issued upon this application commanded the respondent that, upon the receipt of the writ, he proceed to certify to the clerk of each county the question of the choice between the cities of Helena and Anaconda for the permanent seat of government, and to do all other things upon his part required to be done by the act of March 13, 1889, or that he show cause before this court, on September 27th, why he should not do so. The respondent made return to the writ September 27th. He admitted that he did and does refuse to certify the names of said cities, as above described, and that he does not intend to follow certain provisions, described, of the general ballot law of 1889. but that he will perform the duties as to the capital election as laid down in the act of 1891, described in the relator's affidavit. The question presented is whether it is a duty enjoined by law upon the secretary of state to perform the said certain acts defined by the law of 1889.

The general ballot law of 1889, popularly known as the "Australian Ballot Law," was a part of the body of the territorial laws existing at the time of the adoption of the constitution, and became, with the adoption of the constitution, a law of the state. It was such when the second legislative assembly met in 1891. The legislature found that in the following year-1892—the question of the location of the state capital was, by the constitution, to be submitted to the electors of the state. It would appear that the legislature considered that the general ballot law of 1889 was not, in all of its provisions, a wholly suitable method for submitting the question of the capital location. They therefore enacted the law of March 6, 1891. See 2d Sess. Laws, p. 291. This law provided a method for submitting this question to the electors, which followed the general spirit and system of the general ballot law,-the system, as we have observed, which is called the "Australian Ballot Law." But this law of 1891 differs from the law of 1889 in some of its details. For example, it requires the

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secretary of state to publish the notices of election, and to prepare, print, and distribute to the county clerks the ballots upon the capital question; whereas the law of 1889 required that the secretary of state should certify all questions to be submitted to the people to the clerk of each county, and it was the duty of the county clerk to include such question in the publication which he made. See Ballot Law of 1889, § 14. The relator here demands that the secretary perform the duty enjoined upon him by the law of 1889, and that he certify the names of the cities to be voted for to the county clerk of each county, and perform all other acts required by the law of 1889. The secretary contends that he is not enjoined by law to perform the said duties defined by the act of 1889, where there are other acts required by the law of 1891 which are inconsistent with the law of 1889.

The writ of mandamus may be issued by this court to the secretary of state to compel the performance of an act which the law especially enjoins as a duty resulting from his office. Code Civ. Proc. § 566. The general ballot law of 1889 enjoins upon the secretary of state, as a duty resulting from his office, that he certify to the county clerks a question to be submitted to the people of the state, and that he do certain other things. He refuses to perform these alleged duties. Why? Because he contends that these certain provisions of the law of 1889 are in this case superseded by the law of 1891, and that, therefore, the said certain duties prescribed by the law of 1889 are not at this time duties enjoined upon him, but that he must, under the law of 1891, perform other and different duties inconsistent with the provisions of the law of 1889. This is an alternative writ of mandamus, whereby the respondent is commanded to do the act or acts named, or show cause why he should not be so required. He has shown his cause. We should naturally suppose that an inquiry upon a hearing of this sort would be, is the duty alleged to be enjoined by law upon the secretary of state a duty so enjoined? The relator holds up the law of 1889, and says that it is. retary appeals to the law of 1891, and says that it is not. How can we determine whether the law of 1889 does indeed enjoin the duties under consideration, and alleged to rest upon the secretary of state, unless we determine whether the law of 1889 is of force as to the secretary of state in this matter, and controls and commands his action? If it does so control and command him, he is refusing to perform a duty enjoined by law as a result of his office. If it does not so control and command him, he is not refusing to perform a duty enjoined upon him as a result of his office. This seems to be a matter to determine. We know of no way to determine it except to inquire whether the said provisions of the law of 1889 are superseded, as to this capital election, by the law of 1891; for, if not so superseded, they would seem to be in force as against the secretary. volves, of course, deciding whether the law of 1889 or the law of 1891 is the rule of action for the secretary in this matter. To be sure, it is not the function of a court to advise a state officer as to his duty, or to decide fictitious cases for the information or enlightenment of any one. But if deciding a contention does inform and enlighten a state officer, or any one else, that fact is not, in itself, an objection to the making of a decision. It would seem to be necessary to decide, in a mandamus case, whether the duties alleged to rest upon respondent by provision of statute do so rest upon him in the particular matter under consideration; and we do not understand why such decision should not be gone into because it requires the determination as to which of the two laws should be followed by the secretary of state, or because, by reason thereof, such an officer obtains light upon such subject. In the case at bar we are clearly of opinion, as shown below, that the secretary of state is correct in obeying the provisions of the law of 1891, and ignoring the provisions of the law of 1889, where the two are in conflict. He is performing his duty, and is not refusing to perform any duty enjoined by the law of 1889. That is the question raised upon considering whether the alternative writ shall be made peremptory. And because the secretary of state is not so refusing to perform a duty enjoined by law, it will be ordered that this alternative writ of mandamus be dismissed.

There has come into this case a suggestion that this is not a proper case of mandamus to be entertained by this court. We do not quite understand the ground of this suggestion. If it be that the secretary of state is performing his duty, and not refusing to perform any duty, and that, therefore, we have naught to do with him, that brings the consideration right down to our position: that is, that we dismiss the writ because the alleged enjoined duty is not indeed so enjoined. But if conditions were reversed, and the secretary were indeed refusing to perform a duty clearly enjoined upon him as a result of his office. we understand that a mandamus would lie. Code Civ. Proc. § 566. And we see no reason why it should not lie upon the refusal of the secretary at a time when the writ would have the effect of accomplishing the performance of the enjoined duty by the secretary, instead of waiting for the time when it was too late for performance, and the evil results of the nonperformance, if any there were, had become accomplished facts, and irremediable. These duties of the secretary of state, under the election laws, are ministerial, and not judicial, and we do not understand that decisions of courts are in point which refused mandamus or injunction sought to be directed to judicial officers to command them how to perform judicial acts, -that is, deciding for such judicial officers

which of two or more courses they should pursue,—the pursuance of which rested within their judicial discretion. Such cases, not here in point, are found in Gaines v. Thompson, 7 Wall. 347, and the cases there cited. The books are full of decisions to the same effect. The distinction between these cases and that before us is perfectly apparent, and does not need comment. The following is quoted in Gaines v. Thompson, from State v. Johnson, 4 Wall. 475: "A ministerial duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple, definite duty, arising under circumstances admitted or proved to exist and imposed by law." So, in the case at bar, the duty of the secretary of state, under the law of 1889, is "a simple, definite duty, arising under circumstances admitted or proved to exist, and imposed by law," if the law of 1889 is in force; and whether that law is in force as to this matter is the question before us.

We have said thus much upon this branch of the case. It was not mentioned by counsel, and we should not have treated it had it not been an occasion for disagreement among the members of this court. It is quite true that the contention of relator's counsel was not strenuous, and they made no vigorous effort to support the position of their client. Indeed, it may as well be as frankly stated in this opinion as it was in the argument of counsel that the counsel considered that it was not so important how this case was decided as that it be decided. But we do not think that this is a reason for our not deciding it at all. The contention is here made by the record, and we have quoted the affidavit on the application in full; and, examining the case upon the record, we think that there is sufficient therein to entitle both parties to a decision. In consideration of the view that we take of the merits of this application, no harm would be done in this case if we expressed no opinion as to whether the duty is enjoined upon the secretary to follow the said certain provisions of the law of 1889 which are under consideration. cases could readily arise where great harm would occur if the court were to stand idly by, and refuse a decision to an applicant for mandamus, who sought to compel an officer to do a ministerial act, and sought to compel him at the only time when the doing thereof would be effective. Take, for example, the case of State v. Tooker (decided by this court a few days since) 37 Pac. 840. There the secretary of state did not publish a proposed amendment to the constitution, in the time required by the constitution. If, in time to make that required publication, application had been made in this court, stating that the secretary refused to make such publication, and would not make it, as required by law, we are of opinion that the court would issue a mandamus requiring him to do so, and would not wait to determine whether or not he should do so until some future time when litigation arose, and when it was too late to require the performance of that defined duty.

Coming to the merits of this application, the position of the relator is simply this: The law of 1889 must now obtain, because the law of 1891 is unconstitutional and void, and is not a law. It is unconstitutional because it is special legislation, and prohibited by the provisions of the constitution, which states that the legislative assembly shall not pass any local or special laws in any of the following enumerated cases, among others: The opening or conducting of any election, or designating the place of voting. The suggestion is made that this law of 1891 is invalid, as falling under the ban of this prohibition, in that it is a special law as to conducting an election. As above noticed, the contention to this effect was not at all strenuous, and we are of opinion that it clearly cannot be sustained. In the case of In re Dewar's Estate, 10 Mont. 426, 25 Pac. 1026, this court had under consideration an act of the legislature changing the fees of a public administrator. It was sought to apply to that act of the legislature the provisions of the restriction act of congress, which controlled our legislature then, as does the constitution above cited now. In that case we said: "The restriction act forbade only the passing of any local or special law upon the subject indicated. The only inquiry, therefore, before us is whether the act of September 14, 1887, was local or special. The operation of the act is not upon any particular person or officer, nor in any certain locality or localities in the territory. It applies to all executors and administrators, public and private, throughout the territory. shadow or pretense of reason there is to pronounce this act local or special is not apparent to us. On the other hand, that it is not local or special seems to us perfectly clear, and so undisputably sustained by the decisions that to discuss the proposition or review the cases would be an uninstructive compiling of elementary and well-understood law. Suffice to refer to a few authorities: State v. Parsons, 40 N. J. Law, 1; Wheeler v. Philadelphia, 77 Pa. St. 338; McAunich v. Railroad Co., 20 Iowa, 338; Haskel v. Burlington, 30 Iowa, 232; Land Co. v. Soper, 39 Iowa, 112; Railway Co. v. Hanniford, 49 Ark. 291, 5 S. W. 294; Dow v. Beidelman, 49 Ark. 325, 5 S. W. 297; Montague v. State, 54 Md. 481; Abeel v. Clark, 84 Cal. 226, 24 Pac. 383; State v. Miller, 100 Mo. 439, 13 S. W. 677; Longan v. County of Solano, 65 Cal. 122, 3 Pac. 463; Brooks v. Hyde, 37 Cal. 366; Humes v. Railway Co., 82 Mo. 221; Skinner v. Bogert, 42 N. J. Law, 407; Ewing v. Hoblitzelle, 85 Mo. 64; State v. Tolle, 71 Mo. 650; Darrow v. People, 8 Colo. 417, 8 Pac. 661; In re Church, 92 N. Y. 1; State v. Hawkins, 44 Ohio St. 98, 5 N. E. 228; and many cases in Sedg. St. &

Const. Law, pp. 534, 535, 539, notes." 10 Mont. 442, 443, 25 Pac. 1026.

Looking at the act of the legislature as to the capital location ballot from the point of view of the prohibition of the constitution, it is seen, in the language of the Dewar Case, that the operation of the act is not upon any particular person or officer, nor in any certain locality or localities in the state. It applies to all persons alike. It is not a local law. It extends over the whole state. It applies to every county, every precinct, and every voter. Every voter in the state casts his vote for the capital under its provisions. There is no suggestion made as to why it should be considered a special law, and no reason to this effect occurs to us. Although the law of 1889 was adopted by the constitution, it was a law only until changed by future legislation. It was not wholly suitable and applicable to this capital election. In these details the law of 1891 made some changes. It operates uniformly upon all persons who are brought within the retations and circumstances provided for by it. It is said in McAunich v. Railroad Co., 20 Iowa, 343, in speaking of a law contended to be special: "It applies to all railroad corporations now in existence, or which may hereafter exist, and is just as general and uniform as it would be if applied to all common carriers; and in the latter case, it is conceded by appellant's counsel, in their printed argument, the law would be valid. Very many laws, the constitutionality of which is not doubted, do not operate alike upon all citizens of the state. Take the case of the general laws for the incorporation of cities and towns, which is one of the special cases enumerated in article 3, § 30, supra, in which the laws must be general and of uniform operation. By these laws, certain rights, powers, and privileges are conferred upon cities of the first class, of which there are but three or four in the state. Certain other different and less powers and privileges are conferred upon cities of the second class, and still different and less upon towns. The same is true of corporations organized for different purposes. Each class has its powers and privileges, different from the These laws are general and uniother. form, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the law. They are general and uniform in their operations upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of persons within the scope of their operation." Pages 343, 344. So with our act of the legislature of 1891; it operates alike and uniformly upon all persons and places brought within its purview. The law is not special, and is not unconstitutional. That there is a proper case before us for the expresion of this view we have attempted to show above. It is ordered that the writ be dismissed.

PEMBERTON, C. J., concurs.

HARWOOD, J. (dissenting). This proceeding ought to have been dismissed without considering and deciding the questions presented thereby, because, according to the course of law and practice, these questions are not now properly before this court for determination. Neither the writ of mandamus nor injunction can be legally invoked as an indirect method of instructing or advising officers of the executive department as to duties imposed upon them by law, and in what manner they shall perform the same, especially in cases like the one at bar, wherein the officer asserts his intention to perform the duties required when the time arrives for his action. Gaines v. Thompson, 7 Wall. 347; Arberry v. Beavers, 55 Am. Dec. 791. Nor can the consideration of courts be legally invoked to determine a mere dispute raised by an individual with an officer as to what particular public duties the law imposes upon his office for future execution. The facts presented in this case show simply such a dispute, raising a feigned issue, for the purpose of drawing from this court, if possible, an authoritative judicial response determining the same, and thereby to instruct and direct the secretary of state in the future performance of his duties on the subject mentioned. The courts have uniformly refused to entertain and respond to that character of issues, whether sought to be presented by mandamus or injunction. Therefore, in my opinion, this proceeding should have been dismissed with that remark, and without deciding the dispute sought to be presented for determination. The writ of mandamus lies in cases (where there is no other plain, speedy, and adequate remedy) to compel the performance of ministerial acts enjoined upon an officer by law, which acts the proper officer refuses to perform. This proceeding involves no such case. Nor is it even so pretended in the argument thereof by relator's counsel. The case presented by relator's petition, in substance, is that, the permanent location of the capital or seat of government of this state being a question required by law to be submitted to the qualified electors thereof at the next ensuing general election, and the secretary of state being required by law to perform certain official acts in relation to the submission of that question, he must, by careful consideration of the provisions of the law, and perhaps by availing himself of legal counsel, ascertain what acts or duties the law prescribes for him to perform in reference to that subject; that in view of these conditions it appears relator, a citizen and qualified elector, called upon the secretary of state, and inquired of him how he proposed to discharge said duties. If the secretary of

state had replied that he proposed to discharge those duties as the law prescribed, it would then have been difficult for relator to have raised any controversy with the secretary upon the subject. In such event relator would have been unable to accomplish the end sought, that is, to raise a dispute with the secretary of state as to what the law requires of him in the premises, and bring that controversy immediately into court for decision, unless relator had applied to the court by way of writ of mandamus to compel the secretary of state to narrate to relator or his counsel, in detail, all of the acts and things which the law required of him on that subject, as he understood it. But the secretary of state, having informed himself of the duties devolving upon his office in this matter, obligingly pointed out to his interrogator the law governing his action, and the particular acts he must perform in order to fulfill its requirement, as the secretary of state understood it. And according to the decision of the majority of this court the secretary had so carefully considered the various provisions of law on this subject as to be correct in his interpretation of them in ascertaining his duties in the premises. The time had not yet arrived for action by the secretary of state when he was thus interrogated by the relator, but his duties were to be performed in the future. He neither refused nor proposed to neglect the performance of any duty in the premises required of him by law, as he had ascertained and understood the requirements of law; but, on the contrary, asserted his purpose to discharge all of these duties at the time and in the manner prescribed. But, as appears, in order to bring a case into court, and procure, if possible, a judicial decision, in advance of any action on the part of the secretary of state, either affirming the correctness of the secretary's interpretation of the laws relating to the submission of said question, or pointing out some error therein, relator demanded, as he alleges, that the secretary of state, when the time for action on his part should arrive, shall do otherwise than his counsel, consideration, and judgment had led him to believe the law required of him in discharging his public duties on that subject. In other words, the demand was that the secretary of state should adopt and follow another interpretation of the law, proposed or suggested by the relator; and upon the secretary declining to comply with such demand, or declining, rather, to promise to adopt and follow the interpretation suggested by relator, who assumed the role of interrogator and counselor of the secretary of state, relator straightway brings into this court, under the name and style of a mandamus proceeding, the dispute which he had thus raised with the secretary of state, and seeks from this court a response as to whether relator's contention is correct, or whether the secretary had rightly interpreted the provisions of the law on the subject under discussion. In the presentation of the case relator's counsel frankly admit that they are quite indifferent as to which way the decision may turn, so that there is a decision of the dispute, carrying the authority and weight of a determination of this tribunal. They wished merely to propound to this court the question which relator has raised with the secretary of state, and receive a response in the form and bearing the weight of a judicial determination by this court as to which of the two possible interpretations of the law must be followed by the executive department of this state in discharging in the future its public duties on that subject; in a case, too, where the particular officer of that department whose duty it is to act has signified his intention and determination to act fully as the law prescribes.

It is needless to do more than state the case, with the circumstances of its production, to show at once the entire lack of a legitimate cause for judicial determination set forth therein. Nor can the form of verbiage, nor the device of feigned demand, infuse into it the substance of such a cause. These devices only give it the mere sound of a proceeding in mandamus. Relator shows no substantial grievance whatever, either public or private, to be redressed, unless it be a mental grievance. His only grievance is that his mind is not quite clear as to whether the secretary's mind is clear on the subject of his duties in presenting the capital question to the people. The secretary of state shows, in his answer and presentation of his counsel, that he has, with much care and caution, sought out and arrived at a conclusion as to what duties devolve upon his office in this matter. He expresses no doubt about the correctness of his conclusion, and asserts his purpose to discharge these duties fully, unless interfered with by some superior power. Relator hopes the secretary is right, but still he gives this court to understand that there is a doubt in his mind,not exactly a reasonable doubt, which he or his counsel can well explain, or by reason of which they insist with emphasis on another interpretation, yet a vague doubt, accompanied by a slight fear that, if some one in the future should question the action of the secretary of state, it might occasion some inconvenience, haunts the mind of relator, as his counsel inform this court,—which doubt and fear can only be dispelled, and relator's mind set at rest, by a decision of this tribunal. Such is the case presented, and nothing more. There is no sanction in practice or precedent to warrant the entertainment and judicial consideration and determination of the question thereby propounded, unless this court propose to institute the practice of solemnly handing down responses to legal propositions which might in the future be involved in some cases. Something on the style of responsa prudentum, in vogue

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among the Roman jurists but entirely distinguished therefrom, because the responsa prudentum "was not of the bench, but of the bar;" the opinions of learned jurists, not decisions promulgated by and endowed with the weight of judicial authority. Ancient Law, 32; 1 Kent, Comm. 230. the case of Gaines v. Thompson, 7 Wall. 347, Mr. Justice Miller, delivering the unanimous opinion of the court, approvingly quotes from the case of Commissioner of Patents v. Whiteley, 4 Wall. 522, the language of Chief Justice Taney, as follows: "Some of the observations of Chief Justice Taney in delivering the opinion in the former are so pertinent to the case before us, and state so well the relations of the judicial branch of the government to the officers engaged in the executive branch, that they may well be reproduced here. Speaking of the functions of these officers, he says: In general, such duties, whether imposed by act of congress or by resolution, are not mere ministerial duties. The head of an executive department of the government, in the administration of the various and important concerns of his office, is continually required to exercise judgment and discretion. He must exercise his judgment in expounding the laws and resolutions of congress under which he is required to act.' 'If,' he says, 'a suit should come before this court, which involved the construction of any of these laws, the court certainly would not be bound to adopt the construction given by the head of the department; and if they supposed his decision to be wrong, they would, of course, so pronounce their judgment. But this judgment, upon the construction of the law, must be given in a case in which they have jurisdiction, and in which it is their duty to interpret the acts of congress, in order to ascertain the rights of the parties before them. The court could not entertain an appeal from the decision of one of the secretaries, nor revise his judgment in any case where the law authorized him to exercise judgment or discretion. Nor can it by mandamus act directly upon the officer, and guide and control his judgment or discretion in the matters committed to his care, in the ordinary exercise of his official duties. * * * The interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief, and we are quite satisfied that such a power was never intended to be given them.' the same effect are also the cases: U.S. v. Seaman, [17 How. 225]; Same v. Guthrie. [Id. 284]; Same v. Commissioner of Land Office, [5 Wall. 563]." Indeed, the whole opinion of Mr. Justice Miller in that case might be pertinently quoted here as showing that in entertaining and judicially treating the dispute presented in the case at bar this court has departed very far from the judicial province. To the same effect also is the holding of the supreme court of the United States | defendant in error.

in the case of Decatur v. Paulding, 14 Pet. 497. But, as before observed, I apprehend the controversy presented by relator in this case is so obviously outside of the province of judicial cognizance that it ought to require no citation of authority to establish that suggestion. But the entertainment and decision of this case sets the precedent, and establishes the practice for its kind in this jurisdiction. Therefore the way is open to call upon the judiciary to decide disputes which individuals may raise with public officers as to their public duties, prescribed by law for future execution, and which the officer in no manner proposes to neglect. But, in order to instruct them, or to obtain a judicial holding, in advance of their action, and in an ex parte proceeding, that the course about to be pursued is correct beyond all future question, let the person so desiring inquire what the officer proposes to do in respect to the subject, and dispute the correctness of his view, and demand that he do otherwise, however unfounded. There you have a case on all fours like the present one for judicial consideration and determination. This fashion of feigned dispute will no doubt be frequently resorted to in this jurisdiction as a convenient method of obtaining judicial decisions before action of the officer is taken, and before cases actually arise, "to save future inconvenience." It would apply conveniently to tax levies and sales, to quiet titles, etc., to questions as to issuing of bonds, sale of state lands, elections, and a multitude of other cases wherein officers of the executive department must perform public duties. Such actions will be brought for the purpose of instruction and repose. But, in my opinion, as said in Gaines v. Thompson, supra, such "interference of courts with the performance of the ordinary duties of the executive departments would be productive o. nothing but mischief."

PITMAN v. CITY OF EL RENO.
(Supreme Court of Oklahoma. Sept. 8, 1894.)
MUNICIPAL CORPORATIONS—DEFECTIVE SIDEWALK—LIABILITY FOR INJURIES.

Whether one injured while walking on sidewalk at night, with knowledge that it is defective, and looking for the defect at the time, is guilty of contributory negligence, is a question for the jury.

Error to district court, Canadian county; before Justice John H. Burford.

Action by Moses Pitman against the city of El Reno. The court sustained a demurrer to plaintiff's evidence, and gave judgment for defendant. Plaintiff brings error. Reversed.

Forest & Gunn, E. E. Jennings, and W. H. Criley, for plaintiff in error. D. W. Talbott, John I. Dille, and John Schmook. Jr., for defendant in error.

SCOTT. J. This is an action for damages for personal injuries, alleged to have resulted from a defective sidewalk in the city of El Reno on the 12th day of September, 1893. Judgment for \$10,000 is prayed for. The case was tried in the district court for Canadian county on the 14th day of December, The jury was impaneled on the 14th day of December, 1893, and the plaintiff introduced all his testimony and rested. Thereupon the defendant filed a demurrer to the evidence, which was sustained by the court. The case comes to this court on error. The only question necessary to consider is whether the court erred in sustaining the demurrer, discharging the jury, and rendering judgment for the defendant. It appears from the testimony that the defendant in error is and was a city, duly incorporated, at the time the injury occurred; that Bickford avenue was, at the said time, the principal thoroughfare of said city, in daily use by the public; that on the west side of said avenue, between the streets of Woodford and Russell, at and before the time of the injury, there was kept and maintained a sidewalk; that in the month of September, 1892, and for a long time prior thereto, there existed in said sidewalk a defect, of which the defendant in error had due notice; that said defect consisted in an offset in said walk of about eight inches, and between the high and low walk there was a space of six or eight inches, not covered by plank or board, which space extended across the entire width of said walk; that on the 12th day of September, 1892, after dark, the plaintiff in error was passing along said street upon said sidewalk, and, while so passing, stepped into the said open space, and fell in such a manner as to badly bruise the muscles of the posterior portion of one of his legs, from which injury he suffered much pain, and was compelled to remain in doors for a period of about six weeks; that, at the time of the injury, he had full knowledge of the existence of said defect, and of its danger and the exact location; that the time of the injury was after night; that his vision was dim and impaired; that the defect was in a dark place in the street, where no light shone from the adjoining building; that, at the time of the accident, the plaintiff in error was looking for and seeking to avoid said defect; that he had been for a long time passing along said walk every day, attending to his business,—that of an hotel keeper.

The case, we think, turns on one proposition: Was there sufficient evidence to sustain the judgment for plaintiff in error, or, had a verdict in any amount, not excessive, been returned by the jury, could this court allow it to stand? If the evidence was insufficient to sustain a verdict in case one should have been rendered, then it follows that the court was correct in sustaining the demurrer. If, however, the testimony was sufficient, taking all as true, and drawing

reasonable inferences therefrom, and excluding conflicting testimony, then it follows that the court erred in sustaining said demurrer, and the case should be reversed.

Did the plaintiff have the right to pass along said street and walk, knowing, as he did, of the existence and location of the defect? The principal case relied upon by defendant in error is Wright v. City of St. Cloud (Minn.) 55 N. W. 820, in which it is held that, since the injured person had a present knowledge of the defect, the corporation was not liable for the injury. We doubt the correctness of this doctrine as applied to the case at bar, and, when the opinion is read, we hardly think the view, as a legal proposition, is maintained. In the case cited, the defendant was a small town in the northern country, and the action was for injury in falling on a path over a portion of sidewalk, which had not been properly cleared of snow and ice. The plaintiff knew in that case that the place was dangerous, and was herself to blame for exposing herself in that manner. The court, in the opinion, seemed to circumscribe itself, for fear of imposing too great a burden upon small towns, in that climate, in keeping the walk clear in remote parts of the town, and thus held that the person injured was guilty of negligence per se. In the text of the opinion, we find the following language: "The general, if not the universal, doctrine is that the duty of a city to exercise reasonable care to keep its sidewalks in safe condition for travel is not limited to structural defects, but extends also to dangerous accumulations of snow and ice. This is implied, if not decided, in Henkes v. City of Minneapolis, 42 Minn. 530, 44 N. W. 1026. In this climate and in this new state the duties of cities with respect to ice and snow must necessarily be somewhat limited, and care should be taken that they be not held to a degree of diligence beyond what is reasonable, in view of their situation. What reasonable care might require in a milder climate or in an older country, where cities are more compactly built, might be too high a standard in this climate for new cities, often embracing within their limits much territory that is more rural than urban." The other cases cited by defendant in error are decided upon the same theory. In the case of City of Centralia v. Krouse, 64 III. 19, the court used the following language: "Having undertaken to go where he knew it was positively dangerous, it must be held that he did so at his own peril. It was in daylight, and he could see that the walk was full of danger holes, and was all covered with snow and ice, and it was culpable negligence in him to undertake to pass over it. It was probably dangerous for any one, and it was highly imprudent in one so far advanced in life, to undertake to pass over the walk in its then condition, and covered, as it was, with snow and ice." Another case, seeming to sustain the theory of the defendant, is that of Durkin v. Troy, 61 Barb. 437, where it is held: "Now, the foundation of the plaintiff's cause of action, if he had one, is that this piece of ice was a dangerous obstruction to the passage of those using the sidewalk for that purpose, which the city was bound to remove, and the danger consisted in the liability of those who stepped upon it to slip and fall. The obstruction was therefore one to be avoided by those using the sidewalk, and seeing or being able to see the ice; and, if it could readily be avoided, the failure to avoid it, by one using the sidewalk, and plainly seeing the obstruction, must be accounted negligence." In these cases it seems to be the theory of the court that sidewalks covered with snow and ice are actually dangerous, and in this they are probably correct. There is a difference, however, between a defective place, which may result in injury, and one which is so dangerous that passing over it is nearly certain to result in injury. If the action of the plaintiff in error would, in the usual course of events, have resulted in injury, the court very properly sustained the demurrer. Contributory negligence is nothing more nor less than negligence on the part of the person injured, and the rules of law applicable to negligence of a defendant are applicable thereto. Beach, Contrib. Neg. The fact that a person attempts to travel on a street or sidewalk after he has notice that it is unsafe or out of repair is not necessarily negligence; but, of course, one cannot needlessly or recklessly run into dan-Corlett v. City of Leavenworth, 27 Kan. ger. If a person attempts to pass over a sidewalk, bridge, or other structure, knowing the same to be in a dangerous condition, and, in such attempt, receives injury, his knowledge of the danger will, presumptively, establish contributory negligence; but such presumption is not conclusive. Olsen v. City of Chippewa Falls (Wis.) 37 N. W. 575.

In the case at bar the walk was a public thoroughfare, used by the entire public daily; and we think the public was not bound, because of a mere defect in the walk, to go around the block to avoid it, or even to go on the other side of the street. We think all that is necessary in such a case is for the person passing such place to use ordinary care and caution to avoid being injured. In other words, we cannot think that the action of the plaintiff in error in passing along the same street used by other people continuously, and one which he was accustomed to use daily himself, without injury, was negligence per se; and, when he simply used the same walk others did, it is a question, to be found from the evidence, if his injuries resulted from his own negligent acts at the time of its occurrence. In the case of City Council of Montgomery v. Wright, 72 Ala. 411, we find the following language, which seems directly in point: "It would seem legal truism to say that it could not be deemed a want of

other persons, similarly circumstanced, were in the constant habit of doing, without accident or injury to themselves, so far as is disclosed, which is set out in the bill of excep-tions. There was ample room for the plaintiff to have safely passed between the fence and the washout, and his familiarity with the existence of the defect may have been an argument, in his own mind, inducing him to believe that he could pass it in safety. The possession of a walking cane, with which he seemed to have felt his way along when approaching the defective place, was a circumstance also favorable to the prospect of his safety. The plaintiff could not, we repeat, have been guilty of a want of ordinary care, prima facie, in selecting a route which was ordinarily traveled with safety by all pedestrians going in the same direction. If he was guilty of contributory negligence at all, it was not in selecting the route, but in the want of care exercised in the act of walking after he had made the selection." In the case at bar the evidence shows that, at the time of the injury, the plaintiff in error was not only using ordinary care, but he was carefully seeking to find the defect. In the case of Maultby v. City of Leavenworth, 28 Kan. 747, Judge Brewer, speaking for the court, announces what we take to be the correct rule: "And upon this we remark, in the first place, that the mere fact that the plaintiff knew the sidewalk was defective did not prevent him from using it. The logic of a converse proposition would be this: that if all the sidewalks in a city are defective, and all the citizens are aware of it, no one could use a sidewalk except at his own peril. The city would then absolve itself from all liability by making known its omission of duty. This is not the law. A city must discharge its duty of making its streets and sidewalks reasonably safe for public travel: and it does not necessarily release itself from liabilities to a traveler injured thereon by mere proof that such traveler knew the condition of the street or sidewalk. As we said in the case of Corlett v. City of Leavenworth, 27 Kan. 673: 'The fact that a person attempts to travel on a street or sidewalk after he has notice that it is unsafe or out of repair is not necessarily negligence.' Now, in this case the plaintiff was intent on business. While he knew the condition of the sidewalk, he was cautious in his actions. Ordinarily, a person is not obliged to forsake the sidewalk, and travel in the street; for, while thereby he could avoid one kind of risk, he would expose himself to another, to wit, that of injury from passing vehicles. Besides that, the condition of a street on a rainy night is not such as to invite the steps of one traveling on foot. Neither is a party, although he is aware of the condition of the sidewalks, necessarily obliged to go around the block or travel by another street"

say that it could not be deemed a want of In a late case (Village of Clayton v. Brooks, ordinary care for the plaintiff to do what all [III. Sup.] 37 N. E. 574) this question is fully

thority thereon is reviewed. The proposition would seem to be forever put at rest in this country on this authority. The court, in this case, say: "Walking on a defective sidewalk at night, with knowledge that it is defective, is a circumstance tending to show negligence, but is not conclusive proof thereof. City of Aurora v. Dale, 90 Ill. 46, followed." Another strong case recently decided is Town of Fowler v. Linquist (Ind. Sup.) 37 N. E. 133; Howard, C. J., delivering the opinicn. In the opinion in Village of Clayton w. Brooks we find this language: "The mere fact that a traveler is familiar with the road, and knows the existence of a defect therein, will not impose upon him the duty to use more than ordinary care in avoiding it. * * * Such knowledge is a circumstance, and perhaps a strong one; but it should be submitted, with the other facts of the case, to a jury, for them to determine whether, with such knowledge, the plaintiff exercised ordinary care in proceeding on a way known to be dangerous, or, in proceeding, used ordinary care to avoid injury. But the mere fact that the obstructed street was out of the way of the point at which the traveler was aiming, or that he might have taken a nearer way, is immaterial, as it is the duty of the town to repair all the streets." Shear. & R. Neg. \$ 376. See, also, Erie City v. Schwingle, 22 Pa. St. 384; Whittaker v. West Boylston, 97 Mass. 273; Morrill, City Neg. 139. Nor does the mere fact that the plaintiff might have taken better and safer sidewalks than the one he did take charge him with want of ordinary care. City of Aurora v. Hillman, 90 Ill. 61. The fact that a person injured by reason of a defective street could have taken another road is no defense to an action against the town. 37 N. E. 133, supra. In Osage City v. Brown, 27 Kan. 74, an action against the city of Osage City to recover damages resulting from a defective sidewalk, the plaintiff recovered \$550, and the city of Osage City took the case to the supreme court, and alleged, among other errors, that the plaintiff was guilty of contributory negligence, and therefore not entitled to judgment. It was alleged that, just prior to the injury, plaintiff was engaged in the business of teaming in said city; was near 70 years old; had occasionally traveled on foot over the defective sidewalk when going to the Masonic Lodge, or when out trading. On the night of the injury, he was on his way to the lodge; the night was cloudy, and consequently dark; he was a little late, and walked somewhat briskly. His foot caught in the rise of offset which was not covered, and held him so that he fell. The court then say: "From these facts, such negligence is not perceived on the part of the

injured person as to prevent a recovery."

The trial court instructed the jury "that every person passing over the sidewalk of a

discussed, and nearly the entire field of au-

city is required to exercise such care and diligence in doing so as men of ordinary care and diligence would use under similar circumstances. In determining whether plaintiff used such care at the time he received the injury complained of, it would be proper to consider his knowledge of its condition, the time, the light or darkness at the time and place the injuries were received, and his manner of traveling, and any other facts appearing from the evidence that would tend to show such care or want of it,"-and further charged them that, if they found from the evidence that the plaintiff materially contributed to such injury by such negligence, they would find for the defendant. The court say: "This instruction, given by the trial court, was the true declaration of the law."

Upon the facts in proof in the case at bar, the court below unquestionably erred in finding from the evidence, as a matter of law, that the plaintiff in error could not recover, and in rendering judgment for the defendant. The demurrer should have been overruled, and the jury called to assess the damages, under an instruction from the court that, upon the facts proved, the plaintiff in error was entitled to recover; or, under the authority, the court itself could have assessed the damages. Lindley v. Kelley, 42 Ind. 294; Strough v. Gear, 48 Ind. 100. This is the Indiana rule, and, as the Code of that state was in force in this territory at the date the action was instituted, it is applicable, and should be observed in this case. The cause will be remanded to the court below, with instructions to assess the damages in accordance with this decision. It is so ordered. All the justices concurring.

(2 Okl. 568)

In re McCLASKEY.

(Supreme Court of Oklahoma. Sept. 8, 1894.)
COURT — ABSENCE OF JUDGE — ADJOUENMENT BY
CLERK—VALIDITY — FORMER JEOPARDY — WHAT
CONSTITUTES.

1. The presence of the judge of the district court in and for Payne county, Okl. T., on the first day of the November term, 1892, of that court, was indispensable to the validity of the subsequent proceedings purporting to have been held in the November term of that court; and the clerk of the court had no authority, in the absence of the judge, to adjourn the court to a future day; nor had the judge power, while in another county, to authorize the clerk of the court to exercise any judicial powers in opening and adjourning court. In re McClaskey (Kan.; Oct. 7, 1893) 34 Pac. 459.

2. When the time fixed by law for the holding of a term of court arrives and the judge is

2. When the time fixed by law for the holding of a term of court arrives, and the judge is not present, the clerk of the court cannot, in the absence of statutory authority to that end, adjourn the court to a future day.

 In the absence of such a statute the consequence of the nonattendance of the judge is

the lapse and loss of the term.

4. The court must exercise its jurisdiction within its terms, as regulated by law; and where a person is tried and convicted at a time when the court cannot be legally held the pro-

ceedings are void, and the judgment a nullity. In re Terrill (Kan.; Oct. 7, 1893) 34 Pac. 457.

5. A person is not in legal jecopardy until put upon trial before a court of competent jurisdiction, under an information or indictment suf-

diction, under an information or indictment sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; that is, impeaned and sworn. Cooley, Const. Lim. 327, 328, and cases.

6. If a defendant is tried, convicted, and judgment pronounced, and such defendant incarcerated in the penitentiary in execution of the judgment, and subsequently remanded to the trial court for further proceedings upon the ground that said trial court had not jurisdiction, said defendant has not been once in jeopardy, within the constitutional meaning. within the constitutional meaning.

(Syllabus by the Court.)

Petition by Matthew McClaskey for writ of habeas corpus to obtain his release from the custody of the sheriff of Payne county, Writ denied. Okl. T.

C. R. Buckner, for petitioner. Sterling P. King, for the Territory.

SCOTT, J. The petitioner, Matthew Mc-Claskey, filed his petition in this court, praying for a writ of habeas corpus, on the 22d day of January, A. D. 1894. The action is instituted upon the theory that he has been once in jeopardy, within the meaning of the constitutional guaranty that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb." On the 16th day of August, 1892, the petitioner was indicted by the grand jury of Payne county, charging him with the murder of John J. Anderson, and on the 18th day of November, 1892, was found guilty of said charge, and his punishment assessed by the jury, under the law, at imprisonment at hard labor for life. In execution of this sentence he was transported to the penitentiary at Lansing, Kan., where he remained incarcerated until his discharge from the custody of the warden, on the 7th day of October, 1893, by the supreme court of said state, and placed by him in the hands of the sheriff of Payne county, by authority of the following order: "In re Matthew H. McClaskey. This cause comes on for decision, and thereupon it is ordered and adjudged that the petition for the writ of habeas corpus be allowed, and that the petitioner, Matthew H. McClaskey, be released from imprisonment in the Kansas state penitentiary, and forthwith delivered by the warden of said penitentiary into the custody of the sheriff of Payne county, Oklahoma territory, there to answer the charges in the indictment under which he was originally arrested. It is further ordered that the respondent pay the costs of this case in this court, taxed at \$---, and hereof let execution issue. C. J. Brown, Clerk of Supreme Court. [Seal.]" This order was complied with, and the petitioner delivered to the sheriff of Payne county, and is now being held, awaiting further proceedings before the district court of that county, in the meantime praying discharge, assigning therefor, in substance, the following specific legal

"First. That the charge upon grounds: which the petitioner is held has been fully investigated by a court of competent jurisdiction, and that upon said investigation said petitioner was ordered discharged. Second. That the petitioner has been tried, convicted, judgment entered, and sentence passed upon him, and that, in execution of said sentence, petitioner had been incarcerated in the penitentiary at Lansing, Kansas, and, having had a hearing on a writ of habeas corpus by the supreme court of the state of Kansas, was ordered discharged from said penitentiary. Third. That no further proceedings upon the charge for which he is held ought to be had against him, for the reason that at the April term of the district court of Payne county said petitioner was put upon his trial, and found guilty, and sentence passed, and, in execution of said sentence and judgment, petitioner was incarcerated in the penitentiary at Lansing, Kansas. Fourth. That the petitioner was on the 16th day of August, 1892, indicted on the charge for which they now hold him, at which date and time, the petitioner alleges, there was no court or grand jury in session in Payne county. Fifth. Two or more terms of court for Payne county have passed since petitioner has been in custody, and that more than one term of court has passed since petitioner was indicted upon the charge he is now held, and that the petitioner has in no way continued, delayed, or hindered his trial. Sixth. That there is no legal warrant or commitment, or other legal process on which this petitioner is held, issued from any court."

While the petitioner seeks to discharge on several grounds, the only one seriously urged for is the technical question raised as to whether the trial, conviction, sentence, and subsequent imprisonment of the petitioner operate as jeopardy, within the meaning of the law. In considering his alleged illegal restraint, the supreme court of Kansas (Justice Johnson speaking for the court; 34 Pac. 459) uses this language: "This is a proceeding in habeas corpus to release from custody Matthew H. McClaskey, who is imprisoned in the state penitentiary at Lansing, Kansas. The proceeding presents substantially the same question that has just been decided in the case In re Terrill, 34 Pac. 457. The petitioner was indicted for murder at the April term, 1892, of the first judicial district for the territory of Oklahoma, within and for Payne county. A trial was attempted on November 14, 1892, at what purported to be the November term of the court, which resulted in a conviction, and a sentence of imprisonment at hard labor for life. He was committed to the state penitentiary of Kansas, it being also the prison for the territory of Oklahoma. The November term of the court should have begun on the 1st day of that month, but the Honorable E. B. Green, who was the presiding judge of the court, failed to attend. He

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sent an order from another county, by mail, directing an adjournment of the court until the 10th day of November, 1892. When the 10th of November arrived the judge of the court was again absent. The clerk undertook to adjourn the court until the following day. Upon that day the judge appeared and convened court, after which followed the trial and conviction of the petitioner. failure of the judge to appear and open court upon the 1st day of November resulted in the loss of the term. The presence of the judge at the time appointed by law for the holding of the court was indispensable to the validity of the subsequent proceedings, and the judge had no authority, by an order made in another county, to authorize or direct the ministerial officers to exercise judicial powers in opening and adjourning court. In re Terrill, supra. Following the judgment in the Terrill Case, the respondent will release the petitioner from imprisonment in the penitentiary, and deliver him to the custody of the sheriff of Payne county, Okl. T., there to answer the charges in the indictment under which he was originally arrested. All the justices concurring." Justice Johnson, speaking for the court in the Terrill Case, referred to in the language just quoted (34 Pac. 457), covering the question as to the legality of the April term of the same court more fully, and involving exactly the same legal question, says: "An indictment was returned by the grand jury of Payne county, Okl. T., charging Ira N. Terrill with the offense of murder; and at a trial held September 26, 1892, he was convicted of the offense charged, and the punishment fixed by the jury was imprisonment in the penitentiary at hard labor for life. Subsequently, the sentence of the court was pronounced, adjudging that Terrill be confined in the territorial penitentiary at Lansing, Kansas, for the term of his natural life, where he was conveyed, and is now held in custody by the warden of that prison. He seeks release here by a proceeding in habeas corpus, and in his application he alleges several grounds why his imprisonment is illegal, only one of which it will be necessary to notice. He asserts that the trial was had and the judgment rendered at a time not authorized by law; that the court was then without jurisdiction to take any proceedings against him, and hence the sentence and judgment of the court are absolutely void. In pursuance of law the terms of the district courts of Oklahoma were fixed by order of the supreme court, and the terms are required to be held in the county of Payne, commencing on the third Tuesday in April and the first Tuesday of November of each year. The petitioner was tried in 1892, and during the time within which the April term might have been held; but it appears that the judge of that court was not present at the time and place when the April term of court should have begun, nor was he present in person for several days afterwards. The

court should have been opened on April 19th, but the judge did not appear until the 26th of that month, when he opened and held court until April 30, 1892. Several adjournments were made by the court, one of which was to June 14, 1892; but the judge of the court again failed to appear, when the clerk attempted to adjourn the court until August 16, 1892. At the latter date the judge appeared in person, and held court from time to time, with intervening adjournments, until September 26, 1892, when the trial and conviction of the petitioner occurred. The failure of the judge to appear and open court upon the day appointed resulted in the loss of the term, and proceedings had by a court at a time not authorized by law are absolutely void. There was then no statute of Oklahoma providing for the adjournment of the court by the clerk or other of its officers in case of the nonattendance of the judge. statute since enacted, and which went into effect in August of the present year, provides that, if the judge of a court fails to attend at the time and place appointed for holding his court, the sheriff shall have power to adjourn it from day to day until the judge do attend, or a judge pro tem. is selected, and if the judge is not present, and a judge pro tem. is not selected within two days after the first day of the term, the court stands adjourned for the entire term. St. Oki. par. 4026. There is ample power in a court which has been regularly convened to adjourn to a future time, provided it be not beyond the term; but, in the absence of a statute authorizing it, the clerk or other ministerial officer cannot act for the judge in either opening or adjourning court. The clerk is a ministerial officer, and, without statutory authority, can exercise no judicial function. opening, holding, and adjournment of court are the exercise of judicial power to be performed by the court. To perform the function of a court, the presence of the officers constituting the court is necessary, and they must be present at the time and place appointed by law. A 'court' is defined by Bacon to be 'an incorporeal political being, which requires for its existence the presence of its judges, or a competent number of them. and a clerk or prothonotary, at or during which, and at a place where, it is by law authorized to be held, and the performance of some public act indicative of the design to perform the functions of a court.' Abr. tit. 'Court,' A; Hawes, Jur. § 27. give existence to a court, then, its officers, and the time and place of holding it, must be such as are prescribed by law.' Hobart v. Robart, 45 Iowa, 503. There being no authority in law for the clerk to open and adjourn court, the consequence of the failure of the judge to appear upon the day appointed for holding the court was the loss of the term. Railway Co. v. Hand, 7 Kan. 380; People v. Bradwell, 2 Cow. 445; People v. Sanchez, 24 Cal. 17; State v. Roberta

8 Nev. 239; Brown, Jur. § 22; 12 Am. & Eng. Enc. Law, 296. In the case of Wight v. Wallbaum, 39 Ill. 554, the court was regularly in session on the 23d of August, and regularly adjourned until the following day. After that time several adjournments were entered when no judge was present. In reviewing the question the court said: the 23d, for want of a judge, no legal business could have been transacted, and for that reason the court stood adjourned. The judge who opened court might no doubt have adjourned to a specified day, had the business of the court required it, and business might have been regularly resumed at that time. judge had no power to authorize the ministerial officers of the court to exercise judicial powers even in opening and adjourning the court. They not having such authority, and the court not having been opened on the 24th by a judge authorized to exercise the jurisdiction of the court, it stood adjourned after the 23d, and that must be regarded as the last day of the term.' See, also, In re Millington, 24 Kan. 214; Lewis v. City of Hoboken, 42 N. J. Law, 379; Hoye v. State, 39 Ga. 718; Wightman v. Karsner, 20 Ala. 446; Brumley v. State, 20 Ark. 77; Thomas v. Fogarty, 19 Cal. 644. The failure of the judge of the district court for Payne county, Okl., to attend and open court upon the appointed day, operated to end the term, and no further session of the court could be held until the next regular term, or until a specified term was legally called. To meet such exigencies, most of the states have enacted statutes for preserving the term similar to those now in force in Oklahoma territory and in Kansas. In the absence of such a statute the clerk was powerless to keep the court open until the arrival of the judge, many days after the time for the commencement of the term. The petitioner was tried after the April term had elapsed, and the proceedings in connection with his trial and conviction must be regarded as coram non judice and void. Although the right of the court to inquire into the illegal restraint of the petitioner is questioned, no substantial objection to its jurisdiction is or can be urged. He is imprisoned in Kansas, and within the jurisdiction of the court, and there is undoubted power in the court to inquire into the cause of his restraint. Having been tried and convicted at a time when the court could not be legally held, the court was without jurisdiction, and the conviction was void. While the petitioner must be released from imprisonment at the penitentiary, and from the custody of the warden, our judgment will not operate as an unqualified discharge. So far as appears here, he was regularly indicted, and as the proceedings had against him were without furisdiction and void, it is possible there was no jeopardy, and that another trial may be had. The warden will therefore be directed to release the petitioner from imprisonment in the penitentiary, and deliver him to the custody of the sheriff of Payne county, Okl. T., and for such further proceedings as the prosecuting officers may desire to take. All the justices concurring."

The court has fully and carefully examined the decisions of the supreme court of Kansas in the Cases of McClaskey and Terrill, just quoted, and all the authorities cited therein, and fully concur in the doctrine, and will decide this case, conceding the correctness of the law as thus announced. This renders the legal status of the petitioner very clear. He was tried, convicted, and sentenced at a time when court could not be legally held in Payne county, under the law, and therefore all proceedings at said time and place were coram non judice. After the pronouncement of the judgment the petitioner was imprisoned in the penitentiary at Lansing, Kan., which was also the prison for Oklahoma territory, under and by authority of a statutory provision authorizing the governor to contract for the care of prisoners convicted under the laws of Oklahoma, outside of the territory, in the absence of a territorial penitentiary here. The petitioner does not contend that his trial, sentence, and conviction alone constitute jeopardy, but avers that his incarceration in the penitentiary in execution of the judgment of the court carries with it, eo instante, jeopardy, within the meaning of the law. In other words, the instant the petitioner was incarcerated in pursuance of such judgment, jeopardy attached. The petitioner cites numerous authorities in support of his contention. Ex parte Lange, 18 Wall. 163; State v. Cooper, 13 N. J. Law, 375; Com. v. Loud, 3 Metc. (Mass.) 328; Harman v. U. S., 50 Fed. 921; Ex parte Friday, 43 Fed. 919; In re Feeley, 12 Cush. 598. The distinction sought to be made, and the argument offered to sustain this new doctrine advanced by the petitioner, are indeed too fine for human conception. Among the cases cited is Ex parte Lange, 18 Wall. 163. This case does not decide the question at all, by inference or otherwise, and is wholly inapplicable to the case at bar. It never was the law that jeopardy ever attached unless the trial court had jurisdiction, nor is it the law now; nor does this case, or any of the authorities cited. declare such a startling departure from a line of decisions reaching back to the very beginning of American criminal jurisprudence. The petitioner was returned to the custody of the sheriff of Payne county, and is now held for trial by a court that has jurisdiction. This he has the right to demand, and this is what is guarantied to every citizen under the constitution of the United States, and until such a trial is had there can be no jeopardy. In view of the illegality of the pretended court at which the petitioner was convicted, his trial, conviction, and sentence have no greater significance than a trial, conviction, and sentence by a pretended court organized by private citizens of the country;

and subsequent incarceration would not in either case have the effect of rendering such a trial a legal one, or investing jurisdiction when in law it never had existed. If this were true, every defendant suffering from an illegal imprisonment would have been, according to the contention of the petitioner, once in jeopardy, without reference to the question of jurisdiction. "Jeopardy," in its constitutional or common-law sense, has a strict application to criminal prosecutions only. A person is not in legal jeopardy until put upon trial before a court of competent jurisdiction under an information of indictment sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; that is, impaneled and sworn. Cooley, Const. Lim. 327, 328, and cases cited; Hilands v. Com., 111 Pa. St. 4, 2 Atl. 70; U. S. v. Gibert (1834; Story, J.) 2 Sumn. 38-62, Fed. Cas. No. 15,204; U. S. v. Haskell, 4 Wash. C. C. 402; Fed. Cas. No. 15,321; Brown v. Swineford, 44 Wis. 287; People v. Horn, 70 Cal. 18, 11 Pac. 470; 24 Cent. Law J. 563; 17 Am. Law Rev. 735-753; 4 Cr. Law Mag. 31-36, 487-508; Moore v. State, 71 Ala. 309; People v. Webb, 38 Cal. 467; State v. Tatman, 59 Iowa, 473, 13 N. W. 632; Wright v. State, 5 Ind. 290; Williams v. Com., 78 Ky. 96; Com. v. Jenks, 1 Gray, 490; Com. v. Farrell, 105 Mass. 189; State v. Burke, 38 Me. 574; State v. Roe, 12 Vt. 93; Winsor v. Reg., L. R. 1 Q. B. 289; 2 Benn. & Heard, Cr. Cas. 327.

This guaranty of personal security became a part of the constitution of the United States by amendment ratified December 15, 1791, and in no case before or since that date has it ever been announced that jeopardy ever attached unless a defendant had been put upon trial before a court of competent jurisdiction. Thus, in the case before us, unless it appears that the April term of the district court of Payne county was a court of competent jurisdiction, the petitioner has not been in jeopardy, within the constitutional meaning. It has been held that the court that tried the petitioner was not one of competent jurisdiction. Indeed, this fact is the cause of the petitioner's discharge from the custody of the warden of the Kansas penitentiary, and his return to the authoritles of Payne county. He stands in the same position exactly now as he would had this point been raised on the trial, and the case appealed to this court and reversed, and the cause remanded for a new trial. fact that his rights have been ascertained and determined by a proceeding in habeas corpus gives him no more than a right to a new trial. Hence, the point raised by petitioner, that on account of his return to Payne county authorities, as the record discloses, on habeas corpus, he is entitled to an

unqualified discharge, is untenable. It is ordered that petitioner be held for further proceedings at the first regular term of the district court of Payne county. All the justices concurring.

WOLFF v. WOLFF. (No. 15,417.) Sept. 26, 1894.) (Supreme Court of California. DIVORCE—ALIMONY—PRINTING AND COUNSEL FEES.

1. An order by the judge who tried a di-vorce case, granting \$100 printer's fees and \$250 counsel fee on a pending appeal from a judgment in favor of the wife, and a contemplated appeal from an order denying a new trial,

will not be reversed as excessive.

2. In an action for divorce, an order granting a counsel fee for an appeal from an order denying a new trial, made before such appeal is taken, will not be reversed as premature where, on the hearing of the appeal from the or-der granting such allowance, it appears that an appeal from the order denying a new trial is pending.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action for divorce by Lillie Wolff against Henry Wolff. From an order granting an allowance for counsel fees and disbursements, defendant appeals. Affirmed.

Fox & Kellogg, for appellant. W. H. L. Barnes (W. W. Foote, of counsel), for respondent.

PER CURIAM. This is an appeal from an order made after judgment in a divorce case allowing alimony. The affidavit, among other things, states that the case has been tried. and judgment rendered for plaintiff; that an appeal had already been taken from the judgment, and a motion for a new trial had been made and denied; and that defendant contemplated an appeal from such order. Thereupon, the court allowed as alimony for the two appeals: For printing, \$100; for counsel fees, \$250. The affidavit also shows that, although alimony had been previously allowed to the amount of \$1,700, only \$250 had been paid; that plaintiff was destitute of means. It is contended that the allowance is excessive, but we cannot so conclude. The judge who made the order had tried the case. and was fully aware of the nature of the controversy. How much printing would be required would depend upon this. It would have been more prudent to forbear making an allowance for the second appeal until after it had been taken, but our records show that the appeal from the order denying a new trial was taken afterwards. We do not think the order should be reversed because the provision for this was premature. The order is affirmed.

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104 Cal. 130
WALLACE v. McKENZIE et al. (No. 18,275.)
(Supreme Court of California. Sept. 17, 1894.)
MORTGAGES—PRIORITIES.

Where a mortgage on land is made under an express oral agreement that it shall be subject to one to be given to D., the fact that it is recorded before the mortgage to D. will not, in equity, destroy the priority of the latter as between the immediate parties.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Miles Wallace, assignee in insolvency of John Krohn, against McKenzie, Rule, and Dickey, to foreclose a mortgage. Judgment was rendered in favor of defendant Dickey, and plaintiff appeals. Affirmed.

Stuart S. Wright and J. P. Meux, for appellant. Frank H. Short, for respondents.

McFARLAND, J. The plaintiff, Wallace, as assignee in insolvency of one John Krohn, brought this action to foreclose a mortgage executed to said Krohn by defendants Mc-Kenzie and Rule. Dickey was made a defendant upon averment that he claimed some interest in the mortgaged premises which is alleged to be subsequent and subject to the lien of plaintiff's mortgage. Dickey, by answer and cross complaint, set up that he had a mortgage on said premises, executed by said McKenzie and Rule, which was prior and superior to the mortgage of plaintiff. The court found in favor of Dickey, holding plaintiff's mortgage to be second, and subject to that of Dickey. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial.

The fact are substantially these: days prior to the execution of either of the mortgages. Krohn, who was a creditor of Mc-Kenzie and Rule, requested the latter to give him a mortgage to secure the amount owing by them to him; and they informed him that they would do so if he would accept the same as a second mortgage subject to one which they had given, or were about to give, to Dickey. To this Krohn assented. A mortgage which had been prepared by or for Dickey, who lived at Fresno, and forwarded to McKenzie and Rule, who lived near a place called Coarse Gold, was signed by the latter on or about November 8, 1889. On November 9th the mortgage to Krohn was drawn up by a notary at Coarse Gold,-being substantially copied, except as to amounts, etc., from the mortgage to Dickey,-and both mortgages were on said day acknowledged before said notary, the one to Dickey being Krohn took his mortacknowledged first. gage (the one sued on in this action) "with the express understanding and agreement that he would take and receive the same subsequent and subject to the Dickey mortgage, which, it was expressly understood and agreed, was and should be the first upon said premises." McKenzie and Rule "refused to execute a first mortgage of said premises to said Krohn" and "would never have delivered the mortgage to him, except that the said Krohn agreed to receive and did receive the same as a second mortgage upon said premises, and subject to the said mortgage of the said Dickey." Krohn had his mortgage recorded immediately. Dickey's mortgage was sent to him at Fresno the next day by mail, and was not recorded until several days afterwards. We think that under these circumstances the court below correctly held that the mortgage of plaintiff should be treated in equity as second and subject to the mortgage of defendant Dickey. stands in the shoes of Krohn, and there is no question of innocent holders without notice to be considered. Therefore, authorities cited by appellant which deal with the rights of third parties do not here apply. It seems that when Dickey received his mortgage he sent it back for some corrections, but it does not appear that any alterations were made, and it does appear that no material alteration was made. It does appear that the notary, for some reason, changed the date of the acknowledgment; but that, in any view, is immaterial, for as Krohn had full knowledge of the existence of Dickey's mortgage, and expressly agreed to take his subject to it, it is unimportant whether or not the mortgage was properly recorded. Judgment and order affirmed.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

104 Cal. 20 LOS ANGELES, P. & G. RY. CO. v. RUMP. (No. 19,374.)

(Supreme Court of California. Sept. 7, 1894.)
CONDEMNATION BY RAILHOAD COMPANY — RIGHT
OF WAY — SUCCESSIVE TRIALS — TAXATION OF
COSTS—SATISFACTION OF JUDGMENT — EFFECT—
EVIDENCE—DAMAGES.

1. Code Civ. Proc. § 1254, which provides that where, after an award in condemnation proceedings, a new trial is granted the owner, and he fails on such trial to obtain a greater compensation than on the first, the costs of the new trial shall be taxed against him, does not violate Const. art. 1, § 14, providing that private property shall not be taken for public use without just compensation.

2. Code Civ. Proc. § 1254, provides that if, after the judgment in condemnation proceedings, plaintiff wishes to take possession, it must pay into court the full amount of the judgment; that defendant, upon filing an abandonment of all defenses except as to the amount of damages on a new trial, shall be entitled to receive the amount of the judgment; and that the receipt of such amount shall be held to be an abandonment by defendant of all defenses excepting his claim for greater compensation. Held, that where defendant has filed an abandonment, and received the amount of the judgment, the only issue on a new trial is whether he is entitled to greater compensation; and, if the award is for a smaller amount, plaintiff is not entitled to a judgment against him for the difference.

3. In condemnation proceedings by a railroad company, defendant will not be allowed on a second trial to show the comparative value of her property before and after the construction

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of the railroad, which took place after the first and before the second trial.

4. In condemnation proceedings by a railroad company, evidence will not be received of
the cost of maintaining a fence along plaintiff's
right of way, as the cost thereof is not an element of damage, under Code Civ. Proc. § 1248,
providing that, if the property sought to be condemned be for a railroad, "the cost of good and
sufficient fences" along the line of such railroad
must be assessed as demoscomust be assessed as damages.

5. Defendant's motion to strike out the tes-5. Defendant's motion to strike out the testimony of one of plaintiff's witnesses that "the railroad would prevent any further wash, and it affords a good embankment to protect the balance of the property," was denied. Held, that an instruction that "the compensation to be awarded * * * must be ascertained without respect to any benefits that would accrue to the remainder of the land from the building of the railroad" was sufficient to remove any prejudice to the defendant from the refusal to strike out to the defendant from the refusal to strike out.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; W. H. Clark, Judge.

Action by the Los Angeles, Pasadena & Glendale Railway Company against Minnie Rump to condemn a right of way. Judgment was rendered for defendant for a smaller amount than on a former trial, and she appeals. Modified.

P. W. Dooner, for appellant. Burnett & Gibson, for appellee.

HAYNES, C. Action to condemn a right of way over appellant's premises. Upon the first trial of this action by a judgment entered October 6, 1890, damages were awarded the defendant, Minnie Rump, as follows: Value of land taken, \$75; cost of fencing, \$100; damage by severance, \$600; total, \$775 and costs. The plaintiff paid the damages into court, and took possession and constructed its road. The defendant received the money so paid, and, having filed her abandonment of all defenses to the action except her claim to a greater compensation, moved for a new trial, and her motion having been denied, appealed to this court, and the judgment and order were upon such appeal reversed in May, 1892, upon the ground that the cost of fencing, as found, was against the evidence. 94 Cal. 432. In December, 1892, a second trial was had, and the damages awarded were as follows: Value of land taken, \$106.43; cost of fencing, \$125; damage by severance, \$300,—total damages awarded, \$531.43. Upon this state of the case the court entered a judgment by which the defendant was required to refund to the plaintiff the difference between the award of damages upon the two trials, amounting to \$243.57, less the amount of costs awarded to her upon the first trial, amounting, with interest, to \$177.57 (the same not having been paid); thus giving judgment against her for \$66 and the costs of the second trial, amounting to \$224.20, or a total of \$290.20. Defendant thereupon moved for a new trial, which was denied, and this appeal is from said judg-

ment and the order denying her said motion. 1. Appellant contends that the court erred in awarding costs to the plaintiff upon the second trial, notwithstanding the damages or compensation awarded her was less than that given upon the first trial, and which had been paid by plaintiff and received by Section 1254, Code Civ. Proc., after providing for an appeal to the supreme court in a condemnation proceeding, further provides: "In all cases where a new trial has been granted upon the application of the defendant, and he has failed upon such trial to obtain a greater compensation than was allowed him upon the first trial, the costs of such new trial shall be taxed against him." This provision appellant insists is unconstitutional. We are not cited to any case in this state where that question has been considered. Section 1255, Code Civ. Proc., provides that, in proceedings to condemn property for public use, "costs may be allowed or not, and if allowed may be apportioned between the parties on the same or adverse sides in the discretion of the court." In San Francisco v. Collins, 98 Cal. 262, 33 Pac. 56, it was held that section 1255 is limited by section 14 of article 1 of the constitution, and that the payment of any part of the costs of the plaintiff in that case by the defendant would reduce the just compensation awarded by the jury by a sum equal to the costs so paid. The costs in controversy in that case, however, were not costs resulting from a second trial procured by the defendant for the purpose of securing larger compensation, but which resulted in a verdict for a less sum than that awarded upon the first trial. In Lewis on Eminent Domain (section 562) it is said: "Where the owner is dissatisfied with the amount of damages awarded him in the first instance, and takes an appeal or other proceedings to have a reassessment of the damages, it is usual to provide that he shall pay the costs of the appeal if he fails to secure an increase of damages, and such provisions are proper and valid." In Metler v. Railroad Co., 37 N. J. Law, 222, a similar statute was considered. At page 227 the court said: "The legal effect of these provisions is this: A verdict on a valuation greater than that of the commissioners will entitle the owner to costs, without regard to which party appeals. If the company is the appealing party, and the valuation of the jury is the same or a less sum than that of the commissioners, neither party is entitled to costs. But if the owner is the appealing party, and the jury finds the same or a less sum than the commissioners awarded, he must pay the costs. In that event he must pay the costs, because he has taken an unsuccessful appeal."

¹ Provides that private property shall not be taken for public use without just compensation having been made to or paid into court for the owner.



Appellant's argument is, in effect, that her property cannot be taken without just and full compensation; that, if the award of \$531.43 upon the second trial must be regarded as the just compensation to which she is entitled, she practically receives but \$307.23, if she is required to pay the costs of the second trial, which amount to \$224.20; or, if the first award remains as the measure of her compensation, she does not realize that sum by the amount of costs taxed against her. The result of the second trial, however, shows that the first award, if not more than she was entitled to, was at least just and full compensation; and, that sum having been paid by the railroad company and received by her, she cannot complain if the costs of an unsuccessful effort to obtain greater compensation are taxed against her.

2. Appellant contends, further, that she was improperly required to refund to the railroad company the difference between the first and second awards, amounting to \$243.57. appellant's second point can be sustained, the correctness of our conclusion upon the first point is placed beyond question. Upon this point, also, we are without any precedent in this state, and its solution must depend upon the construction of the Code provisions governing proceedings in such cases. But for the provisions of the Code now to be noticed, we would be inclined to hold that plaintiff is entitled to the benefit of the reduction made upon the second trial. In such case, however, the plaintiff should be charged with all costs, since it would litigate upon an equality with the defendant; and if the damages are set at large by the appeal, and remain undetermined until the final trial, the constitutional requirement that defendant shall receive full compensation cannot be complied with if the defendant is required to pay any part of the costs incurred in reaching such final determination. Section 1254, Code Civ. Proc., requires the plaintiff, if he would take possession and use the property for the purpose intended, to pay into court for the defendant the full amount of the judgment, and such further sum as may be required by the court as a fund to pay any further damages and costs that may be recovered in said proceeding. Said section further provides: "The defendant, who is entitled to the money paid into court for him upon any judgment, shall be entitled to demand and receive the same at any time thereafter upon obtaining an order therefor from the court. It shall be the duty of the court, or a judge thereof, upon application being made by such defendant, to order and direct that the money so paid into court for him be delivered to him upon his filing a satisfaction of the judgment, or upon his filing a receipt therefor, and an abandonment of all defenses to the action or proceeding, except as to the amount of damages he may be entitled to in the event that a new trial shall be granted. A payment to a defendant as aforesaid shall be held to be

an abandonment by such defendant of all defenses interposed by him, excepting his claim for greater compensation." In this case the condemnation money was paid into court by the plaintiff, and paid over to defendant, who filed her abandonment of all defenses except "her claim for greater compensation;" and the plaintiff took possession of the premises condemned, and constructed its road over the same. The payment of the money into court by the plaintiff was not accompanied by a motion for a new trial or notice of appeal or other objection to the amount found by the jury. It paid its money, and took possession of the land condemned. Under the statute, the defendant received the money without prejudice to any proceeding authorized by it to recover greater compensation, but under a condition that plaintiff's right to occupy the land shall not be questioned. Upon payment of the money, plaintiff acquired a vested right in the property, and the defendant a vested right in the compensa-City of Chicago v. Barbian, 80 Ill. 485, 486; Stacy v. Railroad Co., 27 Vt. 44. The abandonment by the defendant of all defenses except her claim for greater compensation confirmed plaintiff's right to the property, and estopped her from denying that right; and the plaintiff, we think, is equally estopped to say that the money received by the defendant is not hers.

It is urged, however, that the appeal from the first judgment vacated it, and with it the finding of the compensation awarded to the defendant. But, if that were true, the plaintiff's right to the possession was swept away with the defendant's right to the compensation. Plaintiff's right to possession, depending, as it does, under the constitution, upon compensation first made, cannot exist without it. It is therefore clear that the appeal of defendant, accompanied by her abandonment of other defenses, did not, as in ordinary cases, vacate the judgment. Nothing that was in issue upon the first trial was in issue upon the second. The sole questions were whether the defendant was entitled to "greater compensation," and, if so, how much additional compensation was she entitled to? The statute requires the court to pay to the defendant the damages awarded by the jury so deposited by the plaintiff, but makes no provision or requirement that any part of it under any circumstances shall be repaid. Under a statute of the state of New York containing a similar provision for the payment or deposit of the compensation for the land, etc., an appeal is provided for, and on such appeal a new appraisal may be ordered by the same or new commissioners, the second report to be final and conclusive on all the The statute then provides: "If the amount of the compensation to be paid by the company is increased by the second report the difference shall be a lien on the land appraised, and shall be paid by the

company to the parties entitled to the same, or deposited in the bank, as the court shall direct: and if the amount is diminished the difference shall be refunded to the company by the party to whom the same may have been paid, and judgment therefor may be rendered by the court, on the filing of the second report, against the party liable to pay the same." 3 Rev. St. N. Y. (8th Ed.) p. 1745, § 18. Under the above statute. not only is the whole question of compensation set at large by the order for a new appraisement, but, if the amount is reduced, there is an express requirement that it shall be repaid, and express authority given the court to render a judgment therefor based upon the report of the commissioners; while under our statute we find no requirement that anything shall be refunded, nor any authority given the court to render a judgment for its repayment. If the defendant had not waived all other defenses, the money deposited would have remained under the control of the court, and "be applied to the payment of the money assessed, and the remainder, if any there be, shall be returned to the plaintiff," as provided in section 1257, Code Civ. Proc. We do not see that our conclusion does any .njustice to the plaintiff. By the payment, without any effort to have a reassessment of damages, it assented that the amount assessed was the just compensation required by the constitution, and cannot therefore complain; and the court having paid it to the defendant, in obedience to the statute, we do not see how it can again assume control over it, or direct to what purpose the defendant shall apply it, in the absence of a statute authorizing it, the proceeding being purely statutory.

Some exceptions to evidence remain to be noticed. Defendant's property was mainly used for picnic purposes. Two years intervened between the first and second trial, and defendant sought to show the comparative value of the use of her property before and after the construction of the road. Plaintiff's objection was properly sustained. See Railroad Co. v. Galgiani, 49 Cal. 140, where the reasons for the exclusion of such evidence are clearly stated.

Appellant also contends that the court erred in not permitting a witness called for the plaintiff to testify upon cross-examination as to the cost of maintaining a fence along the plaintiff's right of way through defendant's land. Section 1248, Code Civ. Proc., relates to the assessment of damages. Subdivision 4 provides: "If the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad, and the cost of cattle-guards where fences may cross the line of such railroad." By this section, compensation must be assessed for each source of damage separately; and by section 1251, Id., the plaintiff, instead of paying into court the amount assessed as the cost of

erecting the fences, may give bond in double the amount so assessed that it will build the fences within the time specified in the statute. By these provisions it would seem that the cost of maintaining the fences after their erection is not regarded as a distinct subject of damage under these proceedings. The Civil Code (section 485) provides that "railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. Railroad corporations paying to the owner of the land through or along which their road is located an agreed price for making and maintaining such fence, or paying the cost of such fence with the award of damages allowed for the right-of-way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals or persons who thus fail to construct and maintain such fence. * * *" It would therefore seem by the express language of the above-cited section of the Civil Code, as well as by subdivision 4 of section 1248. Code Civ. Proc., that, where the railroad company pays the cost of good and sufficient fences "with the award of damages allowed for the right-of-way," the duty of maintaining the fence is upon the owner, and the expense of doing so is included in the damages allowed for the right of way.

A witness for the plaintiff, having testified that defendant's land would not be damaged by the construction and operation of plaintiff's road, was asked to give his reason therefor, and in reply said "that the railroad would prevent any further wash, and it affords a good embankment to protect the balance of the property." Defendant's motion to strike out the answer was denied. It may be conceded that the answer of the witness tended to show that the construction of the road would be a benefit to the remainder of the land, but the court, in its instructions to the jury, expressly charged that "the compensation to be awarded the owner must be ascertained without respect to any benefits that would accrue to the remainder of the land from the building of the road." This was an instruction to disregard all testimony tending to show benefits resulting to the remaining land, including that asked to be stricken out, and, we think, was sufficient to remove any prejudice to the defendant from the refusal to strike out.

The only errors being those committed in rendering the judgment, these may be corrected by a modification of it without a new trial. The costs of the first trial, taxed against the plaintiff and remaining unpaid together with interest thereon, and the costs of this appeal, also taxed to the plaintiff together with the costs of the former appeal, if unpaid, should be set off against the costs of the second trial, taxed to defendant, so far as they will compensate each

other, and a judgment entered in favor of the party in whose favor the balance may be for the excess, leaving in defendant's hands the amount of the first assessment of damages which was paid over to her by the court, pursuant to the statute.

We concur: BELCHER, C.; VAN-CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the order denying a new trial be affirmed, and that the judgment appealed from be modified so as to conform to said opinion.

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In re ASBILL et al. (No. 21,086.)

(Supreme Court of California. Sept. 25, 1894.)

Game Law—Indictment for Violation — Sufficiency.

An ordinance passed by the board of supervisors of Humboldt county makes it a misdemeanor to kill a female deer at any time, or to have in one's possession, at a time when it is unlawful to kill deer in said county, any deer skins from which the evidence of sex has been removed. Held, that an information stating that the accused "did willfully and unlawfully have in their possession deer skins," without stating that the evidence of sex had been removed, did not charge an offens under the ordinance.

Commissioners' decision. In bank.

Habeas corpus by P. Asbill, David Mackey, and Lancaster Lupton, convicted and imprisoned for violating a game ordinance, against T. M. Brown, sheriff of Humboldt county. Granted.

Cooper & Hill and Henley, Costello & Dimond, for petitioners. W. H. H. Hart, T. H. Selvage, and F. P. Deering, for respondent.

HAYNES, C. Petitioners were found guilty by a justice's court, in the county of Humboldt, of a misdemeanor, and were sentenced to pay a fine of \$100 each, or be imprisoned, The offense charged was for the violation of an ordinance passed by the board of supervisors of that county for the protection of game. The charging part of the complaint upon which they were tried is as follows: "That said [naming the defendants] on the 20th day of December, 1893, at Cooper's ranch, in the said county of Humboldt, state of California, did willfully and unlawfully have in their possession deer skins." The judgment followed the language above quoted. The defendants refused to pay the fine imposed, and were committed to jail, and now petition this court to be discharged on habeas corpus.

Petitioners contend that no offense is charged under the ordinance, and that the ordinance is unconstitutional. The complaint was made under section 10 of the ordinance, but a proper construction of that sec-

tion requires the light of other sections. Sections 5, 6, 7, 9, and 10 are as follows:

"(5) Every person who, in the county of Humboldt, shall within the two years next (except from July 15 to October 15, in each year) after the passage of this ordinance, hunt, pursue, take, kill or destroy any male deer, elk, antelope, mountain sheep or buck shall be guilty of a misdemeanor.

"(6) Every person who, in the county of Humboldt, shall at any time hunt, pursue, Lill, take or destroy any female deer, antelope, elk, mountain sheep or doe shall be guilty of a misdemeanor.

"(7) Every person who shall at any time hunt, pursue, take, kill or destroy any spotted fawn shall be guilty of a misdemeanor."

"(9) Every person who, in the county of Humboldt, shall at any time sell, or offer for sale, the hide or meat of any deer, elk, antelope or mountain sheep shall be guilty of a misdemeanor.

"(10) Every person who, in the county of Humboldt, shall buy, sell, or offer for sale, transport or carry or have in his possession any deer, or deer skins, or any hide or pelt from which the evidence of sex has been removed, or any of the aforesaid game at a time when it is unlawful to kill the same, shall be guilty of a misdemeanor."

The construction given to section 10 by the justice before whom the petitioners were tried and convicted, and now insisted upon by respondent, is that it is unlawful to have in one's possession at any time when it is unlawful to kill deer any deer skin, whether the evidence of sex has been removed or The open season being from July 15th to October 15th, it would necessarily follow, if that construction is correct, that the complaint and judgment charging the possession of deer skins on December 20th stated an offense for which the petitioners might be properly convicted and imprisoned. such construction cannot be maintained. concedes, as all must concede, that it is lawful to have in one's possession, during the time it is lawful to kill deer, the skins or hides, provided the evidence of sex has not been removed. By section 9 it is unlawful to sell the hide or skin of any deer at any time, whether during the time it is lawful to kill male deer, or during the time it is unlawful to do so. But it is unlawful to kill a female deer at any time, and because of that prohibition, and as an aid to the detection of its violation, it is made unlawful to have in one's possession at any time the skin or hide from which the evidence of sex has been removed. If it were unlawful to have deer skins in one's possession at any time, there could be no reason for the provision that the evidence of sex shall not be removed from the skins. Coming back, then, to the concession that one may lawfully have in possession deer skins during the time male deer may be lawfully killed, if the evidence of sex has not been removed, what is to be Digitized by GOOSIC done with the skins when that season closes? It is unlawful to sell them "at any time," and if it is unlawful to have them in one's possession after the season closes, what resource is left but to destroy them? And how would the destruction of all the hides on October 16th, each year, tend to the protection of game? It could have no such tendency; but, on the contrary, would tend to defeat the purpose of the ordinance to protect female deer by the requirement that the evidence of sex shall not be removed, since the destruction of the hide would be such removal. It would have been a singular requirement if the ordinance had provided that at the end of the open season all skins of deer should be destroyed; but it would not be more singular than it now is, if the construction contended for by the people can be sustained, which is that if you sell the hides you are guilty of a misdemeanor, and if you keep them after October 15th you are equally guilty. Indeed, the efficiency of the ordinance, so far as it relates to the protection of the female,-and that is its most important provision,-rests in the preservation of the skins, and keeping them in possession without removing the evidence of sex. We see nothing in the ordinance, either in its language or purpose, which would sustain the construction contended for by respondent. No offense known to the law being charged, the petitioners should be discharged.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, it is ordered that the said petitioners be, and they are hereby, discharged.

GAROUTTE, J., being absent, did not participate in the foregoing decision.

104 Cal. 165

GRANT et al. v. McPHERSON et al. (No. 18,189.)

(Supreme Court of California. Sept. 22, 1894.)
REVIEW ON APPEAL—WEIGHT OF EVIDENCE.

In an action to determine water rights in a running stream, where there is uncontradicted evidence tending to show a prior occupancy by the plaintiff, and the evidence as to adverse user by the defendant is conflicting, a judgment for plaintiff will not be disturbed.

Department 1. Appeal from superior court, Tuolumne county; G. W. Nicol, Judge.

Action by William Grant and others against Margaret I. McPherson and others to determine water rights in a running stream. Judgment for plaintiffs, and defendants appeal. Affirmed.

F. W. Street and J. F. Rooney, for appellants. F. D. Nicol and E. A. Rogers, for respondents.

GAROUTTE, J. This is an action brought to determine that plaintiffs are entitled to have 100 inches of water flow to the head of their ditch in Sandy gulch, and to have it determined that they are entitled to divert that quantity of water for the purposes stated in the complaint. Defendants deny that plaintiffs are entitled to the relief sought, and base their denial upon the ground that defendants are the owners of the first right to the waters of Sandy gulch, and this because their grantors first appropriated the waters and, secondly, that, assuming plaintiffs to have acquired the first right by prior appropriation, still they have lost that right, and the defendants have secured the same by adverse user. A jury was impaneled to advise the court as to the facts, and 133 special issues were submitted to them for their consideration. The court adopted the findings of the jury upon these special issues as its findings of fact, and rendered judgment thereon. Appellants made a motion for a new trial, which was denied, and thereupon took the present appeal to this court from the order denving such motion. It is not insisted by appellants that the judgment is not in line with the findings of fact, but it is insisted that the findings have not sufficient support in the evidence, and the important matters raised by this appeal are exclusively questions of fact.

The principal question disclosed by the record is, did plaintiffs or defendants obtain title to the waters of Sandy gulch by actual appropriation? And the determination of that question rests upon the parol evidence of a great number of witnesses as to the acts of the grantors of these respective parties at least 40 years ago, and the conditions surrounding this water way at that time. The parties to this litigation not only rely upon acts of appropriation for their respective titles occurring so many years in the past, but the inception of these titles is laid at about the same time. Under such circumstances most naturally a conflict of testimony arose as to the fact of the first appropriation. A mass of evidence was placed before the court and jury upon this question, and upon such evidence the court and the jury found in favor of plaintiffs; and upon a careful reading of the record we cannot say that there is no substantial and positive conflict upon this disputed question of fact. It would serve no good purpose to take up the testimony of the various witnesses, and analyze it in detail, with the object of indicating specifically this conflict. Appellants base their rights upon actual appropriations made by several different parties, but rely principally upon appropriation by the Bacons. The respondents rest upon an appropriation made by one Morehouse, and, even conceding that the testimony preponderates in favor of appellants' claims, still a first appropriation is shown to have been made by Morehouse by the posttive testimony of one John Curtin, whose credibility is not attacked in any way. And

his evidence is sufficient to support a finding of fact in this regard. While a plaintiff is required to establish his case by a preponderance of evidence, a preponderance of evidence does not necessarily mean a preponderance of the number of witnesses; and upon a question of the character here presented this court cannot say that the evidence of two witnesses, or of three witnesses, must, as to certain facts, overthrow the evidence of one witness testifying to a contrary state of facts. Appellants concede that the evidence of the witness Curtin supports the finding of the court, but insist that his opportunities for observation at the time were limited, and that at most he was but a passing observer of unimportant events to him, and that his time and attention in those days were directed to more stirring scenes. and his mind resting upon more important things. This may all be true, and these things would seem to be arguments of weight before a jury or a court seeking to arrive at the truth, but we hold them of little moment here. His evidence was sufficient to establish a prima facie case, and, even though the weight of evidence was to the contrary, the finding of fact would not be disturbed. Lick v. Madden, 36 Cal. 213; Kile v. Tubbs. 32 Cal. 832; Jarnatt v. Cooper, 59 Cal. 706; Ward v. Waterman, 85 Cal. 504, 24 Pac. 980. The witness was not impeached in any of he ways provided by statute. Such impeachment was not attempted. Evidently his testimony was believed by the jury and by the court, and under the circumstances here presented we are not at liberty to cast it aside. A wall of adjudications to this effect has been raised up by this court, which we have no desire to pass over or batter down, for the wisdom of the rule declared in those adjudications cannot be gainsaid. There is evidence in the record other than Curtin's testimony tending to support plaintiffs' claims, but it is not necessary to call especial attention to it.

Have appellants acquired title to this water by adverse user? The verdict of the jury and the findings of fact made by the court declare that they failed to secure title in that way, and all that we have heretofore said upon the question of a substantial conflict in the evidence may be considered as again said upon this branch of the case. Experience has demonstrated that the only safe rule, and therefore the only wise rule, to follow where a substantial conflict in the evidence is disclosed by the record, is the one which this court has so long and so steadfastly adhered to. The evidence is clearly conflicting upon the question of adverse user for the statutory period, and we cannot disturb the findings of the court in that regard.

We do not think the other sources of title relied upon by appellants are sufficiently meritorious to defeat respondents' claims. Neither do we discern any errors of law upon the part of the court occurring during the

progress of the trial that demand a reversal of the order. For the foregoing reasons the order denying the motion for a new trial is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

104 Cal. 171

McLAUGHLIN v. McLAUGHLIN et al. (No. 15,249.)

(Supreme Court of California. Sept. 24, 1894.) MUTUAL BENEFIT ASSOCIATION—CHANGE OF BENE-PICHARY-REQUIREMENTS OF BY-LAWS-WAIVER.

1. Where the by-laws of a mutual benefit 1. Where the by-laws of a mutual benefit association provide that, to change the beneficiary in a policy, the policy shall be surrendered, the beneficiary named in the policy is entitled to the money, though the insured, who married after taking out the policy, intended to make his wife the beneficiary, and a few days before his death handed the policy to his brother, who promised to have the wife made the beneficiary, but failed to do so.

beneficiary, but failed to do so.

2. A mutual benefit association cannot, after a policy holder's death, waive the requirements of the by-laws as to the mode of changing the beneficiary in the policy.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Hettie McLaughlin against Lottie McLaughlin and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

Marcus Rosenthal, for appellants. Jones & O'Donnell, for respondent.

BELCHER, C. In July, 1886, Alexander McLaughlin became a member of Mission Council of the Order of Chosen Friends, a corporation organized and existing under the laws of the state of Indiana, and received a relief-fund certificate, stating that he had become a member of the order, "and entitled to all the rights and privileges of membership, and a benefit of not exceeding two thousand dollars from the relief fund of said order, which sum shall in case of death be paid to the nephews and nieces, John, Robert, Jennie, and Lottle McLaughlin, children of Armor McLaughlin, in the manner and subject to the conditions set forth in the laws governing said relief fund and in the application for membership." Afterwards Mission Council was dissolved, and he became a member of Home Council of the same order, and continued to be a member thereof, in good standing, until he died, on March 28, 1890. On February 18, 1890, he and the plaintiff intermarried, and thereafter were husband and wife up to the time of his death. In August 1890, the plaintiff commenced this action against the four beneficiaries named in the relief-fund certificate, their father, Armor McLaughlin, and the Supreme and Home Councils of the Order of Chosen Friends, alleging in her complaint facts which it was claimed entitled her to the \$2,000 to be paid on the death of her husband. Before the trial of the action all the parties thereto entered into a written stipulation whereby the said councils disclaimed any and all interest or right in or to the \$2,000 in controversy, and whereby it was agreed that the said sum of money should be deposited in a certain savings bank, in the names of the attorneys of the parties, in trust for the person or persons who should be found entitled thereto by the final judgment to be rendered in the action; and, in pursuance of this stipulation, the money was deposited as agreed, and the action was then dismissed as to the defendant councils. After trial the court found the facts to be substantially as alleged in the complaint, and, as conclusions of law, that the plaintiff was entitled to the said money. Judgment was accordingly entered in her favor, from which and from an order denying a new trial the defendants the McLaughlins appeal.

Appellants contend that the decision was not justified by the evidence, and was against law, and also that several errors of law were committed by the court in its rulings upon the admission of evidence.

The constitution and laws of the order contain the following provisions:

"Sec. 111. There shall be connected with this order a relief fund, from which each beneficiary member, the person or persons designated by said member related to or dependent upon him or her, or the legal representatives of such person or persons, shall be entitled, under the prescribed regulations and conditions, to draw a sum not exceeding the amount named in his or her certificate, as hereinafter specified. During his or her life each member shall have full control of his or her interest in this fund,"

"Sec. 162. Each member shall enter upon his application the name or names of the person or persons related to him or her to whom he or she desires the benefit to be paid in case of death, subject, however, to such future disposal of the benefit as the member may thereafter direct, not in conflict with section 111, and the same shall be entered in the relief-fund certificate according to such direction."

"Sec. 172. A member in good standing may at any time surrender his or her relief-fund certificate, and a new certificate shall then be issued, payable to such person or persons related to or dependent upon him or her as the member may direct, upon payment of the certificate fee (\$1)."

To establish the plaintiff's right to the money as against the beneficiaries named in the certificate, evidence was introduced on her behalf showing the following facts: C. L. Stone was the secretary of Mission Council when Alexander McLaughlin became a member thereof, and continued to be its secretary until it ceased to exist, and as such secretary he issued to McLaughlin his relief-

fund certificate. They were intimate friends, and in 1888 both became members of Home Council at the same time. McLaughlin never attended any of the meetings of either council after his initiation. was never secretary of the new council, but he paid all of McLaughlin's dues, and from time to time furnished him with receipts therefor, signed by its secretary, who was a Mrs. Carroll. About a week after plaintiff and McLaughlin were married, he gave her his certificate, and she put it away, and thereafter retained possession of it until after his death. At the time of handing the certificate to her, he told her he was going out that day to see Mr. Stone, and have it changed to her name. He returned in the evening, and told her he had not been able to find Mr. Stone. On March 7th he saw Stone, and told him he desired to have the certificate changed, and made payable to his wife, and thereupon they agreed to meet at the next regular meeting of the Home Council, to be held on March 11th, and have the change made. Stone then told him that it would be necessary to write out an application to the secretary and to surrender the certificate. He told his wife of the appointment made with Stone, and together they went to the meeting agreed upon, but Stone was not there, and nothing was done. Three days later he was taken sick with pneumonia, from which sickness he never recovered. On March 23d plaintiff sent word to Armor McLaughlin, telling him of her husband's condition. Armor called that evening, and, finding his brother very sick, advised him to transfer all his property to his Alexander then asked Armor to have the certificate changed and made payable to his wife, and asked her to get the certificate, which she did. Armor read it over, and then handed it back, saying, "I will attend to it to-morrow." As Armor was leaving the house that evening, he said to one Webster, a brother-in-law of the plaintiff, that he would go the first thing the next morning and have the certificate changed. and that, in case he could not get it changed, or his brother should die, he would draw the money in the children's names, and turn it over to the plaintiff. Armor called again the next day, and in his presence Alexander then transferred to his wife all his property, consisting of a lot in Seattle and \$2,500, money on deposit in a bank, and during that day Armor stated to said Webster that he had sent one Hansen with \$25 to see the secretary and have it all straightened out: and in the afternoon of the same day Alexander called Webster to his bedside, and asked him if everything had been straightened, and mentioned the certificate, and Webster, relying on what Armor had told him, said it had; and he said it was all right. Plaintiff first learned that she had not been substituted as beneficiary about a month after her husband's death. Meantime

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plaintiff had frequently asked Armor about the certificate, but he gave no definite answer, and said he did not know anything about the laws of the society, but, any way, she would not hear anything for 60 or 90 days.

It is urged on behalf of respondent that the laws of mutual benefit associations, providing how a change of beneficiaries may be made, are for the protection and benefit of the association alone, and that when in this case the councils entered into the stipulation above referred to, and thereby disclaimed any right to the money in controversy, they in effect waived, as they might do, a compliance with their laws by McLaughlin, and hence that appellants cannot invoke them for their benefit. It is further urged that since McLaughlin expressed a desire to have the certificate changed by substituting respondent as beneficiary therein, and took the steps indicated to accomplish that end. it should be regarded, under the rule that equity will consider that done which ought to be done, as in fact changed, so as to entitle respondent to the money. We do not regard the stipulation as in any way material to a determination of the case. It shows only that the councils made no claim to the money, and were willing to pay it into court, and let it go to the party or parties who might be adjudged entitled to it. It is true that during his life McLaughlin had full control over his interest in the fund, and had a right at any time to have his certificate changed by substituting a new beneficiary; and, while he lived, the beneficiaries named in the certificate had no vested interest in the money to be paid on his death; but, when he died, the right to the money did vest either in the respondent or appellants, and the councils had thereafter no power, by stipulation or otherwise, to change or affect that right. The question, then, is, did the expressed desire of McLaughlin to have the respondent substituted as beneficiary, and the steps taken to that end, have the effect to make the change, when the certificate was not surrendered, but remained all the time in respondent's possession, and no application was made to the secretary or other officer to have it changed? This is the first time that a question of this character has ever been presented to this court for decision, but there have been numerous decisions in other states directly bearing upon it. The general and prevailing rule, as shown by these decisions, is that, when the laws of a benefit society prescribe a mode of changing the beneficiary, the mode prescribed must be followed, and no change can be made in any other manner. See Nibl. Mut. Ben. Soc. § 221 et seq., and cases cited; also, Bac. Ben. Soc. § 307, and cases cited. In Wendt v. Legion of Honor, 72 Iowa, 682, 34 N. W. 470, it was held that, as the provisions of the constitution pertaining to the subject were a part of the contract of insurance, the insured could not make any change of beneficiaries, except by compliance therewith, and also that expressed intentions and oral declarations can have no effect to change beneficiaries; and in that case, as in this, it was claimed that, as the order was willing to pay the money into court to be disposed of as should be directed by the final judgment, it had waived a compliance with its The court said: "But it is said this laws. is a matter to which the defendant can only object. We think differently. While the heirs, during the life of the assured, had no right in the policy, their interest being nothing more than in expectancy, upon his death they acquired rights which cannot be cut off except in the manner prescribed by the contract. If that was not done, the defendant could not, even by positive consent after their rights had attached, by act or word do anything to defeat these rights. It is controlled by the contract as it was at the death of the assured." In Supreme Conclave v. Cappella, 41 Fed. 1, the general rule is declared as follows: "In making such change of beneficiary, however, the insured is bound to do it in the manner pointed out by the policy and the by-laws of the association, and any material deviation from this course will invalidate the transfer." It is said in that case, however, that the general rule is subject to three exceptions: (1) If the society has waived a strict compliance with its own rules, and, in pursuance of a request of the insured to change his beneficiary, has issued a new certificate, the original beneficiary will not be heard to complain that the course indicated by the regulations was not pur-(2) If it be beyond the power of the insured to comply literally with the regulations, a court of equity will treat the change as having been legally made. (3) If the insured has pursued the course pointed out by the laws of the association, and has done all in his power to change the beneficiary, but, before the new certificate is actually issued, he dies, a court of equity will treat such certificate as having been issued. same exceptions are recognized in some of the other cases, but it is evident that this case does not come within either of them, Here the council did not waive a compliance with its laws, and issue a new certificate, and it was not beyond the power of the insured to comply literally there-Nor did the insured pursue the course pointed out by the laws, and do all in his power to have the change made. He might have had the certificate surrendered as required, but this was never done or attempted to be done, and no application to the secretary for a change was made. We conclude, therefore, that the case falls within the general rule, and that the beneficiaries named in the certificate were entitled to the money, and the court below should have so determined. We advise that the judgment and order be reversed, and the

cause remanded, with directions to the court below to enter judgment in favor of the appellants.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the appellants.

104 Cal. 156

LANGE v. BRAYNARD et al. (No. 18,252.)
(Supreme Court of California. Sept. 21, 1894.)

NEW PARTIES—HOW AFFECTED BY PREVIOUS PROCEEDINGS — RIGHT TO CROSS-EXAMINE WITNESSES.

Where, in an action to subject land to a judgment, a person to whom the land was conveyed before the commencement of the action is, by order of the trial court, made a party thereto, he may demand that a deposition already taken be stricken out, and that he be allowed to cross-examine the witnesses who have already testified.

Department 2. Appeal from superior court, Tehama county; E. A. Bridgford, Judge.

Action by H. D. Lange against C. P. Braynard and others to subject land to the payment of a judgment. Judgment was rendered for plaintiff, and defendants appeal. Reversed.

Chas. G. Nagle, Nagle & Nagle, P. B. Nagle, and W. Henry Jones, for appellants. A. M. McCoy and H. P. Andrews, for respondent.

DE HAVEN, J. This action was originally commenced by the plaintiff against the defendants C. P. Braynard, William Nagle, and P. M. Cleghorn, for the purpose of subjecting the land described in the complaint to the payment of a judgment theretofore recovered by plaintiff against defendant Braynard, the complaint alleging that said land had been conveyed by said Braynard to the defendant William Nagle, and by said Nagle to the defendant Cleghorn, and that said conveyances were both made without consideration, and for the purpose of delaying and defrauding the plaintiff and other creditors of the defendant Braynard. The defendants William Nagle and Cleghorn filed an answer, denying the material allegations of the complaint, and thereafter, on May 4, 1891, and before the commencement of the trial of the action, the deposition of defendant Braynard was taken by the plaintiff, the defendants Cleghorn and William Nagle being represented at the taking of such deposition by their attorney in the action, P. B. Nagle. The action was commenced in April, 1891, and it appears that prior thereto the defendant Cleghorn conveyed the land in controversy to the said P. B. Nagle, but said deed was not recorded until August 17, 1891. Upon the trial, which was com-

menced in December, 1891, after the said deposition of Braynard had been read in evidence, and the testimony of other witnesses given, and the plaintiff had rested his case, and some testimony had been offered in behalf of defendants, the court made an order directing that the said P. B. Nagle be made a party defendant, which was accordingly done. It is shown by the bill of exceptions that upon the making of this order the said P. B. Nagle "then and there objected to being made a party defendant, and objected to said order, unless he had the privilege of examining the witnesses introduced on behalf of the plaintiff and those already introduced upon behalf of the other defendants, and of cross-examining said witnesses, and each and every one of them; and objected and requested and moved the court that, so far as he was concerned, and against him, that the evidence of said plaintiff and his witnesses be not considered against him without his right to cross-examine the same, and moved the same be stricken out as to him; and on the further ground he objected to all the evidence and depositions heretofore introduced as against him, on the ground that the privilege of cross-examining and objecting to their evidence had not been accorded him, and as against him the same is and was irrelevant, immaterial, and incompetent." These objections and motions were denied, and in so doing the court stated "that the same objection and rulings and exceptions on the part of the other defendants may be considered as taken by P. B. Nagle." The plaintiff recovered a judgment in accordance with the prayer of the complaint, from which, and the order denying their motion for a new trial, the defendants appeal.

The defendants contend that the evidence was insufficient to justify the findings, and complain of many of the rulings made during the course of the trial, but we only deem it necessary to notice the question presented by the ruling of the court in refusing to strike out the deposition of Braynard, and in refusing to allow the further crossexamination of the other witnesses whose testimony was given before the defendant P. B. Nagle was made a party to the action. This ruling was erroneous, and, as the evidence to which it related is material, the judgment and order appealed from must be reversed. Although the defendant P. B. Nagle derived his title to the land in controversy from the other defendants, yet, such title having been acquired prior to the commencement of the action, he would not have been affected by the judgment therein without being made a party thereto. Brady v. Burke, 90 Cal. 6, 27 Pac. 52; Campbell v. Hall, 16 N. Y. 575. "To make one a privy to an action he must be one who has acquired an interest in the subject-matter of the action either by inheritance, succession, or purchase from a party to the action subse-

quent to its institution. A privity antedating the action does not work an estoppel. Verdicts, judgments, depositions in a former cause, and the former testimony of deceased witnesses, are considered as resting on the same principle." Bryan v. Malloy, 90 N. C. 508. In the case of a party brought in by way of substitution,-as, for instance, the executor of a deceased party, or the ourchaser of the interest of a party with notice of the pendency of an action against his grantor,-such substituted party takes the case as he finds it, and is bound by the prior proceedings to the same extent as was his predecessor, and this is so because such substituted party is in privity with his predecessor. Thus, the rule is stated in 2 Barb. Ch. Pr. p. 79: "It is also laid down that in cases of alienation pendente lite the alience is bound by the proceedings in the suit after allenation and before the alience became a party to it; and depositions of a witness, taken after the alienation, and before the alienee became a party, may be used by the other parties against the alience as they might have been used against the party under whom he claims." But here the title of defendant P. B. Nagle was not acquired pendente lite, but before the commencement of the action, and when he became a party the action was, as to him, a new action (Borst v. Boyd, 3 Sandf. Ch. 501), and he could not be compelled to accept depositions taken or testimony given in the case before he was made a party. In the case of Jenkins v. Bisbee, 1 Edw. Ch. 377, it was held that a person made a party to a suit after testimony taken cannot be affected by such proof; and to the same effect are the cases of Hutchinson v. Reed, Hoff. Ch. 816, and Pratt v. Barker, 1 Sim. 1. In Wood v. Swift, 81 N. Y. 81, the case had been referred to a referee, and witnesses examined, when the complaint was amended by adding new parties defendant: and, upon such amendment being made, the trial court entered an order to the effect that the case should "remain, continue, and be tried before the referee . . * as though all parties now to the record had thus been from the beginning of the action," "the added defendants, however, to have the privilege of cross-examining the witnesses theretofore examined." This order was reversed by the court of appeals, the court "It is conceded by appellants' counsel that the court had the power, under section 452 of the Code, to bring in the appellant and the other persons as parties defendant to the action; but, even if it could do that, it could not compel them to accept the referee who had been appointed, and to accept the evidence which had been taken, even with the right of cross-examination which was secured to them. * * * The appellant had the right to have the cause tried by the court without a jury, and he at least had the right to be heard as to

the appointment of a referee, and he had the right to be present when the witnesses were sworn and examined." The principle thus declared is controlling here. A party can no more be compelled to accept a deposition taken in an action to which he was neither party nor privy, than to accept a referee under the circumstances appearing in the case just cited. Nor is the case at all changed by the fact that the deed to Nagle was not recorded at the time of the commencement of the action, or when the deposition of Braynard was taken; nor by the further fact that Nagle was the attorney for the other defendants when such deposition was given, and when the evidence of the other witnesses was admitted, and that as such attorney he cross-examined such witnesses for his clients. Conceding all these matters, the fact still remains that the deposition was taken in an action to which P. B. Nagle was not a party, and therefore was not admissible against him, and the court ought to have given him the opportunity to cross-examine the witnesses previously testifying at the trial, if he desired so to do. Judgment and order reversed.

We concur: McFARLAND, J.; FITZGER-ALD, J.

104 Cal. 128

WALSER v. AUSTIN. (No. 18,249.) (Supreme Court of California. Sept. 17, 1894.)

SPECIAL LAWS—APPOINTMENT OF OFFICERS.

Act March 31, 1891, § 170, subd. 21 (County Government Act), which provides that in counties of the eighth class only district attorneys may appoint assistants, violates Const. art. 11, § 5, which directs that the legislature, by general and uniform laws, shall provide for the election or appointment of county officers, and prescribe their duties. Welsh v. Bramlet, 33 Pac. 66, 98 Cal. 219, followed.

Department 2. Appeal from superior court. Fresno county; M. K. Harris, Judge.

Action by Mark Walser against R. II. Austin. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

C. C. Merriam, for appellant. Sayle & Caldwell, for respondent.

DE HAVEN, J. It was held in the case of Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66, that subdivision 21 of section 170 of the county government act, approved March 31, 1891 (St. 1891, p. 295),¹ contains local and special legislation, and is in conflict with section 5 of article 11 of the constitution of the state, which directs that the legislature, by general and uniform laws, shall provide for the election or appointment in the several counties ωf such county, township, and municipal officers "as public convenience may require, and shall prescribe their duties and fix their terms of

¹ Provides that in counties of the eighth class only district attorneys may appoint assistants.

office." We can add nothing to the reasoning by which that conclusion was reached, and upon the authority of that case the judgment and order herein must be affirmed. Judgment and order affirmed.

FITZGERALD, J. I concur.

McFARIAND, J. I concur in the judgment solely upon the authority of Welsh v. Bramlet, 98 Cal. 219, 33 Pac. 66, and Dougherty v. Austin, 94 Cal. 601, 28 Pac. 834, and 29 Pac. 1092, in which cases I could not concur.

SORENSEN v. DORRIS. (No. 18,339.) (Supreme Court of California. Sept. 24, 1894.)

An appeal will be dismissed where appellant fails to file his printed points and authorities within the time prescribed by a rule of court.

In bank. Appeal from superior court, Siskiyou county.

Action between one Sorensen and one Dorris. From the judgment, Dorris appealed, and Sorensen moves to dismiss the appeal. Dismissed.

R. M. J. Soto, for appellant. L. F. Coburn and J. N. Parker, for respondent.

PER CURIAM. The appellant herein having failed to file with the clerk of this court his printed points and authorities on appeal within the time prescribed by subdivision 4 of rule 2 of this court, respondent's motion to dismiss the appeal from the judgment and order must be granted. Appeals from judgment and order dismissed.

104 Cal. 198

KINGS COUNTY v. JOHNSON. (No. 18,285.)
(Supreme Court of California. Sept. 25, 1894.)
MANDAMUS—JURISDICTION—TAXES COLLECTED BY
WHONG COUNTY—PLYMENT TO PROPER COUNTY

WRONG COUNTY—PAYMENT TO PROPER COUNTY—ENFORCEMENT—CREATION OF NEW COUNTY.

1. Mandamus will not lie to compel the tax collector of one county to pay over to the collector of another county taxes belonging to the latter county which he has unlawfully collected, as mandamus cannot serve the purpose of an action for money had and received.

as mandamus cannot serve the purpose of an action for money had and received.

2. Act March 22, 1893, providing for the formation of K. county, provides that the tax collector of T. county shall, on demand, furnish and assign to the collector of K. county a list of all the unpaid taxes levied on property within K. county. Held, that mandamus will lie to compal the collector to furnish such list.

and assign to the collector of K. county a list of all the unpaid taxes levied on property within K. county. *Held*, that mandamus will lie to compel the collector to furnish such list.

3. Act March 22, 1893, entitled an act to "create the county of Kings," etc., which provides for the manner in which the unpaid taxes which have already been levied on property within its boundaries shall be collected by the county, is not unconstitutional as embracing matter not indicated by its title.

county, is not unconstitutional as embracing matter not indicated by its title.

4. The provision for the collection of the taxes levied being a part of the creation of the county, the act is not special legislation, except so far as the creation of a new county is such.

5. Const. art. 6, § 5, provides that process of the courts shall extend to all parts of the state, and that "said courts and judges shall have power to issue writs of mandamus, certiorari, * * * and habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties." Held, the phrase "in their respective counties" limits the power of the court merely in regard to the writ of habeas corpus, and therefore mandamus may extend beyond the county.

Commissioners' decision. Department 2. Appeal from superior court, Kings county; Justin Jacobs, Judge.

Petition by Kings county for a writ of mandamus against J. Sub. Johnson. From a judgment granting the writ, defendant appeals. Modified and affirmed.

Bradley & Farnsworth, for appellant. M. L. Short, for respondent.

TEMPLE, C. This is an appeal from a judgment awarding a peremptory writ of mandate, entered upon an order overruling a demurrer to the petition; the defendant declining to answer. The petition shows that defendant was and is tax collector of Tulare county, the affiant being tax collector of Kings county. That Kings county was created March 22, 1893. That the fifteenth section of the act creating the county reads as follows: "Sec. 15. It shall be the duty of the tax collector of the county of Tulare upon the demand of the tax-collector of the county of Kings to furnish, assign and transfer to the tax-collector of the county of Kings a complete list of all unpaid taxes assessed and levied during the year eighteen hundred and ninety-two, on property within the boundaries of the county of Kings. The tax-collector of the county of Tulare shall file a duplicate list of such unpaid taxes assessed within the boundaries of the county of Kings with the county auditor of Tulare county. The tax-collector of the county of Kings shall give to the tax-collector of the county of Tulare a receipt for said list of said unpaid taxes, and shall file a duplicate list with the auditor of the county of Kings, and thereupon all such unpaid taxes shall become payable to the tax-collector of the county of Kings, and he is hereby authorized to collect and receipt for the same." June 29, 1893, affiant, as tax collector of Kings county, demanded from defendant that as tax collector of Tulare he furnish, assign, and transfer to said afflant a complete list of the unpaid taxes assessed and levied during the year 1892 on property within the boundaries of the county of Kings. That defendant utterly refused so to do, but, on the contrary, proceeded to collect such unpaid taxes to the amount of \$1,300, which he now holds in his possession, and refuses to deliver to the tax collector of the county of Kings. Wherefore petitioner demands a writ of mandate commanding said defendant to furnish such list. An alternate writ was issued, commanding de-



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fendant, as tax collector of Tulare county, to can the payment be compelled by manfurnish such list, and to deliver to afflant, tax collector of Kings county, all taxes collected by said tax collector within the boundaries of Kings county since the formation of such county, or show cause, etc. On the return day defendant demurred to the petition on two grounds: (1) It appeared that the court had no jurisdiction to issue the (2) insufficiency of facts. The demurrer was overruled, and defendant declined to answer. Thereupon judgment was entered awarding a peremptory mandate in the terms of the alternate writ.

I know of no warrant for that portion of the mandate which commands defendant to pay to the tax collector of Kings county moneys which defendant has collected from the taxpayers of Kings county. The act of the legislature contains no authority on the part of the tax collector of Kings county to demand or receive such money. It does not authorize the tax collector of the county of Tulare to collect any taxes for the county of Kings. In fact, by implication it prohibits any collections on his part in the county of Kings after the demand provided for has been made by the tax collector of Kings county. Nor do I see any right which the county of Kings can assert to taxes collected by the tax collector of Tulare prior to the demand. The lien of the taxes for the year 1892 had already attached, and, unless the legislature saw fit to provide otherwise, such taxes due upon property situated in that portion of the former county of Tulare which was set off to the new county was collectible by the tax collector of Tulare. The only provision made in regard to the matter is that upon demand the unpaid taxes in that portion set off to the new county shall be transferred to the new county, and may be collected by the tax collector of Kings. There is no language which would seem to imply that any taxes collected prior to the demand, and since the creation of the new county, shall belong to the new county. On the contrary, the law requires the tax collector of Tulare to pay over each month all taxes collected by him, and I do not see what defense defendant could make to an action on the part of Tulare to compel him to pay into the treasury all taxes collected prior to such demand. But mandamus cannot serve the purpose of an action for money had and received. It can only compel the performance of a duty enjoined by law. The act imposes no duty upon the tax collector of Tulare to the county of Kings, or in which that county is interested, except his duty to furnish the list of unpaid taxes. He has, by his wrongful act, come into the possession of money which belongs to Kings county. At least either such is the case, or his collection is void, and the taxpayers still owe the tax. He can probably be made to pay it to the county of Kings. But it is not due to the tax collector of the county of Kings, nor

But I think the tax collector of damus. Tulare may be compelled by mandamus to furnish the list provided for. Here the act imposes a plain duty, in regard to which the officer had no discretion.

It is contended, however, that section 15 is unconstitutional, because the subject-matter of the section is not expressed in the title of the act, and because it is special legislation. I do not think either objection can be sustained. It is admitted that the legislature has the power to provide for the organization of new counties; that this act, so far as it creates the new county, is valid. Of course, to do this it must—or at least may—provide in detail for its organization and its working machinery. As its territory must be taken from other counties, such law could naturally provide for a division of the public property, if it must be divided, and for the payment of indebtedness. It would evidently be proper for such law to provide for the collection of the taxes which would become due on property in the new county. The lien of the taxes might attach, as here, before the new county would be organized, but the tax, in whole or in part, be collected afterwards. I see no constitutional objection to a provision in regard to the collection of these taxes, and as to whom they shall belong. It would seem eminently proper that such provision should be made. If entitled to criticise the act under consideration in this respect, I should say it is defective in that it is not sufficiently specific, and does not go far enough. Now, all these matters, and many others which would naturally be regulated in such an act, are included in the subject expressed in the title of the act. Ex parte Liddell, 93 Cal. 630, 29 Pac. 251. The title of the act is, "An act to create the county of Kings, to define the boundaries thereof, and to provide for its organization and election of officers, and to classify said county." All the matters stated in the title constitute but one subject, to wit, the creation of the county of Kings; and section 15 is a natural and logical part of that subject. This being so, it is not special legislation, except as the creation of a new county is special legislation.

I have so far not noticed the proposition that the court had no jurisdiction to issue the writ. It is argued that the writ cannot be issued to run out of the county, or to be executed out of the county. The claim is founded upon a construction of section 5, art. 6, of the state constitution. That portion of the section which is material here reads as follows: "They shall be always open (legal holidays and non-judicial days excepted), and their process shall extend to all parts of the state; provided, that all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof affected by such action or actions, is situated.

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Said courts and their judges shall have power to issue writs of mandamus, certiorari, prohibition, quo warranto and habeas corpus, on petition by or on behalf of any person in actual custody in their respective counties. Injunction and writs of prohibition may be issued and served on legal holidays and nonjudicial days." It is said that there should be a comma after the word "custody," and that the phrase "in their respective counties" limits the power of the court as to all the writs mentioned. It is somewhat strange if the convention provided first that the process of these courts shall extend throughout the state, and immediately add that certain important processes shall be issued only in their respective counties, meaning thereby that they shall not extend throughout the state. And how inapt the language to accomplish the supposed purpose. Why should the constitution prohibit the courts from issuing their writs anywhere else than in their respective counties? All writs, whether extending throughout the state or not, would be issued there. The phrase is exactly adapted to express a limitation to the jurisdiction of the court in matters of habeas corpus to the county in which a person is held in actual custody, and we find precisely the same phrase was used twice in the former constitution for the same purpose. And, if the section is to be construed as is contended by appellant, it will apply quite differently to matters of habeas corpus from what has always been understood and practiced. One might be in San Francisco, and yet hold a child in custody in Kings county. Which court would have jurisdiction,-San Francisco or Kings? As the law has always been understood, the court in the county of Kings would have jurisdiction and could extend its writ to San Francisco or elsewhere to reach the responsible party. I think the order or judgment should be modified so as to confine its operation to the duty prescribed in the statute, to wit, to require the appellant to furnish, assign, and transfer the tax list described in the complaint, and that. as modified, it should be affirmed.

We concur: BELCHER, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order or judgment is modified so as to confine its operation to the duty prescribed in the statute, to wit, to require the appellant to furnish, assign, and transfer the tax list described in the complaint, and that, as modified, it is affirmed.

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KELLY v. BRADBURY. (No. 15,554.) (Supreme Court of California. Sept. 28, 1894.)

REVERSAL ON APPEAL

Where, on appeal on the ground of insufficiency of the evidence, the respondent not only fails to file a brief, but also to argue the case orally, the judgment will be reversed.

Department 2. Appeal from superior court, city and county of San Francisco; A. A. Sanderson, Judge.

Action by Thomas Kelly against William B. Bradbury. There was a judgment for plaintiff, and defendant appeals. Reversed.

Gordon & Young, for appellant. Low, for respondent.

PER CURIAM. It appears from the record that the verdict of the jury is assailed by the specifications on the ground of the insufficiency of the evidence to support it. There is no brief on file by respondent, nor was the case orally argued in his behalf. It therefore follows, on the authority of Richter v. Irrigation Co. (Cal.) 36 Pac. 96, and Davis v. Hart (Cal.) 37 Pac. 486, that the judgment and order appealed from should be reversed. So ordered.

4 Cal. Unrep. 805

TODD v. MART.N. (No. 18,307.)

(Supreme Court of California, Sept. 17, 1894.) ACTION AGAINST ADMINISTRATOR — SERVICES AS NURSE—EVIDENCE — DEPENDANT'S COMPETENCY AS WITNESS.

1. A verdict rendered on conflicting evidence will not be disturbed.
2. Evidence showing that services were ren-

dered by one as nurse to deceased is sufficient to charge the estate therefor, without proof of

an express request by deceased.

3. Where plaintiff, after the death of deceased, continued in his former work of taking care of the latter's stables and stock without any authority from the administratrix, such services form a charge of necessity on the es-

4. Expenses incurred by the widow before she was appointed administratrix, and not apparently for the benefit of the estate, are not

parenty for the benefit of the estate, are not chargeable against it.

5. Code Civ. Proc. § 1880, disqualifies parties or assignors of parties to an action against an executor or administrator, or persons in whose behalf such action is prosecuted on a claim against the estate of the deceased, from textifying as to feets occurring before the death testifying as to facts occurring before the death of the deceased. Held, that the disqualification applies only to those parties who assert claims against the estate.

against the estate.
6. Code Civ. Proc. § 2049, provides that the party producing a witness shall not impeach his credit by evidence of bad character, but may contradict him by other evidence, and show former inconsistent statements. Held, that the plaintiff in an action against an administratrix.

having called her to testify in his behalf, is not necessarily bound by her answer.

7. In an action against an administratrix for services as nurse to deceased, one who served in the same capacity alternately with plaintiff may testify as to the nature and amount of the services.

Commissioners' decision. Department 2. Appeal from superior court, Trinity county; T. E. Jones, Judge.

Action by E. N. Todd against Isabell J. Martin, administratrix of the estate of John Martin, deceased, to recover for services as nurse to the deceased in his last illness, and for other services. Judgment for plaintiff, and defendant appeals. Affirmed.

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Walter H. Linforth, for appellant. James W. Bartlett, for respondent.

HAYNES, C. The defendant appeals from the judgment entered against her upon the judgment roll and a bill of exceptious setting out the evidence. A demurrer to the complaint was overruled. No point is made thereon in appellant's brief, and, as the complaint states a cause of action, the other objections raised need not be noticed. claim consisted of several items, aggregating \$876.66, and stated several credits, leaving an alleged balance due plaintiff of \$368.16, and was allowed by the administratrix, upon presentation, for the sum of \$57.08. The jury returned a verdict for \$361.16, upon which judgment was entered for plaintiff. Appellant reserved a large number of exceptions to evidence, and also specifies particulars wherein the verdict is not justified by the evidence. The sufficiency of the evidence will be first considered.

1. The first item in plaintiff's claim is for the sum of \$93, alleged to have been given by the plaintiff to John Martin in May, 1891, to be placed in his safe for safe-keeping. There was evidence from which the jury would be justified in finding the delivery of the money to Martin, and that it was put in the safe. There was also evidence tending to prove that on February 5, 1892, the money had not been returned to plaintiff. When delivered to Martin, the money was in a purse, according to the testimony of Mr. Everhart, and was counted by Martin; and that on February 5, 1892, he, Everhart, heard Mr. Martin say to plaintiff that he was going below, to be gone some time, and asked Todd whether he wanted his purse, to which Todd replied that he did not. Mr. Martin died July 30, 1892. On August 17th, Mr. Spratt, the public administrator, took charge of the estate, and opened the safe, but did not find any purse containing money; that he found an empty leather bag, which was neither marked nor tagged. John Hewston. who had been in Martin's employ for about 15 years, testified that he knew of Martin's custom with reference to keeping money and packages in his safe for others; that he had frequently kept money for him; but that it was his invariable custom to tag or label all money, packages, or purses belonging to others with their names upon them. A period of nearly seven months elapsed after the conversation in relation to the purse. testified to by Everhart, before the death of Martin, during which the plaintiff had almest daily opportunities of receiving back his purse. On the other hand, plaintiff, during all the time after the deposit, was in the employ of Martin at a salary of \$50 per month, and it does not appear that at any time he was in need of money beyond that which he received for his labor. ever may be our opinion as to the weight of evidence, we think the evidence was such as

to require its submission to the jury, and that this court should not disturb the verdict thereon.

2. As to the amount of credits defendant was entitled to on plaintiff's account for services, the testimony was conflicting to such an extent that we are not permitted to say that upon that point the verdict is not justified by the evidence.

8. It is contended that there is no evidence tending to establish the fact that plaintiff rendered "fifteen days' service, or any number of days' services, to John Martin, as a nurse, at his request." Inasmuch as defendant admitted that plaintiff did serve as a. nurse for John Martin for five days during his last illness, we infer that counsel for appellant bases the alleged insufficiency of the evidence upon the absence of direct evidence of a request by John Martin. Wethink the evidence was sufficient in both particulars. It is not necessary that thereshould be direct evidence of an express request. The fact that he was called from his regular employment at the livery stable, and devoted his time to the care of Mr. Martin, with his knowledge and that of his wife and the attending physician, is sufficient to show a request. Or, if Mr. Martin had been unconscious, the request of the wife or the physician would have been deemed his request.

4. One item in plaintiff's claim is for seventeen days' services at the stable, from August 1st to the 17th, which was after the death of Mr. Martin. It is objected that these services were not shown to have been rendered "at the request of Mrs. Martin, as administratrix of the deceased." The facts were that, prior to his death, the deceased conducted a livery stable, and plaintiff was employed therein for a year or more at a compensation of \$50 per month. From the time of Martin's death until August 17th, there was no administrator or other person legally authorized to take charge of the estate, or to employ any one in any service connected therewith. It could not have been the duty of the plaintiff, in view of his past employment by Mr. Martin in that service, to have ceased to care for the property, or permit the horses to die of hunger or thirst. Services of this character so rendered prior to the appointment of an administrator must be deemed to have been included in the term of service contracted for by the deceased, and to form a proper charge against the estate; or, if it cannot be placed upon that ground, it is, while not a debt either of the intestate or the administrator, a charge thrown upon the assets by necessity, but for which the administratrix subsequently appointed would not be personally liable. It is analogous to a claim for funeral expenses paid by a person other than the administrator or executor, which, at common law, are a charge against the estate, though not strictly a debt due from the decedent. In Patterson v. Patterson, 59 N. Y. 574, the defendant in an action upon an obligation made to the deceased, but payable to the executor, was permitted to set off the funeral expenses of the deceased paid by the defendant. In Hapgood v. Houghton, 10 Pick. 154, it was held that the law raises a promise on the part of the executor or administrator to pay for the funeral expenses as far as he has assets, and that if he have no assets he should plead that fact in bar, and that if he has, the judgment must be against them in his hands. Humanity, as well as the interests of the estate, required that the stock be cared for, and no one could more appropriately assume that duty than one who had been employed by the decedent in his lifetime to perform the same service; and as to the value of the services, that compensation which had been paid plaintiff by the decedent will be deemed reasonable; and as to services rendered after the death of Mr. Martin, plaintiff is a competent wit-

The item in plaintiff's claim for the sum of \$5 of plaintiff's money, expended in making a trip to Redding and return at the request of Mrs. Martin, August 6, 1892, for the purpose of bringing Henry Martin to Weaverville, is not a charge for which the estate is liable. Mrs. Martin was not then administratrix, nor does the service appear to have been for the benefit of the estate, and no evidence should have been received in regard thereto. It is clear, however, that this item was disallowed by the jury. This item was for \$5. There was another item of \$2 for "cash paid Lewis Moore, in change." The least of the remaining four items was \$28.33. No evidence was given as to the \$2 The verdict was for \$361.16, while the amount claimed was \$368.16, the difference being the amount of this and the \$2 item above named. The error did not, therefore, prejudice the defendant.

Plaintiff called the defendant as a witness, and asked her to give the dates and items of the cash payments made to the plaintiff between the 1st day of June, 1891, and the 15th of August, 1892. Counsel for defendant objected, on the ground of incompetency, under subdivision 3 of section 1880, Code Civ. Proc., and the objection was overruled. Defendant thereupon, as such witness for the plaintiff, was permitted, over the objection of defendant, to testify from the books of the deceased to the several items of payments referred to in the question. Section 1880, Code Civ. Proc. provides: "The following persons cannot be witnesses: 3. Parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted, against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." This section has been several times consid-

ered by the court, but never under precisely the circumstances here existing. We think, however, that in Chase v. Evoy, 51 Cal. 618. a construction was given which may fairly be held to include this case. There the action was against the administratrix upon a claim against the estate, the claim consisting of a promissory note made by the decedent and two others, who were also defendants, The administratrix of the deceased maker called one of her codefendants, and proposed to prove by him "what, if anything, had been paid thereon, and how paid." This court, after saying that the language of the statute, if literally construed, might exclude all parties to the action, whether called to testify for or against the estate, but that to give it such construction would defeat the manifest purpose of the act, and that the language was capable of a different construction, further said: "Parties to the action, or in whose behalf it is prosecuted, are not allowed to testify against the estate in a suit to establish a demand against it. One of the parties to the transaction out of which the demand originated being no longer in esse, it was deemed unwise to permit the other party to testify to his version of the demand when called by the plaintiff in a proceeding to establish the demand. statute, it is true, provides in general terms that 'the parties to an action or proceeding' against the estate shall not testify, but the obvious meaning of this provision is that a party to the action shall not testify against the executor or administrator." We think it could not have been the intention of the legislature to render incompetent as a witness in such cases the executor or administrator who is charged with the duty of protecting the estate against improper or unjust demands, as in many cases it would tie his hands, and operate to prevent his giving efficient protection, and compel him to stand by with lips sealed, and see the estate despoiled, when, if permitted to speak, the fraudulent or unjust character of the claim would be exposed and defeated. Nor do we think the language of the Code inconsistent with such construction, but, on the contrary, that its manifest intent and purpose require it. We think it is only parties who assert claims against an estate who are rendered incompetent to testify, and that the word "parties" does not refer to the executor or administrator who is the party defendant If, however, the executor or administrator is the assignor of the claim asserted by the plaintiff, or is a person for whose benefit it is prosecuted, or himself asserts a claim, as he may do, the other language of the section is sufficient either to fix him as the party prosecuting the claim, or as the person for whose benefit it is prosecuted, and upon that ground declare him incompetent, but does not do so simply because he is the party defendant. In Blood v. Fairbanks, 50 Cal. 420, it is true, it was said that all parties to

the action were incompetent. But in that case it was not necessary to decide that ques-Hewitt had assigned to Blood his interest in the contract, but for some reason he was made a party to the action, though, as he had no interest, he was merely a nominal party. He was held to be incompetent as a witness, because he was a party. But he would have been incompetent if he had not been a party, for the reason that he was an assignor of the plaintiff, and so within the express letter of the statute. In the case at bar we see no reason why the defendant was not a competent witness, and, being competent, because not within any of the grounds mentioned in the Code rendering her incompetent, the plaintiff had the right to call her as his witness.

Plaintiff was asked whether he had a conversation with Mrs. Martin, after the death of Mr. Martin, relative to the purse alleged to have been placed in the safe. The objection made by defendant was properly overruled. The question did not call for the conversation, and the conversation itself might have been of a character to make it relevant and competent. The conversation, as afterwards given by the witness, was unimportant; but, if it was not competent, there was no motion to strike it out.

The testimony of J. C. Todd is relevant so far as it shows the opportunity his employment as nurse gave him of knowing of the services of the plaintiff in the same capacity, and the character of the services required as a nurse in that case. The fact that plaintiff came in the evening, and assumed the duties of nurse, and that the witness found him there in the morning when he returned, was evidence from which the jury could properly infer, in the absence of evidence to the contrary, that plaintiff was on duty all night: and defendant's motion to strike out the testimony of the witness was properly denied.

As to appellant's contention that respondent, having called Mrs. Martin as a witness, is bound by her answers, it is sufficient to say that section 2049, Code Civ. Proc.,1 lays down a different rule. The instruction given to the jury upon this point at defendant's request was not accurate, but was evidently not understood, either by the court or jury, to mean what counsel now contends it means. The court certainly did not understand by the words, "the plaintiff is bound by the testimony of the defendant given by her while a witness on his own behalf," more than is expressed in the section of the Code above cited. Besides, this instruction must be taken in connection with others requested by the defendant, to the effect that the jury were the exclusive judges of the evidence, and that they might "reject the most positive testimony of a witness."

The modifications of defendant's requests to instruct the jury were proper, and the instructions refused were properly refused. These modifications and refusals, so far as they represent any question of importance, fall within points already discussed, and need not be further noticed.

Finding no error which requires a reversal, we advise that the judgment be affirmed.

We concur: VANCLIEF, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

104 Cal. 161 ALLISON RANCH MIN. CO. V. NEVADA COUNTY. (No. 18,310.)

(Supreme Court of California. Sept. 21, 1894.) TAXATION - BOARD OF EQUALIZATION - INCREASE OF ASSESSMENT-NOTICE TO CORPORATE OFFICES.

1. A notice by a county board of equaliza-tion, addressed to "D., Owner" of a mine, is not evidence that the property was assessed to D. 2. Where a notice by a county board of equalization was to "D., Owner" of a mine, it may be shown that he was an officer of a cor-poration owning the mine, authorized to accept service of the notice service of the notice.

3. A notice by a county board of equalization will not be rendered ineffectual by reason of any inaccuracy on the part of the clerk in making up the minutes of the proceedings of the board.

4. It is not necessary, to authorize a county board of equalization to increase an assessment, that a complaint or affidavit that the assess-ment is too low should be filed with the board.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge. Certiorari by the Allison Ranch Mining Company to review the proceedings of the board of equalization of Nevada county. Judgment was rendered for respondent, and petitioner appeals. Affirmed.

Chas. W. Kitts, for appellant. Thos. S. Ford, Dist. Atty., for respondent.

DE HAVEN, J. This proceeding was commenced in the superior court of Nevada county for the purpose of obtaining a judgment annulling an order of the board of equalization of the county of Nevada, increasing the assessed valuation of certain property belonging to the petitioner. The petitioner is a corporation, and alleges in its petition that the said board of equalization, "without any notice to petitioner, and without taking any evidence or proofs whatever. arbitrarily raised and increased the assessment upon its said property, as made by the assessor, from \$12,000 to \$25,000." Upon the filing of the petition a writ of certiorari was issued and directed to the county of Nevada. In its return to the writ the county

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¹ Code Civ. Proc. § 2049, provides that "the party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may show that he has made at other times statements inconsistent with his present testimony."

filed an answer denying the allegations of the petition, and also caused to be returned to the court a certified copy of all the proceedings of the county board of equalization, so far as related to the matter of increasing the petitioner's assessment. Upon the hearing the superior court gave judgment to the effect that the petitioner take nothing by the action, and that the petition be dismissed. The judgment itself recites that "upon the evidence, arguments, proofs, and premises, the court finds as true each and every allegation of the answer, and finds as untrue such allegations of the petition as are denied." From this judgment the petitioner appeals, and the case is presented here upon the petition, answer, return, and judgment of the court, and without any bill of exceptions.

It is claimed by the petitioner that the following entries appearing in the minutes of the board of equalization show affirmatively that the order complained of was made without notice to the petitioner:

"July 11, 1893. A. E. Davis, owner of the Allison Ranch mine, in Grass Valley township, is hereby cited to appear and show cause why the assessment on said mine should not be raised from \$12,000 to \$25,000.

"July 17, 1893. A. E. Davis, owner of the Allison Ranch mine, heretofore cited to appear and show cause why the assessment on the Allison Ranch mine should not be raised from \$12,000 to \$25,000, appeared before the board through C. W. Kitts, Esq., who being duly sworn, made a statement in relation to the said mine. The board took the matter under advisement. Ordered, that the assessment of the Allison Ranch Mining Company, on the Allison Ranch mine, in Grass Valley township, be raised from \$12,000 to \$25,000."

It is argued in behalf of the petitioner that this record of the board of equalization shows that its order was based upon notice given to A. E. Davis, and not to the petitioner, and presumptively that the property was originally assessed to Davis as owner. We cannot accept this view. The mere recitals in the minutes of the board referring to A. E. Davis as owner of the Allison Ranch mine do not determine the title to the property. They do not show that the original assessment was not made to the conceded owner, the petitioner here, nor are these entries at all inconsistent with the fact that A. E. Davis was the president, secretary, or managing agent of the petitioner; and, if he was, the notice served upon him of the intention of the board to increase the assessment of the Allison Ranch mine was notice to the petitioner, and such notice was not rendered ineffectual by any want of accuracy upon the part of the clerk in making up the minute entries in relation to it. It was competent upon the hearing before the superior court to show by evidence aliunde the minutes that A. E. Davis was the presi-

dent, secretary, or managing agent of the petitioner, and that the Allison Ranch mine was originally assessed to it; and we will presume, in support of the judgment of the superior court, that such proof was made. Such evidence would not contradict the record of the board of equalization, and would show that it acted within its jurisdiction in making the order complained of. We do not think that the board of equalization should be held to any very strict rules in the matter of keeping the minutes of its proceedings, and the rule as to the matter of notice to be given the property owner ir such cases as this is properly stated in Waterworks v. Schottler, 62 Cal. 103, as follows: "In our opinion, as intimated in Patten v. Green, 13 Cal. 330, such tribunals as the boards of supervisors ought not to be held to any great strictness of procedure in the matters above discussed herein; and if, under a rule or an order of such boards, a party has notice of the intended action of a board of supervisors, sitting as a board of equalization, in regard to the assessment of his property, in time to have a full and fair hearing during the sessions of the board, we will hold such notice to be sufficient, unless it appears affirmatively that a full and fair hearing was denied him by the action of the board."

It is urged that the order of the board was void because not based upon a complaint or affidavit filed with the board. There are two answers to this contention: First, the petition does not assail the jurisdiction of the board upon such ground, and there is nothing in this record to show that the objection was raised in the superior court. Second, under section 3673 of the Political Code, the jurisdiction of the county board of equalization to give notice of its intention to raise any individual assessment is not made to depend upon having before it a complaint or affidavit that such assessment is too low, and asking that the same be increased. The jurisdiction of the board to act in the matter of increasing an assessment is complete after giving to the person assessed the notice prescribed by that section, and the board may give such notice on its own motion. Judgment affirmed.

We concur: McFARLAND, J.; FITZ-GERALD, J.

104 Cal. 106

DAW v. NILES et al. (No. 19,140.) (Supreme Court of California. Sept. 13, 1894.) PAYMENT OF MORTGAGE TAX—PAROL AGREEMENT BY MORTGAGOR—FORPSITURE OF INTEREST.

A contemporaneous parol promise by a mortgagor to pay the mortgage tax does not invalidate the stipulations for interest, under Const. art. 13, § 5, providing that every contract obligating a debtor to pay the tax upon money loaned shall, in that respect, and as to any interest specified therein, be void. Garoutte and Harrison, JJ., dissenting.

In bank. Appeal from superior court, Los Angeles county; Walter Van Dyke, Judge.

Action by George W. Daw against William Niles and John B. Niles to foreclose a mortgage. There was a judgment for plaintiff, from which defendants appeal. Affirmed.

A. W. Hutton and Minor & Woodward, for appellants. Albert M. Stephens, for respond-

BEATTY, C. J. This is an action to foreclose a mortgage given to secure the payment of a promissory note for \$10,000, payable 10 years after date, with interest at the rate of 7 per cent. per annum, and containing a stipulation to the effect that if the interest is not punctually paid the principal and accrued interest shall become immediately due and payable, at the option of the holder. Nearly four years having elapsed after the execution of the note, without the payment of any part of the principal or interest, the plaintiff exercised his option to treat the whole amount as immediately due, and sued to foreclose. The defendants, by way of defense to the action, allege that at the time of the execution and delivery of the note and mortgage, and as a part of the same transaction and contract, it was agreed between the plaintiff and the makers of the note and mortgage that they (the mortgagors) should and would pay and discharge all taxes and assessments which might be assessed or levied upon said money or mortgage, anything in said promissory note or mortgage, or either of them, to the contrary, notwithstanding. And it is further alleged that said agreement was knowingly made and omitted from said mortgage with the intent to evade the provisions of section 5 of article 13 of the state constitution, and on that ground defendants deny that by their failure to pay the alleged interest on said note the same became or is due or payable. In other words, they take the position that, on the facts alleged in their answer, no interest can ever become due on the note, and no suit to collect the principal can be commenced short of 10 years from its date. This position is undoubtedly sustained by our decision in the recent case of Burbridge v. Lemmert, 99 Cal. 493, 32 Pac. 310; but the difference between that case and this is that there the agreement to pay the taxes on the mortgagee's interest in the land was in writing, while here it is only claimed to have been by parol; and the question is not as to the sufficiency of the defense, as pleaded, but is wholly with respect to the competency of the evidence offered to sustain it.

At the trial, one of the defendants and joint makers of the note and mortgage, having been called and sworn as a witness on behalf of the defendants, was asked the following question: "Did you and your brother, John B. Niles, have any agreement with the plaintiff with reference to the payment by Cal.Rep. 35-37 P.—61

you and your brother of the taxes to be assessed or levied upon the mortgage set forth in the complaint, or the money secured thereby?" To which the plaintiff objected upon the grounds, among others, that it was incompetent, and that oral evidence was inadmissible for the purpose of contradicting or varying the terms of the note and mortgage, and that no oral agreement could be shown, binding the mortgagors to pay the taxes upon the mortgage, or upon the money thereby secured. The attorneys for defendants having admitted that there was no agreement in writing respecting the payment of said taxes, the court sustained plaintiff's objection to the question, and also to the further and more formal offer of the defendants to prove the allegations of the answer as above set forth. Thereupon, the cause was submitted for decision, and the decree of foreclosure was entered, including a direction to pay to the plaintiff, out of the proceeds of the sale of the mortgaged premises. the principal of the note, with accrued interest, counsel fees, and costs. The defendants appeal from the judgment upon a record showing the facts as here stated, and the question to be determined is whether the superior court erred in excluding evidence of an oral agreement to pay the taxes on the debt or mortgage. The appellants do not question the general rule as to the inadmissibility of oral evidence to add to, contradict, or vary a written agreement, but they claim to be within one of the well-understood exceptions to the rule.

Section 1856 of the Code of Civil Procedure states the rule and its exceptions as follows: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: (1) Where a mistake or imperfection of the writing is put in issue by the pleadings. (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section eighteen hundred and sixty, or to explain an extrinsic ambiguity, or to establish illegality or fraud. The term 'agreement' includes deeds and wills, as well as contracts between parties."

The contention of appellants is that the validity of their agreement to pay interest was the fact in dispute; that the parol promise which they offered to prove would have rendered said agreement void; and, therefore, that their offer came within the second exception to the rule. This conclusion seems to be inevitable if it be true, as the argument assumes, that the alleged parol promise to pay the taxes would have rendered the agreement to pay interest void, and the ques-

tion therefore is narrowed down to this: Does a parol promise by a mortgagor to pay the mortgage tax invalidate the written stipulations for interest contained in the note and mortgage? This is a very serious question, the decision of which is fraught with the gravest consequences, not only to the entire business community, but more especially to those whose interests or necessities compel them to become borrowers of money. To hold that such a parol promise does invalidate the written agreement is not merely to punish actual transgressions of the supposed prohibition of the constitution; it is to set at large every written agreement by which the payment of money is or shall hereafter be secured; it is to introduce doubt and uncertainty where now is certainty and security; it is to multiply litigation, and to make possible infinitely more fraud than it can possibly prevent,-and all this for the sake of a more than doubtful advantage to necessitous borrowers, for, since there is no limit imposed either by the laws or constitution of California to the rate of interest that may be exacted by the lender of money, it would seem that any additional risk to which the business of lending is subjected can only result in an increase of the rates of interest. But the question before us is one of constitutional construction, and must be decided without reference to the argumentum ab inconvenienti, unless the provision in question is of doubtful or ambiguous import.

Section 5 of article 13 of the constitution reads as follows: "Every contract hereafter made, by which a debtor is obligated to pay any tax or assessment on money loaned, or on any mortgage, deed of trust, or other lien, shall, as to any interest specified therein, and as to such tax or assessment, be null and void." The parol promise of the defendants in this case does not come within the literal terms of this provision of the constitution. nor, we think, within that natural and unforced construction of its terms for which they contend. The language of the section is not happily chosen, and, literally taken, involves an absurdity, for it speaks of a contract which obligates the debtor, and is at the same time void. What is evidently meant, however, is a contract which, but for the invalidating effect of this provision, would obligate the debtor to pay the tax, and this contract must be a part of the contract to pay the interest, for it is the interest specified therein, i. e. in the contract to pay the tax, which is alone invalidated. Upon these conditions, it is legally impossible that a parol promise to pay taxes should invalidate a written promise to pay interest, for such parol promise could never obligate the debtor. Code Civ. Proc. § 1639. It could never be proved against him under the rule of evidence above quoted (Id. § 1856), for the reason therein stated,—that, with the exceptions enumerated, there is a conclusive presumption that the writing contains all the terms of the contract. But we would not be willing to rest our decision on this technical and literal construction of the clause in question, or upon its evident conformity to the whole tenor and natural import of the language used. We concede that if, upon a comprehensive view of the several provisions of the constitution relating to this subject, there is disclosed a well-defined policy and intention on the part of the framers of the constitution, which is capable of enforcement, we should give to this particular clause a construction in harmony with such policy, and an effect which will not only prevent any direct infringement of its terms, but every indirect attempt to evade them. The appellants contend that the policy of the constitution in this particular is to protect improvident and necessitous borrowers from the exactions of greedy money lenders; that its inhibition of contracts by which the debtor is obligated to pay the mortgage tax is in perfect analogy with the usury laws; and that, on the same grounds, and to the same extent, that parol evidence was admissible to prove that a contract was usurious, it must be admissible to prove a contract by the debtor to pay the mortgage tax. Conceding, for the present, the correctness of these propositions, let us see how far the authorities bear out the claim of counsel as to the admissibility of parol evidence to sustain a plea of usury.

At the outset of their argument, they quote the language used by Lord Mansfield in delivering the opinion of the court in Floyer v. Edwards, Cowp. 114, "And, where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute," and also a saying attributed to Lord Coke: "To them that lend money my caveat is that neither directly nor indirectly, by art or cunning invention, they take above six in the hundred, for they that seeke by sleight to creepe out of these statutes will deceive themselves, and repent in the end." though unable to verify the quotation, we have no doubt that this language is correctly attributed to Lord Coke, for the first clause of the sentence contains almost a literal statement of the terms of the usury statutes, and the last is simply a variation of the statement subsequently made by Lord Mansfield of a perfectly familiar doctrine especially applicable to the laws against usury. But neither Lord Coke nor Lord Mansfield, nor any other English court or judge, so far as we are advised, ever held a case like this to be within the doctrine so stated. We have not, of course, been able to run through the almost countless cases in which the plea of usury has been interposed; but, so far as our research has extended, we have found no English case which sustains the contention of appellants on this precise point, and the industry of counsel seems to have been equally What they have found, and all fruitless. that they have found, are cases like that

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above cited from Cowper's Reports, of which there are a great number, all illustrating the precise meaning and limiting the application of the general statements of Coke and Mansfield above quoted. When a money lender took a written obligation by which his debtor expressly promised to pay the principal of the loan with more than legal interest, the case was one to which the maxim "res ipsa loquitur" applied, and of course the doctrine in question had no application; but there were a large number of cases in which a plea of usury was interposed to an action on a contract by which the debtor ostensibly agreed to pay money upon some other consideration than a loan, or by which he agreed to pay more than he had received, and these were the shifts and devices to which the sayings above quoted referred. The case of Floyer v. Edwards, supra, is a good illustration. The plaintiff was a refiner, and sold the defendant gold and silver wire upon an agreement made at the time of the sale that, in case the price was not paid in three months, the defendant should pay to the plaintiff a half-penny an ounce per month for so long a time as the money should remain unpaid. If this was a bona fide sale, the agreement was lawful, and in strict accordance with the custom of the Goldsmiths' Company, although a half-penny per ounce was far above the lawful rate of interest, while, if it was not a sale, but in fact a loan disguised as a sale for the purpose of evading the statute, the form in which it had been put would not protect it. The case was tried before Lord Mansfield at nisi prius, and parol evidence as to the negotiations preceding the transaction admitted for the purpose of determining whether it was in fact a loan or sale. Under his lordship's instructions the jury found for the plaintiff, and the rule for a new trial was discharged by the court in In the course of his opinion, Lord Mansfield used the language above quoted, which, in that connection, meant only this: That, where the real consideration of a promise to pay money is a loan, that consideration may be proved, notwithstanding the written contract has recited a sale of goods as the consideration of the promise. But, of course, it was a matter of familiar knowledge to Lord Mansfield that not only this particular device, but a great number of others, had been practiced by money lenders from the very beginning of the legislation against usury, for the purpose of evading the statutory penalties, and no doubt he had those practices in mind. Among the earliest and most common of these contrivances was the grant of annuities or rent charges, redeemable and otherwise. A large number of the decisions upon such cases are reviewed by Chief Justice Marshall in his opinion in Scott v. Lloyd, 9 Pet. 418, where such a grant was held to have been a mere cover for a loan at usurious rates. Another device was to compel the borrower to buy from the lender a half interest

in a clock, to be kept by the lender, or an impossible wardrobe, or other article of furniture, or a horse of a slave, or goods of any kind, at an extravagant price, and including this price in the note or bond for the money actually loaned. Another was to exact a premium for the loan at the time of making the advance, or, in other words, to take a note for a larger sum than was actually loaned. Another was to exact a bill of exchange for the amount of the debt or loan, with a premium added largely in excess of the rate of discount on such bills. There were many others, as the decided cases show; but they all possessed one feature in common, and it was that particular trait which gave point and force to the observation of Lord Coke and Lord Mansfield, and which clearly indicates the extent of its just application. In every one of the cases to which we have referred, it will be seen that the action was upon a contract,-generally in writing,-which was by its terms lawful and legitimate, and not only capable of proof against the debtor, but legally enforceable according to its terms, if valid in fact as well as in appearance. In other words, the lender had so "contrived" that he could actually enforce the payment of unlawful interest against an unwilling debtor, and thus defeat the purpose of the statute, unless the debtor was allowed to prove, not a collateral verbal promise of his own, having no validity or force whatever. but a concrete fact outside of the agreement, and tending to show that the ostensible agreement upon which the action was founded was a sham, or that the consideration or declared object of the contract was not its real consideration or object. In such cases the courts were confronted with a dilemma in which a choice of evils was necessary. They had either to make an inroad upon or an exception to a most salutary rule of evidence, or they must lend themselves to the enforcement of contracts, the purpose and effect of which was to frustrate the statute. In this situation there was, of course, but one thing to do, or rather there was but one precedent to follow, for the difficulty was one that had been encountered by the courts long before the usury statutes, and had been solved by making the necessary exception to the rule of evidence. But this exception was made no broader than was necessary in order to avoid the greater evil of enforcing a contract founded upon an illegal or insufficient consideration, or entered into for the accomplishment of an unlawful object. There was no occasion to extend the exception to a case like this, in which the verbal promise sought to be proved could never have had the slightest force or validity, and which, if made, gave the lender no advantage, and subjected the This distinction is debtor to no liability. clearly and forcibly stated by Chief Justice Parker in delivering the opinion of the supreme court of Massachusetts in the case of Butterfield v. Kidder, 8 Pick, 512,—a case

which involved the precise point under consideration here. His opinion is short, and we cannot do better than quote it in full. He says: "The verbal promise to pay eight per cent. when the note was made, by which there was a promise to pay the money lent and lawful interest only, ought not to vitiate the note, for it was wholly without consideration, and cannot be taken as part of the contract, which was in writing, and must be considered as evidence of the intention of the parties. Supposing the agreement to pay and receive more than six per cent., the plaintiff could recover nothing but what is promised by the note. The additional promise was therefore wholly nugatory, and cannot affect the note. If it be said that by this contrivance the statute may be avoided, the answer is that, if that verbal promise should be carried into effect by paying unlawful interest, the taking would be an offense, and the party would become liable for the penalty. But by this contract now in suit there is not reserved or secured more than six per cent., and therefore the contract is not void."

It cannot be denied, however, that in some cases this distinction, and the principle upon which it is founded, have been overlooked. An instance of this is presented by the South Carolina case of Willard v. Reeder, 2 McCord, 369, which, like the Massachusetts case last cited, involved the precise point under discussion. Another case involving the same point, and decided the same way, is Lear v. Yarnell (decided by the Kentucky court of appeals) 3 A. K. Marsh. 419. Disbrow v. Crawford (a case decided by the supreme court of New Jersey) 18 N. J. Law, 325, is to the same effect, and so is the case of Gilmore v. Woolock (decided by the supreme court of Wisconsin) 13 Wis. 589. With these exceptions, none of the cases cited by counsel sustain them upon the point under discussion; and, as to these cases, we can only say that the views upon which they were decided do not command our assent. In the South Carolina case no authority is cited. and no reason given, to sustain the conclusion of the court, except one that begs the whole question. The court assumes that an infraction of the statute is consummated by the mere giving of an oral promise of no force or efficiency whatever, while, if our view and that of the supreme court of Massachusetts is correct, there results from such a promise no infraction of the law. In the Kentucky case, also, no authority is cited, and the court reasons in a circle to the same conclusion reached by the South Carolina court. In the New Jersey and Wisconsin cases the decision is rested upon the supposed authority of a number of decisions cited in the respective opinions, but a reference to those decisions will show that they lend a very slight support to the proposition under discussion. The first case cited by the New Jersey court is Fussil v. Brookes, 12

E. C. L. 594, 2 Car. & P. 318. The report is of the proceedings on the trial at nisi prius before Abbott, C. J. The defendant proved the actual payment of interest in excess of the lawful rate, but the court held that this did not avoid the bond without proof that the payment was in pursuance of an agreement made at or before the execution of the bond, but, if the jury believed that it was made at or before the execution of the bond, then the bond was void. The verdict was for the plaintiff. This case, it will be observed, is in precise accord with the decision of the Massachusetts court, and establishes the proposition that, where a parol promise to pay more than legal interest is relied upon to sustain a plea of usury, two things must occur: There must be the fact of actual payment of usurious interest, and there must have been a promise in pursuance of which the interest has been paid. Clearly, this case does not support the proposition to which it is cited, and the same may be said of six out of the seven other cases cited in the same connection. In one only (Merrills v. Law, 9 Cow. 65) was the question involved, and the decision of the supreme court, which was afterwards reversed by the court of errors (6 Wend. 268), was mainly upon a question of practice. Each of the other cases involved one of the devices above referred to. In the case in S N. J. Law, 233 (Clark v. Badgley), for instance, the lender sold the borrower a half interest in a clock as a part of the same transaction, and was to keep and repurchase the clock at about half the selling price. In the Wisconsin case, also, there is the same indiscriminate citation of cases which do not support the decision, along with two or three which do support it,—a sure indication that the court had entirely missed the distinction so clearly made in Butterfield v. Kidder, supra.

We have carefully examined all the other cases cited by the appellants, and find that, so far as they involve the plea of usury, they were, without exception, devices by which the borrower had been compelled to enter into an apparently valid contract in writing to pay usurious interest under the guise of an annuity, rent charge, purchase price of land, or something of the kind, or to sign a note or bill for more than the amount of the loan or debt. They are all, in other words, easily distinguishable from this case. In the case of Stein v. Swensen, 46 Minn. 360, 49 N. W. 55, for instance,—and we refer to this case because it comes nearer the point than any of the others,-the borrower clearly proved the fact that at the time of the loans and renewals he had been compelled to pay various sums in excess of legal interest, and in that connection was allowed to offer parol evidence of the understanding upon which such payments had been made. The case was in principle like Fussil v. Brookes, supra. In the cases of Buffendeau v. Brooks,

28 Cal. 642, and Agricultural Works v. Estes (Cal.) 32 Pac. 940, parol evidence was admitted for the purpose of showing that written contracts, apparently valid, had been entered into for unlawful purposes.

From this review of the authorities, it very clearly appears that the exception to the general rule of the statute (Code Civ. Proc. § 1856) does include evidence of a parol agreement which is part of a written agreement, when the effect of the parol agreement is to invalidate the written agreement. But the proposition that a parol promise to do an unlawful thing will invalidate the written promise of the same party to do what is entirely lawful has little authority, and less reason, to support it. It is, of course, very different when the written promise of one party is made in consideration of an oral agreement of the other party to do an unlawful act, as in Buffendeau v. Brooks, supra. In such case the illegality of the consideration may undoubtedly be proved as a defense to an action on the written contract, because it necessarily invalidates it. This is the case to which the second exception to the rule applies.

But even if we were satisfied with the doctrine contended for by appellants, as applied to the usury laws, there would still be a difficulty in applying it to the provisions of our constitution relating to the mortgage tax. We should be compelled to disregard their strict terms in favor of a large and liberal construction in furtherance of the policy of protecting borrowers against the greedy exactions of lenders. Before discarding a salutary rule of evidence, designed to prevent frauds and perjuries, in pursuit of any object, however laudable, it is worth while to consider whether such object is possible of attainment. If we should hold as appellants ask us to hold, there is no doubt that we should open to dispute and litigation an immense number of transactions which are otherwise secure against attack. There is as little doubt that such litigation would invite more or less falsehood and perjury, and result in some instances in the grossest injustice. All these things would come inevitably, but no single borrower would be protected or aided in the slightest degree against the exactions of lenders. As to existing parol contracts to pay the mortgage tax, if any such there be, they are simply void, and the borrower needs no protection from the courts. As to future transactions, no grasping money lender, accustomed to the business and aware of the constitutional provisions in question, will ever take a contract, written or verbal, for the payment of the mortgage tax, not only because such a contract is void, but for the all-sufficient reason that he has no need to do so in order to exact all that the borrower can be induced to submit to. He can take all that the traffic will bear in the shape of interest, the rate of which is unlimited either by the law or

the constitution. By its own inherent defect in failing to limit the rate of interest, the supposed policy of the constitution is rendered incapable of enforcement by any action of the courts. All that they could accomplish by upholding the doctrine for which appellants contend would be to subject unwary lenders, in isolated cases, to a heavy penalty for accepting a promise of no obligation upon the borrower, and worse than useless to the lender,-an arrangement much more likely to originate in the craft of the borrower than in the greed of the lender. It is scarcely worth while to stretch the terms of the constitution, or broaden the exceptions to a salutary rule of evidence, in order to attain an object so inadequate. We think the superior court did not err in the ruling complained of, or in overruling the demurrer to the complaint. Judgment affirmed.

We concur: DE HAVEN, J.; McFAR-LAND, J.; FITZGERALD, J.

GAROUTTE, J. I am compelled to dissent from the views and conclusion of the court declared in this case. If I clearly grasp the grounds upon which the court has based its conclusion, they are, in the main, that this oral agreement offered to be proven was collateral to the principal contract, and also made without consideration. To my mind. neither of these positions has any support whatever. The oral agreement was neither collateral, nor was it without consideration. The consideration for it was the loan of the money, and this agreement to pay the taxes was based upon that consideration as fully and completely as the agreement to pay the interest on the loan, or to repay the loan itself. The agreement was not collateral. It was as much a part of the original contract entered into between these parties as any other covenant contained therein. It was so alleged to be in the answer, and so offered to be proven at the trial. Again, this case, in all essentials, is an exact photograph of the case of Burbridge v. Lemmert, 99 Cal. 493, 32 Pac. 310, except that the agreement to pay the taxes was there made in writing, -a writing distinct from the mortgage. That writing was collateral to the contract and without consideration, if this oral agreement is collateral and without consideration, yet this court declared that such writing rendered the agreement in the mortgage to pay interest void. The error of the court seems to lie in assuming that the writing is conclusive evidence of the terms of the contract, and such appears to be the view of Chief Justice Parker in Butterfield v. Kidder, 8 Pick. 512, as well as we are able to ascertain those views from the very meager opinion of the court in that case; and that case is relied upon as the sole authority to support the judgment here declared. It was so decided under the peculiar and special provisions of the Revised Statutes of Massachusetts, and the decision, without doubt, must be read in the light of such statutes, for the principle there declared stands alone as an adjudication. In Dunscomb v. Bunker, 2 Metc. (Mass.) 8, reference is made to Butterfield v. Kidder, and it is there stated that the rule is different in New York; citing Merrills v. Law, 9 Cow. 65,—a case which is squarely opposed to the principal opinion of this court.

The elementary doctrine that parol testimony is not admissible, either to add to or subtract from, or in any way contradict or vary, the terms of a written instrument, is conceded and recognized by all courts, and, in conjunction with certain exceptions to the rule, is substantially stated in section 1856 of the Code of Civil Procedure, to wit: "When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives, or successors in interest, no evidence of the terms of the agreement other than the contents of the writing, except in the following cases: * * * (2) Where the validity of the agreement is the fact in dispute. But this section does not exclude other evidence of the circumstances under which the agreement was made * * * to explain an extrinsic ambiguity, or to establish illegality or fraud." It is here proposed to show that a certain agreement of mortgage is void as to the interest specified therein, by showing by parol that one term of the agreement which in itself was unlawful was intentionally omitted therefrom. This provision of the statute in effect says that the terms of the agreement, as evidenced by the writing, are not conclusive as showing all its terms, and that other and additional terms may be shown by parol when the validity of the agreement is attacked. The validity of the agreement is here attacked, and the exception to the general principle forms the true rule. It appears to be the very case where the statute authorizes us to look beyond the contents of the writing for the purpose of ascertaining the actual terms of the agreement. The intent and purpose of the provision of the constitution was to protect borrowers, in their necessities, from the exactions of money loaners, and the provision is based upon the same lines, and owes its enactment to the same reasons, that caused the passage of the usury statutes found in nearly every state of the Union. It is charged that this agreement was entered into in this manner for the purpose of evading a provision of the constitution, and it would be anomalous if the offending party could so hedge himself about by writings as to prevent a court from reaching such iniquity. Lord Coke said: "To them that lend money my caveat is that neither directly nor indirectly, by art or cunning invention, they take above six in the hundred, for they that seeke by sleight to creepe out of these statutes will deceive themselves, and repent in the We are unable to discern any differend." ence in principle between the present case and those cases arising under usurious con-In that class of cases the doctrine is settled beyond all question that contemporaneous oral agreements are admissible for the purpose of showing the usurious character of the contract, and thereby destroying its validity. In Willard v. Reeder, 2 Mc-Cord, 369, the syllabus states the point in the decision as follows: "Where a person borrowed money, and gave his note for the amount, with lawful interest, and at the same time made a verbal promise to pay five per cent. more interest, making twelve per cent., the court held, upon an action being brought on the note, that it was usurious and void, although it was left to the borrower's honor only whether he would pay more than legal interest." In the opinion of the court the following language is found: "But it is said this promise did not constitute an agreement, because it was merely honorary, and imposed no obligation on the defendant. This course of reasoning would lead to the ridiculous result that a party could not incur the forfeitures and penalty attached to the usury because the act by which it was consummated imposed no obligation. Agreements against law have the form, but not the binding efficacy, of contracts, and consequently, all the obligation they impose must, of necessity, be only honorary." In Stein v. Swensen, 46 Minn. 364, 49 N. W. 55, the same principle is again declared, and Gilfillan, C. J., said: "As there is no device or shift on the part of the lender to evade the statute, in or behind which the law will not look in order to ascertain the real nature of the transaction, as no act, however formal, no instrument, however solemnly executed, will stand in the way of the court getting at the truth, in order to determine whether there has been an attempt to evade the law, it was competent to prove the oral agreement indicated by the question." In 7 Am. & Eng. Enc. Law, p. 91, the exception to the general rule as to the admission of oral testimony bearing on written instruments, is stated as follows: "Provided, that any of the following matters may be proved: Fraud, intimidation, illegality, want of due execution, * * * or any other matter which, if proved, would produce any effect upon the validity of any document, or any part of it, or which would entitle any person to any judgment, decree, or order relating thereto." Wharton, in his work on Evidence (volume 2, \$ 935), says: "On the same reasoning it may be true that the contract embodied by the writing is illegal, and therefore void. If void, it is not a contract. To exclude evidence because it is a contract is to assume the very point in liti



gation. Nor can any form of instrument of indebtedness preclude a debtor from setting up usury."

There is no sound reason to be urged why the present case does not come squarely within the principle declared by these authorities. If the oral evidence offered in this case was properly rejected, it was wrong to admit it against the practicers of usury, and thus the practical application of those statutes would be defeated by the simplest of devices. The penalties attached to a violation of this provision of our constitution are severe, and it is not likely that parties seeking to violate it would publish their wrong to the world by inserting this void stipulation in the original instrument designed for record. Neither is it probable that they would commit their purpose to writing at all. It would most naturally be done in secret, and in parol, for the borrower's parol agreement to pay the taxes upon the mortgage would be just as valuable to the money lender, and probably more valuable, than if the stipulation were incorporated in the mortgage itself. The agreement, however made, would be void in law, and its value would depend solely upon the honor of the borrower. Again, the provision of the constitution is very broad. It uses the words "every contract." It therefore clearly includes oral contracts for the loan of money not evidenced by writing of any character. Such loans would constitute solvent credits, and it cannot for a moment be contended that, while the contracts of loan may be oral, yet an agreement to pay taxes by the borrower upon such loan could not also be oral. It is thus apparent that, under certain contracts coming within the purview of the provision of the constitution, the idea of oral agreements to pay the taxes was naturally and necessarily present in the minds of the framers of the instrument.

Counsel in his argument, and the opinion of the court, to some extent, has strongly animadverted upon the depressing results to the general prosperity of the state, and to the special hardships which will fall upon the borrowers of money, if the construction which we have given this provision of the constitution shall be declared the law. In answer to such an argument, we can only say that, by reason of counsel's warmth and earnestness in the advocacy of his client's cause, we hope and believe his fears in this regard are highly exaggerated; but, whatever may be the result, we have no power to add to or subtract from the language of this section of the constitution. We must construe it as it stands enacted, and the question as to the wisdom and policy of this provision is not a matter for our consideration. This court is not the forum to administer relief for evil in the law, if evil there be. For all the purposes of this court, it is sufficient that it is a provision of the organic law of the land, and as such it is our duty

to uphold and sustain it whenever assailed. As was said by Beatty, C. J., in discussing another provision of the constitution, in Sheehy v. Shinn (Cal.) 37 Pac. 393: "The provision of the constitution was aimed at the substance of these abuses, and not at the form. * * * To give effect to the constitution, it is as much the duty of the court to see that it is not evaded as that it is not directly violated." If we hold that this provision may be so easily evaded as is here contemplated, its repeal, for all practical purposes, will take effect from the date of such holding. Lord Mansfield said: "Where the real truth is the loan of money, the wit of man cannot find a shift to take it out of the statute." By this decision it requires but little wit to find a shift to avoid this provision of the constitution.

It is proposed to show in this case that this oral agreement to pay the tax upon the mortgage was a part and parcel of the principal contract, and that it was omitted from the contract evidenced by the writing for the very purpose of evading the provision of the constitution. We think the evidence admissible. To countenance any other practice would render the object of the provision entirely abortive. A provision of the constitution cannot be trifled with in that way, and the result of every such attempt, when the latter is brought to the attention of the court, must be that the money lender will be overwhelmed in his own folly.

HARRISON, J. I concur in the foregoing opinion of Mr. Justice GAROUTTE.

FAULKNER v. RONDONI et al. (No. 18,-255.)

(Supreme Court of California. Sept. 21, 1894.)
WATER FOR IRRIGATION —PRESCRIPTIVE RIGHTS—
IMPEACHMENT OF WITNESS—CONFLICTING STATEMENTS.

1. The fact that the owner of land on a fork of a stream used all the water in such fork does not show such an invasion of the rights of a prior appropriator of water from the stream below the two forks as to give to the former a prescriptive right to use all the water in the fork, the lower owner having always received enough water for his purposes through the supply coming from the other fork of the stream.

2. In an action to determine the right to the water of a stream, defendant's witness was asked on cross-examination if he had not stated that plaintiff's right was inferior to defendant's. The witness denied having so stated, nor had he, on his direct examination, testified as to defendant's right. Held, that it could not be proven, to impeach him, that he had so stated, as such declaration, not being evidence against plaintiff, was not relevant to the issues.

3. Though it is a question of fact as to the amount of water actually diverted by a person claiming a right thereto by prescription, yet, as it is a matter of common knowledge that persons build their ditches with a view to the quantity of water needed, slight testimony is sufficient to show that the full capacity of the ditch was used.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Action by James Faulkner against Antonio Rondoni and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

A. J. Ridge and A. Burrors, for appellants. C. W. Kitts, for respondent.

SEARLS, C. This is an action to quiet title to a certain ditch and water right, to recover damages for the diversion of water therefrom, and for an injunction restraining defendants from such diversion. Plaintiff had a decree establishing his title to the ditch extending from his ranch, therein described. to a certain stream, known as "South Wolf Creek," and his prior right at all times to divert from said South Wolf creek, and to conduct the same through said ditch, water to the extent of 31 inches, measured under a 6-inch pressure; that the rights of defendants in and to the waters of said stream and its tributaries are inferior and subordinate to those of plaintiff; enjoining the defendants from interfering with said water to the extent of plaintiff's right, and awarding damages against defendants for \$100, together with costs of suit; and further decreeing defendants to be entitled to use, for the purposes of irrigation upon the Paro and Rondoni ranches, so much of the waters of said South Wolf creek and its branches as remains in excess of the amount decreed to plaintiff. The cause was tried by the court without a jury, and written findings filed. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

It was admitted at the trial that plaintiff and his grantors have been the owners of and in the possession of that certain land or ranch described in the complaint since 1865, and that plaintiff has been such owner and so in possession since 1877. In 1867 Nathan Wheeler, the predecessor in interest of plaintiff, constructed a ditch and flume extending from said ranch to Wolf creek (sometimes called "Dry Creek"), tapping said creek about 400 feet below the forks thereof, by means of which he diverted the waters of said creek, and conducted the same to said ranch. where they were used for irrigation and domestic purposes; and he and his successors in interest, including the plaintiff, have ever since used said water for said purposes. Wolf creek and its tributaries are natural water courses, and during a portion of the year afford a large volume of water; but during certain seasons of the year, and especially in the months of July, August, and September, the water in said creek becomes scarce. and at times there are not 31 inches of water in said creek, at the head of plaintiff's ditch. Originally, no dam was necessary to divert

the water into plaintiff's ditch; but with the lapse of time the channel of the creek, from natural causes, or from mining or other causes, has been cut down and lowered so that a dam is now necessary to divert the water. Defendants are the owners, as tenants in common, of the ranch described in their joint answer, situate upon said Wolf creek, at and near the head of plaintiff's ditch, the title to which comes to them from the Central Pacific Railroad Company through a deed executed by said company to Alexander Paro, September 2, 1873. Said ranch is designated as the "Paro Ranch." The defendant Antonio Rondoni is the owner of a ranch situated upon the forks of Wolf creek, above the Paro ranch, the title to which he derives by sundry mesne conveyances, from said Central Pacific Railroad Company, under a deed dated April S, 1871. Both the Paro ranch and the Rondoni ranch are under cultivation, and defendants have facilities for diverting, and have been accustomed to divert, water from the forks of said Wolf creek to irrigate their growing crops on their said ranches. The evidence shows that on the 7th day of September, 1872, Alexander Paro, the predecessor of defendants in the Paro ranch, conveyed to Nathan Wheeler, under whom plaintiff claims, by deed of bargain and sale, the water ditch, with the water rights and water thereunto belonging and therewith connected, together with the right to keep said ditch in repair, and to enter upon the lands of the grantor for that purpose. As before stated, the ditch of plaintiff had its head upon, and in part crossed, the Paro ranch. Whether cr not there had been any controversy as to the right to the water or to the right of way for the ditch prior to the conveyance does not appear. Defendants, in their answer, set out a prescriptive right in themselves to the use of all the water of both forks of South Wolf creek, upon the Paro ranch; and defendant Rondoni pleads a like right to the waters of the south fork or east fork of said creek, for use upon the Rondoni ranch situate on said fork. The case, so far as the facts are concerned, must turn (1) upon priority of appropriation; (2) upon the prescriptive rights, if any, of the several parties.

Near the close of appellants' brief, it is urged that "the entire judgment disregards the riparian rights of the defendants." There were good reasons for so doing. The complaint, after stating the date of the appropriation by plaintiff's predecessor, avers "that, at the time of the construction of said ditch and the appropriation of said water, the land over which said ditch ran, and over which said South Wolf creek or Dry creek ran, were open, unsurveyed, unappropriated government lands of the United States." The answers failed to deny this allegation, and the court found in consonance with it.



It was not necessary to find upon a fact admitted by the pleadings, but, had the court found against the admission, it would, if material, have been ground for reversal. The evidence showed the lands of defendants to be riparian to South Wolf creek or its tributaries, but, if they have any riparian rights to the water of said creek, they are subordinate and subject to the rights of appropriators who diverted such water prior to the divestment of the government title, and who have continued to use such water pursuant to such appropriation for a useful purpose. We do not know judicially that the land in question is within the limits of a railroad grant, or that, if within such limits, it is land which the railroad company could take under the grant, or, in the absence of proof, that such railroad company ever had any title thereto. The court found in favor of plaintiff as a prior appropriator, and upon his claim of a prescriptive right to 31 inches of water, and against the prescriptive rights of defendants, as against plaintiff, set up in their answers. The evidence was, it is thought, amply sufficient to support these findings. There are in the very nature of the claims set up to the use of water, in cases of this character, certain elements of uncertainty which cannot be eliminated. Mountain streams, which furnish large quantities of water during a portion of the year, and which is appropriated by many persons, during the dry season, or in years of drought, dwindle to mere rills, or cease to flow. Witnesses who have observed the annual user of the water by given individuals for many years are prone to forget as to the nonuser, when the quantity is small, from the simple fact that the use impresses the mind, while its absence is not noticed by the casual observer. These, and some other elements of uncertainty which might be mentioned, render the task of determining the exact facts in a given case extremely difficult. A careful review of the evidence and admitted facts in the present case leads to the conclusion that upon all the salient points the court below deduced the facts from the testimony with a large degree of accuracy.

Appellants contend that the finding that plaintiff's ditch would carry 31 inches of water is unsupported by the evidence. In support of this contention, we are referred to the testimony of C. E. Uren, a civil engineer, who testified in substance that a short distance below the measuring box there was an old flume, which had a capacity of only 131/2 to 15 inches under a 6-inch pressure. He stated that the capacity of the ditch above the flume was 35 inches. The witness speaks of the grade of the flume, but the record is silent as to what that grade was, thus omitting an important factor essential to a calculation of the capacity of the ditch. On the other hand, plaintiff and Alcorn, a witness on his behalf, testified that the ditch would carry 31 inches, and that the

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flume would carry as much as the ditch. There was also evidence (1) that plaintiff used a portion of the water to irrigate above this flume; (2) that, at the time when Uren probably measured the flume, it was split, and not in repair, and that another board was put on to raise it two inches higher. Alcorn, who was entirely familiar with the ditch and had charge of it for a time, says he measured the flume, and "it was 8 inches bottom, and 6 inches sides." That this was the size of the flume when in its normal condition, and that a portion of the side was removed from some cause when Uren measured it, may well be inferred from the evidence.

The objection that there was no evidence to show that the plaintiff or his grantors have continuously, from 1867 to 1891, diverted into their ditch so much of the water as the same would carry, etc., cannot be maintained. The statement specifies that there was evidence to show that, since 1866-67, Wheeler and his successors in interest, including the plaintiff, have each year used the water through the ditch for irrigation and domestic purposes upon plaintiff's ranch. Several of the witnesses alluded to the water being scarce at plaintiff's dam by saying there was not enough to fill his ditch; and plaintiff, as a witness in his own behalf, said in substance that he had sufficient water to irrigate his ranch until 1891, and that it required his ditch full to irrigate his crop. If these assertions of the witness were correct, it must follow that his ditch was accustomed to carry water to the extent of its capacity, when it was to be had. No point was made on this question at the trial; hence, we need not expect to find the evidence full on that head. Men usually construct ditches of this character with a view to the quantity of water needed or to be had. and not for amusement; and when constructed and used, while the quantity of water actually diverted is a question of fact, the user of the quantity their ditches will carry is so natural, and so nearly in accord with our common knowledge, that slight testimony is sufficient to establish the fact.

Passing a number of objections to the findings, which are merely technical and unimportant, or, as in case of one of them, directly in the face of the facts, as stipulated in open court, and we come to the question most elaborately discussed by appellants in their brief, viz. that relating to the findings of the court against the prescriptive rights of defendants, claimed to have been acquired by them by an adverse user of the water for a period in excess of five years. The right which is acquired in and to the waters of a stream by a prior appropriation thereof may be lost, either wholly or in part, by the adverse possession and user of another; and when such adverse claimant has had the continued, notorious, uninterrupted, and adverse enjoyment of the water, or of a portion thereof, during the period prescribed by the statute of limitations for entry upon lands (which in this state is five years), the law will presume a grant of the right so held and enjoyed by him. Water Co. v. Crary, 25 Cal. 504; American Co. v. Bradford, 27 Cal. 361; Cave v. Crafts, 53 Cal. 135; Cox v. Clough, 70 Cal. 345, 11 Pac. 732. The right acquired by prescription is measured by the extent of the continuous enjoyment. The right claimed must be adverse; that is to say, "it must have been asserted under claim of title, with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted." Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645; American Co. v. Bradford, "In order to constitute a right by prescription, there must have been such an invasion of the rights of the party against whom it is claimed that he would have had ground of action against the intruder." Water Co. v. Hancock, supra; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623. The glaring defect in appellants' case, under which they claim a prescriptive right, is involved in the proposition last quoted. Their argument is ingenious, if not sound. It may be paraphrased thus: Defendants for over 10 years have irrigated their ranch held by them as tenants in common, during each year, with water from the two forks of South Wolf creek. Defendant Rondoni has continuously, for 10 years, irrigated the ranch owned by him on the south fork of said stream, and, when necessary so to do, has used all the water of said south or east fork for that purpose; and, as to the last assertion, there is no conflict in the evidence. This must be admitted as literally true, but the conclusion drawn by appellants does not follow. The testimony shows that plaintiff's ditch has its head below the junction of the two forks of the stream; that during a portion of the year there is sufficient water in the stream for all the parties; that the north fork is the principal or larger branch, and furnishes most of the water; that prior to 1891 plaintiff had plenty of water, or, when it became short, defendants, upon being notified, turned it down. It came, no doubt, mainly from the north fork, but this could make no difference to the plaintiff. It was 31 inches of water to which he was entitled, and he was not injured, and could not complain that it came from one branch. and not from the other. There was no invasion of his rights, and he had no ground for an action, as long as he received the quantity of water to which he was entitled, and according to his testimony he did receive it until 1891. It follows that if, under such circumstances, Rondoni used all the water of the south fork, it was not, up to 1891, an invasion of the rights of the plaintiff, and hence afforded no foundation upon which to build a prescriptive right,

At the trial, counsel for appellants, upon the cross-examination of B. Alcorn, a witness who has testified for plaintiff, asked said witness if he had not stated to defendant Rondoni and Antonio Mirandi, at the house of Wheeler, during the summer of 1890, when the latter was sick, that he (the witness) knew all about the water, and could tell them as well as anybody else, and that Faulkner (the plaintiff) had the right to the water that came below the forks of the creek, but had no right to the water above the forks of the creek, and that Faulkner had no right to interfere with them as to the water above the forks of the creek. The witness, in answer, denied that he had so stated. Defendants thereafter called, as a witness on their behalf, defendant Rondoni, and offered to prove by him the truth of the alleged statement of Alcorn, as involved in the affirmative of the question put to him. to which counsel for the plaintiff objected as being immaterial, irrelevant, and incompetent, and not pertinent to any issue raised by the pleadings, etc. The objection was sustained, an exception reserved, and the ruling is now assigned as error. Antonio Mirandi was also called as a witness, a like offer of proof made, like objections offered, a like ruling had, and exception taken, and a like error is assigned. It was said by Wallace, C. J., in People v. Devine, 44 Cal. 458: "A recognized rule, or rather qualification of the rule, governing the impeachment of the credit of a witness by proof of contradictory statements elsewhere made by him, is that the matter involved in the supposed contradiction must not itself be merely collateral in its character, but must be relevant to the issue being tried." People v. Webb, 70 Cal. 120, 11 Pac. 509; People v. Devine, supra; People v. Dye, 75 Cal. 112, 16 Pac. 537; People v. Furtado, 57 Cal. 346. Furst v. Railroad Co., 72 N. Y. 542, was an action against a street-car company for injury to a child by being run over. The conductor was called as a witness for defendant, but testified nothing as to the driver. On crossexamination he was asked, in substance, if he had not said to the father of plaintiff that it was the fault of the driver: that. had he looked, it would not have happened, etc. Replying in the negative, testimony was admitted to contradict him, and it was held error. In the present case the witness Alcorn had not testified as to any matter relating to the right to the water above the forks of South Wolf creek. His declaration out of court, made to third parties, and not in the presence of plaintiff, could not bind the latter, and was totally inadmissible for that purpose. It was not in contradiction of anything to which he had testified. was outside of legitimate cross-examination, and hence, as it did not come within any exception provided in such cases, the answer of the witness was final. 1 Green! Ev. § 449; People v. Tiley, 84 Cal., 651, 24 Pac.

290; People v. Bell, 53 Cal. 119. There was no error in the rulings of the court excluding the proffered testimony.

Tue findings are sufficient to uphold the The other errors assigned are unjudgment. important. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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CONROY v. DUNLAP. (No. 18,282.) (Supreme Court of California. Sept. 21, 1894.) INSOLVENCY - SET-OFF BY DEBTOR OF INSOLVENT -WHEN ALLOWED.

Under the insolvency act of 1880 (section 43), which provides that no set-off shall be allowed, in favor of a debtor of an insolvent, on account of a claim against the insolvent transferred to the debtor may set off a claim properties." a debtor may set off a claim propetition," a debtor may set off a claim pur-chased before the filing of the petition by the insolvent, though he knew of the latter's insol-

Commissioners' decision. Department 2. Appeal from superior court. Placer county: Matt. F. Johnson, Judge.

Action by W. C. Conroy, as assignee in insolvency of O. W. Hollenbeck, against William Dunlap. There was a judgment for plaintiff, and defendant appeals. Reversed.

F. P. Tuttle and John M. Fulweiler, for appellant. Ben P. Tabor, for respondent.

BELCHER, C. O. W. Hollenbeck was en gaged in the business of banking in Placer county, and on October 31, 1892, the doors of his banking house were closed, and payments suspended, he being insolvent. At that time the defendant was indebted to him in the sum of \$321.80 for money loaned, and he was indebted to one Mrs. S. J. Dunlap in the sum of \$339.98 for money deposited in his bank by her. On November 1, 1892, Mrs. Dunlap, for a valuable consideration, assigned and transferred in writing her said demandagainst Hollenbeck to the defendant. On November 10, 1892, Hollenbeck filed in the superior court of Placer county his petition and schedule in voluntary insolvency, and was thereupon adjudged to be an insolvent debtor. Thereafter the plaintiff was duly elected and appointed assignee of the estate of the insolvent, and qualified as such, and the clerk of the court, by an instrument under his hand and the seal of the court, assigned and conveyed to him all the property, real and personal, of the debtor. The plaintiff, as such assignee, brought this action to recover from the defendant the said sum of \$321.80, alleging that on the 10th day of November, 1892, the defendant was indebted to Hollenbeck in that sum for money loaned, and that no part of the same had been paid. The defendant, by his answer, denied that he was indebted to Hollenbeck on the 10th day of November, 1892, or at any time after the 1st day of that month, in the sum named, or in any sum; denied that he had not paid his said indebtedness; and averred that on November 1, 1892, he was indebted to Hollenbeck, and Hollenbeck was indebted to Mrs. Dunlap, and Mrs. Dunlap assigned and transferred her said demand to him, as before stated, and that thereby he became, and now is, a creditor of Hollenbeck and of his estate for the balance of said sum, to wit, \$18.18.

The case was tried, and the court found the facts to be substantially as above stated, and as conclusions of law: "(1) That the defendant is not entitled to the set-off claimed, and that the same should be disallowed." That the plaintiff is entitled to judgment for the sum of \$321.80, gold coin of the United States, and to legal interest thereon from the 10th day of November, 1892, and to costs of suit." Judgment was accordingly so entered, from which, and from an order denying a new trial, the defendant appeals.

The appellant contends that the conclusions of law were not justified by the facts, and were erroneous; and whether this be so or not must be determined from a consideration of the provisions of the insolvent act of 1880. Section 21 of that act provides that the assignee may sue in his own name to recover any debt due the insolvent, "and no set-off or counter-claim shall be allowed in any such suit, for any debt, unless it was owing to such creditor by such debtor at the time of the adjudication of insolvency." And section 43 provides: "In all cases of mutual debts and mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed and paid. But no set-off or counter-claim shall be allowed of a claim in its nature not provable against the estate; provided, that no set-off or counterclaim shall be allowed in favor of any debtor to the insolvent of a claim purchased by or transferred to him after the filing of the petition by or against him, for the purpose of making such set-off or counter-claim." It is evident that the claim here sought to be set off is such a one as may constitute a counterclaim under section 438, Code Civ. Proc., and that it was purchased by and transferred to the defendant before the filing of Hollenbeck's petition in insolvency, and was a debt owing to defendant by Hollenbeck at the time of the adjudication in insolvency. And it is claimed for appellant that, under the maxim, "Expressio unius est exclusio alterius," section 43, supra, should be so construed as to allow claims purchased before the filing of the petition by the insolvent to be offset, since claims purchased after that date are, in express terms, excluded. There have been no decisions of this court, so far as we are advised, bearing upon the question in hand, but the same question has several times arisen

and been passed upon by the federal courts in cases involving the construction of section 20 of the bankrupt act of 1867, which reads as follows: "In all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate; provided, that no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased or transferred to him after the filing of the petition." The cases referred to are: In re City Bank of Savings, Loan & Discount, Fed. Cas. No. 2,742; Hitchcock v. Rollo, Fed. Cas. No. 6,535; Sawyer v. Hoag, 17 Wall. 610; Hovey v. Insurance Co., Fed. Cas. No. 6,743; Lloyd v. Turner, 5 Sawy. 453, Fed. Cas. No. 8,436.

The case of In re City Bank of Savings, Loan & Discount was the first in point of time, and was decided by the United States district court of California, Hoffman, J. In that case it was held that under the twentieth section of the bankrupt act such a set-off as is here claimed might be made, and the court, after reviewing the English cases bearing on the question, said: "The rule established by these cases seems to have been adopted by congress in framing the provisions of the bankrupt act with regard to offsets. A debtor of the bankrupt is allowed to set off a debt due to him from the bankrupt, provided it has been purchased by or transferred to him before the filing of the petition." Hitchcock v. Rollo was next decided by the United States district court of Illinois, Drummond, J. In that case it was held that a claim against an insolvent, purchased by his debtor before the filing of a petition in bankruptcy, with knowledge of the insolvency, could not be used as a setoff, but it was admitted that it might be so used if purchased without such knowledge. And the court, speaking of the case of In re City Bank of Savings, Loan & Discount, said: "It was held in that case that the fact that the creditor of the bankrupt, at the time he assigned his claim to a debtor, had reason to believe the bankrupt to be insolvent, did not prevent the debtor from setting off against the debt the claim thus assigned. * * If the case decided in California intended to sanction a set-off such as is claimed here, we do not feel inclined to adopt the rule there stated. We hold it to be the duty of a court of equity so to construe the twentieth section as not to suffer it to defeat the main purpose of the bankrupt law, or to permit one creditor in this way to obtain the payment of his claim in full, to the sacrifice of the claims of other creditors." Sawyer v. Hoag was an action brought by the assignee of a bankrupt corporation to recover money alleged to be due the company, and in which the defendant sought to have certain claims against the company,

which he had purchased before the filing of the petition in bankruptcy, set off against his indebtedness. The court, by Mr. Justice Miller, said: "The first and most important question to be decided in this case is whether the indebtedness of the appellant to the insurance company is to be treated, for the purposes of this suit, as really based on a loan of money by the company to him, or as representing his unpaid stock subscription." And it was held that the money due was for unpaid shares of stock in the company. The court further said: "Though it be a doctrine of modern date, we think it now well established that the capital stock of a corporation, especially its unpaid subscriptions, is a trust fund for the benefit of the general creditors of the corporation." And again: "The debt which the appellant owed for his stock was a trust fund, devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim." And upon this ground it was held that the defendant was not entitled to the set-off. Hovey v. Insurance Co. was a case in the United States circuit court of Ohio. in which Swing, J., delivered the opinion. It was held that "a debt of one insolvent purchased by his debtor immediately prior to the filing of a petition in bankruptcy, and purchased in order to set the same off against his indebtedness, is protected by the bankrupt act, it only forbidding the set-off of claims purchased after petition filed." The court reviewed very fully the authorities, and, speaking of Sawyer v. Hoag, said: "If the supreme court had given to the twentieth section the construction contended for, there would have been no necessity of determining the character of the indebtedness of Sawyer, for it was an admitted fact that he knew of the insolvency of the company when he purchased the certificate." And again: "Having determined this most important question, that the debt was a part of the stock of the company, and therefore a trust fund for the benefit of the general creditors of the corporation, they decide, as against such a fund, the set-off could not be allowed, and their construction of the twentietn section must be taken as applying to a case of the character they found the one before them to be. So that, rather than being an authority in favor of the construction claimed by plaintiff. it would seem to be one strongly-inferentially, at least-against it." After the foregoing decisions were made, congress, on June 22, 1874, amended section 20 of the bankrupt act by adding at the end thereof the following words: "Or in cases of compulsory bankruptcy, after the act of bankruptcy, upon or in respect of which the adjudication shall be

made, with a view of making such set-off." Lloyd v. Turner was a case in the United States district court of California, and was decided in 1879 by Hoffman, J. It was held that "a claim against the bankrupt, purchased before the filing of the petition, but with full knowledge of the insolvency, and with intent to use the claim as a set-off, is available for that purpose to the purchaser in a case of voluntary bankruptcy." The learned judge reviewed the earlier cases, and considered that the conclusion reached derived much support from the case of Sawyer v. Hoag, and also from the amendment made by congress to section 20 in 1874. He said: "That amendment provides that in cases of compulsory bankruptcy no offset shall be allowed of a claim purchased or transferred after the act of bankruptcy in respect of which the adjudication shall be made, and with a view of making such set-off. In voluntary cases the original language of the act has been suffered to stand, and the set-off is prohibited only when purchased or transferred after the filing of the petition.

It is not made clear by the record in this case that either the defendant or Mrs. Dunlap had knowledge of the insolvency of Hollenbeck at the time of the assignment and transfer in question. But, assuming that they did have such knowledge, still, in our opinion, the set-off claimed was authorized by the provisions of the insolvent act, when properly construed, and should have been allowed by the court below. We advise that the judgment and order be reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the defendant.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and the cause remanded, with directions to the court below to enter judgment in favor of the defendant.

104 Cal. 221
DAUGHERTY v. DAUGHERTY et al. (No. 18,294.)

(Supreme Court of California. Sept. 28, 1894.)
FRAUDULENT CONVEYANCE—EVIDENCE.

Where the evidence showed that a conveyance was voluntary, and was made when the grantor was in debt, and embraced all his property subject to execution, that it was kept secret, and the grantor retained possession until his death, and there was uncontradicted evidence of an admission by the grantor that he had conveyed to defraud creditors, a finding that there was no fraud is erroneous.

Commissioners' decision. Department 1. Appeal from superior court, Amador county; C. V. Gottschalk, Judge.

Action by Mary E. Daugherty, administratrix of the estate of George W. Daugherty, deceased, against Mary Daugherty and

Cephas Daugherty, to set aside a conveyance by the deceased to the defendant, Mary Daugherty, and to compel a reconveyance to plaintiff. Judgment for defendants, and plaintiff appeals. Reversed.

R. C. Rust and Wm. J. McGee, for appellant. D. B. Spagnoli (Armstrong & Bruner, of counsel), for respondents.

SEARLS, C. George W. Daugherty, a married man, was the owner of a residence and a tract of land known as "Lots Numbers 11, 12, and 13, in Block Number 8," in the town of Jackson, county of Amador, state of California, and was indebted in sundry sums of money, amounting to say \$400, of which sums \$205 was secured by a mortgage on the lots last mentioned. On or about May 12, 1890, said George W. Daugherty filed a declaration of homestead upon his residence property, and conveyed to his mother, Mary Daugherty, one of the respondents herein, by a voluntary deed of conveyance, in consideration of love and affection, the lots above mentioned. Besides the homestead and the lots thus conveyed, said Daugherty, grantor, had no other property. Mary Daugherty, the mother and respondent, either paid off the mortgage on the lots conveyed to her, or advanced to her son and grantor the money necessary therefor, viz. \$210, and the mortgage was satisfied. George W. Daugherty continued in possession of the property so conveyed, and collected to his own use the rents therefrom, amounting to \$12 per month, until his death, which occurred April 5, 1891. The appellant herein, who is his widow, was duly appointed administratrix of his estate, qualified as such, procured the homestead to be set apart for her and her infant child, and allowed claims against the estate aggregating some \$206, of which claims \$100 at least was due prior to the voluntary conveyance aforesaid; and. there being no assets for the payment of said claims, the appellant, at the request of creditors, under section 1589, Code Civ. Proc., instituted this action to set aside, as fraudulent and void, the deed of conveyance, and to compel a reconveyance of the property by the mother, Mary Daugherty, etc. The complaint charges (1) that the conveyance was voluntary, and without valuable consideration; (2) actual fraud on the part of deceased and his mother, with a view to defraud the creditors of deceased. The answer admitted the conveyance, denied all fraud, etc. Cephas Daugherty is the husband of the other defendant, and is made a party defendant. The cause was tried by the court without a jury, and written findings filed, negativing all charges of fraud, upon which judgment was entered in favor of defendants for costs. Plaintiff appeals from the judgment, and from an order denying her motion for a new trial.

Under section 3442 of our Civil Code, the question of fraudulent intent here is one of

fact, and not of law, "nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." McFadden v. Mitchell, 54 Cal. 628; Bull v. Bray, 89 Cal. 286, 26 Pac. 873; Threlkel v. Scott, 89 Cal. 351, 26 Pac. 879; Windhaus v. Bootz, 92 Cal. 617, 28 Pac. 557. The question then is, did the testimony warrant the findings of the court? I am driven to the conclusion that it did not, It established, without any conflict whatever, the following facts: (1) That the conveyance was voluntary. (2) That, at the date of the conveyance, decedent was indebted. (3) That he conveyed all of his property subject to execution. (4) That the conveyance was kept secret, and that neither his creditors or his father, who is a defendant here, knew of it until his death. (5) That he continued to use the property as his own up to the time of his death. (6) That one of his creditors, who held a small claim against him, was crowding him for payment. (7) There is also the testimony of four witnesses to the effect that deceased declared to them at different times and places, in substance, "that he owed some money below, and was afraid his creditors would hop on him," and was going to deed the property to his mother, and that his creditors were pushing him, and he expected to be attached, and that "he had deeded his property to prevent his creditors from attaching it, * * * and that he would fight them to the bitter end." There was no contradiction of any of this testimony, except by showing declarations of deceased to the effect that he had had trouble with his wife, had separated from her, and wanted to fix it so that she would not get the property. This constitutes a synopsis of the testimony on the question of fraudulent intent, and upon it the finding should have been in favor of the plaintiff, and the judgment and order appealed from should be reversed, and a new trial ordered.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and a new trial ordered.

104 Cal. 208

WALKERLY et al. v. GREENE, Judge. (No. 15,712.)

(Supreme Court of California. Sept. 25, 1894.)

BILL OF EXCEPTIONS - GROUNDS FOR STRIKING OUT — SETTLEMENT — MANDAMUS TO JUDGE — FINDINGS AS TO WILL—INTENTION OF TESTATOR.

1. A bill of exceptions should not be struck out for omitting to set out the evidence or other matter necessary to explain it, as required by Code Civ. Proc. § 648, unless it appears that the omission was made with intent to perpetrate a gross and deliberate fraud.

2. A petition for mandamus to compel a

judge to settle a bill of exceptions which he has

ordered stricken out for fraudulent emission of material facts should allege in substance that such bill contained everything that the petitioner

believed it should contain.

3. Where a will is set out in the findings, a bill of exceptions attacking further findings as to what testator "intended" and "meant" can-not be objected to on the ground that the evi-dence upon which the findings were based was not set out in the bill, since the will is the best evidence of testator's intention.

In bank.

Application for mandamus by John Walkerly and others, legatees of William Walkerly, deceased, against W. E. Greene, judge of the superior court, to compel a settlement of a bill of exceptions on an appeal from a decree of distribution. Writ granted.

B. B. Newman, for petitioners. H. C. Firebaugh, for respondent.

BEATTY, C. J. This is an original proceeding by mandamus to compel settlement of a bill of exceptions. Petitioners are some of the residuary legatees of William Walkerly, deceased, whose will was admitted to probate in Alameda county in 1887. In 1892 his executors filed their final account, and a petition for distribution of the estate. In August of that year the final account was settled, but the matter of distribution was continued from time to time until November 27, 1893, at which date a decree of distribution was entered, which also embraced the settlement of several accounts filed by the executors supplemental to their final account. On November 28th—the day following the entry of this decree—the petitioners appealed therefrom to this court, and in due time perfected their appeal. By stipulation of parties their time to prepare a bill of exceptions to the decree was extended beyond the 16th of December, and on that day they served on all the other interested parties copies of a document entitled in the cause, and bearing the following caption: "Bill of Exceptions. On appeal from the decree settling the (socalled) final account of the executors and distribution of the estate, made, signed, and filed in the above-entitled action, matter, and proceeding in said superior court on November 27, 1893, and which was appealed from to the supreme court on the 28th day of November, 1893, by the contestants, Mary S. Doughty and ten other nieces and nephews of William Walkerly, deceased, and beneficiaries under his last will." To this proposed bill of exceptions the attorney for the executors proposed amendments, but at the same time he took and reserved the objection that it was not entitled to settlement, because it was a sham and a fraud, purposely omitting nearly everything that it ought to contain, and false in the matters set forth. The attorney for the other interested parties, without offering any amendments to the proposed bill, contented himself with giving notice of a motion to strike it out upon similar grounds. viz that it was false and insufficient, and

not proposed in good faith. Upon this motion and these objections the proposed bill, the amendments, and the notice of the petitioners that they refused to accept said amendments were submitted to the respondent, one of the judges of the superior court of Alameda county, who, on March 26, 1894, sustained the motion to strike out, and dismissed the application of the petitioners for a settlement of the bill, whereupon they filed their petition here for a writ of mandate.

Upon the filing of this petition an alternative writ was directed to the respondent, the judge of said court, who on the return day showed cause by answer and demurrer, in which the executors and some of the legatees unnecessarily joined. The demurrer to the petition is general and special, for want of facts and for uncertainty, and the principal point urged in support of these objections is that it nowhere appears in the petition that the petitioners ever presented to the respondent a fair or proper draft of a bill such as the statute requires them to prepare. This objection is certainly well founded. The petition, though inordinately long, is mainly composed of matters wholly irrelevant, and contains no allegation in form or substance that the draft of the bill proposed by the petitioners (which, it was alleged, embraced numerous exceptions to the findings of fact upon which the decree was based) stated fairly, or at all, the evidence necessary to explain the objections to such findings. The statute (Code Civ. Proc. \$ 648) plainly requires that the bill, when it sets forth exceptions to a verdict or other decision upon the ground of insufficiency of the evidence to justify it, must state the objection, with so much of the evidence or other matter as is necessary to explain it, and no more, but of course this ideal bill of exceptions, if it ever should be realized in practice, would probably owe its perfection to the united efforts of the parties and the court through the means provided by law for amending and correcting the statement first proposed, and these provisions would be superfluous if we were to hold that a party is not entitled to a settlement of his bill unless he puts into it everything it should contain, and nothing else, in the first instance. If a review of the decisions of the superior court could be had only upon such conditions, this court would seldom have occasion to consider the merits of litigated controversies, but would undoubtedly find abundant occupation in trying questions similar to these here involved. The statute, however, does not mean that the party desiring a bill of exceptions must propose a perfect bill in the first draft, or forfeit his right to a review of the decision from which he has appealed. The provisions of section 648, Code Civ. Proc., are mainly intended as a guide to the judge in settling the bill, though they also impose a duty upon the parties. It is undoubtedly the duty of the moving party to proceed in good

faith, and to do his proper share of the work involved in the settlement of the bill. He has no right to put off upon the opposite party or the judge the labor of reducing to writing, and incorporating by way of amendment, statements of evidence and other matters which he knows a proper and fair bill of exceptions ought to contain. Nor has he any right to include statements or matters that are untrue or irrelevant. A corresponding duty rests upon the opposite party, who has no right to propose amendments which he knows ought not to be allowed. But although these reciprocal duties of the parties are undoubted, it is not easy to decide in a particular case whether or not they have been consciously and deliberately violated; and it is only in a gross case of palpable and deliberate fraud that the severe penalty of striking out the bill, and thus denying the party a hearing upon the merits of his case, can be properly imposed. In Hearst v. Dennison, 72 Cal. 228, 13 Pac. 628, we held that the judge of the superior court was justified in refusing to settle a bill of exceptions when the draft of the proposed bill was a mere "pretense and fraud," when it was "so grossly untrue, or so foreign to the real history of the case, as to come within no reasonable meaning of 'a statement of the case,' as used in the Code." In Sansome v. Myers, 77 Cal. 356, 19 Pac. 577, this doctrine was perhaps carried even further with respect to a bill of exceptions in a criminal case. But that decision, which was made in overruling a demurrer to the answer of the respondent, was somewhat modified by the subsequent decision of the same cause upon the facts reported by the referee who tried the issues. See 80 Cal. 483, 22 Pac. 212. In effect, the right of a judge to strike out or refuse to settle a bill of exceptions was limited to a case of gross and manifest fraud on the part of the one proposing it. Such a case will not often present itself, but cases do arise every day in which there is not only a disagreement of the parties with each other, but an equally radical disagreement between the court and the parties as to what the statement of the case ought to contain. to what it ought not to contain this court has painful experience of the fact that even settled bills of exceptions are frequently overladen with statements and repetitions of evidence and other matters which serve no purpose except to multiply costs and render more difficult the examination of the vital points of the controversy.

From this general statement of our views, it follows that we cannot hold that a petition for a writ of mandate in a case of this character is fatally defective when it fails to show that the proposed bill of exceptions was absolutely such as a settled statement ought to be, but we do think the petition ought to allege in substance that the proposed bill contained everything that the petitioner honestly believed it should con-

And if the defects of this petition had not escaped our attention at the time, we should not have issued the alternative writ; but, having issued it, and the respondent having, by his answer, presented with great fulness all the facts and grounds upon which his refusal to settle the bill was based, we do not deem it necessary or proper now to sustain the demurrer and quash the writ merely in order, by the filing of an amended petition and the issuance of a new writ, to get finally to an issue which is as completely joined as it ever could be joined in the most orderly procedure. On the contrary, we think that under the circumstances the proper course to pursue is to treat the answer as a waiver of the demurrer; and this brings us to the question whether there is any material issue made by the pleadings, or, in other words, whether the matters set out in the answer do not cure the defect in the petition. The petition is, as we have said, inordinately long, and the answer is correspondingly voluminous, made so by the careful denial of most of the immaterial allegations of the petition. It also has attached as exhibits copies of the proposed bill of exceptions of the amendments proposed by the executors, of the motion of certain legatees to strike out the proposed bill, and of the order of the respondent sustaining said motion. In response to this answer the petitioners file another formidable document in the nature of a replication. closing with a prayer that the matter may be referred to a commissioner to take and report evidence as to the material issues, etc., and that upon the coming in of his report this motion be set down upon the calendar of the court for hearing and further argument, etc., etc. This prayer suggests a long series of proceedings upon which we should enter with extreme reluctance, even if it were strictly necessary. But we do not deem it necessary. It appears to us that there is a much shorter road to the end of a controversy which, on the line suggested, might, and probably would, protract itself indefinitely, to the detriment of all parties interested in the Walkerly estate, not to mention the business of the court and the interests of other suitors.

Taking the admitted allegations of the petition and the allegations of the answer which support the petition, we think facts enough appear to justify us in holding that the refusal of the respondent to settle this bill of exceptions is not justified. The bill, as prepared, is certainly not a model, and we can well conceive that the task of settling it is one which would severely tax the patience of a busy officer; but we do not think it bears evidence of bad faith and purposed unfairness. Its faults appear, on the contrary, to be due to deficient knowledge of the true office and essential nature of a bill of exceptions, which exhibits itself much more conspicuously in the useless and re-

dundant matter incorporated in the draft than in the comparatively slight omissions of evidence that ought to have been set out. The decree appealed from was a decree of distribution and settlement of accounts supplemental to the final account of the executors. Besides the recitals of fact contained in the decree proper, it referred to, and was partly based upon, certain "findings of fact," which were filed with the The petitioners objected to a decree. number of these findings upon the ground that they were not sustained by the evidence, but when we come to look at the findings so objected to we find that they were not in reality, except in two or three instances, findings of fact, but rather conclusions of fact from other facts specifically found, or conclusions of law. As to these objections, no evidence was needed, or could be admitted, to explain them; and as to the two or three findings strictly of fact, which were questioned, the evidence to support them, if it existed, could have been supplied by a very short amendment, which could have been written out and inserted in far less time than it must have taken to prepare the order striking out the proposed bill. To be more specific upon this point, we will state that the will and codicil of William Walkerly, as admitted to probate in 1887, are found and recited in full in the findings and decree. It is then found by a number of successive findings that the testator "Intended" and "meant" a variety things, and it is these findings as to the intention and meaning of the testator which are the principal object of attack in the bill of exceptions as proposed. The respondent says in his answer that the evidence upon which these findings are based was not set out in the proposed bill. But what evidence could there have been of what the testator meant and intended except the terms of the will and codicil? Of course there may have been some questions as to identity of the property disposed of, or the number or identity of legatees, or other latent ambiguities in the will as to which extraneous evidence was admissible, and possibly there may have been something in the circumstances surrounding the testator at the time the will was made of which evidence was admissible for the purpose of construction; but the findings of intention which the petitioners have attacked have no possible dependence upon extraneous evidence. They depend wholly upon the terms of the will, and the recitals it contains, and the exceptions to them are in fact nothing but arguments founded upon the terms of the will.

In the careful examination of the proposed bill which we have made we find but three questions raised as to real findings of fact: (1) As to the character and value of the services of the attorney for certain legatees; (2) as to the character and value of the

services of the attorney for the executors; (3) as to the extraordinary services of the executors. As to these findings it is claimed by petitioners in their proposed bill that the evidence did not sustain them, and it sets out no evidence on the subject. The respondent says that the evidence amply sustained these findings, and that it was purposely and fraudulently omitted. Possibly it may have been, but from all the facts disclosed we are disposed to take a more charitable view of the matter, and to hold that this omission ought not to deprive the petitioners of a hearing upon the more important questions involved in the appeal. The amount of these items is comparatively trifling, and the amendments proposed by the executors will supply the evidence with no trouble to anyone except the petitioners when they come to engross the bill.

The other specifications, with a single exception, are of errors of law in the conclusions of the court, and neither need nor admit of explanation by evidence. exception referred to relates to the ruling of the court denying a continuance. statement of this matter is said to be false. If so, an allowance of the proposed amendment, which is very brief, would have cured it. Upon the whole, we think the bill should have been settled. The objection that it was out of time, because the parties had only stipulated an extension of time to prepare a bill of exceptions, and not a statement of the case, is untenable. Equally untenable is the objection to the name or description which the petitioners gave to the bill. We have quoted its caption in the beginning of this opinion, and we think it is entirely sufficient to show what the paper was, and to connect it with the notice of appeal. Let a peremptory writ issue.

We concur: FITZGERALD, J.: HARRI-SON, J.; VAN FLEET, J.; McFARLAND, J.; DE HAVEN, J.

4 Cal. Unrep. 819 In re WALKERLY'S ESTATE. (No. 15,794.) (Supreme Court of California, Sept. 25, 1894.) DISMISSAL OF APPEAL-GROUNDS.

1. An appeal will not be dismissed because

1. An appeal will not be dismissed because of the failure to file a printed transcript of the record in time, where an application is pending to settle the bill of exceptions.

2. As no appeal is instituted by the service of a notice of appeal after the time to appeal has expired, an order will not be made dismissing such an attempted appeal ing such an attempted appeal.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Accounting by the executors of the will of William Walkerly. Motion to dismiss two Motion denied. appeals.

B. B. Newman, for appellant. Rogers & Paterson, for the widow. H. C. Firebaugh, for respondent. F. G. Whitney, for certain beneficiaries.

Cal.Rep. 35-37 P.-62

BEATTY, C. J. These are motions to dismiss two appeals,-one from a decree or order settling the accounts of the executors supplemental to their final account and distributing the estate, which was made and entered November 27, 1893; the other an attempted appeal from an order settling the final account of the executors, which was made and entered in August, 1892. The motion to dismiss the first-mentioned appeal is based upon the alleged failure of the appellants to file a printed transcript of the record in time, and is overruled because it appears that an application to settle a bill of exceptions to the said order is pending. Walkerly v. Greene (No. 15,712, just decided) 37 Pac. 890. The other motion to dismiss is also overruled, but solely on the ground that there is no such appeal; the notice having been given long after the time to appeal had expired.

VAN FLEET, J.: McFAR-We concur: LAND, J.; DE HAVEN, J.; FITZGER-ALD, J.

164 Cal, 184 MERRITT et al. v. HILL et al. (No. 18,-120.)

(Supreme Court of California. Sept. 25, 1894.) TRESPASS BY CATTLE—SUFFICIENCY OF COMPLAINT.

A complaint in an action for trespass in Trinity county, alleging that "defendant's cattle and horses ran and trespassed upon said land," and destroyed the grass growing thereon, does not state a cause of action, it not alleging that the trespass was instigated by defendant, nor that defendant had notice thereof.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county: T. E. Jones, Judge.

Action of trespass by Merritt and Gwinn against Hill and Lauffer. A demurrer to the complaint was sustained, and plaintiffs appeal.

McKune & George, for appellants. Coonan & Sevier, for respondents.

VANCLIEF, C. The substance of the complaint in this action is that, while plaintiffs were owners and in possession of about eight sections of land in Trinity county (not alleged to have been inclosed), "defendants' cattle and borses ran and trespassed upon said lands, ate up, injured, and destroyed the grass, hay, and verdure being and growing thereon," to the damage of plaintiffs in the sum of \$1,000. It is not alleged that the trespass was instigated by defendants, nor that defendants had notice thereof. A demurrer to the complaint on the ground that it does not state a cause of action was sustained by the court, and, plaintiffs having declined to amend their complaint, judgment passed for the defendants. Plaintiffs bring this appeal from the judgment on the judgment roll, and contend that "at common law the rule was that

every man must, at his peril, keep his cattle on his own land; and if he fails he is liable for their trespass on the land of others, whether fenced or unfenced;" citing 3 Bl. Comm. 211; Cooley, Torts, 337; Pol. Code, § 4468.

In 1850 the legislature of this state enacted that "the common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of the state of California, shall be the rule of decision in all courts of this state;" and section 4468 of the Political Code is to the same effect. Yet it has been held in several cases that the common-law rule as to trespassing animals, claimed by appellants to be applicable to this case, is inconsistent with certain general legislative acts which have always been in force in this state, except as repealed by local laws applicable to some particular counties, of which Trinity is admitted not to be one; and therefore that the common-law rule invoked by appellants has never been in force in this state. Waters v. Moss, 12 Cal. 538; Comerford v. Dupuy, 17 Cal. 308; Logan v. Gedney, 38 Cal. 581. And the authority of these cases was recognized in Hahn v. Garratt, 69 Cal. 147, 10 Pac. 329, the decision of which, however, was governed by a local law, applicable to Santa Clara county alone. I think the judgment should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

104 Cal. 94 HOPPE et al. v. HOPPE et al. (No. 18,225.) FOUNTAIN v. HOPPE (HOPPE et al., Interveners).

(Supreme Court of California, Sept. 13, 1894.) HOMESTEAD-SURVIVING WIFE-POWER TO MORT-GAGE-RIGHTS OF MINOR CHILDREN-MORTGAGE BY COTENANT-FORECLOSURE-PARTIES.

1. Code Civ. Proc. § 1465, provides that the homestead set apart after the death of one of the parents is "for the use of the surviving husband or wife and the minor chidiren." Held that, where the order of the court set the homestead apart to the wife for the "use of the family," she could not destroy its quality as a homestead apart to the wife for the "use of the family," she could not destroy its quality as a homestead apart to the wife for the "use of the family," she could not destroy its quality as a homestead apart to the wife for the "use of the family," she could not destroy its quality as a homestead until the children arrived at majority.

2. An action for the partition of a home-stead set apart for the "use of the surviving wife and minor children" (Code Civ. Proc. § 1465) will not lie until the children have reach-

ed their majority.

3. One cotenant cannot intervene in an action to foreclose a mortgage on his cotenant's in-

4. Though a surviving wife may mortgage her interest in the homestead, a purchaser at the foreclosure sale has no right to the possession of any part of the homestead during the minority of any of the children.

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Actions by Herman W. Hoppe and others against Julia Hoppe and W. A. Fountain, and by W. A. Fountain against Julia Hoppe, in which Herman Hoppe and others intervened. The actions were consolidated, and from the judgment Herman Hoppe and others and Julia Hoppe appeal. Reversed.

Armstrong & Platnauer and Henry C. Ross, Jr., for appellants. Clinton L. White, for respondent.

HARRISON, J. The first of these actions (Herman W. Hoppe et al. v. Julia Hoppe and W. A. Fountain) was to obtain a partition of the lands described in the complaint between the plaintiffs and Julia Hoppe, Fountain being a party defendant because he claimed to be a mortgagee of the whole of the premises under a mortgage executed by the defendant The second of these actions Julia Hoppe. was afterwards brought by Fountain against Julia Hoppe to foreclose said mortgage, and the plaintiffs in the first action intervened in the second, and by order of the court the two actions were consolidated. Fountain demurred to the complaint in partition, and also to the complaint in intervention, and to the answer of Julia Hoppe in the foreclosure case; and these demurrers were each sustained. and judgment dismissing the action for partition and the complaint in intervention, and foreclosing the mortgage, was entered. The interveners and Julia Hoppe separately appeal from the judgment upon the judgment roll and a bill of exceptions setting out the order consolidating the actions, and excepting to the rulings upon demurrer. The facts set out in the several pleadings demurred to are substantially the same, and show the following facts: F. W. Hoppe died August 10, 1881, leaving the appellant Julia, his widow. and nine children, of whom these interveners were minors, the others being of full age. At the time of his death he was possessed of a tract of land upon which he and his family resided, containing about 160 acres, situated in Sacramento county, the same being community property. The widow was appointed administratrix, and on October 1, 1881, filed an inventory and appraisement of the estate. wherein said land was appraised at \$4,000. She also filed a petition praying for an order setting aside said land, with the dwelling house thereon, "for the use of the family of deceased," and alleged that the family consisted of herself and nine children, all of whom were named therein; but their ages were not given, nor was it alleged that any of them were minors. Upon this petition, on the 7th day of October, 1881, the court made an order, of which the following is a copy: "In the Matter of the Estate of F. W. Hoppe. Deceased. Julia Hoppe, the administratix of the estate of F. W. Hoppe, deceased, having on the 21st day of September, 1881, made application to the court by petition for an order setting apart, for the use and benefit of the family of said deceased, the real estate men-

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tioned in said petition, together with the improvements thereon, as a homestead. And it duly appearing, to the satisfaction of the court, from the papers on file in the matter of said estate, and other evidence, that said deceased was a resident of Sacramento county at his death, and left estate therein; that letters of administration were duly issued to said Julia Hoppe on the 5th day of September, 1881, and said administratrix duly returned an inventory and appraisement of said estate; that the family of said deceased consist of said Julia Hoppe, his widow, and Emma, Frank, Edward, Othelie, Clara, Robert, Herman, Louis, and Lena Hoppe, his children, and that said applicant, Julia Hoppe, is entitled to have the said premises set apart to her for a homestead; and that the same does not exceed in value five thousand dollars,-it is hereby ordered, adjudged, and decreed that all that certain piece or quantity of land lying and being in the county of Sacramento and state of California, and particularly described as follows, * * * be and the same is hereby set apart to the widow of said F. W. Hoppe, deceased, as a homestead, and shall not be subject to administration." The complaint in intervention further alleged that in the application for letters of administration the names of the interveners were stated, together with their respective ages: that no homestead had been selected, declared, or recorded by F. W. Hoppe and his wife, or either of them, prior to his death; that at the time said homestead was set apart they were minors, the eldest being then 14 years old, and the youngest 5; that the court did not fix a day for the hearing of said petition; that no notice was given in any manner of the bearing; that they had no notice of the hearing; that they had no guardian, general or special; and that they were not represented at the hearing by attorney appointed by the court, or by any person. On December 20, 1888, Julia Hoppe executed a mortgage upon the whole of the homestead to respondent, Fountain, to secure the sum of \$5,000, and it was this mortgage which was foreclosed; and, in regard to the mortgage, it was alleged that Fountain took it with full knowledge of all the facts.

1. The decree setting apart the homestead vested the title thereto in the minor children. as well as in the mother. No homestead had been selected, designated, or recorded in the lifetime of the husband; and the application for the homestead, together with the order setting it apart, were made under the provisions of section 1465, Code Civ. Proc. By the terms of that section the homestead thus set apart is "for the use of the surviving husband or wife and the minor children;" and, by the provisions of section 1468, when property is thus set apart to the use of the family "the one-half of such property shall belong to the widow or surviving husband, and the remainder to the child, or in equal shares to the children, if there be more than one." "The term 'family' throughout the chapter, is used as synonymous with and as representing the surviving wife or husband and children, if any." Phelan v. Smith, 100 Cal. 170, 34 Pac. 667. Whether, therefore, the order setting it apart is to be construed in connection with the application, or whether the mother is to be regarded as having taken the title in trust for the minor children, is immaterial. In either case the homestead was set apart "for the use of the family," and "belongs" to the widow and minor children, and is to remain as a homestead, without any power in either of the parties interested to destroy its quality as a homestead, until after all of the children shall have arrived at majority.

2. The court properly sustained the demurrer to the action in partition. The homestead is a place of abode for the family, and no act of any member of the family can in any way prejudice the rights of the others to occupy it. It must remain intact until the youngest child has reached its majority. Hence, it is not competent for either of the other cotenants to have a partition until that period has been reached. Phelan v. Smith, supra; Trotter v. Trotter, 31 Ark. 145; Hoffman v. Neuhaus, 30 Tex. 633; Keyes v. Hill, 30 Vt. 759; Roberts v. Ware, 80 Mo. 363. We do not mean to say that no case can arise where a court would not authorize the partition or sale of a homestead. Circumstances might exist where it would be the duty of the court, for the benefit of the minor, to decree a partition, or order the interest of the minor to be sold. this qualification need not be discussed.

3. As the owner of an undivided interest in the land, it was competent for the mother to mortgage or convey such interest. She could not, however, confer upon her grantee or mortgagee any greater rights in the premises than she herself held. As she could not destroy the homestead quality of the premises, or deprive the minor children of their right to occupy the homestead, any grantee of her interest must take it subject to the same limitations. A purchaser at the foreclosure sale can obtain no greater rights than would her immediate grantee, and the court in the foreclosure proceedings would have no right, by reason of any covenant in the mortgage or allegation in the complaint, to make any order or direct any act which would affect the rights of any of her cotenants. For the purpose of informing the court of the extent of her interest and the nature of the estate which she had mortgaged, it was proper for her to allege in her answer the manner in which her title had been derived, and to show that the premises had been set apart as a homestead, and that their homestead quality had not yet ceased. Upon these facts being brought to the attention of the court, the decree it might make would be adapted to the rights of the respective parties to the action. As

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the purchaser under the decree would not have a right of entry upon the premises as a cotenant until the termination of the homestead, that limitation should be included in the decree under which the sale should be made. The demurrer to the separate answer of Mrs. Hoppe should therefore have been overruled.

4. The court properly sustained the demurrer to the complaint in intervention. The title of the interveners was in no respect subject to the mortgage, and the rule is well settled that parties holding such title should not be joined in a suit for the foreclosure of the mortgage. Ord v. Bartlett, 83 Cal. 428, 23 Pac. 705; Gody v. Bean, 93 Cal. 579, 29 Pac. 223. And their presence as interveners is as equally unauthorized as though they had been made defendants. As the mortgage of their cotenant could not impair their rights, there was no occasion for them to intervene to protect their rights. The only object to be accomplished by the foreclosure is to transfer to the purchaser under the decree the same title that was conveyed by the mortgagor, and upon receiving the sheriff's deed such purchaser will be placed in the same attitude to the other cotenants as was the mortgagor. In the foreclosure of a mortgage made by one cotenant of his interest in lands, the court will not, while the proceedings are pending or after judgment, interfere with the rights of the other cotenants, or attempt to disturb their possession; and any allegations in the complaint of a covenant in such mortgage for the appointment of a receiver, or any prayer in the complaint for a receiver, will be disregarded by the court, for the reason that it is not competent for one cotenant, either directly or through the aid of the court, to do any act which will impair the rights of his fellow cotenants. The judgment is reversed, and the court below is directed to overrule the demurrer of the respondent to the answer of the defendant.

We concur: DE HAVEN, J.; McFAR-LAND. J.; FITZGERALD, J.; ROUTTE, J.

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CRADDOCK v. O'BRIEN. (No. 18,276.) (Supreme Court of California. Sept. 26, 1894.)

Compensation of Attorney — Construction of Contract — Collection of Claims under Drainage Act—Abandonment of Employment.

1. Defendant employed plaintiff to collect certain judgments against a drainage district for land taken and material furnished, plaintiff to receive a certain amount if successful. At the time the judgments had been declared void, the act organizing the drainage district being unconstitutional, the legislature passed an act providing for the payment of claims arising un-der the drainage act. The board of examiners, acting under the latter act, on the presentation of defendant's claim by another attorney, em-ployed without plaintiff's consent, allowed the claim for the same amount as the judgments, though they, being void, were not admitted as evidence of the claim. *Held*, that the "judgments" and the claim allowed were in effect the same, and plaintiff was entitled to the agreed

2. Where a person, after having employed one attorney to collect a claim, without the latter's knowledge employs another to collect it, the burden of proof is on him to show that the first attorney had either expressly or by lack of effort abandoned its collection.

Commissioners' decision. Department 1. Appeal from superior court, Yuba county; Phil. W. Keyser, Judge.

Action by J. H. Craddock against James O'Brien. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Wm. G. Murphy, for appellant. J. H. Craddock and W. H. Carlin, for respondent

HAYNES, C. The defendant, in 1885, was the owner of certain judgments rendered by the superior court of Yuba county against "Drainage District Number One of the State of California" (which was organized under the act of April 23, 1880, entitled "An act to promote drainage"), and made an agreement with the plaintiff, Craddock, whereby plaintiff undertook to collect them, and for which service, if successful, defendant agreed he should receive \$1,000. This agreement, however, included another judgment in which defendant was not interested. Plaintiff also received for collection other claims of like character, all being judgments against said "drainage district" rendered in "condemnation proceedings" instituted by said district under the Code provisions entitled "Of Eminent Domain;" but in the case of People v. Parks, 58 Cal. 625, it had been held that the act under which the district was organized was unconstitutional, and that the district had no legal existence. The work, however, which the district was organized to accomplish appears to have been done, so far as it affected the property of O'Brien and the others in whose favor judgments had been rendered, and the legislature, realizing that these parties should be compensated, in 1885 passed an act making an appropriation for the payment of claims which had arisen under the first act, and which, it was supposed, would authorize the payment of these judg-Plaintiff thereupon commenced a proceeding in mandamus against the state comptroller upon one of the claims in his hands, to test the right of these claimants under the act of 1885, and that case (Callahan v. Dunn) was appealed to this court by the comptroller, and is reported in 78 Cal. 366, 20 Pac. 737, where it was held that the plaintiff was not within the third section of the act of 1885, as presented by his complaint, the cause having gone off in the court below upon demurrer to the complaint. Having failed in this proceeding, the plaintiff continued his efforts to secure the payment of these claims, principally by conferences with the attorney general with a view to arriving at an understanding as to the mode or form of

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presenting them which would satisfy the law officer of the state. The case of Callahan v. Dunn was decided in this court March 12, 1889. The attorney general was absent much of the time thereafter on business, and upon his return in November of that year a proposition to resubmit all the claims represented by plaintiff to the board of examiners, as suggested by plaintiff, was agreed upon. In the meantime defendant, O'Brien, employed one Maslin to collect his claims, such employment being without the knowledge or consent of plaintiff, and payment of one of his claims was procured on October 3, 1889, and of the other on January 27, 1890. This case was tried before the court without a jury, and findings and judgment passed in favor of plaintiff for the proportion of \$1,000 which the two claims of O'Brien bore to the three claims included in the agreement; and defendant appeals from the judgment and an order denying his motion for a new trial.

No question is made on the appeal from the judgment, but it is contended that the findings are not justified by the evidence, the points being stated in appellant's brief as follows: "The main question that presents itself in this case, and upon which appellant mostly relies, is whether the claims presented by Maslin, to pay which the said warrants were drawn, were legally the same claims which respondent had assumed to collect; and whether respondent had exercised due diligence and ability in the collection of the claims intrusted to him for collection by appellant." We think neither of these questions can be answered favorably to appellant. It is true that at the time of respondent's employment these claims existed in the form of judgments, but these judgments were known to be void, having been so declared by the supreme court. All the injury, however, which O'Brien was entitled to compensation for had been inflicted prior to that time; and although the board of examiners, acting under the law of 1885, and following the decision of Callahan v. Dunn, supra, refused to recognize the judgments as evidence of the amount of compensation to which appellant was entitled, or of the injury done, whatever its character, did allow his claims for the same amounts specified in the judgments, and for injuries which were included in the judgments. In Callahan v. Dunn, 78 Cal., at page 368, 20 Pac. 737, a doubt was expressed whether the language of the act of 1885, "for work done and materials furnished," included compensation for land taken; but it was said that, though a judgment was alleged to have been rendered, the money had not been paid, and that consequently the title did not vest in the district. The question whether "land taken" was within the act of 1885 not having been decided by this court, the board of examiners, in the exercise of its judicial powers, was authorized to construe the act for itself, and evidently did so, at least as to the claim known as that of O'Brien and Walters, inasmuch as in the supplemental affidavit of appellant in support of said last-mentioned claim he states that the value of the timber taken was not less than \$2,000, and "that the land destroyed and taken by the directors caused a damage to him of not less than \$2,000," though the claim he presented was for \$2,566.75, which he alleges was the amount agreed upon with the directors, and that the proceedings for condemnation were had at the suggestion of the directors, as their rights would be better secured there-These facts, we think, clearly show that the claims represented by these judgments and those audited and allowed by the board of examiners were in all essential particulars the same, and were not other or different claims from those which plaintiff was employed to collect either as to character or amount. That respondent exercised reasonable diligence and ability in the prosecution of these claims will not admit of serious question. The questions presented in Callahan v. Dunn were not so clear as to charge counsel with any lack of ability, while the time that elapsed after that decision before he secured the allowance of the other claims was not such as, under the circumstances, could be charged as a lack of Besides, appellant employed andiligence. other to collect the same claims without notice to respondent, and must assume the burden of showing that respondent himself had abandoned the prosecution, either expressly or by such lack of effort as would reasonably show an abandonment. judgment and order appealed from should be affirmed.

We concur: VANCLIEF, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

MONTANA LUMBER & MANUF'G CO. v. OBELISK MINING & CONCENTRAT-ING CO. et al.

(Supreme Court of Montana. Sept. 24, 1894.)

MECHANICS' LIENS — BUILDING ON LEASED LAND
—NOTICE OF LIEN—APPIDAVIT.

1. A provision in a lease of mining land that improvements placed thereon by the lessee shall become the property of the lessor, and remain as part of the land, is subject to Comp. St. div. 5, \$ 1375, which provides that where a person has a lien on a building for material furnished, and the interest of the owner of the building in the land is a leasehold, the building may be sold to satisfy the llen, and may be removed by the purchaser.

may be sold to satisfy the lien, and may be removed by the purchaser.

2. Comp. St. div. 5, § 1371, provides that a corporation claiming a lien for material furnished for a building shall file an account for the amount verified by affidavit. Held, that an affidavit to an account filed by a corporation signed, "M. Co., by M., Asst. Mgr.," is sufficient, when its terms show that it is the individual expres-

sion and affirmation of M. from his own personal |

knowledge.

8. Where the object of a mechanic's lien is to charge only the building, and not the land, and not the land, and not the land, and not the land. the notice of lien need not state the name of the owner of the land.

4. A mechanic's lien acquired on a building for material furnished to a lessee of land on which the same is erected is not restricted to the material furnished, but covers the entire interest of the lessee in the building.

Appeal from district court, Jefferson county; Frank Showers, Judge.

Action by the Montana Lumber & Manufacturing Company against the Obelisk Mining & Concentrating Company, Octavius Hight, and J. W. Fairfield. From the judgment rendered, both plaintiff and defendants Hight and Fairfield appeal. Judgment modified.

Corbett & Wellcome, for appellants. Walsh & Newman, for respondent.

HARWOOD, J. Both parties to this action appeal, and assign certain alleged errors in the adjudication thereof. Those assigned on the part of defendants will be first consider-The object of the action is to obtain judgment in favor of plaintiff against the Obelisk Mining & Concentrating Company, defendant, upon a demand in the sum of \$2,-602.71, for building material and machinery alleged to have been purchased from plaintiff, and used by said company in the construction of a certain shaft house, ore house, office building, and a five-stamp concentrator on the Obelisk mining claim, situate in Jefferson county, Mont., and to foreclose a lien claimed by plaintiff on said improvements to secure payment of the judgment. The defendant Obelisk Mining & Concentrating Company was not the owner of said mining claim, but was lessee thereof from defendants Hight and Fairfield, who owned the same; and, while working said mining claim as lessee, the said Obelisk Mining & Concentrating Company obtained and used said material and machinery as aforesaid. Plaintiff sought a decree foreclosing its lien claim upon said improvements, with provision for removal of the same from said mining claim by the purchaser, as provided by statute in such cases. Comp. St. div. 5, 1375. The owners and lessors of said mining claim, Hight and Fairfield, appeared in defense, and opposed the granting of the relief demanded by plaintiff. They set up in defense the lease of said premises executed between themselves and the Obelisk Mining & Concentrating Company, by the terms and conditions of which it was provided that all improvements and machinery placed on said premises by the lessee (with a few exceptions, which do not concern this consideration) were to become the property of the owners, as soon as placed on said mine, and remain as part thereof; and, by virtue of that provision of the lease and the provisions of the lien law exempting the owner's interest in leased property from a lien for obligations incurred by a lessee while in possession thereof, the owners contend that no lien could attach to the buildings and machinery put on said mining claim by the lessee to secure payment for the materials used in the erection or equipment thereof.

Appellants Hight and Fairfield are supported by the statute and decisions in their contention that the owner's interest and estate in leased property is not subject to be charged with a lien for obligations incurred by the lessee in and about his operations thereon. Such was the holding, upon careful consideration, in the case of Pelton v. Mining Co., 11 Mont. 281, 28 Pac. 310, and Block v. Murray, 12 Mont. 545, 31 Pac. 550. In these cases it was sought to fasten a lien on a leased mine to secure payment for labor employed by the lessee in working the same. In the latter case, in addition to claims for labor, there was an item for timber furnished by one of the claimants, and used in working the mine. But in neither case was it sought to foreclose a lien on any building or machinery or other improvement put on the leased premises by the lessee, capable of being removed therefrom, as is sought in the present case. The question involved between the lien claimants and the owners of the mining claim in the present case is widely distinguished from that involved in these cases,—as widely distinguished as would be the holding in one case that no lien could be applied in favor of a laborer who stoped ore or dug a well on leased premises, under contract with, and for the use and benefit of, the lessee; and the holding in another case that a contractor and builder who, at the instance of the lessee, furnished the material or labor to construct a building on the same premises, capable of removal therefrom, was entitled to a lien on such improvement to secure payment for the labor or material used in the erection thereof, with provision to remove the same from the leased premises. In the one case it is readily perceived that there is something substantial put upon the leased premises by the lessee, to which a lien may be attached for obligations incurred in the erection thereof, and which can be taken away, leaving the estate of the owner as it was when leased; while in the other case there is no structure or thing erected by the lessee which can be removed, to which a lien may be attached to secure payment for the labor employed by the lessee in relation thereto.

The statute of this state upon the subject of liens provides that "the entire land to the extent aforesaid upon which any such building, erection or other improvement is situated, including as well that part of said land which is not covered with such building, erection or other improvement, as that part thereof which is covered with the same, shall be subject to all liens created by this chapter, to the extent, and only to the extent, of all the

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right, title and interest owned therein by the owner or proprietor of such building, erection or other improvement, for whose immediate use or benefit the labor was done, or things were furnished; and when the interest owned in such land, by such owner or proprietor of such building, erection or other improvement, is only a leasehold interest, the forfeiture of such lease for the non-payment of rent, or non-compliance with any of the other stipulations therein, shall not forfelt or impair such liens so far as concerns the buildings, erections and improvements thereon put by such owner or proprietor charged with such lien, but such building, erection or improvement may be sold to satisfy said lien, and be moved within twenty days after the sale thereof by the purchaser." Comp. St. div. 5, p. 1031, § 1375. Under the provisions of this statute, plaintiff is entitled to maintain its lien on improvements, such as buildings and machinery, placed on the leased premises by the lessee, to secure payment for the material or machinery furnished in the construction or equipment thereof, and is entitled to have its lien foreclosed thereon, and such improvements sold to satisfy such demand, with provision in favor of the purchaser to remove the things sold within the time provided by law. This lien attaches to matter added to the leased premises by the lessee, and goes no further; provision being made by law for removal thereof, so that the premises leased by the landlord may be returned to him unaffected by such lien. The statute so providing is paramount to the conditions of the lease, and the lien which the statute creates is not destroyed by a provision of the lease to the effect that the improvements by way of buildings, or a mill for the reduction of ore, shall inure to the lessor as soon as the same is placed on the premises. Such provisions of a lease, as well as provisions of other contracts, are subject to the provisions of the statute, and are presumed to have been made in contemplation thereof.

These appellants, Hight and Fairfield, further contend that the notice of plaintiff's lien was not properly verified. The statute provides that the lien claimant shall, within 45 days after furnishing the labor or material for which the lien is claimed, file with the county clerk and recorder of the county wherein the property is situate "a just and true account of the amount due or owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, verified by affidavit; but any error or mistake in the said account or description shall not affect the validity of said lien: Provided, the property may be identified by said description." Laws 15th Ex. Sess. 1887, p. 71, § 821. The account filed in this case was verified by O. J. Mc-Connell, assistant manager of plaintiff, by the following affidavit: "State of Montana, County of Silver Bow-ss.: O. J. McConnell, being duly sworn, says that he is the assistant manager of the said Montana Lumber and Manfacturing Company; that he has heard read the above and foregoing notice and claim of lien, and knows the contents thereof; and that the statements and allegations therein contained are true, of affiant's own knowledge. Montana Lumber and Manufacturing Company, by O. J. McConnell, Asst. Mgr. Subscribed and sworn to before me, this 19th day of April, A. D. 1892. Augustus T. Morgan, Notary Public." The point of objection to this verification is that Mc-Connell appears to have subscribed the name of plaintiff corporation to this affidavit, and that the corporation was not acting, and could not act, as affiant therein. Notwithstanding this objection, the affidavit, as appears from its own terms, is the individual expression and affirmation of McConnell, out of his own mouth, and from his own personal knowledge, under oath administered by an officer duly qualified. It is his own personal utterance, verifying said account, under the sanction of his oath. We hold the verification sufficient

Nor do we find sufficient force to vitiate the lien in the objection urged by appellants Hight and Fairfield that the notice of lien is insufficient because it does not describe the party against whose property the lien was claimed. The notice of lien described said premises, and the property on which the same are situate, and avers that the lumber, building material, and machinery were furnished by plaintiff to said defendant Obelisk Company, and by it used in said improvements, and that said Obelisk Company is the owner and reputed owner thereof. It is not proposed or sought in this action to make said lien a charge upon the property leased by Hight and Fairfield to the Obelisk Company, but only upon said buildings and reduction plant placed on said mining claim by said lessee, and fully described in said notice of lien.

The assignment of error presented on behalf of plaintiff is that the trial court, by its ruling and decree, restricted plaintiff's lien to the precise material and machinery furnished by it, and used in the construction of said buildings and reduction plant. Plaintiff was entitled to a lien extending throughout the structure or mechanical plant erected or established on said property by the lessee, in the erection or construction of which the material and machinery furnished by plaintiff had been used. Such lien extends to the structure added to the leased premises by the lessee, and no further; and the boundary line between rights of such lien claimant and the rights of the owner of the leased premises is found by ascertaining, not just how much lumber or paint or wall paper or nails or how many particular "jigs and plungers and jig screens" were furnished by the lien claimant towards the buildings or reduction works on which the lien is sought to be applied, but by ascertaining the original condition of the leased premises, when the

lessee went into possession thereof, as respects the improvement on which the lien is claimed. If this were a case where some particular piece of machinery had been added to a mill, owned and leased along with the mine, it would, of course, be proper to restrict the lien for such machinery to that which was added by the lessee, and such ruling would be in conformity with the views here expressed, because it is here held that the lien for things furnished the lessee cannot extend to the interest or estate of the lessor. But there is no contention in this case that any of the improvements upon which plaintiff sought to have its lien foreclosed, or any part of the same, existed on said premises, and was owned by the lessors, Hight and Fairfield, when they leased said premises. There is no denial that the improvements described in plaintiff's lien were wholly added to the leased premises by the lessee; and, if that be true, the same are subject to plaintiff's lien. The judgment should therefore be modified by decreeing the foreclosure of plaintiff's lien upon the structures described therein, and shown to have been placed on said property entirely by the lessee. The cause is therefore remanded for modification of the judgment in conformity with the views herein expressed. Judgment modified.

PEMBERTON, C. J., and DE WITT, J., concur.

BANKS v. YOLO COUNTY. (No. 18,354.) (Supreme Court of California. Sept. 29, 1894.) BOARD OF EDUCATION—COMPENSATION—REPEAL OF ACT.

Pol. Code, § 1770, as amended by Act March 15, 1889, allowing five dollars per day to each member of the board of education for certain services, is not repealed by Act March 16, 1889, amending certain sections of the county government act, the later act not referring to compensation of members of said board.

Department 2. Appeal from superior court, Yolo county; W. H. Grant, Judge.

Action by George Banks against Yolo county for salary as secretary of the board of education. Judgment for plaintiff, and defendant appeals. Affirmed.

C. M. Head, for appellant. R. L. Simpson, for respondent.

PER CURIAM. We do not think that section 1770 of the Political Code, as amended by an act approved March 15, 1889, which allows five dollars per day to each member of the board of education, including the secretary, for certain services, was repealed by sections 180 and 211 of an act approved the following day, March 16th, amending certain sections of the county government act (St. 1889, pp. 191, 192, 270, 300). There is no clause in the latter act expressly repealing any part of the former act; indeed, it has no

repealing clause at all. If, therefore, it repeals the former act, it must do so by implication. But "repeals by implication are not favored, and the repugnancy between two statutes should be very clear to warrant a court holding that the later in time repeals the other, when it does not in terms purport to do so. This rule has peculiar force in the case of laws of special and local application, which are never deemed repealed by general legislation except upon the most unequivocal manifestation of intent to that effect." Cooley, Const. Lim. (6th Ed.) 182. In the case at bar the two acts, passed so near each other in point of time, must be so construed, if possible, as to give effect to both; and we see no irreconcilable conflict. The act of March 15th refers to a special subject,—compensation of members of the board of education,-while said subject is not referred to in the act of March 16th, which is in its nature general. Moreover, the parts of the said act of March 16th, which are invoked as repealing the part of the said act of March 15th here in question, are only re-enactments of the law as it theretofore stood; and some consideration is to be given to the rule declared in section 325 of the Political Code, that: "Where a section or part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the amended form, but the provisions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment." See Dillon v. Saloude. 68 Cal. 270, 271, 9 Pac. 162. Respondent's cause of action is not barred by the clauses of the statute of limitations invoked by appellant. It is founded on "a liability created by statute," and comes within the three-years limitation. Code Civ. Proc. § 338; Higby v. Calaveras Co., 18 Cal. 178. There are no other points necessary to be noticed. The judgment is affirmed.

THOMPSON v. GORNER. (No. 15,262.) (Supreme Court of California. Sept. 24, 1894.) INTEREST—PROVISION FOR INCREASE AFTER DE-FAULT—EFFECT—WAIVER.

1. Where a contract provides for interest at a certain rate, and that on default, in addition thereto, interest shall be paid at the rate of 1 per cent. per month, the acceptance, after default, of interest at the rate of 8 per cent., without demand for the 1 per cent. per month, is not a waiver of the latter interest accruing after the one entitled thereto has given notice that he will insist upon the same. Thompson v. Gorner (Cal.) 36 Pac. 434, reversed.

2. The provision in a promissory note that after default, in addition to the interest provided for the maker will now 1 per cent. per month

2. The provision in a promissory note that after default, in addition to the interest provided for, the maker will pay 1 per cent. per month extra, is not a penalty clause, but a contract, but the acceptance, after default, of interest without the extra 1 per cent., is a waiver thereof for the months for which such interest was accepted Thompson v. Gorner (Cal.) 36 Pac. 434, affirmed.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by Mary Thompson against Christ Gorner to foreclose a mortgage. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Edgar B. Haymond, for appellant. John Yule and Edward H. Stearns, for respondent.

McFARLAND, J. This is an action to foreclose a mortgage given to secure a promissory note. The appeal involves only a small amount of interest on the principal of The note was dated March 20, the note. 1888, and matured two years after date. The interest clause, which gives rise to the present controversy, is as follows: "With interest thereon, in like gold coin, from the date hereof until paid at the rate of eight per cent. per annum, payable monthly in advance, and, (i) said principal or interest is not paid as it becomes due, it shall thereafter bear interest at the rate of one per cent. per month." The monthly interest was paid each month until the maturity of the note. After that—the principal not having been paid—the defendant continued to pay to plaintiff, who was the holder of the note, the monthly interest at 8 per cent. per annum; and said interest at said rate was received by plaintiff, and accepted by her as payment of said monthly interest, until February 20, 1892. On said last-named day defendant offered to pay a month's interest as usual,—at the said rate of 8 per cent. per annum,-but the plaintiff refused to receive it, and claimed interest at 1 per cent. per month as provided in the note. March 18, 1892, defendant tendered to plaintiff the whole amount of principal due, and also the amount of interest due rated at 8 per cent. per annum. This the plaintiff refused to receive as full payment of the whole indebtedness on the note and mortgage, and on March 31, 1892, she commenced this action. The court below held, as conclusions of law, that the 1 per cent. per month was in the nature of a penalty; and also that plaintiff, having accepted the monthly interest at 8 per cent. per annum for nearly two years, waived any claim of right to exact 1 per cent. per month interest after the maturity of the note. When this appeal was in department it was held that the 1 per cent. clause in the note was not to be treated as a penalty, but as a contract to pay 1 per cent. per month interest upon a contingency shown to have happened, but that the acceptance by plaintiff of the interest at 8 per cent. per annum was a waiver of her claim to collect more interest for the months for which she had so accepted the interest at 8 per cent. We are satisfied with both of these conclusions, and adhere to them. But it was also held in department that plaintiff, by accepting the 8 per cent. for past months, waived her

right to demand the 1 per cent. per month in the future. Plaintiff's points and authorities were very meager, covering only one page, and referring only to the question of penalty. In her petition for hearing in bank her counsel calls our attention to section 1698 of the Civil Code, which reads as follows: "A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise." Under the principle of this section the plainuff was entitled to recover interest at 1 per cent. per month for the time during which she refused to accept, and did not accept, interest at 8 per cent. per annum. She did not contract in writing to change the interest as expressed by the written terms of the note, and her acceptance of the 8 per cent. was of no higher dignity than an express oral agreement. But it was an executed agreement only as to months for which she accepted the interest at 8 per cent; as to the future, it was executory (Erenberg v. Peters, 66 Cal. 114, 4 Pac. 1091; Taylor v. Soldati, 68 Cal. 27, 8 Pac. 518; Simmons v. Hamilton, 56 Cal. 493), and void under said section of the Code (Johnson v. Polhemus, 99 Cal. 240, 33 Pac. 908). It does not clearly appear from the transcript, which by stipulation does not include all of the judgment roll, whether or not plaintiff claims as interest the difference between 8 per cent. and the 1 per cent. for the months during which she accepted the 8 per cent, but she is not entitled to said difference for said months. She is entitled, however, to interest at 1 per cent. per month from the time she first demanded it. She should have judgment for the amount of the principal, and interest thereon from and after the 20th day of February, 1892, at 1 per cent. per month. The judgment is reversed, with direction to the superior court to render judgment for the plaintiff for the amount due and unpaid upon the principal of the note, together with interest thereon from February 20, 1892, at 1 per cent. per month.

We concur: HARRISON, J.; FITZGER-ALD, J.; DE HAVEN, J.; VAN FLEET, J.

MACOMBER v. CONRADT et al. (No. 15,259.)

(Supreme Court of California. Sept. 21, 1894.)
In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Action by C. A. Macomber against Julius Conradt and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

John H. Durst, for appellants. Henley, Swift & MacSherry and S. V. Castello, for respondent.

McFARLAND, J. The averments of the complaint show that the contract between respondent and appellants was one for the purchase and sale of mining stocks on margin, and the court found that the said averments were true. The appeal is based on the judgment roll alone, and there is no evidence before us. The judgment must therefore be affirmed on the authority of Cashman v. Root, 89 Cal. 373, 26 Pac. 883, and the recent case of Sheehy v. Shinn (Cal.) 37 Pac. 393. There is no conflict between said cases and Kutz v. Fleischer, 67 Cal. 93, 7 Pac. 195. The judgment is affirmed.

We concur: De HAVEN, J.; FITZGER-ALD, J.; HARRISON, J.

104 Cal. 224
McCREA v. JOHNSON et al. (No. 15,580.)
(Supreme Court of California. Sept. 26, 1894.)

An assignee of a mechanic's or material man's claim cannot file the notice of claim or serve the notice on the owners, so as to perfect the lien, as the privilege of asserting a mechanic's lien cannot be assigned.

MECHANICS' LIENS-ASSIGNMENT.

Department 1. Appeal from superior court, city and county of San Francisco; W. H. Levy, Judge.

Action by G. P. McCrea against Kate Johnson and others to enforce mechanics' liens. There was a judgment for defendants, and plaintiff appeals. Affirmed.

G. P. McCrea and J. C. Bates, for appellant. W. H. Mahoney, for respondents.

GAROUTTE, J. The plaintiff is the assignee of the claims of certain laborers who performed work for a subcontractor in the erection of a certain building belonging to the respondent Kate Johnson. Her codefendants are the original contractors and the subcontractors. After the aforesaid assignment was made, the assignee proceeded under section 1184 of the Code of Civil Procedure, and served a notice upon said Johnson, stating that he was such assignee, and, among other things, requesting her to withhold from the contractor sufficient funds to meet his demands therein stated. Plaintiff subsequently filed his claim of lien, and brought this action to recover thereon.

Two questions only are involved in this appeal: (1) Has an assignee of the claim of a mechanic or a material man the right to file in the recorder's office the notice of claim of lien provided by the statute? (2) Has such assignee the right to serve upon the owner the notice provided by the terms of section 1184 of the Code of Civil Procedure? We are compelled to answer both interrogatories in the negative. It is squarely decided in Mills v. Land Co., 97 Cal. 254, 32 Pac. 169, that the right to create and assert a mechanic's or laborer's lien, under the mechanic's lien law, is a personal right, and nonas-

signable. It is sufficient to say that we are entirely satisfied with the principle there declared, and now reaffirm it as the law of this state. A large majority of the cases cited by the appellant as opposed to this view are not in point. They come directly in line with the views of this court as found expressed in the recent case of Duncan v. Hawn (opinion filed September 5, 1894) 37 Pac. 626. We are also satisfied that the principle which points the judgment in the Mills Case, when applied to appellant's right to give the notice to the owner contemplated by section 1184 of the Code of Civil Procedure, is fatal to his claims upon this appeal. The right to give this notice, and to secure certain benefits thereby, was a personal right of the laborer, which could not be assigned. It was no more assignable than the right to file a notice of claim of llen was assignable. Plaintiff's assignors transferred to him their claims and demands, and those claims and demands were against the subcontractor alone who employed them. At the date of such assignment, they had no claim or demand against the owner of the building of any kind or character, and, consequently, no legal rights against the owner passed to the plaintiff by the assignment. The effect of the notice provided by the section of the Code, when served by the proper parties and under certain conditions, is to create new rights and new liabilities; and, for the purposes of this case, it is entirely immaterial whether such service results in the creation of a lien upon the fund in the hands of the owner owing to the contractor, or whether a simple legal liability is created in favor of the laborer and against the owner. Under either of these conditions, the assignment of the demand cannot carry with it the right to give a notice which will accomplish such results. If a lien is created by the service of the notice, then the case is squarely within the principle declared in Mills v. Land Co.; and, if the service of the notice simply results in the creation of a legal Hability against the owner of the building where none before existed, the same principle is equally applicable, and there can be no assignment of such a right. For the foregoing reasons, the judgment is affirmed.

We concur: HARRISON, J.; VAN FLEET, J.

104 Cal. 230

BOUCHE v. LOUTTIT. (No. 18,300.)
(Supreme Court of California. Sept. 26, 1894.)
RELEASE OF GUARANTOR—FAILURE TO EXHAUST
SECURITY.

1. Where defendant, to secure a mortgage note given by another, gave his nonnegotiable note under an agreement that, on the maturity of the mortgage note, the mortgage should be immediately foreclosed, and defendant should be liable only for the deficiency, the latter was released by a delay of four years in foreclosing the mortgage.

2. An action against the guarantor of any deficiency on a note after the security has been exhausted, brought before the security has been sold, is premature.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by Nelson Bouche against James A. Louttit. There was a judgment for defendant, and plaintiff appeals. Affirmed.

J. J. Paulsell and Ed. R. Thompson, for appellant. Louttit, Woods & Levinsky, for respondent.

TEMPLE, C. This action is upon a nonnegotiable promissory note, executed June 1, 1881, by defendant, to one H. E. Williamson. Defendant was not indebted to Williamson, but the note was intended as collateral security for the obligation of D. and A. Bolte, who on that day borrowed from Williamson the sum of \$1,100. The Bolte note was also secured by a mortgage on land in Calaveras county. The understanding between Louttit and Williamson was that, when the Bolte note became due, Williamson would proceed at once to collect the same by foreclosure of the mortgage, and that Louttit would be liable upon his note, given as collateral, only for the deficiency, if any. The Bolte note became due August 1, 1882; but no action was instituted and no steps taken to collect the same until 1886, when an action was commenced to foreclose. The amount of judgment for principal and interest and costs, and including costs of sale, amounted to \$2,518.-50. The amount realized from the sale, which was had July 23, 1887, was \$1,800. This suit was commenced July 31, 1886. Upon these facts, the trial court held that plaintiff could not recover, and I think the conclusion must be sustained. The note was nonnegotiable, and therefore in the hands of the assignee any defense could be made which would have been good against the assignor. It also appears to have been assigned after it became due. The contract of Louttit was that of a guarantor of the deficiency after the mortgage security had been exhausted. It was the duty of the holder to proceed at once to realize upon the other security, and this he expressly agreed to do in the contract of guaranty. It needs no argument to show that a delay of nearly four years after the principal note became due is unreasonable. Furthermore, the action was prematurely brought. The guaranty was to pay the deficiency, and there was no deficiency until the sale of the mortgaged premises, and the sale took place after the suit was brought. I think the judgment and order should be affirmed.

We concur: SEARLS, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

104 Cal. 227 McCORMICK v. BALDWIN. (No. 18,308.) (Supreme Court of California. Sept. 26, 1894.) MINING CLAIM—ABANDONMENT — RESUMPTION OF Work.

Rev. St. U. S. § 2324, provides that, in Rev. St. U. S. § 2324, provides that, in case of nonperformance of a certain amount of labor yearly on a mining claim, it shall be open to relocation, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work on the claim. Held, that to "resume work," within the provision of the statute, means to begin work anew with a bona fide intention of prosecuting it.

Department 2. Appeal from superior court, Nevada county; John Caldwell, Judge.

Ejectment by Hamilton McCormick against George W. Baldwin, Jr., for mining lands. Verdict and judgment for defendant, and plaintiff appeals. Affirmed.

J. M. Walling, for appellant, C. W. Kitts. for respondent.

McFARLAND, J. This is an action of ejectment. The premises described in the complaint consist of certain quartz-mining property called the "Gracie Consolidated Q. M. Claims." They include three distinct mining locations or claims adjoining each other, called the "Big Blue" (or "Gracie"), on the east; the "Guernsey," in the center; and the "East Orleans," on the west. The defendant asserts title to certain quartz-mining claims which conflict with and include portions of said Guernsey and East Orleans claimed by plaintiff. The verdict and judgment were for defendant, and, from the judgment and order denying a new trial, plaintiff appeals.

In the transcript and briefs many points touching mining law are made and suggested, but there is only one point which we deem it necessary to notice in detail, and that arises out of certain instructions of the court about the construction of the words "resume work," in section 2324, Rev. St. U. S.1 The mining locations upon which appellant bases his right to the premises in controversy were made in the year 1885 and prior thereto. There is no pretense of evidence that he ever worked on the Guernsey or East Orleans, or that any work was ever done by him on the Big Blue prior to the year 1892. There is some evidence of some work done by appellant in a tunnel on the Big Blue in 1892, but from all the evidence in the case the jury must have found that if

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¹Rev. St. U. S. § 2324, provides: "On all claims located prior to the 10th day of May, 1872, ten dollars' worth of labor shall be performed or improvements made by the 10th day "On_all formed or improvements made by the 10th day of June, 1874, and each year thereafter, for each 100 ft. in length along the vein until a patent has been issued therefor * * *; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation, * * * provided that the original locators, their heirs, assigns or legal representatives, have not resumed work on the claim after failure and before such location."

there was any work done on the Big Blue in 1892 it was entirely insufficient to hold the three claims under the United States statute, even though the work on the Big Blue could be applied to the other claims. But it was abundantly shown that the tunnel in the Big Blue in which appellant claimed to have worked in 1892 was of no use whatever in developing either of the other claims, and therefore could not be applied to the latter. Respondent made his locations, which included parts of the Guernsey and East Orleans, in February and April, 1893, and the Guernsey and East Orleans were then clearly subject to relocation, unless appellant, after the expiration of the year 1892, had resumed work within the meaning of the statute before respondent made his locations. Upon this subject the appellant testified that "on the 1st day of January, 1893, plaintiff performed about three hours' work on each of said three locations," and that on said day and the day following, January 2d, he dug a shaft on the Orleans about six feet deep. No more work was done by him afterwards. He contends that by these acts he had resumed work so as to invalidate any attempted hostile locations. Upon this subject the court gave several instructions, the substance of them being this: That a party cannot hold a mining claim for several years without doing in any year the work required, by simply going on it at the beginning of each year, and doing a few hours' work, with no bona fide intent to comply with the statutory requirement as to the amount of work to be done. In instruction No. 11 the word "and" is inadvertently used before the word "unless," but all the instructions taken together clearly showed to the jury what the court meant. The latter part of instruction No. 11 may be taken as a fair sample of the instructions objected to by appellant, and is as follows: "Unless, before the alleged location by the defendant of the ground in controversy, the plaintiff had done some work with the bona fide intention of doing the balance of the requisite work during the year 1893. It is against the policy of the law, and a fraud against the government and the law, to hold quartz claims by merely doing a few dollars' worth of work thereon at or near the beginning of the year next following the year on which claimant failed to do the necessary work, when such work is not commenced with the bona fide intention of being continued till the full amount is done. Such labor, so done, is a mere pretense and sham, and will not prevent the relocation for want of necessary work." This instruction, and the other instructions given by the court upon the subject, are, in our opinion, correct. To "resume work," within the meaning of said section 2324, is to actually begin work anew with a bona fide intention of prosecuting it as required by said section. Of course, it was for the jury to determine from all the evidence in the case whether or not the facts

brought the case within the principle of the instructions. And under this view it is not necessary to examine the points made as to the validity of appellant's original locations. the validity of the old Stoddard claim of 1875, or the mesne conveyances thereof from Stoddard to Eastman, the contract between Eastman and Calvert, etc., or many other points made in the case. There was no substantial defect in the locations of respondent. We see nothing further in the case to be considered. The judgment and order appealed from are affirmed.

We concur: DE HAVEN, J.; FITZGER-ALD, J.

104 Cal. 239 BLYTH et al. v. ROBINSON. (No. 14,543.) (Supreme Court of California. Sept. 28, 1894.) BOND AGAINST MECHANICS' LIENS-MATERIAL MAY AS SURETY-EFFECT-RIGHT TO ENFORCE LIEN.

1. A bond by a contractor, indemnifying an owner against liens on his building, is valid, indemnifying though the plans and specifications forming part of the building contract were not filed with the

county recorder.

2. Where the surety on a bond given by a contractor to an owner, to indemnify the latter against mechanics' liens on his building, supplies to the contractor material for such building. ing, and files a mechanic's lien therefor, and in consideration of the satisfaction of the lien the owner gives him his note for an amount less than the claim, the owner may, in an action on the note, set up as a defense the liability of the surety on his bond.

Department 2. Appeal from superior court, city and county of San Francisco; J. C. B. Hebbard, Judge.

Action by Blyth and others against Robinson on a promissory note. Judgment was rendered for defendant, and plaintiffs ap-Affirmed.

E. N. Wakeman, for appellants. Van Duzer, for respondent.

DE HAVEN, J. This appeal is taken by the plaintiffs from a judgment in favor of the defendant. The only question arising upon the record before us is this: Do the findings of the court, read in connection with the facts admitted by the pleadings, sustain the judgment? The facts shown by the record are these: The defendant entered into a written agreement with one Houser for the alteration and repair of a certain house belonging to the defendant. The contract price of this work was \$4,600, the said Houser to do all the work, and furnish at his own expense all the materials used in the alteration and repair of such building. and deliver the same to the defendant free from all liens on account of labor or materials. The contract price was to be paid in installments, three during the progress of the work, and the last, of \$1,300, 35 days after the building was completed. Accompanying said contract was a bond in the

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sum of \$4,000, executed to defendant by the said contractor, Houser, as principal, and the plaintiffs as sureties, "guarantying the performance of all the conditions of said contract on the part of the said Houser, and, among other things, that said house should be delivered to the defendant free from all liens that might arise from or be filed against said building on account of material or labor furnished by said Houser, and used in or about said structure." The plans and specifications forming a part of the contract for the alteration and repair of defendant's building were not filed in the office of the county recorder. The plaintiffs are lumber dealers, and they sold and delivered to the contractor, Houser, lumber of the value of \$1,036, to be used by him in the alteration and repair of defendant's building, and for which sum they duly filed their claim of lien against said building. Upon the completion of Houser's contract, there remained unpaid to him only the last installment provided for by the contract, \$1,300, and there were filed against the defendant's building liens which, together with the lien of plaintiffs, amounted to the sum of \$2,360, and the contractor was wholly insolvent. The defendant paid the other liens upon the suggestion of plaintiffs, and after he had done so was informed by them of their claim and lien for \$1,036. In respect to this the court finds that "plaintiffs then offered defendant to take his promissory note for the sum of nine hundred (\$900) dollars, and cancel said lien, which offer defendant accepted, and said lien for ten hundred and twenty-six (\$1,026) dollars was accordingly canceled." This action was brought by plaintiffs to recover the amount due upon the note referred to in the finding just quoted. The defendant in his answer pleaded a want of consideration for the note, growing out of the foregoing facts, and further alleged that he had been damaged by reason of the failure of the contractor to pay and discharge the lien of plaintiffs, in the sum of \$925, the amount sued for, and that under the terms of the bond above mentioned he was entitled to recover such damages by way of set-off or counterclaim to plaintiffs' action. As a conclusion of law from the foregoing facts, the superior court found in substance that the counterclaim of defendant was established, and that he was entitled to a judgment against plaintiffs for his costs.

1. The bond executed by plaintiffs, and by the terms of which they undertook to protect the defendant against all claims for liens which might arise or be filed against his building on account of material or labor used or employed by Houser in the performance of his contract with defendant, was valid, notwithstanding the plans and specifications forming a part of the building contract were not filed with the county recorder.

Kiessig v. Allspaugh, 91 Cal. 234, 27 Pac. 662; Id., 99 Cal. 452, 34 Pac. 106. This being so, the judgment of the superior court was right. The note sued on was without any legal consideration to support it. The cases cited by the appellants to the effect that forbearance to sue, or the compromise of a doubtful claim, constitutes a sufficient consideration for a promise, are not in point. The findings do not show that the note was given for the purpose of compromising a doubtful claim, and, as to the forbearance of plaintiffs to foreclose their lien against the defendant's building, they were already under a legal obligation not to foreclose such lien, by the terms of the bond executed by them, and in canceling this lien they conferred no benefit upon defendant to which he was not already legally entitled, and themselves suffered no detriment they were not already legally bound to suffer; and this was not a sufficient consideration for the note obtained from the defendant (Civ. Code, § 1605), and, as the findings show that there was no other consideration, the decision of the superior court might well have been rested upon the ground that such note was without consideration.

2. But, if we assume, as did the court below, that the note is not without a legal consideration to support it, still it is clear the plaintiffs are not entitled to recover in this action. The note was given for the purpose of discharging one of the liens against which plaintiffs undertook to indemnify the defendant when they executed the bond as sureties for the contractor, and immediately upon the payment of such note a cause of action would have arisen, by virtue of the terms of such bond, in favor of defendant against the plaintiffs, for the amount so Under such circumstances, and to avoid circuity of action, the defendant should be permitted to interpose plaintiffs' liability upon the bond as a defense to this action. The court did not find that defendant made any valid agreement to release plaintiffs from their obligation as sureties for the contractor, and no such legal effect was worked out by the mere fact that defendant executed the note sued on under the circumstances disclosed by the findings. The particular reason which moved him to execute his note in payment of plaintiffs' demand against the contractor does not appear, but it may be conjectured that he did so under the mistaken belief that the bond executed by plaintiffs was void because of the failure to file with the county recorder the plans and specifications referred to in the contract which it accompanied; but, whatever may have been his reason, it is sufficient to say that, so far as disclosed by this record, the giving of the note, although an unnecessary and unwise thing for defendant to do, did not destroy the obligation of the bond, and it is eminently just that the plaintiffs should not be permitted to escape their liability upon such bond, and in so escaping be permitted to reimburse themselves from defendant for the loss which they may have sustained in their dealings with the principal on the bond. Judgment affirmed.

We concur: McFARLAND, J.; FITZ-GERALD, J.

STATE ex rel. TAYLOR v. PENNOYER et al., Commissioners.

(Supreme Court of Oregon. Oct. 16, 1894.)

Injunction — Erection of Public Building —

Constitutional Law.

Where it does not appear that the burden of taxation will be increased by the erection of a public building without, instead of within, the seat of government, the state is not entitled to an injunction restraining a board of its officers from carrying out the provisions of an act requiring such board to purchase land for and erect a branch insane asylum outside of the seat of government, on the ground that such act is contrary to Const. art. 14, § 3, providing that all public institutions of the state shall be located at the seat of government.

Appeal from circuit court, Marion county; George H. Burnett, Judge.

Action by the state ex rel. A. C. Taylor against Sylvester Pennoyer and others, a board of commissioners of the state of Oregon, to restrain the purchase of a site for and the building of a branch insane asylum. A demurrer to the complaint was overruled, and defendants appeal. Reversed.

J. C. Moreland and T. H. Crawford, for appellants. H. J. Bigger and W. H. Holmes, for respondent.

WOLVERTON, J. This suit was instituted for the purpose of having the defendants, acting in their capacity as a board of commissioners of public buildings of the state of Oregon, enjoined and restrained from purchasing 640 acres of land in Union county, in this state, to be used as a site for a branch insane asylum, and expending therefor, of the public funds, the sum of \$25,000; from constructing buildings thereon to be used as a hospital for the care of insane persons who should be lawfully committed thereto for care and treatment at the expense of the state; and from expending the funds approprinted therefor. The legislative assembly, at its last session, passed an act "To provide for the location and construction of a branch insane asylum in the eastern portion of Oregon and appropriating money therefor," which provided, among other things: That the governor, secretary of state, and state treasurer, acting in their capacity as a board of commissioners of public buildings of the state of Oregon, should, within 60 days after the act took effect, locate a site for a branch insane asylum, to be known as the "Eastern Oregon Insane Asylum," at some point in one of the following named counties: Wasco, Sherman, Gilliam, Morrow, Umatilla, Union, Crook, or Baker. That said board shall contract for and purchase in the name of and for the state, at the place selected for said asylum, a tract of land consisting of not less than 320 acres nor more than 640 acres, and shall, in the manner provided for by the act, proceed to erect and construct upon said premises an asylum building and outbuildings, and make suitable improvements, and supply the same with furniture and fixtures and everything necessary and requisite to fully complete and equip said Eastern Oregon Asylum, at a cost not exceeding the sum of \$165,000. For the purpose of purchasing the land and erecting the asylum buildings, the act appropriates out of the public treasury of the state, from any moneys not otherwise appropriated, \$165,000. or so much thereof as may be necessary.

The complaint alleges, in substance, that the relator is a taxpayer and citizen of the state; that the defendants, Pennoyer, Mc-Bride, and Metschan, as governor, secretary, and treasurer of the state of Oregon, constitute the board of commissioners of public buildings of the state; that by virtue of the powers in them vested, as such board, under the provisions of a pretended act of the legislative assembly, which it is claimed passed the assembly at its seventeenth biennial session, the defendants are about to purchase with the moneys of the plaintiff, sought to be appropriated by said legislative assembly for the purpose, 640 acres of land in Union county, Or., for the sum of \$25,000, to be used as a site for a branch insane asylum for the state; that defendants, in their capacity as such board, are about to expend of the moneys of the plaintiff, sought to be appropriated as aforesaid, the sum of \$140,000 in constructing buildings on said land, to be used as a hospital for the care of a portion of the insane of said state who may be hereafter lawfully committed to such institution for care and treatment at the expense of the state; that said asylum, if constructed as intended, will be one of the public institutions of the state, and that, unless restrained, defendants will purchase and pay for said lands, and build and pay for said buildings, with the money of the state, to the great and irreparable injury of plaintiff; and that plaintiff has no other plain, speedy, or adequate remedy at To this complaint the defendants interposed a demurrer, and, for ground thereof. alleged: First, that neither the state nor the relator nor the plaintiff has any legal capacity to bring this suit; second, that the complaint does not state facts sufficient to constitute a cause of suit against the defendants. or either of them; third, the complaint does not state facts to constitute any injury threatened to the plaintiff; fourth, that no cause is stated in said complaint for the issuance of an injunction. The demurrer was overruled by the court below, and the cause is

here for our consideration upon the questions arising upon the complaint and demurrer.

This case is only distinguishable from the case of Sherman v. Bellows, 24 Or. 553, 34 Pac. 549, in that it is brought in the name of the state upon the relation of a private individual, instead of in the name of the private individual directly. It is the settled doctrine of this state that an individual taxpayer, whose burdens would be increased by the wrongful acts of public officers, and where a fraudulent or illegal diversion or misapplication of the public funds is about to be consummated, has such an interest, by reason of the special and peculiar injury he would sustain, as would give him a standing in a court of equity by injunction to restrain such acts, and prevent such diversion of the public funds. Carman v. Woodruff, 10 Or. 133. This doctrine is so well established and sustained by the undoubted weight of authority in the United States that it is unnecessary to enumerate the cases sustaining it. The taxpayer must, however, present such a case as will bring him within the ordinary equitable rules which govern when relief by injunction is sought. He must show that some act is threatened or imminent which will result in some material injury to himself, for which there is no adequate remedy at law. It is not sufficient that he apprehends injurious consequences, which neither actually exist nor are threatened. Fanciful, speculative, or even possible evil results are too remote and indefinite upon which to call into requisition the restraining process of a court of equity. This rule is applicable as well when the state is a party plaintiff as where an individual occupies a like position. Allen, J., in People v. Canal Board of New York, 55 N. Y. 395, "When the state, as plaintiff, invokes the aid of a court of equity, it is not exempt from the rules applicable to ordinary suitors; that is, it must establish a case of equitable cognizance, and a right to the peculiar relief demanded." See, also, 2 High, Inj. § 1327. So that in legal effect the position occupied by plaintiff herein is not superior to or different from that of the plaintiff in Sherman v. Bellows, supra. The state represents the aggregate of individual taxpayers; the individual himself only, but incidentally the whole people, and the object sought to be attained is identical. The acts violative of law or trust relations, which will result in material injury to the individual, must be threatened or imminent, to entitle him to the interposition of a court of equity, and in principle there exists no reason why a different equitable rule should apply where the state is plaintiff.

The contention of the plaintiff is that the legislative act aforesaid is in contravention of section 3, art. 14, of the state constitution, which is as follows: "The seat of government, when established as provided in section 1, shall not be removed for the term of twenty years from the time of such es-

tablishment; nor in any other manner than as provided in the first section of this article; provided, that all public institutions of the state, hereafter provided for by the legislative assembly, shall be located at the seat of government,"-and therefore void and inoperative. That the clause "public institutions of the state" means or includes the public buildings thereof; that the branch insane asylum provided for by the act is a public institution, in that sense, and therefore should, under the constitution, be located at the seat of government. In Elliott v. Oliver, 22 Or. 47, 29 Pac. 1, Mr. Justice Lord says: "As a general rule a court will not pass upon a constitutional question, and decide a statute to be invalid, unless a decision upon that very point becomes necessary to the determination of the cause;" citing in support thereof Ex parte Randolph, 2 Brock. 448, Fed. Cas. No. 11,558; Hoover v. Wood, 9 Ind. 287; Cooley, Const. Lim. *163. This rule arises out of the due respect which one co-ordinate branch of a state government entertains towards another. The legislature, in adopting laws for the government of the people, does so under its construction of the constitution, and the just presumption always prevails that the business of the legislature is transacted with due regard for the fundamental law by which its acts are limited and governed. It must be a clear case. therefore, and one in which the constitutional question is the very lis mota, before courts will assume the responsibility of declaring an act of the legislative assembly void upon constitutional grounds, and reverse the judgment of a co-ordinate branch of the state government. Does the plaintiff present such a case? and has it exhibited such equities as to entitle it to the relief demanded? The legislature, acting in its legislative and discretionary capacity, has, by adopting the act in question, declared, in effect-First, that a new asylum building is required for the accommodation and proper care and treatment of the insane and idiotic of the state; second, that it is to the best interests of the state and such unfortunates that the same be located in the eastern part of the state; and, third, that \$165,000 is required for its construction and completion, and makes an appropriation accordingly. No one will contend but what the legislature had a perfect constitutional right to determine upon the necessity for an additional building, and the amount of funds necessary for the construction thereof, and to make an appropriation therefor. What the difference will be between the cost of construction and maintenance of such a building as an asylum at the seat of government, and a like building and its maintenance in eastern Oregon. is not made apparent by the complaint; and this is wherein the plaintiff fails to show that the burdens of taxation of its citizens will be increased, or that any additional amount of public funds will be required, as a consequence of its erection at the latter place. This is the exact ground upon which the case of Sherman v. Bellows, supra, was decided, and we see no reason now for disturbing that decision. Mr. Justice Moore, speaking for the court in that case, says: "Conceding, without deciding, that the soldiers' home is a public institution of the state, provided by the legislative assembly, and that section 3 of article 14 of the constitution required the trustees to locate it at Salem; that they had threatened to violate their official duty by locating it at Roseburg,-does it appear that the plaintiff has sustained a personal injury thereby? If it were alleged that, in consequence of the location of the soldiers' home at Roseburg, plaintiff's property would be subjected to a burden of taxation in addition to that which it would be required to bear if located at Salem, then he would sustain a personal injury; and, since an adequate compensation cannot be had at law, he would be entitled to an injunction to prevent such location." Mitchell, J., in Thompson v. Commissioners, 2 Abb. Pr. 252, in speaking of the equitable remedy by way of injunction, says: "It was never granted merely to prevent an officer from carrying out a law of the state because it was deemed unconstitutional, where some equity was not the foundation of the bill." 2 High, Inj. § 1326. Chalmers, J., in Gibbs v. Green, 54 Miss. 592, says: "Neither an executive nor a ministerial officer can be enjoined generally from putting a law into force [citing Mississippi v. Johnson, 4 Wall. 475]. The complainant who seeks an injunction must be able to specify some particular act, the performance of which will damnify him, and it is such act alone that he can restrain. This court has no power to examine an act of the legislature generally, and declare it unconstitutional. The limit of our authority in this respect is to disregard, as in violation of the constitution, any act or part of an act which stands in the way of the legal rights of a suitor before us; but a suitor who calls upon a court of chancery to arrest the performance of a duty imposed by the legislature upon a public officer must show conclusively, not only that the act about to be performed is unconstitutional, but also that it will inflict a direct injury upon him." The case at bar presents the peculiar situation of the state calling into requisition one co-ordinate branch of the government to enjoin the executive and ministerial officers of the state, acting in the capacity of a board of commissioners of public buildings, from carrying out the provisions of a law adopted by another co-ordinate branch of the same state government. The contention of the state is that the court must interpose by the extraordinary remedy of injunction, and render nugatory the solemn enactment of a co-ordinate branch of its government, as in contravention of the fundamental law, without at the

same time alleging any facts showing wherein and in what manner the state would be damnified, and without exhibiting any good or sufficient reason for the exercise of such extraordinary power. A mere suggestion that the act complained of is unconstitutional, and that the legislature has exceeded its constitutional limitations, is insufficient to call into requisition a court of equity. "The court, as such, has no supervisory power or jurisdiction over public officials or public bodies." People v. Canal Board of New York, supra. The state, when equitable relief is sought, such as is prayed for in the present proceeding, must, like private individuals, bring itself within the known and fixed rules of equitable interference before the court will grant its petition. It follows from these conclusions that the demurrer should be sustained, and it is so ordered, and that the cause be remanded to the court below for further proceedings not inconsistent with this opinion.

TOOLEY v. CHASE.

(Supreme Court of Oregon. Oct. 8, 1894.)
REFORMATION OF DEED.

In an action to reform the description in a deed, the question of mutual mistake is one of fact, and not of law.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by Elton E. Tooley against C. Henry Chase. There was a judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Adams, for appellant.

PER CURIAM. This is a suit to reform the description in a deed executed by Elizabeth Walker, which conveyed real property to the defendant by the following description. to wit: "Commencing at a point in the center of the Base Line road, 99.5 rods from the southwest corner of section 34, township 1 north, range 2 east of the Willamette meridian, running thence north 69.7 rods; thence east 19.5 rods to a road; thence south along said road 69.7 rods to the center of the Base Line road; thence west along the center of the Base Line road 19.5 rods to the place of beginning,—containing %5 acres. more or less." The defendant having procured a survey of the premises, by commencing at the initial point, discovered that the north boundary was 18 feet and the south 4.8 feet longer than the calls given in the deed; and, having built his fence on the west boundary as surveyed, this suit was commenced by Elizabeth Walker to correct the alleged error on the ground of a mutual mistake, but she having died, E. E. Tooley, as executrix of her last will, was, by order of the court, substituted as plaintiff. Issue having been joined, and a trial had thereon, a decree was rendered dismissing the complaint,

from which the plaintiff appeals. The question presented is one of fact, and not of law, and, from a careful examination of the evidence, we are of the opinion that there was no error in the decree of the trial court, and it is therefore affirmed.

DE LASHMUTT v. SEAL.

(Supreme Court of Oregon. Oct. 8, 1894.)
RESCISSION OF DEED.

In an action to set aside a deed because of fraudulent representations, where the evidence entirely negatives any fraudulent representations by defendant, or any representations which were relied on by plaintiff, a judgment for defendant will not be disturbed.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Action by Van B. De Lashmutt against Charles F. Seal to set aside a deed for fraud. Judgment for defendant, and plaintiff appeals. Affirmed.

W. W. Thayer, for appellant. Wallace Mc-Camant, for respondent.

PER CURIAM. This is a suit to set aside a deed executed by the plaintiff to the defendant, alleged to have been procured by fraud. It appears that the plaintiff and one H. B. Oatman, as tenants in common, owned a tract of land in section 18, township 1 S. of range 2 E. of the Willamette meridian, extending 164 rods from east to west and 80 rods from north to south, which, after running a line through the center from east to west, they divided into 5-acre tracts, and sold and conveyed three of them near the southwest corner to H. A. Hogue, supposing and believing that Hogue's west boundary extended to the west of the main tract. But it subsequently transpired that there remained a tract of land containing 2.93 acres between said boundary lines, which is the subject of this suit; that the title of the land thus sold to Hogue became, by mesne conveyances, vested in S. P. Florence, except that in the deed from Hogue the initial point of the description was placed 5 rods too far south, leaving the title to a tract 5 rods in width and 60 rods in length in Hogue, and purporting to convey a tract of the same dimensions out of land adjoining said 15 acres on the south: that Florence employed H. Halleck and R. B. Curry, real-estate agents, to dispose of his land for such price as they could realize for it, and negotiations were accordingly entered into between Curry and the defendant for the sale of the property, and while the negotiations were pending the defendant went upon the land, and was informed that it was bounded on the west by a tract owned by Dudley Evans, but upon procuring an abstract of the title to the Florence tract he discovered the 2.93 acres lying between it and the Evans tract, and the errors in the boundaries as given by the Hogue deed, whereupon he called upon the plaintiff and Oatman, and, after explaining to them what the abstract disclosed, was told that if there was any land lying between the Florence and Evans tracts it belonged to Florence, and they promised to execute quitclaim deeds therefor. The defendant, having secured these promises from the plaintiff and Oatman, without which he would not have purchased, paid the purchase price and received the Florence deed, the quitclaim deed of Hogue, and the quitclaim deeds of the plaintiff and Oatman to the land in controversy. Nearly two years after these deeds had been executed and recorded, E. E. Howes obtained a bond for a deed from plaintiff and Oatman for a portion of the premises in controversy, and, having erected a house thereon, was notified by the defendant that the building was upon his land. The plaintiff and Oatman then commenced suits to set aside said deeds, and, the issues having been joined therein, they were referred to George A. Brodie to take and report the testimony, with his findings of fact and law thereon, and, having found for the defendant, the court, upon motion, affirmed bis report, and decrees were entered dismissing each complaint, and from the decree against the plaintiff he appeals.

The suit is founded upon the alleged fraud ulent representations of the defendant, which it is claimed induced the plaintiff to execute the deed to the property in question. A careful examination of the evidence discloses that the plaintiff and defendant each believed that the land in question was a part of the Florence tract, and there is not a particle of evidence which tends to prove that the defendant ever made any fraudulent representations respecting the property, or that the plaintiff relied upon any representations made by the defendant, and hence the decree of the court below is affirmed.

NORTH BRITISH & M. INS. CO. v. LAM-BERT et al.

(Supreme Court of Oregon. Oct. 2, 1894.)
INSURANCE CONTRACT—VALIDITY—INSURER'S
AGENT ACTING FOR INSURED—EFFECT.

1. Where the terms of insurance are settled between the assured and the agent of an insurance company, acting within the real or apparent scope of his authority, and it is agreed that a policy evidencing the contract shall be issued, to take effect from the date of the agreement, such contract is binding upon the company.

pany.

2. An oral contract of insurance made by
the agent of an insurance company while acting
as agent for the assured, and not assuming to
represent the company in the contract, but
dealing with its officers having full authority to
act, is binding upon the company.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by the North British & Mercantile Insurance Company against its agents, Lambert & Sargent, to recover for a loss occasion-

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ed by their alleged neglect and disobedience of instructions. Verdict and judgment for plaintiff. Defendants appeal. Reversed, and new trial ordered.

Zera Snow, for appellants. M. W. Smith, for respondent.

MOORE, J. This is an action brought by a fire insurance company against its agents to recover a sum of money which it is alleged it was compelled to pay in consequence of a loss under a policy written by them contrary to instructions, and which they neglected to cancel when directed so to do. The facts show that the defendants, having been appointed local agents to solicit business for plaintiff in Portland, Or., and write fire insurance policies in plaintiff's name, were furnished a list of prohibited risks, which, among other property, included vinegar factories; that in August, 1891, the defendants wrote a policy in the name of the company, insuring the vinegar factory of the Western Vinegar Company, which was, by order of the plaintiff, canceled, and defendants' attention particularly called to this class of prohibited risks; that in the summer of 1892 a general agent of the plaintiff, upon inspecting the books kept by defendants as such agents, found a memorandum therein of the policy written in 1891 upon said vinegar factory, which did not appear to have been canceled, and, believing the property was insured by plaintiff, he examined said factory, and, not having expressly or in any way disapproved of the apparent risk, the defendants were led to believe the company would approve an insurance of the property, and on August 18, 1892, they wrote a policy of concurrent insurance on said factory in plaintiff's name for the sum of \$1,000, to take effect on the 22d of that month at 12 o'clock m., and mailed a report to the plaintiff's general agent at San Francisco, Cal., containing a memorandum of said policy, which was received on Saturday, the 20th of said month; that, two days thereafter, the general agent wrote the defendants, directing them to cancel and return the policy without delay, which order they received on August 24th, but did not on that day inform the assured of the plaintiff's intention to cancel the policy, and on that evening, between 11 and 12 o'clock, the said factory was destroyed by fire; and, proof of the loss having been made, the plaintiff, on October 3, 1892, paid \$941.16, the amount thereof, and brought this action for reimbursement, which resulting in a verdict and judgment for plaintiff, the defendants appeal.

Numerous assignments of error are made in the notice of appeal, but we shall only consider those which relate to the pleadings. The defendants, after denying the material allegations of the complaint, in substance alleged that upon receipt of plaintiff's notice to cancel said policy they fully set forth all

the facts concerning the risk to another insurance company, which by its officers directed and authorized the defendants, who were also agents of said company, to write a policy upon said vinegar factory for the sum of \$1,000, in lieu of plaintiff's policy, and deliver it to the assured, to take effect from 12 o'clock m. of the day when said factory burned; that they represented the assured, and had authority to secure and accept said insurance in lieu of plaintiff's policy; that they proceeded to the writing of said policy. to take effect as agreed upon, but, before they had time to exchange it for plaintiff's policy. the fire occurred, but that they had effected an oral insurance with said other company in lieu of the insurance under plaintiff's policy. and had authority from the assured to assent to such oral insurance. These allegations were, upon plaintiff's motion, stricken out, and, as defendants contend, erroneously. while the plaintiff contends that it appeared therefrom that the defendants were the agents of the assured and the insurance company with which the alleged contract of oral insurance was made; that as the agents of both parties they could not make a valid contract, and hence said allegations did not constitute a defense to its action. The rule is well established that if the terms of insurance are settled between the parties, and it is agreed that a policy evidencing the contract shall be issued, to take effect from the date of the agreement, such contract is valid and binding upon an insurance company when made within the real or apparent scope of the agent's authority. Hardwick v. Insurance Co., 20 Or. 547, 26 Pac. 840. It remains to be seen whether a person representing the assured can make a valid contract of insurance through an agent of the company of which he is also an agent. No agent will ever be permitted to take upon himself incompatible duties and characters, or to act in any matter where he has an adverse interest or employment (Story, Ag. § 9); nor can any person, without their knowledge and consent, be the agent of both parties to the same transaction (New York Cent. Ins. Co. v. National Frotection Ins. Co., 14 N. Y. 85: Mercantile Mut. Ins. Co. v. Hope Ins. Co., 8 Mo. App. 408; Utica Ins. Co. v. Toledo Ins. Co., 17 Barb. 132). A contract made by an individual as the agent of both parties is not void, but voidable, only, at the election of either principal, if made within a reasonable time. Greenwood v. Spring, 54 Barb. 375. There can be no meeting and agreement of the minds of the contracting parties when represented by the same individual without their knowledge and consent, and hence no contract is effected by the acts of such agent, except by the ratification of both principals after knowledge of all the material facts; but if the agent act for both, with their knowledge and consent, and according to their instructions, the minds of the parties have met and agreed upon the terms of the

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contract, and it is of binding force from the date of its execution by the agent. Had the defendants confined themselves to the allegation that, as agents of the assured and insurance company, they made the contract of insurance, without alleging that it had been done with the knowledge and consent of both principals, or that it had been ratified by both, after knowledge of all the facts, it might well be considered that the pleading failed to allege a valid contract; but they have alleged that, as agents of the assured, they made the contract with the officers of the insurance company, and were directed by them to write a policy carrying it into effect; and the question is whether, under such circumstances, they could make a valid contract. There is no arbitrary rule of law prohibiting contracts between a corporation and its agents when such corporation is represented by other agents with whom the contract is made. If the defendants did not assume to represent the insurance company in entering into the contract with it, but dealt with its officers, who were independent agents and had authority to act for it, the contract, though oral, is binding upon the insurance company. Mor. Priv. Corp. § 527. In Northrup v. Insurance Co., 48 Wis. 420, 4 N. W. 350, it appeared that one Edwards, the general agent of the defendant company, had been occasionally employed to collect rent, pay taxes on, and find purchasers of, certain portions of plaintiff's real property, and that the key to one of his buildings had been delivered to Edwards, who had been instructed to guard the property, and insure the building in the company he represented, which he promised to do; but, claiming to be very busy at the time, he stated that the building was insured, and that he would write the policy thereof the next day. This he neglected to do for more than a month, and finally wrote it, and mailed the report thereof only a few hours before the building was destroyed by fire. In an action brought by the plaintiff against the insurance company for the loss under the policy, a nonsuit was granted because Edwards was the agent of the plaintiff when he wrote the policy for the defendant. The court, upon appeal, held that Edwards had no control of the property except to watch over it, and guard it against injury or destruction, and that such care of the property, being to the advantage of the insurance company, would not preclude its general agent from writing a policy thereon. In a note to the foregoing case, reported in 19 Am. Law Reg. (N. S.) 291, Marshall D. Ewell collates the rules applicable to double agencies. and says: "The rule that the same individual cannot be the agent of both parties seems properly to be limited to cases where the agency relates to the same transaction, or involves incompatible duties; and, with relation to both of these cases, the knowledge and consent of both parties that the agent should act for both will remove the objection."

The allegation that the contract of insurance was made with independent agents of another company shows that the defendants were not assuming to act as the agents of both parties in relation to the same transaction, nor does it necessarily involve incompatible duties, and hence is not within the rule above announced. If the agents with whom it is alleged the oral contract was made had real or apparent authority to enter into it, when consummated it took the place of plaintiff's policy, and the defendants had a right to a hearing on that question. It results from this view of the case that the defense pleaded was material, and hence it was error to strike it from the answer, for which the judgment is reversed, and a new trial ordered.

LITTLE v. CITY OF PORTLAND.

(Supreme Court of Oregon. Oct. 8, 1894.)

PUBLIC IMPROVEMENTS-PAYMENT - NEGLIGENCE OF CITY - ASSIGNMENT OF CLAIM - RIGHTS OF Assignmes.

1. A stipulation, in a contract by a city for a public improvement, that the contractor shall look for payment to a particular fund, to be raised by assessment, does not relieve the city from liability for negligently delaying to raise such fund. Commercial Nat. Bank v. City of Portland (Or.) 33 Pac. 532, followed.

2. The partial assignment of a claim against a city is not assign multipular and in the

city is not against public policy, and, in the

absence of a statute to the contrary, is valid.

3. Where a city has assented to the partial assignment of a claim against it, a recovery in an action at law by one of the assignees is not

a bar to an action by the others.

4. A city, by drawing orders on the city treasurer, payable to the contractor or order, for a part of the amount due him under an entire contract, consents to the assignment by the contractor of such parts of his claim, so as to entitle his assignees thereof to sue separately therefor.

5. Though the limit of a municipal indebt edness has been reached, a contract for street improvements, providing for payment out of a fund to be raised by assessment of the locality improved, is valid, as no present indebtedness is

incurred thereby.

6. The liability of the city for negligently falling to raise such fund is one arising ex delicto, and not ex contractu, and therefore the city is liable for the damages arising therefrom, though its limit of indebtedness has been reached.

Appeal from circuit court, Multnomah county; E. D. Shattuck, Judge.

Action by F. C. Little, assignee, against the city of Portland. There was a judgment for plaintiff, and defendant appeals. Affirmed.

J. V. Beach, for appellant. J. B. Cleland, for respondent.

MOORE, J. This is an action brought by the plaintiff, as assignee of the Oregon Paving & Contract Company, against the city of Portland, for damages caused by the nonpayment of certain warrants, amounting to \$1,100, drawn by the defendant upon a special fund to be raised by assessment of real property benefited by the improvement of Twelfth street, in said city. The facts out of

which the cause of action arose, and upon which the complaint was based, are identical with those stated in the case of Commercial Nat. Bank v. City of Portland (Or.) 33 Pac. The defendant, after denying the material allegations of the complaint, interposed the following defenses: (1) That the city made the improvement without having acquired jurisdiction, and is therefore unable to collect the cost thereof from the owners of the property; (2) That the said contract was entire, and that the assignment to the plaintiff of a part of the amount alleged to be due thereunder was without the assent and against the wish of the defendant; that the Commercial National Bank recovered \$3,-063.59 of the city in an action founded upon similar facts arising out of the same contract; and (3) that the city of Portland was at the time the contract was entered into in debt in a sum exceeding that prescribed by its charter as the limit of its indebtedness. A demurrer to said defenses having been sustained by the court, and the defendant declining to further plead, judgment for the amount claimed was rendered against it, from which it appeals.

The questions presented relate to the alleged error of the court in sustaining the demurrer. It is contended that where a city is not vested by its charter with power to improve streets, and pay the expense thereof out of the general fund, it cannot be held liable on account of a breach of duty on the part of its officers, in a case where the contractor agrees to look for his compensation to the fund to be raised by assessing the property benefited by such improvement, unless the city can reimburse itself from such assessment. This question was fully discussed by Lord, C. J., in the case of Commercial Nat. Bank v. City of Portland, supra, and the reason upon which the decision there rests is so potent that it needs no further elucidation here.

It is further contended that, there being a prior recovery of a part of the contract price of the improvement, such recovery is a bar to this action. A chose in action, by the ancient common law, could not be assigned, except by or to the king; but courts of equity modified this rule, and protected the assignee of a chose in action as much as the law protected a chose in possession, and for that purpose considered the assignee of a chose in action the trustee of, and authorized to use the name of, the assignor, to recover possession. 2 Bl. Comm. 442. This equitable modification of the ancient common-law rule was an outgrowth of a commercial era, made necessary to adapt it to the condition of a trading people; and the legislative assemblies of most of the states of the Union. in order to keep pace with the growth and expansion of business methods, have enacted laws authorizing the assignee of a chose in action to prosecute the claim in courts of law in his own name. Bank v. McLoon, 73 Me. 498. In our own state, Hill's Code, \$ 27, provides that every action shall be prosecuted in the name of the real party in interest. Courts of equity have in modern times further modifled the rule first adopted, and now enforce partial assignments of choses in action, upon the theory that the interests of all the parties can be determined in a single suit. debtor, in cases of conflicting claims, if not in default, can bring the entire fund into court, where a decree can be made, awarding proper distribution, without the risk of having a judgment rendered against him for the costs and disbursements of the suit. Bank v. McLoon, supra; James v. City of Newton, 142 Mass. 366, 8 N. E. 122. This, however, is not recognized in actions at law, when such partial assignments are made without the knowledge and consent of the debtor. The debtor's liability usually depends upon an entire contract, and if the creditor could, without the debtor's consent, split up his claim at all, and assign any portion of it, he could do so indefinitely, and thus subject the debtor to many actions, involving great outlay in costs and disbursements, not contemplated by the contract, which was limited to a single liability upon an entire demand. Mandeville v. Welch, 5 Wheat. 277. It is well settled that a creditor cannot, without the knowledge and consent of the debtor, split up an entire demand into distinct parts. and maintain separate actions at law on each. In such a case a recovery in one action bars the others. Smith v. Jones, 15 Johns. 229; Willard v. Sperry, 16 Johns. 121; Marziou v. Pioche, 8 Cal. 536; Herriter v. Porter, 23 Cal. 385. If, however, the assignment of a part of a claim is made with the knowledge and consent of the debtor, the assignee may bring his action upon it without making other holders of the demand parties. Grain v. Aldrich. 38 Cal. 514; Bank v. McLoon, supra. such cases the rights of the plaintiff as assignee serve as the consideration for the new contract, which becomes the ground of the action. The action is on the defendant's promise to the plaintiff, and not upon the assignment, or upon any right growing out of it. Getchell v. Maney, 69 Me. 442. The right to maintain an action based upon the debtor's assent to a partial assignment of a demand rests upon the theory that the assignment of the property in the sum transferred to the assignee is a good consideration for the debtor's promise to pay the assignee, and that by the promise the indebtedness to the assignor is, pro tanto, discharged. James v. City of Newton, supra.

But defendant's counsel contend that a municipal corporation is not bound, in any case, to accept or recognize a partial assignment of a claim against it, and cites the case of Appeals of the City of Philadelphia, 86 Pa. St. 179. In this case it is conceded that an assignment of a part of a debt is valid in equity between individuals; but the court refused to apply the rule to a debt due from a

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municipal corporation, on the ground that the policy of the law is against permitting individuals, by their private contracts, to embarrass the principal officers of a municipality. But in James v. City of Newton, supra, the supreme court of Massachusetts held that there was no ground for any such distinction in that commonwealth. Nor can we see any just reason why the contract of a municipal corporation, in accepting and agreeing to pay a part of a demand against it to the assignee of its creditor, should, in the absence of any statute to the contrary, be treated in a different manner from the contract of private individuals. The cause of action being upon the agreement of the city, and not upon the creditor's order, it follows that the city would be liable, unless prohibited from making such contracts by its charter. In the case at bar the city of Portland executed warrants, of which the following is a copy: "No. 180. Portland, Or., Oct. 27, 1887. To the Treasurer of the City of Portland: Pay to P. H. Schoulderman & Co., or order, three hundred dollars, out of the funds for Imp. of 12th street, Ord. No. 5246. Attest: W. H. Wood, Auditor and Clerk. John Gates, Mayor. \$300." This warrant and others, amounting to \$1,100, were delivered to the payees named therein, and by them assigned to the plaintiff. The city by this means split up the demand of the contractors, and ordered the treasurer to pay to them or their order the amounts named in the several warrants. This was an acceptance and agreement on the part of the city to pay a part of the demand, and, having voluntarily assumed the liability, there is no reason why it should now escape it, upon the theory that the contract was entire.

It is also contended that at the time the contract for the improvement of Twelfth street was entered into the limitation of the city's indebtedness, under the charter, had been reached, which precluded the city from entering into any contract whereby its indebtedness might be increased. That part of section 149 of the city charter applicable to the limit of the city's indebtedness is as follows: "Except as otherwise expressly provided or permitted by this act, the indebtedness of the city of Portland must never exceed in the aggregate \$100,000." This provision of the charter prohibited the city from entering into any contract by which its indebtedness might be increased beyond that amount, and every person who contracts with a municipal corporation, whereby an indebtedness is created, must, at his peril, take notice of the financial condition of the city, and whether the proposed indebtedness is in excess of the prescribed limit. French v. City of Burlington, 42 Iowa, 617; Buchanan v. Litchfield, 102 U. 8. 278. It is now well settled, however, that, even though the limits of municipal indebtedness may have been reached, an appropriation of anticipated income does not create an indebtedness, and that a contract which provides that the cost of any improvement shall be paid out of a fund expressly created therefor is valid, notwithstanding the provision of the charter as to the limit of the city's indebtedness. Salem Water Co. v. City of Salem, 5 Or. 29; Koppikus v. Commissioners, 16 Cal. 248; People v. Pacheco, 27 Cal. 175; City of East St. Louis v. Flannigan, 28 Ill. App. 449; State v. Mc-Cauley, 15 Cal. 429; People v. Brooks, 16 Cal. 1; Grant v. City of Davenport, 36 Iowa, 396; People v. May, 9 Colo. 404, 12 Pac. 838; City of Springfield v. Edwards, 84 Ill. 626; Fuller v. Heath, 89 Ill. 296. The reason assigned by these decisions for the application of the foregoing rule is that materials furnished to and labor performed for a municipal corporation are exchanged for warrants, to be drawn upon the treasury, and made payable out of a specific fund, which has been created by an assessment or levy of taxes, and appropriated to that purpose, under an agreement that the person furnishing the materials or performing the labor will rely upon the specific fund only for payment, and that the corporation shall incur no liability whatever. The contract in the case at bar contained a stipulation that the contractors should look for payment only to the fund to be raised by an assessment of the property benefited, and that they would not require the city, by any legal process or otherwise, to pay for the same out of any other fund; and, when the improvement under the contract was completed, warrants were drawn upon the treasury in favor of the contractors, and made payable out of said fund. "It is believed," says Seevers, J., in Water Co. v. Woodward, 49 llowa, 58, "the constitution applies, not only to a present indebtedness, but also to such as is payable on a contingency at some future day, or which depends on some contingency before a liability is created. But it must appear such contingency is sure to take place, irrespective of any action taken or option exercised by the city in the future; that is, if a present indebtedness is incurred or obligation is assumed, which, without further action on the part of the city, have the effect to create an indebtedness at some future day, such are within the inhibition of the constitution. But if the fact of indebtedness depends upon some act of the city, or upon its volition to be exercised or determined at some future day, then no present indebtedness is incurred, and none will be until the period arrives, and the required act or option is exercised, and from that time only can it be said there exists an indebtedness." So, in People v. Pacheco, 27 Cal. 218, Sawyer, J., in speaking of the debts of a municipality when made payable out of a specific fund, said: "True. a portion of the money provided may be stolen or destroyed, or, by reason of some unlooked-for accident, may not be collected

or on hand when needed; and in such case a debt or liability might ultimately accrue from this cause, to the extent of the deficit thus accidentally arising. But no debt can result till the contingency arises, and the validity of the debt can only be affected to the extent of such accidental deficit." From these decisions it would appear that no debt was created until the contingency arose, and, as the contract provided that the cost of the improvement should be paid out of the special fund, the city incurred no indebtedness until it failed to collect the fund within a reasonable time, and hence its authority to enter into the contract was not affected by the charter prohibition.

It is conceded that a municipal corporation cannot escape liabilities which are cast upon it by operation of law, under a plea that its indebtedness has reached the legal limit. People v. May, 9 Colo. 404, 12 Pac. But it is contended that such liability results from actions ex delicto only, and that this action is ex contractu. The action is to recover damages resulting from a breach of the city's obligation and neglect of duty to assess and collect the necessary fund within a reasonable time to defray the cost of the street improvement; and in such cases the right of recovery is not upon the contract, which has been fully performed, but upon facts and circumstances independent of the contract. 1 Dill. Mun. Corp. § 414. Wrong and damages constitute torts, and one may become a wrongdoer by neglecting to do something which he ought to do, whereby another suffers an injury. 1 Chit. Pl. 60. Unintentional Cooley, Torts, wrongs consist in neglecting to perform some duty which the party has assumed by contract, or which the law has imposed by reason of some official position. "Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described as assumpsit, in which the promise is stated as the gist of the action. where, from a given state of facts, the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case, founded in tort, is the more proper form of action, in which the plaintiff, in his declaration, states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and damage resulting from that breach." 1 Chit. Pl. 135. The law imposes an obligation upon the municipal corporation, when it orders an improvement of the streets, to put the necessary machinery in motion, and to prosecute in good faith and with reasonable diligence the means afforded to it, under its charter, to raise and collect the funds by an assessment of the property affected by the improvement, in order to redeem its obligation. Commercial Nat. Bank v. City of Portland, supra. And a failure on the part of the city to comply with any requirement of the charter by which the funds may be realized would subject it to a general liability. North Pac. L. & M. Co. v. East Portland, 14 Or. 6, 12 Pac. 4. It will thus be seen that the law in such cases raises a legal obligation upon the part of the city to assess and collect the fund within a reasonable time, which it has failed to do, thereby causing the damage of which the plaintiff complains; and, although the plaintiff might have availed himself of some other form of action to enforce his demand, he was nevertheless entitled to bring his action as he has done for damages resulting from the neglect of the city to perform its legal obligation. In City of Chicago v. Sexton, 115 Ill. 230, 2 N. E. 263, it was held that a municipal corporation was responsible for the want of fidelity or negligence of those who are authorized to act for it. Scholfield, J., in that case, said: "There is nothing new in thus holding a municipality responsible for the want of fidelity of those who act for it. Suits of that kind are of daily occurrence. The liability thus imposed is not within the constitutional and statutory limitations in regard to the creation of indebtedness." It follows that the court committed no error in sustaining the demurrer to the several defenses, and hence the judgment is affirmed.

FETTE v. LANE. (No. 18,264.)

(Supreme Court of California. Sept. 21, 1894.)
Conversion by Mortgages — Rights of Prior Mortgage—Evidence and Findings—Notice of Prior Mortgage.

1. Plaintiff took a mortgage on certain crops as security for a loan, and subsequently defendant took a mortgage on the same crop for seed furnished, and to secure future advances. Plaintiff's mortgage was not recorded. *Held*, that a finding, on conflicting evidence, that defendant had notice of plaintiff's mortgage before making the advances on the second mortgage, would not be disturbed.

An unrecorded mortgage of personal property is valid against a subsequent mortgagee

with notice.

3. Where defendant's second mortgage for seed furnished was made before he had notice of plaintiff's prior unrecorded mortgage on the same crops, defendant has a prior lien to the extent of the seed furnished, but cannot enforce against the plaintiff liens for advances furnished the mortgagor after notice of the first mortgage.

4. In an action by the first mortgagee of crops to recover the amount of his lien from a second mortgagee, who has sold them, one of the mortgagors may testify as to a statement by plaintiff that it was understood that the crops should be sent to defendant subject to plaintiff's lien, in order to rebut an allegation that plaintiff had surrendered his lien.

5. A finding that barley subject to mortgages to plaintiff and defendant was to be stored by defendant in plaintiff's name, that he stored it in his own name, that plaintiff's demand of enough to secure his claim was not complied with, and that the barley was sold by defendant, and the proceeds retained by him, shows a conversion of the barley.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by F. Fette against Frank E. Lane to recover on a note secured by mortgage on crops sold by defendant under a second mortgage. Judgment for plaintiff, and defendant appeals. Affirmed.

James H. & John E. Budd and Thompson & Paulsell, for appellant. Nicol & Orr, for respondent.

HAYNES, C. This action was tried by the court. The findings, briefly stated, disclose the following facts: On March 31, 1892, O'Brien and Smith were indebted to plaintiff in the sum of \$564, and on that day executed to him their promissory note for that sum, payable August 1, 1892, with interest, and on the same day executed to the plaintiff a "crop mortgage" to secure the same, upon a crop of barley then growing on lands therein described. Prior to that time O'Brien and Smith procured from defendant the seed for said crop, amounting to 330 sacks, under an agreement to return two sacks of barley for each sack of seed; and on May 21, 1892, O'Brien and Smith executed to defendant a crop mortgage on the same crop previously mortgaged to plaintiff to secure to defendant the return of said two sacks for each one so furnished, and for the payment of such sums of money as defendant might advance to them, not exceeding \$100. This mortgage further provided that the mortgagors were to care for and protect the crop while growing, and, when fit for harvesting, to harvest, thresh, clean, and sack the same, and deliver it to the mortgagee, to be by him held and disposed of for the payment of the moneys thereby secured; and in default of either of said acts the mortgagee was authorized to enter and take possession and harvest, thresh and sack the same, and all expenses so incurred, including hauling, storing, and delivery, were to be secured by the mortgage, and first paid; and for all these purposes the mortgagee was constituted the attorney in fact of the mortgagors, with power to sell and dispose of the same at such times and for such sums as he might deem proper. This mortgage was duly recorded on the day of its execution, but the prior mortgage to plaintiff was not recorded. It was further found by the court that, after the execution of the mortgage to the defendant, but before any advances or expenditures were made thereunder, the defendant was informed of the prior mortgage to the plaintiff; that, subsequent to the execution of said mortgage to defendant, and prior to the harvesting of the crop, it was agreed between plaintiff and defendant that when the crop should be harvested and sacked the whole of it should be shipped to

defendant at Stockton, and be by him stored in the name of the plaintiff, and held for the satisfaction of plaintiff's said claim; that with the consent of O'Brien and Smith the whole of the crop, amounting to 4,525 sacks, was shipped to defendant, who stored the same in his own name; that thereafter plaintiff demanded that defendant turn over to him so much thereof as was necessary to secure the note held by plaintiff, but defendant refused to do so, and thereafter sold at private sale the whole thereof, amounting to \$3,468.77, and received and appropriated the whole thereof to his own use; that no proceedings were taken to foreclose said mortgage, nor any notice of sale given: that the money so received by defendant was largely in excess of the sums due under both said mortgages and all sums expended in harvesting the barley, and that no part of plaintiff's note against O'Brien and Smith had been paid. One or two other facts found by the court will be noticed in another connection. Upon these findings judgment was entered for plaintiff for the amount due on said note, and the defendant appeals therefrom, and from an order denying his motion for a new trial.

The questions principally discussed are as to the sufficiency of the evidence to justify the findings. It could serve no useful purpose to discuss the evidence in detail. A few points only can be noticed. The finding that defendant had knowledge of plaintiff's mortgage before he made any advances or expenditures on account of the mortgaged property is justified by the evidence. The evidence is clear that he had such knowledge, but as to the precise time when such knowledge was obtained the evidence is conflicting. The finding of the court, therefore, cannot be disturbed.

That defendant made large advances to O'Brien and Smith, which he was not required to make under the terms of his mortgage, and which were not secured by it, even if plaintiff's mortgage had never existed, is clear from defendant's testimony. He said: "Smith and O'Brien's account had exceeded the amount of my mortgage to such an extent that I thought I ought to be secure, and so attached the crop." The amount for which the attachment was issued appears from defendant's testimony to have been \$1,236, and the evidence is sufficient to sustain the finding that he received from the sales of the barley a sum of money largely in excess of the amounts secured by both mortgages. No judgment was taken in the attachment proceeding, and, after the barley was all delivered to defendant, the attachment was dismissed. Plaintiff claimed. and the court found, that an agreement was made between plaintiff and defendant to the effect that defendant should receive all the barley, and store it in plaintiff's name. to the end that his claim should be paid, thus giving defendant the opportunity of apply ing the remainder to the payment of his claim, this arrangement being assented to by Smith and O'Brien. Appellant contends that this finding is not supported by the evidence, but that, on the contrary, plaintiff ugreed to take the barley, and pay defendant \$1,700, and further to guaranty the payment of the harvesting expenses. The evidence shows that there were negotiations looking to the arrangement last above stated, but the two propositions appear to have been under consideration at the same time. That plaintiff made the offer to pay the \$1,-700 is conceded by him, but plaintiff wanted the barley stored at Sperry's warehouse: that, if it was not stored there, he was afraid he should have to pay storage twice; and the conclusion seems to have been arrived at which is stated in the finding of the court. The plaintiff testified further that he left his note and mortgage with defendant for collection, and that defendant told him to come "in a couple of days," and get his money; while defendant testified that he never agreed to assume plaintiff's obligation against Smith and O'Brien, "only that when I was paid he should be paid." It would be idle for us to attempt to reconcile these conflicts. and, not being able to do so, we cannot disturb the findings.

Appellant's counsel say in their brief that "the amount secured to Lane [the defendant] by the mortgage, exclusive of the insurance money, was \$3,474.96, and the amount of sales \$3,468.77, so that the amount received from sales was insufficient to pay the amount secured to be paid exclusive of insurance." The sum above stated is the entire indebtedness of O'Brien and Smith to defendant, except the insurance, and includes \$1,236, which appears from the testimony of defendant to have been the amount for which the attachment was issued. As the attachment could not issue without an affidavit that the amount claimed was not secured by a mortgage or other lien, the defendant cannot well insist that his whole claim is secured by his mortgage.

It is also insisted by appellant that, as plaintiff's mortgage was not recorded, it is void as against creditors and subsequent purchasers and incumbrancers in good faith and for value. Civ. Code, \$ 1217, provides: "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof." "The object to be attained by requiring the recording of mortgages of personal property is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case." Berson v. Nunan, 63 Cal. 552.

As to the barley furnished by defendant for seed, defendant's subsequent mortgage, taken without notice of the prior unrecorded mortgage, is entitled to the first lien. It is not necessary to consider how far, and as to what expenditures, made after knowledge of

plaintiff's mortgage, defendant's mortgage may be held to constitute a prior lien, since the mortgaged property exceeds the amount secured to both plaintiff and defendant under their respective mortgages, and hence the question of priority is unimportant. Nor could the attachment of the property by defendant, after notice of plaintiff's mortgage, affect his lien, even if the attachment had not been dismissed; but, if it were otherwise, the attachment baving been discharged, no lien remained except those created by the mortgage. For the purposes of this decision it may be conceded that plaintiff expended nothing in harvesting the crop, and that defendant paid all the expenses, and that the expenses of harvesting and storing the crop were a prior lien under defendant's mortgage, for the result reached by the trial court would still be right, inasmuch as the other advances not required by the mortgage, and included in the attachment, are more than sufficient to satisfy plaintiff's lien.

As to the manner in which the barley was sold, we think the plaintiff does not stand in a position to question it. If enough had not been realized to satisfy plaintiff's lien after satisfying such part of defendant's lien as was prior to his, the question might be material. Both liens having been satisfied, the only parties interested in that question are Smith and O'Brien, and they are not in court. A discussion of the question is, therefore, not only unnecessary, but improper.

Smith, one of the mortgagors, called by plaintiff, was asked whether he, O'Brien, Fette, and Lane had an understanding as to how and to whom the grain should be shipped? The witness answered: "Yes, sir. We had an understanding. Mr. Fette told me he had an understanding with Mr. Lane." Defendant objected to what Fette told the witness unless Lane was present. Counsel for plaintiff then stated they did not offer it to bind Mr. Lane, but to meet an allegation of a surrender of plaintiff's lien. The court overruled the objection, and the witness said: "We didn't have an understanding with Mr. Lane,—at least I didn't,—how to ship it. All the understanding I had was, Mr. Fette told me that he had an understanding with Mr. Lane to ship the barley to Mr. Lane in Mr. Fette's name." We think the evidence was competent for the purpose for which it was introduced, and that the court properly refused a motion to strike it out. It was not evidence against Lane to show that he had assented or agreed that the barley should be shipped or stored in plaintiff's name, but was competent to show that Fette still claimed a right under his mortgage, and had not, as was alleged, abandoned his lien.

It is also contended that there was no conversion by defendant. But the finding that the barley was to be stored by defendant in plaintiff's name, that he stored it in his own name, that plaintiff demanded a delivery of so much thereof as would secure

his claim, that such demand was not complied with, and that defendant sold the barley and retained the proceeds, comes so near to showing a conversion that Chitty could not have discovered the difference. Counsel's contention, if based on their construction of the evidence, as was doubtless intended, might lead to a different conclusion.

After a careful review of the evidence and the arguments of counsel it must be said that, wherein there is any doubt of the correctness of any of the findings, the testimony is so conflicting that they must be permitted to stand. Nor can we even say that upon the evidence we would have made different findings. We advise that the judgment and order appealed from be affirmed.

We concur: SEARLS, C., BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

104 Cal. 282
BEQUETTE v. PATTERSON. (No. 18,254.)
(Supreme Court of California. Oct. 1, 1894.)
HIGHWAYS—PRESCRIPTION—PUBLIC LANDS—REMOVAL OF OBSTRUCTIONS.

1. In trespass for the removal of a fence built by plaintiff, evidence showing that the space across which it was built was originally a race track, but was connected at different points with public roads, and had been used continuously for 14 years as a public highway, justifies a finding that it was a public highway.

continuously for 12 years as a public highway, justifies a finding that it was a public highway.

2. Act Cong. 1866 granted a right of way for highways over public lands not reserved for public use, and patents to such lands are taken subject to the easement of such highway.

3. An illegal obstruction may be removed from a highway, at the direction of the board of supervisors, by one who is not a road overseer.

Commissioners' decision. Department 1. Appeal from superior court, Placer county; W. H. Grant, Judge.

Trespass by P. Bequette against William Patterson, road overseer, for the removal of a fence. Judgment for defendant, and plaintiff appeals. Affirmed.

Tuttle & Tuttle, for appellant. A. K. Robinson and Wallace & Wallace, for respondent.

HAYNES, C. Plaintiff, claiming to be the owner of certain land through which an alleged highway ran, closed up the road by fencing across it. The defendant removed the fence, and plaintiff brought an action of trespass to recover damages laid at \$100, and for an injunction against threatened trespasses of a like character, if plaintiff should again erect the fence. The defendant answered, denying plaintiff's ownership of the land; alleging that he was road overseer of the district including this road, that the road in question was and is a public highway, that the fence was an obstruction and nuisance, and that he removed it under

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an order made by the board of supervisors; and denied that plaintiff had sustained damage. For a separate answer he alleged that plaintiff threatened to renew the obstruction, and prayed for an injunction. The cause was tried by the court, and upon the findings judgment was entered for the defendant. The appeal is from the judgment and an order denying a new trial. Appellant attacks the findings, and also specifies numerous errors of law occurring upon the trial.

We think the evouence is sufficient to justify the finding that the way in question is a public highway. That it was originally intended for and was used as a race track appears probable. It was not, however, a circular track, but was nearly straight, was adjacent to the town of Forest Hill, and connected at each end with public roads; and there is much evidence tending to show that for many years it had been used by teams, stages, and other travel. By one of the witnesses it was spoken of as a "back street." The way appears to have been known as the "Race Track" some 30 years ago, and, though travel over it has been at times interrupted, there seems to have been no interruption for the last 12 or 14 years, until the erection of the fence by the plaintiff, which was removed by the defendant. The court also found that the way had been legally and actually dedicated by Charles Harley before the plaintiff became the owner of the land. Whether this finding is sustained by the evidence it is not necessary to consider. A dedication of the way, either express or implied from long and uninterrupted use, having been found, the finding that plaintiff is not the owner of the parcel of land over which the road passes becomes immaterial, for if it is a public highway the ownership of the land could give him no right to obstruct it: and for a like reason it is immaterial whether the county owns the fee of the land covered by the way, or only an easement, since in either case it has the right to an unobstruct-

It seems to be contended that, because the land over which the road lies was not patented by the United States until 1889, the right to use the way could not have been acquired by the public until after that time. The act of congress of 1866 granted the right of way for highways over public lands not reserved for public uses, and a patent from the United States is taken subject to the easement of such highway. McRose v. Bottyer, 81 Cal. 122, 22 Pac. 303. This land was patented to Harley in 1889, and plaintiff could not acquire from him a better title, as against the road, than Harley had under his patent.

Appellant further contends that the defendant was not the road overseer of that district at the date of the alleged trespass, and that the finding that he was is not justified by the evidence, because his official

bond was not approved until the day after the trespass. He had, however, taken the oath of office, the sureties on his bond had qualified, and he testified that in removing the fence he acted as roadmaster, and did it by direction of the board of supervisors. He was at least an officer de facto, but if he was not, as the board of supervisors have charge of the roads, and the obstruction was illegal, the defendant might lawfully remove it by their direction.

The sixth finding is not obnoxious to the objection that it is a mere conclusion of law. It finds that said road "now is, and was at all times mentioned in plaintiff's complaint, and for more than twenty years last past has been, a public road or highway, used and treated as such by the road officers of Placer county, and duly constructed as such in the manner required by law." The findings as a whole are inartificially drawn, and include some matters not essential to the support of the judgment; but, so far as essential they are sufficiently clear to be comprehended, and they support the judgment.

There are some exceptions to rulings upon evidence. That some immaterial evidence was admitted in reasonably clear, but we do not see that plaintiff was or could be prejudiced by the testimony so admitted, and the same may be said as to the exclusion of some evidence offered by the plaintiff. None of these rulings were upon a vital point in the case, nor of such character as would benefit the profession to discuss or decide. We advise that the judgment and order appealed from be affirmed.

We concur: VAN CLIEF, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

4 Cal. Unrep. 780

RAYMOND v. GLOVER et al. (No. 19,335.) (Supreme Court of California. Oct. 3, 1894.) Additional opinion. For former opinion, see 37 Pac. 772.

PER CURIAM. The opinion heretofore filed herein is modified by striking out the following paragraph: "Whatever, therefore, may be the rights of the bank, as against Glover, I think it plain that plaintiff is entitled to the first lien upon the property to secure her debt of \$1,300,"—and inserting in lieu thereof the following: "Whatever, therefore, may be the rights of the bank, the plaintiff, as against Glover, is entitled to a lien upon the property to secure her debt of \$1,300." The judgment rendered herein is set aside, and the following judgment is given: For the reasons given in the foregoing opinion the cause is remanded, with directions to find whether or not the bank took the note as security, without notice of the facts showing the equities in favor of the plaintiff. This fact may be found upon the evidence already taken, with such further evidence upon that subject as the parties may see fit to submit. If the

court finds that the appellant took the note as security, without notice of the facts showing such equities, judgment should be rendered giving to the appellant a first lien upon the property for the amount of its claim, and to the plaintiff a second lien thereon to the extent of \$1,300 and interest, as provided in the contract of sale.

101 Cal. 232

PEOPLE ex rel. HARGRAVE v. MARK-HAM, Governor. (No. 15,877.)

(Supreme Court of California. Sept. 27, 1894.) ELECTION OF JUDGES—TREM OF OFFICE—CONSTI-TUTIONAL LAW.

St. 1893, p. 163, creating the county of Madera, and providing that the judge of the superior court elected at the special election called to complete the organization of the county should hold office till the first Monday in January, 1897, is in conflict with Const. art. 6, § 6, which provides that a judge of the superior court for each county shall be elected at the general state election, whose term shall commence on the first Monday of January next succeeding his election, in so far as it attempts to extend the term of the judge beyond the first Monday in January next after the special election.

In bank.

Mandamus by the people ex rel. Hargrave to compel H. H. Markham, governor, to include in his election proclamation a call for the election of a judge of the superior court of Madera county. Writ allowed.

Wm. T. Searles and W. H. Larew, for petitioner. Robert L. Hargrave, in pro per. W. H. H. Hart, Atty. Gen. (Francis A. Fee, of counsel), for respondent.

BEATTY, C. J. This is an agreed case by which the question is submitted to the court whether at the approaching general election a judge of the superior court of the county of Madera is to be chosen by popular vote. In form the proceeding is a petition for a writ of mandate to the governor commanding him to include in his forthcoming election proclamation a call for the election of said judge. No question is raised as to the power of the court to issue its mandate to the head of the executive department of the state government, but, on the contrary, it is conceded that if the question stated is answered in the affirmative the writ shall issue. The county of Madera was created by an act of the legislature approved March 11, 1893 (St. 1893, p. 168), out of territory theretofore included in the county of Fresno. provided, among other things, for the appointment of a board of commissioners to call, conduct, and verify the results of a special election of the officers necessary to complete the organization of the county. Among the officers to be so chosen, a judge of the superior court was expressly included. In pursuance of these provisions a special election was held in said county on the 16th of May, 1893, and on the 20th of the same month said board of commissioners declared the county to be duly organized. Among other

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officers chosen at said special election the Honorable W. M. Conley was elected to the office of judge of the superior court, and on the 23d day of May he received from the governor a commission empowering him to hold said office "for the term provided by law." The question to be decided here is, when does that term expire? or, in other words, when does a regular term of the office to be filled by choice of the electors at a regular election commence? By section 14 of the act creating the county it is provided that: judge of the superior court chosen under this act shall hold his office until the first Monday in January, eighteen hundred and ninetyseven, and until his successor is elected and qualified." If this provision is not in conflict with the constitution, it is plain that the first regular full term of the office does not commence unti January, 1897, and, consequently, that no judge of said court is to be chosen before the general state election in November. 1896. Const. art. 6, § 6. But the relator contends that by this very section of the constitution the commencement of the first regular full term of every newly-created superior judgeship is fixed for the first Monday in January after the next ensuing general election, and, consequently, that the legislature exceeded its power in attempting to extend the term of the judge to be chosen at the special election in Madera county beyond the first Monday of January, 1895. We think this contention must be sustained. The legislature has the undoubted power to create new counties, and when a new county is created the office of superior judge of such county necessarily springs into existence. Const. art. 6, § 6. Additional judges may also be provided for in the old counties. Id. § 9. Whenever one of these new offices is created. there is, of course, a necessity that it should be provisionally filled in some manner until the commencement of a regular constitutional term; and, if the constitution is silent upon this point, the power of the legislature to make such provisional arrangement by statute cannot be questioned. But, if the constitution has fixed the commencement of the first regular term of such newly-created office, the legislature has no power to fill the office for a term extending beyond the date so fixed. We think the constitution has prescribed a rule which applies not only to the counties in existence at the date of its adoption, and to the office of superior judge therein, but to all counties organized thereafter, and to all additional judgeships, however "There shall be in each of the orcreated. ganized counties and cities and counties of the state a superior court, for each of which at least one judge shall be elected by the qualified electors of the county or city and county at the general state election. The term of office of judges of the superior courts shall be six years from and after the first Monday of January next succeeding their election." Const. art. 6, § 6. The words,

"at the general state election," as applied to newly-created judgeships, must have some definite meaning ascribed to them, and the only definite meaning they can have is the first general election after the creation of the office. If they do not mean the first election, they certainly do not mean the second or third; and if the legislature can extend the term of the judge provisionally elected or appointed beyond the first Monday in January after the first general election, they have the power to extend it indefinitely,—a power for which no one would be so bold as to contend.

It might perhaps have been plausibly argued when this question was a new one that the regular terms of all newly-created judgeships should correspond with those established by the constitution for the old counties, viz. that they should commence in 1885, 1891, 1897, and so on; but when the legislature was first called upon to give its construction to the constitution it rejected this view in favor of the one first above stated. By the act providing for an additional judge in San Bernardino county (St. 1887, p. 19) it recognized the first Monday in January, 1889, as the commencement of the first regular term of the office, and the validity of the act was sustained by this court in People v. Waterman, 86 Cal. 28, 24 Pac. 807. In all subsequent acts providing for additional judges in the older counties the same rule has been followed. San Diego, St. 1889, p. 5; San Luis Obispo, Id. p. 6; Los Angeles, Id. p. 130; Tulare, St. 1891, p. 61; Alameda, St. 1893, p. 3. As to the first three of these acts (of 1889) they of course fit either view as to the commencement of the regular terms, but the last two, and the act of 1887, fit only the view which we have approved. In organizing new counties the legislature has followed this view in the act creating Riverside. St. 1893, p. 3. The act creating Orange county (St. 1889, p. 6) conforms to either view, while the acts creating Glenn, Madera, and Kings counties (St. 1891, p. 98; St. 1893, pp. 168, 179) seem to have been based upon the theory suggested that the regular terms commence only in the years 1885, 1891, 1897, etc. The legislature, it will thus be seen, has in this matter been inconsistent with itself, and we think has, in the three acts last cited, transgressed the constitution, both in its letter and in its spirit. There is no one thing more apparent in the whole tenor of the constitution than the desire of its framers to establish regularity and uniformity throughout the whole frame and system of the government. and it is not to be supposed that they would leave as important a matter as the regular terms of the superior judges wholly unprovided for. On the contrary, it must be held, if any language of the constitution will warrant us in so doing, that a precise rule on this subject has been laid down, and this rule ought to be harmonized, as far as possible, with another leading idea of the framers of the constitution, viz. that the people, as a

rule, should choose their public officers at the general elections, and that other modes of filling offices provisionally should be limited to cases of necessity.

Upon these considerations, and upon what we deem the soundest construction of the constitution, we hold, in accordance with the view which has generally found favor with the legislature, that a superior judge should be chosen in Madera county at the approaching regular election for a full constitutional term. Nothing decided in People v. Waterman, supra, is in conflict with this view, and, when the language of the opinion is considered with reference to the fact that the election there referred to was a general state election, it will be seen that it does not apply to this case. Let the peremptory writ issue.

We concur: HARRISON, J.; DE HAVEN, J.; VAN FLEET, J.; McFARLAND, J.

GAROUTTE, J., being absent, did not participate in the above decision.

4 Cal. Unrep. 824

RICHARD v. HUPP. (No. 18,259.)

(Supreme Court of California. Sept. 29, 1894.)

EASEMENT—Flume Constructed over Another's

Land—Evidence of Abandonment.

1. Plaintiff constructed a flume 564 feet long in the bed of a stream to convey the water from his mine. The flume extended 400 feet on land below, owned by defendant. Eighteen years later, defendant built a dam across the stream, causing the water to flow back, but not further than the limit of his land. Hold, in an action to abate the dam as a nuisance, there being evidence that the flume was built as an adjunct to plaintiff's quartz mill, that evidence that the mill was no longer in operation, and that its condition for many years had been such that it could not be used, was admissible to show an abandonment of any prescriptive easement which plaintiff may have had over defendant's land.

2. To establish a prescriptive right to an easement, the user must have been continuous, adverse, under claim of title, and with the knowledge and acquiescence of the owner of the

servient estate.

3. The refusal of a motion to amend the complaint, made after the decision in the case was rendered, to conform with evidence that the erection of the dam by defendant obstructed the flow of debris and tailings from mines above plaintiff's land, was within the discretion of the trial court.

Commissioners' decision. Department 1. Appeal from superior court, Butte county; E. A. Davis, Judge.

Action by Joseph Richard against John Hupp to abate a nuisance caused by the erection of a dam by defendant flooding plaintiff's mines. Judgment for defendant. Plaintiff appeals, Affirmed.

John Gale, for appellant. Warren Sexton and F. C. Lusk, for respondent.

SEARLS, C. This is an action to abute a nuisance averred to have been caused by the erection of a dam by defendant across a

water course in Butte county, known as "Little Butte Creek," whereby the water of said creek is caused to flow back upon and submerge the quartz mining claim of plaintiff. The cause was tried by the court, without the intervention of a jury, and written findings filed, upon which judgment was entered in favor of defendant for costs. Plaintiff appeals from the judgment and from an order denying his motion for a new trial. Plaintiff, who is appellant here, is, and he and his grantors have been, the owners of and in possession of a quartz mining claim situate and being in section 36, township 24 N., range 3 E., M. D. M. Plaintiff and his co-owners, in 1870 and 1871, constructed a flume running from said mine about 564 feet down the bed of Little Butte creek. flume was built in the bottom of a rock cut from two to five feet deep, and the top of the rock cut was from three to six feet below the natural bed of the creek. All of said flume, except 160 feet of the upper end thereof, is upon land owned by the defendant. The flume was used by plaintiff and his coowners to convey water from their mine, and to some extent for placer mining. The mill of plaintiff has not been used since 1873, and the mill has gone to decay. In 1881, third parties, who had a bond from plaintiff, pumped out the mine, and took out some quartz, but, so far as appears, did not work it. The flume went to decay, and, as the court found, nothing is left of it but the ruins in the bed of the rock cut. Defendant is the owner in fee simple of the N. W. 1/4 of section 1 in township 32 N., of range 3 E., M. D. M., under a pre-emption settlement and entry made in 1868, and a United States patent issued in 1871 to one Nelson, the grantor of said defendant. There is also evidence and a finding as to the ownership by the defendant of a mining claim on the creek between his patented land and the lower or south line of plaintiff's quartz claim, the ownership of which, however, is unimportant to the decision of the case. In 1888 defendant constructed a dam across the creek upon his patented land, about 600 feet below plaintiff's mining claim, and a short distance below certain falls in the creek, for the purpose of diverting the water of the stream for mining and irrigation. The dam so constructed by the defendant is about three feet higher than the crest of the falls, and sets the water back in the stream, but does not overflow or set the water back above defendant's own land, or upon or over the mining claim of plaintiff, or injure it in any manner. That the water so set back overflows a portion of the rock cut in which plaintiff's flume was constructed, but such portion is upon defendant's patented land; and that plaintiff is not the owner thereof, and has no easement in defendant's land, or right to use the same for the purpose of maintaining a flume thereon. The findings are quite full upon all the issues, and are only stated to the extent deemed

necessary to an understanding and elucidation of the points made by appellant. At the trial, objection was made by appellant to testimony tending to show the condition of his mine; that it had not been worked since 1873; that the mill building had fallen down; the flume which carried water to the wheel had disappeared; that the wheel and machinery had gone to decay, etc.,—which objection was overruled, an exception taken, and the ruling is assigned as error.

The theory of appellant is that the testimony shows an injury inflicted by respondent upon the rights of appellant, which, if permitted to continue, might ripen into a right, and hence the interposition of equity was properly invoked, and that appellant's rights are not to be measured by the value of his property. This argument assumes an existing right in appellant, while a vital question under the pleadings related to the existence of such right. It must be conceded under the evidence that defendant's reservoir did not back the water above his own line or off his own land. If plaintiff had any easement or right of way over defendant's land for his flume it must have been by virtue of a prior appropriation, or by a continuous adverse user for a period commensurate with that fixed by the statute of limitations, viz. for five years. A right acquired by appropriation may be lost by voluntary abandonment. Evidence of nonuser during the period necessary to perfect a prescriptive right tends to show its nonexistence. There was evidence tending to show plaintiff's flume as an appurtenant to his mill and min-Under these circumstances, it ing claim. was proper to show that operations at the mill had been discontinued, and that its condition was, and for many years had been, such that it could not be used, not for the purpose of impeaching plaintiff's right to the mine, but to show an abandonment of the right of way, if any, over defendant's land, or such nonuser as would preclude the inference that a prescriptive title ever ripened into existence. A right acquired by prescription to an easement is measured by the extent of the continuous enjoyment, and must be adverse, that is to say, "It must have been asserted under claim of title, with the knowledge and acquiescence of the person having the prior (superior) right, and must have been uninterrupted." Water Co. v. Hancock, 85 Cal. 219, 24 Pac. 645; American Co. v. Bradford, 27 Cal. 361. "In order to constitute a right by prescription, there must have been such an invasion of the rights of the party against whom it is claimed that he would have had ground of action against the intruder." Water Co. v. Hancock, supra; Anaheim Water Co. v. Semi-Tropic Water Co., 64 Cal. 185, 30 Pac. 623. It follows that if the flume ceased to be used, and if the property in connection with which it was used was in such condition that no user of the flume could be had, it was competent to prove such fact to

show that a prescriptive right did not and could not vest in appellant to have and continue his flume upon the land of respondent.

The cause was brought to trial March 3, 1891, and submitted to the court for decision March 4, 1891. On the 14th day of March, 1891, the court filed its written decision directing findings in favor of defendant to be prepared and presented, which findings were filed April 6, 1891. After the decision was announced, and before the findings were filed, but at what precise date does not appear, counsel for plaintiff appeared in open court, and asked leave to amend his complaint so as to conform to the evidence, by averring, in substance, that for many years mining had been carried on upon Little Butte creek; and that in times of high water large quantities of tailings and mining debris have been washed down to and upon plaintiff's claims: and that, by the construction and maintenance of defendant's dam, such tailings were prevented from flowing down the creek as they would otherwise have done, and were caused to lodge upon and cover plaintiff's claim and flume, whereby he was injured and disturbed in the enjoyment of his property. The court refused to permit the plaintiff to so amend his complaint, to which ruling his counsel in due time excepted, and the ruling is now assigned as error. In the course of the trial, the witnesses, in describing the condition of the stream and the property of the plaintiff, incidentally, as it appears to us, described the conditions of the stream as to mining debris and certain dams above plaintiff's flume which had been carried out by floods and never replaced, by reason whereof the wheel of plaintiff and the flume had been to a greater or less degree submerged and clogged by the debris. The granting or refusing leave to amend under such circumstances and at such a time was a matter in the discretion of the court, with the exercise of which this court will not interfere except in case of abuse. No abuse of discretion is apparent in the present instance. It may well be that the court below saw that, if the amendment was allowed, justice would have demanded that the case be reopened, and a further trial of the new issues created thereby had. Be this as it may, no abuse of discretion is made to appear, and hence no error can be predicated on the refusal. The cases cited by appellant are either without application, or refer to instances in which the leave to amend was sought pending the trial. The case of Bradley v. Parker (decided by this court September 28, 1893) 34 Pac. 234, is on all fours with the case at bar, and what is said there need not be repeated.

Appellant contends that the findings are contradictory, indefinite, and inconsistent, and that there is no finding as to appellant's alleged title or right of possession to the flume described in the complaint. We think the findings, taken as a whole, are consist-

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ent, clear, and comprehensive. They may be in part epitomized as follow: (1) Plaintiff (2) He built the flume in owns the mine. 1870-71. (3) It is 564 feet long, and all of it except the upper 160 feet is on defendant's land. (4) The flume had not been used for 10 years. (5) Plaintiff is not the owner of that portion of the flume on defendant's land,that is to say, the lower 404 feet thereof,and has no easement over said land for the purpose of maintaining said flume, and no right to use said land for the purposes of said flume. (6) That the dam does not cause water to flow back on any of plaintiff's property. (7) The dam does not cause water to flow back on plaintiff's flume. (8) The dam does submerge a part of the flume or rock cut, but the part so submerged is the property of defendant, "and plaintiff has no right or interest in or to any part of it." (9) Defendant is the owner, in possession of, and entitled to the possession of all the lands in any wise affected by the waters accumulated, flooded, or submerged by said dam. (10) Plaintiff has not sustained any injury or damage. (11) Defendant's title to the land flooded was initiated in 1868, and he constructed the dam in 1888, for a useful purpose, viz. to divert water for mining and irrigating, and is using it for such purposes. There are other findings which are in accord with the foregoing. That the evidence supports these findings we cannot doubt, and that they support the judgment is equally clear. To analyze the evidence and discuss it at length would only lead to the conclusion that plaintiff, without authority or right in him so to do, constructed the lower end of his flume upon the land of plaintiff, and that the evidence was sufficient to authorize the court below to find (1) that the user was not of sufficient duration and sufficiently continuous for five years to give to the plaintiff a prescriptive right to have and maintain the same on defendant's land; or (2) if such prescriptive right was established by user, that the same was lost by abandonment. It follows that the judgment and order appealed from should be affirmed.

We concur: BELCHER, C.; TEMPLE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

104 Cal. 248

BURRIS v. PEOPLE'S DITCH CO. (No. 18,-294.)

(Supreme Court of California. Sept. 29, 1894.)

EASEMENT—RIGHTS OF OWNER—DITCH ON ANOTHER'S LAND—ALTERATION AND REPAIR — PLEADING—SUFFICIENCY OF ANSWER.

1. The owner of an irrigation ditch has, as against the owner of land through which it runs, the right, in making repairs, to deepen it from 1 to 17 inches for a distance of 140 feet, and to gradually lower the bed thereof 1 foot

in a distance of 170 feet, where the object is to make the ditch of a uniform grade, and to remove from its bottom local irregularities, and the reneirs do not increase the flow of water.

remove from its bottom local irregularities, and the repairs do not increase the flow of water.

2. Where a complaint alleges a material widening and deepening of an irrigation ditch running through plaintiffs land, a denial of the allegation, followed by an averment that "on the contrary * * * said ditch is no wider, nor is it any deeper, * * * than when it was first constructed," raises the issue as to whether the ditch has been materially widened or deepened.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; Wheaton A. Gray, Judge.

Action by David Burris against the People's Ditch Company. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

Daggett & Adams, for appellant. Bradley & Farnsworth, for respondent.

HAYNES, C. The defendant is the owner of a canal or ditch used to convey water from Kings river for the purpose of irrigation. This ditch was constructed in 1875, is about 20 miles long, and in its course crosses two sections of land owned by the plaintiff. The complaint charges that in December, 1887, the defendant widened and deepened the ditch upon plaintiff's lands, and prays for a mandatory injunction to compel the defendant to restore the ditch to its former condition. The defendant answered, and the issues were tried by the court, and upon the findings made judgment was entered for the defend-This appeal is by the plaintiff upon the judgment roll.

The court found that when said ditch was constructed across section 14 it had a width on the bottom of about 25 feet, was a little wider at the top, and was about 6 feet in depth from the surface of the ground, and from the top of the embankment about 10 feet; that on section 26 the ditch was about 30 feet wide on the bottom, was about 2 feet in depth below the surface of the ground, and from the top of the embankments its depth was about 4 feet, and that said ditch is no wider now than when first constructed, and is not any deeper, except as hereinafter stated; that in December, 1887, the defendant, against the protest of the plaintiff, entered upon said ditch to clean out the same, and increased the depth of it for a distance of 140 yards in section 14 of plaintiff's lands from 1 foot to 17 inches, and on section 26 deepened it from 1 foot at the upper end of a "170-yard stretch, tapering down to nothing at the lower end of said stretch;" that said portions of the ditch were deepened to reduce the ditch to an even and uniform grade, "said portions having theretofore been looked upon as humps in the bottom of the ditch," but that no more water is conveyed through the ditch than before. The court further found that plaintiff's lands were not thereby damaged, nor the burden increased, nor the plaintisf obstructed in the free use of any of his lands, or prevented from the comfortable en-

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joyment of any thereof, or that he suffered any pecuniary loss or damage.

Appellant contends that the findings show that he is entitled to the relief demanded, and asks for a reversal of the judgment, and that he have judgment on the findings. It is well settled that the owner of an easement cannot change its character, or materially increase the burden upon the servient estate, or injuriously affect the rights of other persons, but within the limits named he may make repairs, improvements, or changes that do not affect its substance. An easement of the character involved in this case is property, to the reasonable and profitable use and improvement of which, due regard being had to the rights of others, the owner is entitled. Bringing the ditch to a uniform grade by removing local inequalities, such as are stated in the findings, is not a deepening of the ditch. The prescriptive right, as to depth, is determined by the grade and general depth of the ditch, and not by local and unimportant irregularities in the bottom of it. The ditch was not widened, nor the quantity of water conveyed increased, nor the mode or purpose of its use changed. It is argued that, if defendant had the right to do what the court found was done, defendant would have the right to dig the ditch a hundred feet deeper; that in principle there is no difference between deepening it one inch and a hundred feet. There is, however, the difference between that which is material and that which is immaterial. Suppose plaintiff had acquired by prescription a private way for a few rods over his neighbor's land; that at the time he first used the way he found a tree growing in the middle of it, and instead of digging it up had cut it down so low that his wagon could pass over it, and had so used the way for five years. Would it be claimed that he might not afterwards dig up the stump? or, if he did, that his neighbor could obtain a mandatory injunction to require him to put the stump back where it grew? None of the cases cited by appellant sustain his contention. either involve facts of a different nature, or are based upon a change of the character of the easement, or a material increase of the burden upon the servient estate. In Allen v. Water Co., 92 Cal. 138, 28 Pac. 215, principally relied upon by appellant, this court sustained the right of the plaintiff to an injunction upon the ground that the change from the open ditch to a pipe laid under ground was "a change in the character of the ease-In this case there was no change in the character of the easement, or the mode of its use or enjoyment, nor was any injury inflicted upon the plaintiff. The work done the defendant had the right to do, and the injunction was properly denied.

It is further contended that the finding that the ditch was not widened or deepened is in conflict with admissions in defendant's answer. The complaint charged a material widening and deepening, and the contention is that this allegation is not denied, and is therefore admitted. It is conceded that the denial is not in good form, and if it stood alone would be insufficient. But the pleader. after making a literal denial as to the width and depth alleged in the complaint, added: "But, on the contrary, defendant alleges that said ditch is no wider, nor is it any deeper, through the said lands of plaintiff than it was when it was first constructed." This allegation was sufficient to put in issue the said allegations of the complaint. Way v. Oglesby, 45 Cal. 655; Goddard v. Fulton, 21 Cal. 430, at page 436; Robinson v. Merrill, 87 Cal., at page 14, 25 Pac. 162. It may be said. generally, that any allegation in an answer which, if found to be true, necessarily shows that the allegation of the complaint as to the same matter is untrue, is a good traverse, and sufficient as a denial. We see no inconsistency in the findings. The inconsistency claimed rests upon the assertion that the removal of the "humps" was a "deepening" of the ditch, -a proposition that need not be further discussed. The judgment should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

104 Cal. 179

OWEN v. MEADE. (No. 18,258.)

(Supreme Court of California. Sept. 25, 1894.)
ACTION FOR ATTORNEY'S SERVICES — PLEADING
AND PROOF — ASSIGNMENT OF CLAIM — CORRECTION PENDING SUIT.

1. In an action for attorney's services, proof that the attorney's compensation was contingent on the result of litigation does not sustain an allegation that defendant agreed to pay a fixed sum for such services.

2. Where the complaint alleges that defendant agreed to pay a fixed sum for the services, evidence that such sum was a reasonable fee if its payment was made contingent on the result of the litigation is inadmissible.

3. Where an assignment of a claim failed to

3. Where an assignment of a claim failed to name the assignee, and, on the trial of an action thereon, plaintiff introduces parol evidence that he was the assignee, and that his name was omitted by mistake, and offers to have the assignment corrected by the assignor by inserting his name, the court should permit the correction.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge. Action by R. T. Owen against O. J. Meade for attorney's services. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

Stanton L. Carter, for appellant. James Gallagher, for respondent.

DE HAVEN, J. The plaintiff sues as the assignee of one Grady, to recover the sum of \$950, balance alleged to be due for professional services rendered by the said Grady in the prosecution of a certain action brought by the defendant against the county

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of Fresno. The complaint, which is unverifled, alleges that the defendant expressly agreed to pay to said Grady for such services the sum of \$1,000, and also alleges that the services so rendered by Grady were reasonably worth the sum of \$1,000. The answer contains a general denial, and, in addition, sets out a separate defense, in which it is alleged "that the only services rendered by said W. D. Grady were done and performed under and upon a special contract and agreement with said Grady that he (said Grady) would do and perform the service to be rendered and performed under said agreement for the sum of \$50," and that Grady was paid said sum before the alleged assignment to plaintiff. The action was tried by a jury, and the plaintiff recovered judgment in the superior court for the full amount demanded in the complaint; and from this judgment and order denying his motion for a new trial the defendant appeals.

1. Grady, the assignor of plaintiff, was a witness upon the trial, and testified, in substance, that he acted as the attorney for defendant in the action of Meade v. County of Fresno, under an agreement by which he was to receive for such services what is known among lawyers as a "contingent fee." In the action referred to, there was involved, among other matters, a question as to the right of the defendant here to recover interest, amounting to about \$1,800, upon his original demand against Fresno county, and the witness Grady stated the following as the contract between himself and defendant in relation to the compensation he was to receive as attorney for the latter in that action: "I says, if I recover this interest, it will more than pay my fee, and save you that much money. The interest would be about \$1,800. I will charge you a thousand dollars out of that, and, if I don't recover it, I shall charge you ten per cent. of what I do recover; and, if I recover nothing, I will charge you nothing." And, referring to the amount of labor performed by him in that case, the witness further stated: "I think I gave it more attention considering that my fee was to be contingent, a good one, and depended entirely upon what I recovered." The defendant moved to strike out this testimony in relation to the contingent fee, upon the ground that there was no such issue in the case, the complaint alleging that plaintiff's assignor was to receive \$1,000 for his services, without any reference to the result of the action in which they were rendered. The motion was denied by the court. and the court also instructed the jury to the effect that if they found "that it was agreed by and between the defendant and Grady that, in case said Grady recovered the full amount of said claim [referring to the claim of defendant against Fresno county], with interest thereon, then the defendant would pay him \$1,000 and further find said Grady did in every respect fulfill the terms of the

agreement on his part, and did recover, and the defendant did receive the full amount of said claim, with interest, then you must find for plaintiff in the sum of \$950." In refusing defendant's motion to strike out the testimony in relation to the contingent fee, and in giving the instruction just quoted, the court erred. There is a fatal variance between the contract testified to by the witness Grady, and hypothetically stated to the jury in the charge of the court, and the contract alleged in the complaint. contract alleged is that of an unconditional promise upon the part of defendant to pay to the assignor of plaintiff the sum of \$1,000 for his services as an attorney in the prosecution of the action referred to in the complaint; while the evidence which the court held was relevant and sufficient, if believed, to warrant the jury in finding that the defendant made the alleged contract, was to the effect that the promise of defendant to pay was not unconditional, but contingent. There is a wide and essential difference between the two contracts, and proof of one will not support a finding that the other was made. The plaintiff's allegation of an absolute promise was not sustained by proof of the contingent promise, and evidence in relation to such contingent promise was not relevant to the issues made by the pleadings. Lower v. Winters, 7 Cow. 263. In the case just cited, it was said: "The contract proved is also essentially different from that declared on. The declaration states the promise on the part of the defendant to have been absolute and unconditional. The promise proved was to give \$100 for the improvements, if he obtained a contract from the landlord. If he failed in obtaining a contract, he was not bound by his promise to the plaintiff. That was the express condition upon which it was made. It is true, the plaintiff proved upon the trial that the defendant had obtained a contract from Pierpont; but the fact of proving it shows its materiality, and that it ought to have been averred. The plaintiff has recovered on a contract entirely different from that on which he declared. The objection was taken below, and should have been sustained." The case of Lower v. Winters was decided under the common-law system of practice; but, as was said by Rhoades, J., in delivering the opinion of this court in Stout v. Coffin, 28 Cal. 65: "The rule that the probata must correspond with the allegata is not abrogated by the practice act. * * The consequences of a variance between the averments in a pleading and the proof are the same under our system of practice as at common law, except that they may be to a great extent obviated by amendments to the pleadings, which are allowed with great liberality." As an instance of the strictness with which the rule requiring the proof to correspond with the allegations is enforced, the following cases may be cited:

Tomlinson v. Monroe, 41 Cal. 94; Johnson v. Moss, 45 Cal. 515; Clark v. Insurance Co., 36 Cal. 168; Mondran v. Goux, 51 Cal. 151.

2. The court also erred in permitting the witness Terry to give evidence in relation to the reasonableness of the contingent fee testified to by the witness Grady. There was no issue in the case as to the reasonableness of such a fee, and the admission of this evidence was clearly prejudicial to the defendant. See, upon this point, Ellis v. Woodburn, 89 Cal. 129, 26 Pac. 963.

3. The written assignment of the claim sued on omitted to name the plaintiff as the assignee, or to name any assignee, and parol evidence was admitted showing that such omission was unintentional, and that Grady in fact made an oral agreement assigning such claim to plaintiff, and that the writing produced at the trial was intended to effect such assignment. This evidence was objected to by defendant, but, we think, was properly admitted; and when the plaintiff offered to have the writing amended then and there by his assignor, so as to conform to the intention of the parties thereto, if the court had permitted such correction it is not perceived that any substantial right of the defendant would have been thereby affected.

We deem it unnecessary to pass upon the other points urged by appellant. Judgment and order reversed.

We concur: McFARLAND, J.; FITZGER-ALD, J.

104 Cal. 209

VAN LOO v. VAN AKEN et al. (No. 18,267.) (Supreme Court of California. Sept. 29, 1894.) MORTGAGES—CONSTRUCTION—RIGHT TO FORE-CLOSE.

Defendants executed a note to plaintiff, stipulating that, on default in interest, compound interest was to be payable, and executed a mortgage to secure the payment of the note "at maturity," with interest according to the terms of the note. Held, that the mortgagee, for default in the interest, could not foreclose before the maturity of the note.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by Kingsley Van Loo against Louise Van Aken and T. Van Aken to foreclose a mortgage. Judgment for defendants, and plaintiff appeals. Affirmed.

Frank H. Short, for appellant. S. J. Hinds, for respondents.

BEATTY, C. J. Action to foreclose a mortgage. A general demurrer to the complaint for want of facts was sustained by the superior court, and, plaintiff being unable to amend, judgment was entered for the defendants, from which the plaintiff appeals. The sole question to be determined is whether the complaint states a cause of action. It is alleged that on the 9th of December, 1890, the defendants executed and delivered to the

plaintiff their promissory note in the following words and figures: "\$5,000. Fresno, Cal., December 9, 1890. Five years after date, without grace, for value received, we promise to pay to Kingsley Van Loo, or order, in the city of Fresno, the sum of five thousand dollars, with interest thereon at the rate of eight per cent. per annum from date until paid. Both principal and interest payable in gold coin of the government of the United States. Said interest payable annually, and, if not so paid, the interest to draw interest the same as the principal; and, if this note is collected by suit, I agree and promise that the court having jurisdiction allow a reasonable attorney's fee, together with all legal expenses, to be made part of the judgment. Louise Van Aken. T. Van Aken." That at the same time the defendants executed a mortgage to secure the payment of said note according to its terms; that on March 31, 1893, the date of the commencement of the action. no part of the principal or interest of the note had been paid; that the mortgaged premises cannot be sold in portions without injury; that the defendants have violated their covenant to insure, and are insolvent, etc. It is claimed by appellant that on this state of facts, the sum of \$800 being past due for interest, he had a right to commence his action to foreclose before the maturity of the note, notwithstanding the absence of any stipulation in the note or mortgage giving him that right. The decision of this court in Broadribb v. Tibbets, 58 Cal. 6, is directly opposed to this proposition; but appellant contends that the decision in that case is not law, and that it has been overruled in the later case of Yoakam v. White, 97 Cal. 286, 32 Pac. 238. It can scarcely be said that the latter case overrules the former, though it does disapprove it. In Broadribb v. Tibbets it was held that the mortgagee could not foreclose for interest in arrears, because there was no express agreement that he might do so, and certainly that decision was opposed to the current of authority and to the reasonable construction of our statute. Code Civ. Proc. §§ 726-728. But in this case there is something more than the mere absence of an express agreement that the mortgagee may foreclose upon default in the payment of interest. Not only does the note provide for compounding the interest if not paid as it falls due, which by itself is not a waiver of the right to enforce payment, but the language of the mortgage fairly warrants the conclusion that the intention of the parties was that it should not be foreclosed until the principal of the note was due. It is given not "to secure the payment of the note according to its terms," but "as security for the payment to the said mortgagee of the sum of five thousand dollars in gold coin of the United States of America, on the ninth day of December, A. D. 1895, with interest at the rate of eight per cent. per annum, according to the terms and conditions of a cer-

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tain promissory note," etc. To say nothing of the fact that this contract was entered into at a time when the decision of Broadribb v. Tibbets declared the law of the state, and when, presumably, the parties looked to that decision for a construction of their agreement, it cannot be denied that, when a mortgagee is bargaining for the right to sell his debtor's land to satisfy his claim, any doubt that fairly arises upon the terms of the note and mortgage should be resolved against him. Here we think, that, with all the aid that they can derive from the statute, the note and mortgage leave it, at least, doubtful if it was not the intention of the parties that a compounding of the interest should be the only consequence of default in its payment, and that the mortgage should not be foreclosed prior to the 9th day of December, 1895. Therefore we hold that such was their intention. The other questions suggested in the brief of counsel for appellant have not been argued on either side, and we shall not undertake to decide them. Judgment affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; FITZGERALD, J.; McFARLAND, J.

4 Cal. Unrep. 831

HARPER v. ANDERSON et al. (No. 18,262.) (Supreme Court of California. Sept. 29, 1894.) PARTNERSHIP—SUIT FOR ACCOUNTING—PARTIES—EXCLUSION OF EVIDENCE—PRESUMPTION ON APPEAL.

1. Where, in an action for a partnership accounting, books offered in evidence were objected to as not showing the transactions between the parties, the action of the trial court in rejecting the books will not be disturbed on appeal unless on the trial the party offering the books pointed out wherein they were relevant, and the record shows what he proposed to prove thereby.

2. One who buys out a retiring partner, and forms a partnership with the other member of the firm, is not a proper party to a suit by such member against the retiring partner for an accounting, the complaint alleging merely that he has funds of the new partnership in his hands, which were collected by the procurement of the retiring partner.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county; Ansel Smith, Judge.

Action by J. H. Harper against C. M. Anderson and another for a partnership accounting. Judgment was rendered for defendants, and plaintiff appeals. Affirmed.

L. W. Elliott and A. H. Carpenter, for appellant. Nicoll & Orr, for respondents.

HAYNES, C. Plaintiff and defendant Anderson were copartners in the nursery business from May, 1888, to May, 1889, when defendant Anderson sold out to defendant Wheeler. The complaint charges that each of the defendants has collected and received moneys belonging to the firm of Harper & Anderson, of which one-half belongs to plain-

tiff, and prays for an accounting. Among other allegations, it is charged that defendant Wheeler has taken possession of the books, and for that reason plaintiff is unable to ascertain the amount collected or the amount due. The cause was tried by the court without a jury. At the close of plaintiff's evidence in chief a nonsuit was granted as to defendant Wheeler, and, upon the final submission of the case, findings were filed in favor of defendant Anderson, upon which judgment was entered. Plaintiff moved for a new trial on a statement, and now appeals from the judgment and an order denying a new trial.

The appeal from the judgment cannot be considered, because not taken in time.

The answer admitted the partnership between the plaintiff and Anderson, and its dissolution, but denied that the defendants had the books of the firm, or that any collections had been made of moneys belonging to the firm. There was no allegation that the business of the firm had been settled or adjusted, nor that there were no outstanding accounts at the time of the dissolution. The court, however, found that after the dissolution there was a settlement, and that Anderson paid plaintiff a certain sum of money, but that at the time of said settlement it was agreed that any sums of money which might thereafter be collected should belong to the plaintiff and Anderson, one-half to each. The evidence amply sustains the finding of these facts.

Certain books were produced upon the trial, but by whom does not appear. The plaintiff, when on the stand as a witness in his own behalf, was shown certain books, and testified as follows: "I recognize that book as my own book. I bought and paid for it. It was stolen out of my house. It is one belonging to Harper & Anderson, not Harper & Wheeler. This one we had at the nursery, and the other was down at Stockton. We were selling here. This book will show the amount of trees sold at the nursery. Both of these will show the number shipped down, and this book will show the number sold here. This, the number actually received. * * I don't know how many trees were sold down here. The books will show." Plaintiff thereupon offered the books in evi-The defendants objected on the dence. ground that they showed the business between Harper and Wheeler, and were not the books referred to in the complaint. The objection was sustained, and plaintiff excepted. After additional statements by plaintiff in relation to the books, to the effect that one shows the sales at Stockton, and another the sales at Acampo, they were again offered in evidence, and again rejected; the last objection being placed upon the ground that "they show on their face that they do not show the transactions of Harper and Anderson." It must be presumed that the court made such inspection of the books as to sat-

isfy it that the objection that they showed upon their face that they did not show the transactions of Harper and Anderson were true. If, notwithstanding their apparent irrelevancy, they in fact contained relevant and material evidence for the plaintiff, it was the duty of counsel to point it out, and offer to show the same by the books, and to insert in the record the fact so offered to be proven.

It is also urged that the court erred in granting the nonsuit as to Wheeler; that if he bought out Anderson he was bound to account to Harper for one-half of the collections; and that he testified that he had collected \$2,200, no part of which had been paid to plaintiff. Wheeler testified that he took a bill of sale from Anderson, and we infer from one of the specifications of error that it was put in evidence, but it is not set out in the record, nor its substance stated, nor does it appear in any manner that he bought Anderson's interest in the accounts. There is also evidence tending to show that Wheeler purchased from Anderson at plaintiff's instance, and became plaintiff's partner in the business, and that the money so received was the money of the new firm, in which Anderson had no interest, and for which he was not The complaint did not allege any indebtedness from Wheeler on account of the business of the new firm, nor even allege that he was in any way connected with the plaintiff in business; and the only liability alleged against him was for money belonging to Harper and Anderson, which it was charged he had collected by the procurement of Anderson. The nonsuit was therefore properly granted.

It is also urged that the court erred in admitting in evidence the bill of sale from Anderson to Harper. It is sufficient to say that the record does not set out the bill of sale, nor show that it was offered or received in evidence. The appeal from the judgment should be dismissed, and the order denying a new trial affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the judgment is dismissed, and the order denying a new trial is affirmed.

104 Cal. 264

LA POINT v. BOULWARE. (No. 18,279.) (Supreme Court of California. Sept. 29, 1894.) INSOLVENCY PROCEEDINGS — TIME OF COMMENCEMENT—PREFERENCES—VALIDITY.

1. Under Insolvent Act, § 61, providing that "the filing of the petition by or against a debtor, upon which an order of adjudication in insolvency may be made, shall be deemed to be the commencement of proceedings in insolvency under this act," the petition must be sufficient in law to support an adjudication, in order that a transfer made within 30 days previous to the filing thereof shall be void under section 55.

2. The sustaining of a general demurrer to a petition in insolvency shows that the petition was not such that its filing would be deemed the commencement of proceedings in insolvency under Insolvent Act & 61

the commencement of proceedings in insolvency under Insolvent Act, § 61.

3. A transfer made by a debtor within 30 days before the filing of an insufficient petition in insolvency is not made void by the filing of a sufficient amended petition more than 30 days after the transfer.

Commissioners' decision. Department 2. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by Moses La Point, as assignee of T. M. Boulware, insolvent, against C. N. Boulware, to recover personal property alleged to have been transferred to defendant within 30 days before the commencement of insolvency proceedings. Judgment for plaintiff, and defendant appeals. Reversed.

Reardan & White, for appellant. John Gall, for respondent.

HAYNES, C. This action was brought by the assignee in insolvency of T. M. Boulware against the defendant, C. N. Boulware, to recover certain personal property alleged to have been transferred to the defendant by the insolvent in payment of a debt within 30 days before the commencement of insolvency proceedings. The sufficiency of the complaint in this action is assailed by appellant. The complaint here, however, cannot be distinguished from the complaint in La Point v. Blanchard (No. 18,241, filed March 12, 1894) 36 Pac. 98, which was held sufficient.

Appellant also contends that the petition under which T. M. Boulware was adjudged an insolvent was not filed within 30 days after the sale of the horses and wood to the defendant, and that therefore the sale in question does not come within the statute. The sale was made on or about the 1st day of September. A petition was filed by creditors on the 10th. On September 27th the court entered an order denying the petition. That order, we think, ended that petition. But on the 29th, and within the time allowed by the court therefor, an amended petition was filed. The so-called "amended petition" must be taken to be a new petition. The alleged insolvent appeared, and filed a general demurrer to the amended petition, and, as that petition was less than 30 days after the transaction, it was in time. But that demurrer was also sustained, and leave given to amend, and the amended petition, under which T. M. Boulware was adjudged an insolvent, was filed on the 28th of November. The findings show the foregoing facts. Appellant cites section 61 of the insolvent act, which reads as follows: "The filing of the petition by or against a debtor upon which an order of adjudication in insolvency may be made by the court shall be deemed to be the commencement of proceedings in insolvency under this act." It is contended that, if a petition is filed which is insufficient to justify an order adjudging the defendant an insolvent, a new or amended petition which is sufficient cannot take effect by relation as of the date of the original petition, but only from the date of the filing of the sufficient one. Section 405, Code Civ. Proc., provides: "Civil actions in the courts of this state are commenced by filing a complaint." The difference in language used in these two sections is suggestive. In the one last quoted, "filing a complaint" is the commencement of the action. If section 61 of the insolvent act were made to correspond to the above provision of the Code of Civil Procedure, it would read: "The filing of a petition against a debtor shall be deemed to be the commencement of proceedings in insolvency under this act." In this section, however, we have, instead of "a" petition, "the" petition "upon which an order of adjudication in insolvency may be made by the court." We think this language requires, as the commencement of the proceeding, the filing of a sufficient petition,-one upon which a valid adjudication of insolvency may be made. This would seem to be the natural construction and the plain import of the words. But, if reasons for such provision are required, they are at hand. Article 9, \$ 56, of this act imposes heavy penalties for a large number of acts done "after the commencement of proceedings in insolvency," which are not penal if done before. It would seem a hard construction that the filing of a petition upon which no adjudication could be made should be held to be the commencement of proceedings, and so subject the defendant to penalties, though no facts were alleged, or might ever be alleged, which would sustain an adjudication of insolvency. One of these penal offenses is "payment,"an act which, under other circumstances, it is his duty to perform. Nor is the defendant in such proceedings the only person affected. Take this case. The defendant in this action (appellant here) indorsed a note for the insolvent, and, in consideration of the property sought to be recovered in this suit, assumed its payment. Under section 3432, Civ. Code, the transaction is expressly authorized. That section provides: "A debtor may pay one creditor in preference to another, or may give one creditor security for the payment of his demand in preference to another." And under the insolvent act such transactions are not disturbed unless they occur within one month before proceedings in insolvency are commenced. In such case the defendant here, who did only that which he had a right to do, and whose act cannot be assailed unless within the precise time limited by the insolvency act, should not be affected by the filing of an insufficient petition against the party with whom he lawfully dealt. If the filing of a petition against an alleged insolvent, upon which no adjudication of insolvency can be made, can have the effect of converting a lawful act into an unlawful one, and tie the hands of a business man, and prevent him from dealing with his property or paying his debts, it would open a wide door for persecution and the gratification of malice; a door that is effectually closed by the requirement that only the filing of a sufficient petition—one which, upon the facts alleged therein being established by proof, will sustain an order adjudging the defendant an insolvent debtor—shall be deemed the commencement of proceedings under the act.

Respondent calls attention to section 8 of the act, under which he contends the petitioners can amend their petition by leave of the court. The language of the section in that regard is as follows: "The petitioners may from time to time amend and correct the petition, so that the same shall conform to the facts, by leave of the court before which the proceedings are pending." Respondent also calls attention to the language of section 55, which, so far as material, is as follows: "If any person, being insolvent or in contemplation of insolvency, within one month before the filing of a petition by or against him," etc. Counsel italicizes the words "a petition." The remainder of the section shows that an adjudication of insolvency and the appointment of an assignee are required before the penalty can be visited upon the person to whom the property is transferred, and therefore contemplates a sufficient petition. But this section should be so construed as to harmonize with the other provisions of the act. Section 61 makes the filing of a sufficient petition the commencement of the proceedings, and section 56 punishes certain acts done "after the commencement of proceedings in insolvency," while the construction of section 55, contended for, would make the filing of any petition, though it should not be "the commencement of proceedings," to be an act wholly changing the essential character of a transaction from a lawful to an unlawful one.

Respondent further contends that sustaining a demurrer does not necessarily show that an adjudication could not have been had under the petition demurred to. This would be so if the record here were silent as to the grounds of the demurrer. But in this case the record shows that the demurrer was a general one, which implies that the petition was attacked upon the ground that it failed to state facts which would sustain an adjudication that the debtor was an insolvent under the provisions of the act.

We therefore conclude that the proceedings were not commenced within one month after the sale of the property in question to appellant, and that the judgment and order appealed from should be reversed, and the court below directed to dismiss the action at the cost of the plaintiff.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and or-

der appealed from are reversed, and the court below directed to dismiss the action at the cost of the plaintiff.

4 Cal. Unrep. 834 BENNETT et al. v. MORRIS et al. (No. 18,-323.)

(Supreme Court of California. Sept. 29, 1894.) DIVERSION OF WATER - ACTION BETWEEN MINE OWNERS—EVIDENCE—EXAMINATION OF WITNESS
—RECORD OF DEED—ABSENCE OF STAMPS.

1. The question whether a pleading is ambiguous and uncertain cannot be raised by a

general demurrer.

2. The fact that the record of a deed executed in 1872 does not show that any United States revenue stamps were placed thereon does not render such record incompetent evi-

3. In an action for damages for the diversion of water, where a witness has testified only as to the condition of ditches and flumes, and as to the condition of ditches and numes, and the work required to clear them, and not as to the amount of the damage, the action of the trial court in striking out an answer of the witness, "Yes, sir, I have," given in response to a question by defendant's counsel as to whether the witness has stated all the damages, is within its discretion. is within its discretion.

4. In an action for the diversion of water from a mine, a witness who testifies that he knows the claims and ditches involved; that he has been over the ditches and at the mines of both plaintiff and defendant; that he has resided in the vicinity 12 or 13 years, and is a miner by occupation, having been engaged mostly in hydraulic mining,—is qualified to give his opinion as to whether it is practicable for plaintiff to run his mine if defendant continues to run his in the same way as before. run his in the same way as before.

Commissioners' decision. Department 1. Appeal from superior court, Siskiyou county; J. S. Beard, Judge.

Action by W. P. Bennett and others against George Morris and others to restrain the diversion of water, and for damages caused by such diversion. Judgment was rendered for plaintiffs, and defendants appeal. Affirmed.

Jas. F. Farraher and R. S. Taylor, for appellants. Gillis & Tapscott, for respondents.

BELCHER, C. This is an action to restrain the diversion of water, and for damages. By the judgment the plaintiffs were awarded an injunction and damages in the sum of \$250. The defendants appeal from the judgment and an order denying their motion for a new trial. In support of the appeal it is claimed that several errors of law were committed which call for a reversal. These alleged errors will be noticed in their order.

- 1. The demurrer to the first cause of action set up in the complaint was general, and it was not error to overrule it. The words objected to, as showing that no cause of action was stated, must be read in connection with the balance of the count; and, when so read; the most that can be said is that they make the pleading ambiguous and uncertain. But that is an objection that cannot be raised by a general demurrer.
- 2. The plaintiffs offered and were permitted to read in evidence the record of the deed

from Timothy Haley to Andrew Bahr, dated October 18, 1872, and also the conveyance indorsed thereon from Bahr to George Mc-Neal, dated February 14, 1873. The Haley deed appears to have been signed by the grantor's mark, and witnessed as required by section 14 of the Civil Code, and it was proved that diligent search had been made for the original papers, and that they could not be found; that the copies found in the record were substantially correct; and that under the said deeds the grantee, McNeal, entered into possession of the property, and held such possession until he transferred it to other parties in June, 1878. For the purposes for which the plaintiffs sought to use these deeds, it was therefore immaterial whether they were properly recorded or not. And it was also immaterial that it did not appear that any United States revenue stamp was placed thereon. Duffy v. Hobson, 40 Cal. 240; Thomasson v. Wood, 42 Cal. 416.

3. The point is made in appellants' brief that the court erred in admitting in evidence the deed from George McNeal to E. L. Shumway and brother, but no argument is made in support of this position. The point is clearly untenable. McNeal testified to buying the property from Bahr, and that he remained in possession of it and used the ditch and water every mining season up to 1878, when he deeded the property to the Shumways; and Edwin L. Shumway testified that he and his brother got the property from McNeal, and remained in possession of it jointly for 12 years, when they conveyed it to the plaintiffs. The deed was therefore clearly admissible, in connection with the other proofs offered, to show that the plaintiffs and their predecessors in interest had been in possession of the property in question, and claimed to own it, for more than 20 years before the action was commenced.

4. The plaintiffs' witness Knackstedt way asked on cross-examination by counsel for defendants if he had stated all the damages that had been done to plaintiffs' claim, and answered, "Yes, sir, I have." The answer was stricken out on motion, and in this we see no prejudicial error. The witness did not attempt, in his direct or cross examination, to estimate the amount of damage done. He testified as to the condition of the ditches and flumes at different times, and the work required to clean them out; and, as to all the facts stated by him, counsel were in no way restricted in their cross-examination. The court evidently considered the question and answer objected to as improper, under the circumstances, and its action was clearly within the limits of its discretion.

5. During the direct examination of plaintiffs' witness McLaughlin, he was asked whether it was practicable for the plaintiffs to run their mine if the defendants continued to run theirs in the manner they had been running it during the last mining season. The question was objected to on the ground

that the witness had not shown himself competent or qualified to answer it. The objection was properly overruled. The witness had testified that he knew the parties to the action, and the claims and ditches involved; that he was over the ditches in 1892, and had been at the mines of both plaintiffs and defendants; that he had resided in the vicinity for 12 or 13 years, and was a miner by occupation, having been engaged mostly in hydraulic mining. This was a sufficient showing that the witness was qualified to give the opinion asked for.

6. The plaintiffs' witness Edward L. Shumway was asked on his direct examination what it would cost to clean out their lower ditch; that is, clean out the débris that is there now. The question was objected to upon the ground that plaintiffs had not shown that this débris was run into the ditch by any act of defendants, or that they were responsible therefor. The objection was overruled, and, as we think, properly. It was clearly shown that the débris which filled up the "lower ditch" came down from defendants' mine, and there was no pretense that it came from any other source.

7. The only other questions discussed by counsel relate to the sufficiency of the evidence to justify the findings, and the form of the judgment. It would subserve no useful purpose to state the evidence. It covers about 60 pages of the transcript, and is in some respects conflicting. A careful reading of it, however, shows that it is amply sufficient to justify each of the findings complained of.

The judgment does not require any modification. It properly restrains the defendants from using any of the waters of the stream, except at such times and in such manner as they can do so without materially deteriorating the quality of the water for mining purposes on plaintiffs' claim, or diminishing the quantity of water flowing into plaintiffs' ditches to less than 1,000 inches, measured under a 4-inch pressure; and, so long as defendants comply with those conditions, plaintiffs will have nothing to complain of. The judgment and order appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

104 Cal. 254

O'ROURKE v. VENNEKOHL et al. (No. 15,-542.)

(Supreme Court of California. Sept. 29, 1894.)
INSTRUCTIONS—CREDIBILITY OF WITNESS—NEW
TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. Where, on the question of the effect of a false statement by a witness, the court charges that "a witness false in one part of his testi-

mony is to be distrusted in others," a judgment will not be reversed because of a refusal to present the question more in detail, though the instruction asked for would, if given, have been proper.

been proper.

2. In an action for personal injuries the refusal to grant a new trial because of newly-discovered evidence will not be disturbed on appeal where the new evidence is that of but one witness, who, like several who testified at the trial, witnessed the accident.

Department 1. Appeal from superior court, San Francisco county; Charles W. Slack, Judge.

Action by Margaret O'Rourke against Bernard Vennekohl and others for personal injuries. Judgment was rendered for plaintiff, and defendants appeal. Affirmed.

T. C. Van Ness, for appellants. Stafford & Stafford, for respondent.

VAN FLEET, J. Action for damages for personal injuries. Verdict and judgment were for plaintiff, and from the judgment and order denying a motion for new trial the defendants appeal.

1. The court refused the following instruction requested by defendants: "If you shall find that the plaintiff has willfully misstated any fact concerning which she has been interrogated, then her testimony in other respects should be distrusted, and the jury may in such case disregard the whole of her evidence. So, also, if you shall find that any witness examined upon behalf of the plaintiff has willfully misstated any fact concerning which he has been interrogated, then the testimony of such witness in other respects should be distrusted, and the jury may in such case disregard the whole of the evidence of such witness. Where a witness gives willfully false testimony, the jury should treat all his testimony with distrust and suspicion, and reject all, unless convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth,"-but instead charged the jury on this point that "a witness false in one part of his testimony is to be distrusted in others." While we think the instruction as requested was proper, and should have been given, nevertheless we are unable to hold that there was error in the action of the court. In refusing the instruction as asked, the court charged the jury upon the point in the language of the statute, and this, it has been repeatedly held, was sufficient. People v. Treadwell, 69 Cal. 226, 238, 10 Pac. 502, and cases there cited.

2. After a careful examination of the record, we are unable to say that the court erred in denying the motion for a new trial. The motion was based upon the ground of newly-discovered evidence. The granting of a new trial upon this ground is largely matter of discretion, an exercise of which will not be disturbed by this court except in case of abuse clearly disclosed by the record. It should not be granted in any

case where the party has not shown due diligence in discovering and producing the evidence, nor where the evidence is purely cumulative, nor unless the newly-discovered evidence is such as to render a different result upon a retrial probable. Testing the showing made in this case by these rules, we certainly cannot say that there was any abuse of discretion in denying the motion. The new evidence was largely, if not entirely, cumulative, and conceding that appellants' view of the law be correct, that a new trial should not be refused merely because the evidence is cumulative, in a case where the cumulation is sufficiently strong to render a different result probable, we cannot say that the record presents such a case. The new evidence is that of but one witness, who, like several who testified at the trial, witnessed the accident. What the probable result of his evdence, if produced before the jury, would be, when viewed in connection with all the other evidence in the case, was a question which the lower court, with all the witnesses and facts of the case before it, was much more competent to determine than this court can possibly be. We find no error in the record, and the judgment and order denying the motion for a new trial are affirmed.

We concur: HARRISON, J.; DE HAVEN, J.

104 Cal. 262; 4 Cal. Unrep. 838

MERLEY et al. v. BOULON et al. (No. 15,-630.)

(Supreme Court of California. Sept. 29, 1894.)
NOTICE OF APPEAL.

A notice of appeal stating that the appeal is from an "order" denying a motion for a new trial, and from an "order" denying a motion to set aside the judgment, a description of which is given, and "from the whole thereof," is insufficient as to notice of appeal from the "judgment."

Department 2. Appeal from superior court, San Francisco county; J. C. Hebbard, Judge. Action by one Merley and others against one Boulon and others. There was a judgment for defendants, and plaintiffs appeal. Dismissed.

Smith & Murasky, for appellants. Pillsbury, Blanding & Hayne, for respondents.

DE HAVEN, J. The notice of appeal herein is addressed to the attorneys for respondents, and is in the following words: "You
will please take notice that the plaintiff substituted in the above-entitled action hereby
appeals to the supreme court of the state of
California from the order denying plaintiff's
motion for a new trial, and from an order
of said court denying plaintiff's motion to
set aside the decision and judgment in the
action, which said judgment was therein entered in the said superior court on the 16th
day of December, 1891, in favor of the de-

fendants in said action and against plaintiffs, and from the whole thereof." The appeal from the orders named in this notice was dismissed by this court, February 6, 1893; and the appellant now claims that the notice above set out is sufficient as a notice of appeal from the judgment therein described, and he insists upon his right to be heard upon such appeal. This contention cannot be sustained. The notice of appeal is certainly very awkwardly constructed, but is not ambiguous, and it cannot possibly be construed as an appeal from the judgment therein mentioned. It says nothing about an appeal from the judgment, but gives notice only that the plaintiff "appeals to the supreme court • • • from the order denying plaintiff's motion for a new trial, and from an order of said court denying plaintiff's motion to set aside the decision and judgment in the action:" and then follows a description of the judgment to which the said motion of plaintiff related; and the notice then concludes with the words "and from the whole thereof." These latter words refer to the orders previously mentioned, and indicate that the appeal is from the whole and not a part of said orders.

While notices of appeal should be liberally construed, and no appeal should be dismissed because of any misdescription of the judgment or order to which it relates, unless it appears that the respondent has been misled by such misdescription, still this rule is not liberal enough to justify us in holding that the above notice of appeal is or was intended as an appeal from a judgment. In order to constitute such a notice, the paper relied on for that purpose should at least state that the appeal is taken from a judgment; and this, considering the fact that it is not difficult to find words to properly express such an intention, is not a harsh rule. It follows from these views that the cause is not properly on our calendar, the only appeal in the case having already been disposed of; and for this reason the submission thereof is set aside, and the cause stricken from the calendar. So ordered.

We concur: McFARLAND, J.; FITZGER-ALD, J.

5 Cal. Unrep. 774

FLECKENSTEIN v. PLACER COUNTY. (No. 18,298.)

(Supreme Court of California. Sept. 29, 1894.)
COUNTY GOVERNMENT ACT—FEES OF CONSTABLES—CONSTITUTIONALITY OF PROVISIONS.

1. St. 1893, p. 452, § 184, subd. 17, which declares that subdivision 14 of the act (fixing the fees of constables) shall apply to present incumbents, applies to a constable of Placer county holding office at the time of the passage of the act.

county nothing omce at the time of the passage of the act.

2. St. 1893, p. 452, \$ 184, subd. 14, providing that the fees allowed constables for services in criminal actions other than felonies shall not exceed \$75 for any one quarter, is not in conflict with Const. art. 11, \$ 5, which makes it the

duty of the legislature to regulate the fees of officers in proportion to their duties.

3. Nor does such provision conflict with Const. art. 4, § 25, prohibiting local and special legislation affecting the fees of any officer. Department 2. Appeal from superior court,

Placer county; J. E. Prewett, Judge.

Action by one Fleckenstein against the county of Placer to recover constable's fees. Judgment was rendered in favor of plaintiff for less than the amount claimed by him, and Affirmed. he appeals.

A. K. Robinson and F. P. Tuttle, for appellant. L. L. Chamberlain, for respondent.

DE HAVEN, J. This action was brought by the appellant, a constable within the county of Placer, to recover from that county fees for services rendered by him as constable in criminal cases other than felonies. The amount demanded in the complaint is the sum of \$573.10, with interest from July 1, 1893. A judgment was rendered in the superior court in favor of plaintiff, but not for the full amount claimed. The plaintiff appeals. It is conceded by appellant that the judgment is in accordance with subdivision 14 of section 184 of the county government act approved March 24, 1893 (St. 1893, p. 452), and that the judgment must be affirmed if that provision of the act is constitutional, and applies to constables in office in the county of Placer at the date of its DARRAZE.

- 1. Subdivision 17 of section 184 of the act above mentioned declares that "the provisions of subdivision 14 of this section shall apply to present incumbents." This language clearly refers to those holding the office of constable in that county at the date of the passage of the act. It can mean nothing less, and its effect is not destroyed by the fact that the main body of the act of which section 184 is a part does not, except as in the act "otherwise provided," take effect until the first Monday after the 1st day in January, 1895. It is the intention of the act that subdivision 14 of section 184 should take effect immediately upon its approval.
- 2. Subdivision 14 of said section 184 hs not unconstitutional. It provides that constables shall have the "fees allowed by the general fee bill of 1870, provided that the amount allowed by the board of supervisors for services in criminal actions and proceedings other than felonies shall not exceed seventy-five dollars for any one quarter." This provision is not in conflict with section 5 of article 11 of the constitution of this state, which makes it the duty of the legislature, among other things, to regulate the fees of officers "in proportion to their duties." Green v. County of Fresno, 95 Cal. 329, 30 Pac. 544. Nor is the law under consideration local and special, and for that reason forbidden by the constitution.1 Longan v.

The other points urged by counsel as grounds for a reversal of the judgment do not require special discussion. Judgment af-1.11

We concur: McFARLAND, J.; FITZGER-ALD, J.

4 Cal. Unrep. 839

SCHAEFFER v. HOFMANN. (No. 15,382.) (Supreme Court of California. Sept. 29, 1894.) QUIETING TITLE—CONTEST BETWEEN VENDOR AND VENDEE-FORM OF DECREE-COSTS ON APPEAL

1. In an action to quiet title to lands, where no mortgage lien is claimed, and where the answer pleads possession under a contract of sale, and offers payment of the amount due, a judgment declaring the amount due to be a mort-gage on the land will be reversed as not war-

ranted by the pleadings.

2. Plaintiff, by a verbal contract with defendant, agreed to convey certain lands to him within five years on the payment of a certain sum. Defendant went into possession, and made improvements. Held, in an action to quiet title, that equity would require plaintiff to con-yeyon payment of the amount due within a spec-

field time, in default of which his title would be quieted.

3. Costs on appeal from two improper judgments which, if enforced, would have cast heavy expense on the appellant, are properly chargeable to respondent.

Commissioners' decision. Department 1. Appeal from superior court, Napa county; E. D. Ham, Judge.

Action by Caspar Schaeffer against Conrad Hofmann to quiet title to land. There was a personal judgment for plaintiff for a specific sum, and a final judgment making such sum a mortgage lien on the land. Said Hofmann having died, Ida Hofmann, his administratrix, was substituted as defendant, and she appeals. Reversed.

F. E. Johnson, for appellant. H. M. Barstow, for respondent.

SEARLS, C. This action is brought to quiet the title of plaintiff, and to procure him to be restored to possession of a tract of land containing about 10 acres, situate in Pope valley, county of Napa. Defendant answered, denying the allegations of plaintiff as to his right to possession of the premises; admitted that he (the said defendant) was in possession; and by way of cross complaint set out that on the 5th day of September, 1884, plaintiff and defendant entered into a verbal agreement by which plaintiff agreed to sell to him the land upon the payment by defendant to him of \$150, with interest at 8 per cent, within five years, to convey the same to defendant, etc.; defendant was to take possession of the land at once, and retain the same until payment and conveyance; that defendant entered into possession, cleared the land, fenced it, erected a house and planted a vineyard and orchard thereon, etc.;

County of Solano, 65 Cal. 122, 3 Pac. 463; Cody v. Murphey, 89 Cal. 522, 26 Pac. 1081.

⁻ Const. art. 4, \$ 25.

that defendant has always been ready and willing, and is now anxious, to pay the purchase money, and offers to pay the same into court, and asks that plaintiff be decreed to execute a deed, etc. Plaintiff answered the cross complaint, claiming, in substance, that the consideration to be paid by the defendant for the land was \$650, with interest, \$100 of which he admitted had been paid. The cause was tried by the court, and written findings waived. An interlocutory decree was entered, decreeing the defendant to be entitled to a deed of the land from plaintiff upon payment of the sum of money due as purchase money and interest, and referring the question of the amount due to the court commissioner to take testimony and report. The court commissioner reported the sum of \$594.28 due plaintiff from defendant. Thereupon, on the 80th day of January, 1893, an ordinary common-law judgment was entered in favor of plaintiff, and against defendant, for said sum of \$594.28. Thereafter, on the 13th day of February, 1893, a decree was duly filed, but which decree purports to have been signed January 30, 1893. By this decree, omitting the formal parts, it was decreed that the sum of \$594.28 due plaintiff was secured by a lien upon the land, and constituted a valid mortgage thereon, and which mortgage was ordered foreclosed, and the property sold, etc., as in ordinary cases of foreclosure sale. Defendant departed this life, and the administratrix of his estate. having been substituted as a party defendant, appeals from both judgments.

The cause comes up on the judgment roll. It is conceded by both parties that the personal judgment was improperly entered, and hence should be reversed, annulled, and set aside. As to the final decree the position of appellant is (1) that the first judgment was final, and, although not warranted by the pleadings, was valid upon its face, and no other or further judgment could be entered while it remained in force; (2) that the final decree entered February 13, 1893, holding the demand of plaintiff to be a valid and subsisting mortgage, and foreclosing the same, was not warranted by the pleadings.

It may be remarked that plaintiff, in his complaint, asked that his title be quieted. The defendant averred a contract for the purchase of the property by him, and averred a willingness to pay. Plaintiff admitted this, and practically the only difference between them was as to the amount due as purchase money. Under these circumstances. agree with what is said by appellant in the opening brief, viz.: "The court should have directed the respondent to execute the necessary conveyance upon receiving the purchase money within a limited time, and, if appellant's intestate should fail to make payment within that time, then the respondent's title be quieted, and we have possession. There would have been some equity in this kind of a judgment." We may add that there would have been complete equity in such a decree. Counsel for respondent replies: "I agree with appellant that the proper judgment to have been entered is one directing the payment by the appellant within a given period, say thirty days, of the amount found due from him, and, in default of such payment, that respondent's title be quieted."

Counsel for respondent claims that the judgment as rendered was more favorable to appellant than that to which her intestate was entitled, and hence that the costs of the appeal should be assessed against her. There were two improper judgments rendered against appellant's intestate. Upon the first of them an execution might have been levied upon, and enforced against, the property of the judgment debtor. Upon the other, the expenses of a sale would have been cast upon the property of the estate represented by the appellant; or, if she paid the demand, she would have been left without the muniment of title to which, on such payment, she was entitled. It was her right to avoid these disadvantages, and it could only be done by an appeal, the costs of which should not be visited upon appellant. Appellant in her reply brief urges that a new trial should be granted because of the improper allowance of some item of interest. It cannot be said from the judgment roll that there is any just ground for this contention.

The personal judgment of January 30, 1893, appealed from should be reversed, set aside, and annulled. The final decree of foreclosure, filed February 13, 1893, appealed from, should be reversed, and the court below directed to enter a decree requiring the respondent to execute a proper deed of conveyance to appellant as administratrix of the estate of Conrad Hofmann, deceased, of the property in dispute, upon the payment to him by appellant of the sum of \$594.28, with interest thereon from July 29, 1891, at 7 per cent. per annum, within 60 days from the entry of such decree, and, if the appellant shall fail for 60 days to make such payment, that then and in that event the title of respondent to said land and premises be quieted, and that he be restored to the possession thereof.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the personal judgment of January 30, 1893, appealed from, is reversed, set aside, and annulled. The final decree of foreclosure filed February 13, 1803, appealed from, is reversed, and the court below directed to enter a decree requiring the respondent to execute a proper deed of conveyance to appellant as administratrix of the estate of Conrad Hofmann, deceased, of the property in dispute, upon the payment to him by appellant of the sum of \$594.28, with interest thereon from July 20, 1891, at 7 per cent. per annum, with

Cal.Rep. 35-37 P.-64

in 60 days from the entry of such decree, and, if the appellant shall fall for 60 days to make such payment, that then and in that event the title of respondent to said land and premises be quieted, and that he be restored to the possession thereof.

(4 Cal. Unrep. 843)

MALVILLE v. KAPPELER. (No. 15,570.) (Supreme Court of California. Oct. 2, 1894.) SERVICES OF ATTORNEY—EMPLOYMENT BY EXECUTOR—INDIVIDUAL LIABILITY—EVIDENCE.

1. In an action to recover attorney's fees for services rendered in an action in which defendant was named as defendant both individually and as executrix, though not a necessary party thereto, it appeared that she made no claim in such prior action in her individual capacity, and she testified that she employed plaintiff merely as attorney for the estate, but this plaintiff denied. The property received by defendant in settlement of the prior action was applied to the benefit of the estate of which she was executrix, and plaintiff received an allowance from the estate for his services, under order of court. Held, that a finding that plaintiff was not employed by defendant in her individual capacity was proper.

was proper.

2. In such an action the inventory filed by the executrix, who was the wife of the testator, would not determine whether certain premises were separate or community property, and was therefore inadmissible for that purpose.

Department 1. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Action by one Malville against one Kappeler. There was a judgment for defendant, and plaintiff appeals. Affirmed.

N. B. Malville, for appellant. L. J. Hardy, Jr., for respondent.

HARRISON, J. The appellant is not entitled to recover from the respondent for his services, unless they were rendered at her request. This issue is directly presented by the pleadings, and the testimony thereon was contradictory; the plaintiff testifying that he was retained by her as her attorney in the action in which the services were rendered, and the defendant testifying that she never employed him, except as the attorney for the estate of her husband, of which she was executrix, and that for these services he had been fully paid. The finding of the court is in accordance with the testimony of the defendant, and upon this appeal must be accepted as conclusive. It may be added that the testimony of the defendant is corroborated by the circumstances under which the services were rendered. The suit was to foreclose a mortgage upon property belonging to the estate of the deceased husband of the defendant, made by him in his lifetime, and the only interest of the defendant in the property was such as she had under the will. Although she was named as a defendant individually, as well as in her representative capacity, she was not a necessary party defendant in the foreclosure suit, and in the answer which was prepared by the

plaintiff no claim was made on her behalf, except as the executrix of the will. All the property that was received in the settlement of the suit was received for and applied to the benefit of the estate of which the defendant was executrix. For the services thus rendered by the plaintiff he was allowed by the probate court the sum of \$1,500, and the court below finds that this was for all the services rendered by him in the action.

The inventory in the estate would not, for the purposes of this action, determine whether the mortgaged premises were separate or community property, and, when offered for that purpose, was properly refused by the court. The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAR-OUTTE, J.

(104 Cal. 286)

SANTA CRUZ ROCK PAVEMENT CO. v. BOWIE et al. (No. 15,616.)

(Supreme Court of California. Oct. 2, 1894.)
NEW TRIAL—SURPRISE—FORECLOSURE OF ASSESS
MENT LIEN—RIGHT TO JURY.

1. The fact that a party is misled by erroneous advice of his counsel as to the admissibility of evidence is not "surprise" for which a new trial will be granted.

2. In an action in equity to foreclose the

2. In an action in equity to foreclose the lien of an assessment for street improvements, defendant is not entitled to a jury trial, as the action is not on a contract made by him, or which imposes a personal liability on him.

Department 1. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Action by the Santa Cruz Rock Pavement Company against one Bowie and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

J. T. Rogers, for appellants. Parker & Eells, for respondent.

HARRISON, J. Assuming that, in an action to foreclose the lien of a street assessment, it is competent for the defendant to show that the work contracted for has not been done, or that the specifications for the work have been manifestly disregarded (Mc-Verry v. Kidwell, 63 Cal. 246), such a defense must not only be alleged in the answer, but must also be supported by evidence at the trial. If the court refuses to hear any evidence in support thereof, or disregards it in its decision, exception should be taken to its rulings, in order to have the same considered upon a motion for a new trial. Upon the hearing of such motion, any errors in law occurring at the trial must be presented in a bill of exceptions or statement of the case (Code Civ. Proc. § 658), and cannot be considered if presented merely in ex parte affidavits containing the evidence which was presented at the trial, and the rulings thereon.

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After the trial in the present action, the defendants gave notice of their intention to move for a new trial upon the grounds of surprise and errors in law occurring at the trial, stating that the motion as to the surprise would be made upon affidavits. their notice of intention they also specified certain particulars in which they claimed that the court erred at the trial. Subsequently, affidavits were filed on their behalf, setting forth matters which would have constituted evidence in support of their defense of nonperformance of the contract according to its terms, but which, if admissible at all, should have been offered at the trial. There is no statement or bill of exceptions in the record, and it does not appear whether this evidence was offered at the trial, unless it is to be inferred from a statement in the affidavit of the defendant Bowie that he was not prepared, at the trial, to present the matters embodied in his affidavit, for the reason that he was surprised at a ruling of the court contrary to what his attorneys had previously advised him. Erroneous views of the law, or advice of an attorney contrary to the ruling of the court, is not, however, the "surprise" for which a new trial will be granted. Klockenbaum v. Pierson, 22 Cal. 160.

The court did not err in refusing the demand for a jury trial. The action is in equity for the foreclosure of the lien of an assessment, and is not upon any contract made by the defendant (Bunery v. Bradford, 29 Cal. 75), or upon which there is any personal liability against the defendant (Taylor v. Palmer, 81 Cal. 241). In such an action, neither the constitution nor the statute requires the submission of the issues to a jury. Code Civ. Proc. § 592; Cassidy v. Sullivan, 64 Cal. 266, 28 Pac. 234.

The judgment and order are affirmed.

We concur: VAN FLEET, J.; GAR-OUTTE, J.

104 Cal. 203

WAGNER v. WAGNER. (No. 18,179.) (Supreme Court of California. Oct. 2, 1894.) DIVORCE—WILLFUL NEGLECT—RES JUDICATA.

A judgment in favor of the husband in an action by the wife for a divorce, under Civ. Code, § 105, making willful neglect of the husband to provide his wife with common necessaries a ground for divorce if such neglect continues for one year, is not a bar to a subsequent action, based on his continued neglect to support her for a year, occurring after the entry of such judgment.

In bank. Appeal from superior court, Sacramento county; A. P. Catlin, Judge.

Action for a divorce by Helena Wagner against John Wagner, upon grounds of desertion, neglect, and cruelty. Plaintiff prevailed in the court below, and defendant appeals. Affirmed.

Johnson, Johnson & Johnson, for appellant. J. H. McKune, for respondent,

HARRISON, J. The plaintiff, by this action, seeks a divorce from her husband, upon the grounds of desertion, neglect, and cruelty. Each of these grounds is alleged in the complaint as a separate count or cause of action. In the first count plaintiff alleges that the defendant deserted her June 8, 1881, and has without cause and against her will continued his desertion since that date. In the second count she alleges that since the 8th day of June, 1881, the defendant has willfully neglected to provide for her the common necessaries of life, although he has had the ability so to do. Upon the allegations of cruelty the court found in favor of the defendant, and this finding is not challenged by either party. The complaint is unverifled, and the defendant pleaded a general denial; and, as affirmative defenses, that, at the commencement of the action, there was another suit pending between the parties upon the same cause of action; and, also that in another action between them, for the same cause of action, a judgment had been rendered in favor of the defendant prior to the commencement of the present action. The court found that the defendant deserted and abandoned the plaintiff on the 1st day of June, 1889; and that since that date he had continued his desertion and abandonment: and also that since said date the defendant had willfully neglected to provide for the plaintiff the common necessaries of life, although he had had the ability so to These findings are amply sustained by the evidence. Upon the issue of neglect the plaintiff testified as follows: "Defendant has done nothing towards my support in the last two years. I have not seen him except here in court, at the trial of the last case. Defendant, since June 8, 1881, has not contributed to my support anything. my child was born, in December, 1881, he came out to see me; and I asked him to give me fifty cents to buy some medicine with, and he refused. He has never had a home since for me to go to. As he went away when my child was born, he asked me when I was coming back to live with him. I told him I would go when he had a home for me. He said that had nothing to do with it, and he has never advised me he had a home for me. * * * At a former trial defendant did, while on the stand, say, in answer to his attorney, that he wanted me to come back to him, but he did not say he had any place for me. He never had any place for me, and never offered to provide a home for me." It is true that the defendant testified at the present trial: "I offer now in good faith to take her back, and provide for her." But the court was at liberty to determine whether such statement was in reality made in good faith, and was not bound to accept his statement as conclusive.

Upon the special defenses set up in the answer, the court found that there was no action pending between the parties at the

commencement of the present action; that the judgment relied upon by the defendant as a bar was rendered in an action commenced on the 1st day of June, 1889, for causes of action existing at that time; and that said judgment was a bar to all of the acts mentioned in the complaint herein occurring before the commencement of that action, but was not a bar as against any subsequent desertion and neglect. The facts constituting these special defenses are the following: In 1887 the plaintiff commenced an action for divorce against the defendant, in the county of Yolo, upon the grounds of desertion and neglect, in which she alleged that, during all the time since their marriage, he had willfully neglected and refused to provide her with the common necessaries of life, although he had the ability so to do; and that on the 8th day of June, 1881, he deserted her, and had ever since lived separate and apart from her. Issues were joined upon these averments, and on May 13, 1889, judgment was entered in his favor. June 1, 1889, the plaintiff commenced another action for divorce against the defendant, in the county of Sacramento, upon the same grounds, alleging in her complaint that the defendant willfully deserted her more than two years before the commencement of that action; and that, for more than five years prior to the commencement of the action, he had neglected to provide for her the common necessaries of life, although he was abundantly able to do so. Upon issues joined on these averments, the superior court of Sacramento county rendered a judgment in favor of the defendant, which was entered October 24, 1889. The present action was commenced January 21, 1891.

Civ. Code, § 105, makes the willful neglect of the husband to provide for his wife the common necessaries of life, when he has the ability so to do, a ground for divorce, if such neglect continues for one year. A judgment in favor of the husband, in an action by the wife for a divorce upon this ground, could not in the nature of things be a bar to her right to assert as a ground of divorce his continued neglect to support her for a year, occurring after the entry of such judgment. The support of his wife is a continuing obligation on the part of the husband, and his fallure to meet this obligation is a continuing cause for a divorce, unless it appears to the court that there has been an unreasonable lapse of time before the action is commenced (Civ. Code, § 124); and the husband is not released from this obligation by a judgment in his favor in an action for a divorce upon this ground. If, after such judgment, he continues to disregard this obligation for the period required by the statute as a ground for a divorce, the former judgment cannot avail him as a defense. The law does not fix the amount of income which the husband must receive in order to impose upon him the obligation of supporting

his wife, nor does it attempt to designate what are the common necessaries of life. These matters vary with the varying circumstances of the parties to the marriage, and it is left to the discretion of the judge in each case to determine whether the husband's income, as well as the relation between him and his wife, are such as to impose upon him the obligation of providing for her wants; but when a husband is in constant employment, for which he receives the ordinary wages of his labor, and refuses or neglects for years to make any provision for the wants of his wife, a court is justified in finding him guilty of willful neglect. Hardy v. Hardy, 97 Cal. 125, 31 Pac. 906, has no application to the present case. That was an action brought by the wife under section 137, Civ. Code, to recover permanent support from her husband. Her right to maintain the action depended upon the fact of his desertion, without any regard to the time of its continuance. It was held that a former judgment in his favor, in an action for permanent support, based upon a specific act of desertion, was a bar to a second action based upon the same act of desertion.

Certain rulings of the court upon the admissibility of evidence are assigned as errors, but, as these rulings were with reference to evidence upon the issue of cruelty, they need not be considered. The testimony of Parish related to the defendant's neglect prior to the commencement of the former action. As the court found that this neglect was barred by the judgment in that case, it could have had no weight in determining its decision. As the order of the court must be affirmed upon the foregoing grounds, it is unnecessary to determine whether the former judgments in favor of the defendant are a bar to the plaintiff's right to a divorce upon the ground of his desertion. The order is affirmed.

We concur: FITZGERALD, J.; DE HA-VEN, J.; McFARLAND, J.

(4 Cal. Unrep. 845)

BANK OF OROVILLE v. LAWRENCE et al. (LAWRENCE, Intervener. No. 18,257.)

(Supreme Court of California. Oct. 1, 1894.)

Special Findings — Controlling Character —
Pleading—Uncertainty — Designation of Instrument—Lien of Morroage.

1. If a discrepancy exists between the general finding and the more specific findings of particular facts, the latter must control.

2. Where an instrument which is in legal effect a mortgage, and not a deed of trust, is set out in full in the complaint, the fact that it is there designated a "trust deed so being and operating as a mortgage" does not create an ambiguity in the pleading.

3. A mortgage given to secure advances up to a certain sum, if duly recorded, takes precedence of a subsequent attachment, to the extent of any balance due on such advances up to said sum

Department 1. Appeal from superior court, Placer county; M. K. Harris, Judge.



Action by the Bank of Oroville against George H. Lawrence and Nellie L. Lawrence. W. J. Lawrence intervened. Plaintiff had judgment, and defendants and intervener appeal. Reversed.

John Gale, for appellants. Harris & Lloyd, for respondent. Reardan & White, for intervener.

VAN FLEET, J. This action was brought to foreclose an instrument in the nature of a mortgage given by defendants on certain real and personal property to secure the repayment of advances, which, by its terms, plaintiff was to make to the defendant George H. Lawrence, by paying his overdrafts to the amount of \$1,800. The complaint alleges the making of advances in the aggregate of \$4,449.76, the repayment of \$3,278.86, and a balance due plaintiff of \$1,218.90, with interest in the sum of \$47.65. A demurrer by defendants was overruled, and they answered, admitting the making of the mortgage, but denying that there was any indebtedness due. There was an intervention by one W. J. Lawrence, claiming a prior lien on the mortgaged property by virtue of an attachment levied in a suit against the defendant George H. Lawrence. The court found in favor of plaintiff in the amount claimed, and in favor of the right of the intervener to a prior lien upon the personal property, but postponing his lien upon the realty to that of the plaintiff, and a decree was entered accordingly. The defendants appeal from the judgment, and the intervener from so much thereof as postpones his lien upon the real property. The appeals are based upon the findings alone.

From a mass of probative facts found, it appears in substance that the defendant George H. Lawrence, who was a butcher in the town of Oroville, desiring to buy a band of beef cattle which were for sale, and being without ready money to make the purchase, applied to the plaintiff bank. The price of the cattle was \$1,600, and the bank agreed, in consideration of the making of the mortgage in suit, to furnish the money to pay for the cattle, and to advance Lawrence \$200 besides, making in all the sum of \$1,800; the arrangement being that the bank should take the bill of sale of the cattle in its own name, and hold it as additional security for its advances. The mortgage was accordingly executed, and on the same day that it was delivered, February 17, 1893, Lawrence drew his check on the bank for \$1,800, which was honored by the bank, giving to the agent having charge of the cattle its draft for \$1,600, and taking the bill of sale, and paying to Lawrence \$200 in cash. For some reason, however, which does not clearly appear, the agent was unable to make delivery of the cattle, the sale fell through, and the \$1,600 draft was returned to the bank on February 20th, without having been negotiated or cashed. On February 28d, Lawrence paid into the bank \$100, and subsequently, to adopt the language of the finding, "on the 25th of said month of February the plaintiff, recognizing that defendant George H. Lawrence had received no benefit through the attempted purchase of said band of cattle, honored his overdrafts under the terms of said trust deed or mortgage to the extent of four hundred and sixty-five and eleven hundredths dollars (\$465.11) and in like manner, on the 27th day of said month, advanced the further sum of three hundred and ninety-five dollars (\$50)5), and in like manner, on the 1st day of the following month of March, the further sum of \$32.15. That on the 3d day of said month of March the defendant deposited with plaintiff the further sum of one hundred and forty dollars (\$140), thus leaving him indebted to the bank, upon a simple money basis, in the sum of eight hundred and fifty-two and twenty-six hundredths (\$852.26), saying nothing of interest." the 4th of March the parties were informed that the beef cattle for which they had negotiated could be purchased, and upon the promise of Lawrence that he would repay plaintiff the \$852.26 already advanced, by the 6th of March, plaintiff advanced and paid the \$1,600 for the cattle; taking the bill of sale in its own name, and the cattle into its possession, as originally agreed. Lawrence did not, however, pay the \$852.26 as promised, and plaintiff then required him to pay in cash for the cattle at the rate of \$30 per head, as he received them from plaintiff's possession, and on these terms the cattle were eventually delivered to and slaughtered by Lawrence. It is further found that on May 27th the plaintiff advanced and paid for Lawrence the sum of \$95.80 to discharge certain attachment claims against the mortgaged property. The above facts, with others of an immaterial character, are all found in finding 5. It is then found, in finding 6, "that, in view of all the deposits and payments made by said George H. Lawrence, the balance of the account on the 29th day of May, 1898 (the date of the commencement of this action), stood in favor of plaintiff and against said defendant in the sum of one thousand two hundred and eighteen and ninety hundredths dollars (\$1,218.90) principal, besides the sum of (\$46.05) forty-six and five hundredths dollars interest, at the rate of one per cent. per month as provided in said trust deed, and that the same was long overdue and payable from said defendant George H. Lawrence to plaintiff, by virtue of the terms of said overdrafts or checks, and as well also by virtue of said demand for payment of date of March 7, 1893."

The main question presented is whether the findings support the judgment, and we think it manifest that they do not. Under the issues raised the ultimate facts to be found were as to the amount of the indebtedness, if any, and whether the same was

due. It is true that the court, in finding 6, finds the balance of the account to be \$1,218.90 in plaintiff's favor, with certain interest, and that by the terms of the overdrafts the same was due; but it is perfectly evident that this finding is merely a conclusion drawn from the antecedent specific facts found in finding 5, and it will be as readily seen that these facts do not sustain the conclusion, either as to the amount of the balance standing in plaintiff's favor, or as to the fact of its being due. These findings being inconsistent, we must look to the specific facts rather than the general conclusion to find support for the judgment, upon the well-settled principle that if a discrepancy exists betwen a general finding and the more specific findings of particular facts the latter must control. Looking at finding 5, it is apparent that the lower court was under a misapprehension of the effect of the transaction in including, as one of the advances made by plaintiff, the \$1,600 draft or bill of exchange given February 17th. The sale of the cattle having fallen through at that time, and the draft having been returned to the bank and never paid, it did not constitute an advance under the mortgage, since the sum was never in fact withdrawn from the funds of the bank. This, then, left but the \$200 paid to Lawrence as the amount actually advanced on February 17th. Subsequently other advances were made, which gave a balance on March 3d of \$852.26 owing plaintiff; these advances being clearly within the terms of the mortgage, because less in amount than \$1,800. On March 4th the plaintiff advanced and paid the \$1,600 for the cattle. This advance, in excess of the security afforded by the mortgage, was made partly in consideration of the promise by Lawrence to pay back within two days the balance of \$852.26 then standing against him. This, however, he did not do, and thereupon the plaintiff required Lawrence to pay for the cattle as he got them. Right here the finding is indefinite and obscure on the point as to whether Lawrence received any of the cattle without paying for them. It is possible he may have done so before the plaintiff made the requirement that he pay cash. If he dld pay for them all at the rate of \$30 per head, he must have paid back all and a little more than their purchase price, since there were 55 head in the lot. If the fact is that there remained any unpaid portion of the sum advanced for the cattle, it should be distinctly found, in order to strike a correct As the findings leave the account, balance. the most that can be found against the defendant is the item of \$852.26, due March 3d, and the \$95.80 advanced May 27th to discharge attachments, making \$948.06. There is no way that we can discover, under the facts found, by which the balance ar-

rived at by the court can be figured out. Nor is there any sufficient finding as to the balance due when the action was commenced. Here, again, the specific facts found do not support the conclusion stated in finding 6. As to the \$852.26, the promise of Lawrence to repay that amount on March 6th was for a good consideration, and that sum became due at that date. But there is nothing whatever in the findings to show any understanding or agreement, as required in the mortgage, as to when the \$1,600, or any part of it, or the item of \$95.80 subsequently advanced, should be repaid; and as the \$852.26 cannot be traced into the final balance struck, the judgment cannot be supported, because there is nothing to show that that balance was due when the action was commenced. There being no basis, in view of the uncertainty of the findings, for a modification of the judgment, the case will have to be sent back for a new trial.

There is no other point requiring extended notice. The demurrer of defendants to plaintiff's complaint was properly overruled. The instrument sued on, while having the form of a deed, and purporting in terms to convey the title to the property, shows upon its face that it was intended as, and in legal effect is, a mortgage, and not a deed of trust. Koch v. Briggs, 14 Cal. 256. Being set out in full in the complaint, the fact that the pleader designates it as a "trust deed so being and operating as a mortgage" does not create an ambiguity or uncertainty in the pleading, since its character is to be determined from its terms. The allegation "that all said advances made by way of payment of said overdrafts were by the terms thereof, and so became immediately due and payable," is not a conclusion of law, but is, while awkwardly expressed, a sufficient allegation of the ultimate fact. The statement published by the plaintiff corporation was substantially sufficient to bring it within the law, and the court did not err in so holding. Nor did the court err, under the facts found, in postponing the lien of the intervener to that of the plaintiff upon the real estate. While the plaintiff never acquired a lien upon the personalty by virtue of his mortgage, he did upon the realty; and, the attachment of the intervener having been levied subsequently to the recordation of the mortgage, the lien of the latter took priority, to the extent of any balance found due plaintiff up to \$1,800, since the fair construction to be put upon the terms of the mortgage is that it was a continuing security for any balance of advances or overdrafts not exceeding \$1,800. Judgment reversed, and cause remanded for a new trial.

We concur: HARRISON, J.; GAR-OUTTE, J.



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104 Cal 279

BLACK v. SHARKEY. (No. 18,202.) (Supreme Court of California. Oct. 1, 1894.) DELIVERY OF DEED-EVIDENCE OF INTENTION.

. Though there is no allegation of fraud, accident, or mistake in the answer, parol evidence is admissible to show that the deed on which plaintiff relies, and which named him as grantee, was not in reality delivered, though

it was handed to him by the grantor.

2. In an action of ejectment, it appeared that, 13 years previously, plaintiff's uncle handed him a deed of the land, which stated a money consideration, but that the uncle remained in exclusive possession and paid the taxes for 10 years, until his death, as did his administrator up to the time of tripl and that plaintiff tor up to the time of trial, and that plaintiff, as county assessor, for four years, took his uncle's affidavit that he owned the property, and did not include it in his own inventory of assets under the insolvent act, but stated in conversation that his uncle turned over the land to him for a time to avoid trouble. While he had sation that his uncle turned over the land to him for a time to avoid trouble. While he had the deed, plaintiff gave the patent to the land to his uncle, telling him at the time that he had destroyed the deed, and advised him not to give defendant a deed of the land, and later expressed regret when his uncle's will, in defendant's favor, was declared void, saying that the land ought to go to defendant. Plaintiff testified that he failed to assert ownership because the deed was lost for a number of years, and he did not wish to make a claim without ability to produce a deed, and that he recorded the deed when he found it, but did not notify defendant for several months, though he knew that the administrator had commenced prothat the administrator had commenced pro-ceedings to sell the land. *Hold*, that a finding that the instrument was not intended to operate as a deed was proper.

Commissioners' decision. Department 1. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action of ejectment by Thomas Black against Miles Sharkey. Judgment was rendered in favor of defendant, and plaintiff appeals. Affirmed.

P. O. Hundley and Goodwin & Goodwin, for appellant. C. E. McLaughlin, for respondent.

VANCLIEF, C. Action of ejectment in which the judgment was in favor of the defendant, and plaintiff appeals. plaint is in the most general form, alleging plaintiff's ownership and right of possession, and an ouster and withholding of possession by defendant; and the answer is a specific denial of all allegations of the complaint, except as to the withholding of possession. James Sharkey, uncle of defendant, was the owner of the demanded premises on May 13, 1878; and plaintiff claims title under him by a deed of conveyance of that date, which purports to be an absolute bargain and sale deed, in consideration of \$600, the payment of which is acknowledged in the deed. The evidence satisfactorily shows that the deed was signed. acknowledged, and placed in the custody or possession of plaintin by James Sharkey at or about the time of its date, where it remained until the commencement of this action,—a period of 13 years. James Sharkey continued to reside on the land described in the deed until December 15, 1888, when he died; and defendant, as administrator of James Sharkey, has been in possession ever since. The plaintiff never had actual possession of the land, and never received any rent or profit therefrom. On the trial the defendant contended that the deed was never delivered to plaintiff in the sense required by law to give it effect as a conveyance of the land, for the reason that neither party ever intended that it should have such effect; and the trial court sustained this view.

 Counsel for appellant contend that, inasmuch as there is no allegation of fraud, accident, or mistake in the answer, no evidence dehors the deed was admissible to prove the intention with which the deed was placed in the custody or possession of plaintiff, and especially not admissible to prove that the parties did not intend that the deed should take effect according to its terms. it is true that the possession of a deed by the grantee is prima facle evidence that such deed was delivered by the grantor with intent that it should take effect according to its terms, yet such possession is not conclusive evidence of a valid delivery; and "it may be shown by parol evidence that a deed in the possession of the grantee was not delivered." Devl. Deeds, §§ 294, 295, and au-"And even if the deed thorities there cited. is deposited with the grantee, but for a purpose other than delivery, it would not take effect as a deed; nor can a title be derived from a deed which has not been delivered. While, therefore, it is not competent to control a deed by parol evidence where it has taken effect by delivery, it is always competent by such evidence to show that the deed, though in the grantee's hands, has never been delivered." Washb. Real Prop. p. 311. And it is also well settled that a deed which has always remained in the hands of the grantor may be shown to have been duly delivered. Says Mr. Devlin (section 269): "Actual manual delivery and change of possession are not required in order to constitute an effectual delivery; but whether there has been a valid delivery or not must be decided by determining what was the intention of the grantor, and by regarding the particular circumstances of the case." In the case of Hastings v. Vaughn, 5 Cal. 316, it was "Delivery is a qestion of fact, depending more upon intention than upon the mode of fulfilling the intention." In Hibberd v. Smith, 67 Cal. 547, 4 Pac. 473, and 8 Pac. 46, it was said: "The act, solemn and authentic, done in writing in form apt for the conveyance of land, with signature and seal, does not take effect as a deed until delivery with intent that it shall operate. The intent with which it is delivered is all important. This restricts or enlarges the effect of the instrument." To the same effect is the case of Denis v. Velati, 06 Cal. 223, 31 Pac. 1. In all these cases extrinsic parol evidence was admitted to prove the intent. As strong cases to the same effect in other states, see Stewart v. Stewart, 50 Wis. 445, 7 N. W. 369; Knolls v. Barnhart, 71 N. Y. 474. I think, therefore, that the court did not err in admitting extrinsic evidence tending to prove that the deed was neither delivered by defendant nor accepted by plaintiff with the intent that it should take effect as a conveyance of the land.

2. Counsel for appellant contend that, even if the evidence was admissible, it was insufficient to justify the finding of the court. It must be conceded, not only that the burden of proof was upon the defendant, but that, to sustain it, the proof on his part must have been strong and satisfactorily convincing; and it seems to have been so, though mostly circumstantial. (a) As above stated, the plaintiff was never in possession of the land, and never received any rents or profits during the 13 years between the date of the deed and the commencement of this action. (b) James Sharkey remained in the exclusive possession, claiming to be owner, until he died,a period of 10 years,-and during this period paid all the taxes; and his administrator has been in possession and has paid all the taxes ever since. (c) During four years of the period that James Sharkey was in possession, the plaintiff was assessor of the county of Plumas, in which the land is situate, and, as such assessor, officially and personally assessed the land for each year of its term of office, to James Sharkey, as owner, and, prior to each assessment, administered to Sharkey the oath, required by law, that the list of property (including the land in question) assessed to him was correct; the written description of the land in each list being in the undisputed handwriting of the plaintiff. On the occasion of one of these assessments, Sharkey complained to him that his valuation of the land was too high, to which plaintiff answered that he did not think so. (d) On July 12, 1886, plaintiff filed in the superior court of Plumas county his voluntary petition as an insolvent debtor, and annexed thereto an inventory purporting to contain an accurate description of all his estate, both real and personal. This inventory was verified by his oath, as required by the insolvent act; but it contained no description of nor reference to the land in question. (e) O. McElroy testified, in substance, that, about 18 or 14 years before the trial, he had a conversation with plaintiff, in which plaintiff told him that Sharkey was getting old and childish, and imagined that he might have trouble about his land, and for that reason "turned the land over to plaintiff for a time;" but said nothing about a deed. (f) Defendant testified that in 1882, in his presence, plaintiff handed to James Sharkey the United States patent for the land, saying, "Here, Uncle Jimmy, is your patent;" that Sharkey asked plaintiff, "What ever became of that deed?" and plaintiff an-

swered that "he destroyed it;" and it was admitted that the patent was in Sharkey's possession at the time of his death. Defendant further testified that in 1884 plaintiff told him "to take care of the old man, and, when the old man would die, he would leave me his property;" that in 1884 or 1885 James Sharkey proposed to deed the land to defendant, and they went to plaintiff's store to have plaintiff draw the deed, but he would not draw the deed, and advised James Sharkey not to make such a deed, for the reason that, if he did, defendant "could kick him out any time," but said nothing about his deed for the property, or his claim to be the owner of it; that in 1888, after the death of James Sharkey, plaintiff advised defendant to settle up the estate, and let it in his own name, and accompanied defendant to the county seat for the purpose of assisting him to that end. (g) It appears that James Sharkey had attempted to make a will giving his property to defendant, and, when plaintiff and defendant went to the county seat for the purpose of commencing proceedings to settle the estate, they called on Mr. McLaughlin, defendant's attorney herein, for advice. As to what was said by plaintiff on that occasion Mr. McLaughlin testified as follows: "On the 28th of December, 1888, Miles Sharkey and Thomas Black, the plaintiff and defendant in this action, came to my office, and presented to me a document purporting to be the last will and testament of James Sharkey. I told them it was not a will in law. When I told them it was not a will, Mr. Black said to me: 'It is too bad. Uncle Jimmy always intended that land should go to Miles. What will be the result if this is not a will?' I said, after the payment of the debts and costs of administration, it must be distributed among the heirs of James Sharkey. He said: "That is too bad, too bad. I am sorry there was a mistake. The land should belong to Miles Sharkey.' When it came to filling in the petition for letters of administration, Miles Sharkey said nothing. When it came to a description of the real estate, Mr. Black said: 'Well, there is Uncle Jimmy's homestead in Sierra valley. I can't give you the numbers. but you will find them in the assessment roll of 1888." (h) There was the testimony of two other witnesses tending in a slight degree to impeach the character of the plaintiff for truth and veracity, but his own testimony, in connection with undisputed facts and circumstances, was more damaging. The only evidence on the part of the plaintiff in rebuttal, except his own testimony, was the testimony of James Collins as to plaintiff's character. By his own testimony, he neither denied nor attempted to explain the evidence for the defense showing his assessment of the land to plaintiff as owner, nor that showing that he did not include the land in his insolvency inventory, nor did he deny any part of the testimony of Mr. McLaughlin, but he simply denied all the material testimony

of the defendant. Upon being asked why he did not set up his ownership of the land at the time McLaughlin pronounced James Sharkey's will invalid, he answered: "There was several years that that deed was lost. If I had gone to work and said I owned that land by a deed, and could not produce it, it would have been like many other blunders. They would have laughed at me. Therefore I said nothing in regard to it because of the loss. It was not recorded. Very soon after, I found it, and got it recorded." He further testified that the deed had been lost seven years before he found it; that his little child found it in his woodshed; but that he did not notify the defendant or lay any claim to the land until three or four months after he found the deed, though he knew, before he found it, that proceedings for an administrator's sale of the land had been commenced and were pending in the probate court.

I think the judgment should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

104 Cal. 344

BAXTER v. HART. (No. 19,425.)
(Supreme Court of California. Oct. 2, 1894.)
PARTIES PLAINTIFF—TRANSFEE OF INTEREST—
PLEADING—WAIVER OF DEFECT.

1. Where one of the parties jointly interested in a contract for threshing grain agrees that the other shall receive all of the benefits thereunder, the latter, being the real party in interest, is the only proper party plaintiff in an action thereon.

2. The objection that one of the joint obligees in a contract, in an action thereon by himself alone failed to not out in his parties.

2. The objection that one of the joint obligees in a contract, in an action thereon by himself alone, failed to set out in his complaint, the agreement by which he acquired the other party's interest, cannot be raised for the first time on appeal, evidence of such agreement having been admitted below.

Commissioners' decision. Department 2. Appeal from superior court, Kern county; A. R. Conklin, Judge.

Action by J. L. Baxter against Moses Hart. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Patten & Graham and R. J. Ashe, for appellant. Robinson & Haralson, for respondent.

SEARLS, C. This action was brought to recover \$391.93 for services performed by plaintiff in threshing wheat and barley for defendant. The complaint was not verified, and the answer was a general denial of its allegations. The cause was tried by the court, written findings filed, and judgment rendered thereon as prayed for in the complaint. The appeal is from the final judgment, was taken within 60 days after rendition of judgment, and is supported by a bill of exceptions. The testimony was conflicting. There was testimony tending to show

the following state of facts: Plaintiff and one Flanigan owned a threshing machine, and were engaged as partners in threshing grain for farmers. Said Flanigan and defendant were also partners in the crop of grain threshed. Flanigan arranged with defendant for the threshing, and each of them was to pay separately for one-half of the threshing. Plaintiff and Flanigan then agreed that they would not thresh the crop as copartners, but that the pay coming from defendant should all go to plaintiff, and that Flanigan's grain should be threshed for him free to offset the other half. It did not appear that this arrangement between plaintiffs was known to defendant until after the grain was threshed. There was no plea of a nonjoinder of parties, and no objections to testimony.

The only question in the case is, does this testimony support the finding that defendant is indebted to plaintiff in the sum of \$391.98 for the threshing of defendant's crop of wheat and barley, etc.? No reason is perceived why plaintiff and Flanigan could not, as between themselves, although copartners, agree that, as to a given venture or contract, plaintiff should have the entire benefit, as they might have assigned the demand arising therefrom one to the other after completion of such venture or contract. Had: detendant presented a counterclaim against the firm held by him before notice of this arrangement, it would have been valid to defeat the claim; but, in the absence of such a cross demand, it is not perceived that he can be injured by a judgment for that which he was bound to pay. The case, then, stands thus: Plaintiff and Flanigan entered into a contract jointly with defendant, and then, by an agreement between themselves, stipulated that plaintiff should be the recipient of the entire benefit thereof. This constituted him the real party in interest as between himself and his copartner, and, as a result, he was the proper and only proper party plaintiff. In pleading the facts, however, the joint contract and the special agreement between plaintiff and Flanigan whereby the former became the owner of the claim should have been set out. It was omitted, and defendant might have objected at the trial to the introduction of the evidence of the joint contract and the agreement between plaintiff and his copartner. This was not done; and, the evidence having shown the right of plaintiff to recover, it is now, on appeal, too late to raise the objection for the first time. Had the objection been made at or before the trial, it could have been obviated by an amendment of the complaint. By not being taken, it was waived. The judgment appealed from should be affirmed.

We concur: TEMPLE, C.; BELCHER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

104 Cal. 218

JACOBS v. ELLIOTT, County Clerk. (No. 18,265.)

(Supreme Court of California. Oct. 2, 1894.) JURORS' FEES-ATTENDANCE ON COURT.

Under St. 1871-72, p. 188, § 1, amending Act 1870, § 28, and providing that jurors shall receive a certain sum per diem for "attendance" upon court, a juror is not entitled to fees for the time during which he is dismissed from attendance on the court before his final discharge.

Commissioners' decision. Department 2. Appeal from superior court, Merced county; J. K. Law, Judge.

Mandamus by A. Jacobs against J. G. Elliott, county clerk. There was a judgment for defendant, and plaintiff appeals. Af-

James F. Peck, for appellant. B. F. Fowler, for respondent.

SEARLS, C. This is a proceeding under a writ of mandate sued out by appellant to command respondent, as county clerk of the county of Merced, to issue to him, the said appellant, a certificate showing and certifying to his attendance in and upon the superior court in and for said county of Merced as a trial juror, and that he is entitled to pay for 51 days, and to like pay for one mile travel as such juror. The cause was submitted upon the petition, answer, and agreed statement, upon which the court below found in favor of respondent, and entered judgment discharging an alternative writ of mandate theretofore issued in the cause, and awarding costs against the appellant. The appeal is from the judgment discharging the writ.

The petitioner was in all respects competent to serve as a trial juror in the county of Merced, and was regularly drawn, summoned, and on the 23d day of March, 1891, appeared as a juror in the superior court in and for said county of Merced, and served as such juror for three days, viz. until and including March 25, 1891. On said last-mentioned day. petitioner and other jurors in attendance on said court as jurors were, by order of the court, duly entered, excused from attendance; and by subsequent like orders, of all of which petitioner was duly notified, he was excused from and did not attend as or serve as a juror until May 19, 1891, when he duly appeared and served for two days, at the end of which time he was finally discharged. The question to be determined is this: Was petitioner, under the law, entitled to pay for the 51 days intervening between his first appearance and his final discharge, or only for the 5 days of his actual service?

The superior courts of the several counties of the state are required in the month of January in each year to make an order designating the estimated number of trial jurors required for the transaction of the business of the court and the trial of causes therein for the ensuing year; and thereupon the supervisors are required to select a list of pealed from is affirmed and by GOOGIC

persons competent to serve, as required by the court, and place the same in the possession of the county clerk, who shall place the names upon separate pieces of paper, fold and place them in a box to be called the "trial jury box." "The persons whose names are so returned shall be known as regular jurors, and shall serve for one year, and until other persons are selected and returned." Code Civ. Proc. \$\$ 204-211. The following sections of the same Code provide that, when the business of the superior court requires the attendance of a trial jury, it shall require it to be drawn and summoned to attend the court at a time to be designated. These provisions of the Code are full and explicit as to the mode of selecting, drawing, and securing the attendance of jurors for the superior court, but make no provision for their compensation. Their pay is regulated in most if not all of the counties of the state by the act of 1872. St. 1871-72, p. 188. By the first section of that act, which amends section 28 of the act of 1870, it is provided as follows: "Grand and trial jurors shall receive two dollars per day for attendance upon a court of record," etc., provided that in certain counties, of which Merced is one, "grand and trial jurors shall receive three dollars per day." From the foregoing provisions it will be observed: (1) That persons become and "shall be known as regular jurors" by being selected and having their names deposited in the designated manner in the designated receptacle. (2) They become entitled to the fixed compensation only when their names are drawn therefrom, and they are summoned and attend upon a court of record. The compensation comes, not by virtue of the quasi office, but at so much per diem for attendance on the court. Jurors are subject to the orders of the court. It designates the time when their attendance shall commence. and its duration. It may excuse them for cause, and may discharge the whole panel at will. Having general authority to command the presence of the jury, and by virtue of sundry statutes as well as by that inherent authority which comes from the common law and attaches to courts of record, it is not doubted but that the superior court may, in furtherance of the public interest, dismiss from attendance upon it for a limited and specified time the jurors in attendance, without finally discharging them from their duties: and, as their compensation is only given for attendance, they are not entitled, when so excused, to the per diem fixed by the statute. As the clerk of the superior court did not refuce to the appellant the certificate for five days' attendance and the mileage to which it was conceded he was entitled, the judgment of the court below should be affirmed.

We concur: BELCHER, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment ap104 Cal. 273

PEOPLE v. NEARY. (No. 21,098.) (Supreme Court of California. Oct. 4, 1894.) Homicide—Trial—Evidence—Burden of Proof

-Reasonable Doubt.

1. When arraigned, defendant is not entitled to have read to him a list of the witnesses examined.

2. In a trial for murder, where evidence has been given to show ill will between defendant and deceased and threats of the former against the latter, it is not error to call the attention of the jury to such evidence, where the evident purpose is to warn them against giving

much importance to the same.

3. In a trial for murder, after stating that, where the killing by defendant is shown, the burden is upon him of proving circumstances which would mitigate the same, a charge that it was not necessary that defendant prove affirmatively that he did not intend such consequences, if there exists a reasonable doubt that he is guilty, is not erroneous where the court further charges that "the commission of homicide by defendant, if proved, does not cast on him the burden of proving circumstances of mitigation or excuse by a preponderance of evidence."

4. In a trial for the murder of a wife by her husband, it appeared that, a few minutes before the killing, their daughter left them in their house, eating at a table; that, on her return, defendant was trying to lift deceased from the floor, and that she died immediately; that defendant's explanation was that he and deceased had an altercation, and that a butcher knife which he threw on the table glanced therefrom, and struck the deceased; that the relation between husband and wife had been unpleasant; that the knife entered the abdomen of deceased, making an incision nine inches long, the entire length of the blade. Held, that a conviction would not be set aside.

In bank. Appeal from superior court, Santa Cruz county; J. H. Logan, Judge.

James M. Neary was convicted of murder, and appeals. Affirmed.

Bart Burke, Charles B. Younger, and Reddy, Campbell & Metson, for appellant. Carl E. L. Lindsay, Dist. Atty., Wm. H. H. Hart, Atty. Gen., and Charles H. Jackson, Dep. Atty. Gen., for the People.

McFARLAND, J. Appellant was charged by information with the murder of his wife, Catherine Neary, and was convicted of murder in the second degree. He appeals from the judgment, and from an order denying his motion for a new trial.

1. Appellant objected to being required to plead upon the ground that he had not been arraigned, because there was not read to him at the time of his alleged arraignment a list of witnesses. Assuming that the point sought to be presented can be raised upon such an objection without moving to set aside the information, still, as there is no requirement that the names of witnesses shall be indorsed upon an information, section 943, Pen. Code, applying only to indictments, the "list of witnesses" mentioned in section 988 can apply only to an arraignment in a case where there has been an indictment. People v. Sherman (Cal.) 32 Pac. 879.

2. The court did not err in denying appellant's challenge to the panel on the alleged

ground of the disqualification of the officer who summoned the jurors. Waiving all other questions, the evidence on the point was not of such a character as to give us warrant to declare that the court erred in holding it insufficient to establish the disqualification of the officer.

3. The court did not err in overruling appellant's objection to the testimony of the coroner as to a certain statement made to him by appellant touching the cause of his wife's death. In the first place, the statement was not a confession, and therefore not subject to the rule that a confession must first be shown to have been made freely and voluntarily, etc.; and, in the second place, it was the same statement that was made to several other persons, and does seem to have been made freely and voluntarily.

4. We see no prejudicial error committed by the court in giving or refusing instructions to the jury. The court had the right to tell the jury that there had been evidence offered "tending" to show ill will between appellant and deceased, and threats by the former against the latter, for there certainly was some evidence that had that tendency. Moreover, the court made the statement clearly for the purpose of warning the jury against attaching much importance to such evidence, and immediately proceeded to impress that warning in language that occupies nearly two pages of the printed transcript. Evidently, appellant was not prejudiced by this part of the court's charge. We do not think that the part of the charge pointed out in point 5 of appellant's original points and authorities can be construed as telling the jury that appellant could be convicted solely upon his own admissions. Appellant objects to a certain part of the charge in which the word "demonstrate" is used. This part of the charge was also intended to be and was favorable to the appellant. The court, having stated the rule laid down in section 1105, Pen. Code, that, the commission of the homicide by appellant being shown, the burden was upon him of proving circumstances which would mitigate, justify, or excuse, used this language: "But you will observe in this connection that the burden of proof thus cast upon defendant is not used in any literal sense. It is not necessary that defendant shall in this matter, any more than in any other, prove affirmatively that he did not intend such consequences. It is sufficient that he demonstrate to your understanding, by testimony given, by inferences correctly and properly drawn from the whole testimony in the case, that, notwithstanding the burden so cast upon him, there still exists in your mind a reasonable doubt of his guilt. In the trial of every criminal case, the law, at the outset, clothes the defendant with the presumption of innocence until his guilt is proven beyond a reasonable doubt; and this presumption attaches at every stage of the case and to every fact essential to a conviction." Moreover, at the request of appellant, the court gave other instructions upon this subject, and, among others, the following: "The commission of homicide by the defendant, if proved, does not cast on him the burden of proving circumstances of mitigation or excuse by a preponderance of evidence. If the evidence introduced, either on the part of the prosecution or the defense, creates in the minds of the jury a reasonable doubt as to whether the act was justifiable or excusable, or whether it was caused accidentally or feloniously, you should acquit the defend-These instructions, notwithstanding the unhappy use of the word "demonstrate." state the law upon the point involved as favorably to appellant as could be reasonably expected, and go fully as far as People v. Bushton, 80 Cal. 160, 22 Pac. 127, 549. We see no errors in the refusal of the few instructions asked by appellant which were refused. They were covered by the many instructions given. Neither were there any errors in the few amendments made by the court to the instructions asked. The court gave more than 30 instructions asked by appellant, and the charge of the court of its own motion was quite lengthy; and all the instructions, taken together, stated the law, not only fairly, but most favorably to appel-

5. The only serious question in the case is whether the evidence was sufficient to justify the verdict, or, rather, whether it should be held here that the court below erred in not granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict. At the time the deceased received the wound which caused her death, there was no one present other than the deceased and the appellant. A few moments before it occurred, their little daughter had left them seated at a small table in a room of their house, at which they were eating, and had gone out to the well for some water. When she returned, she saw the deceased lying on the floor, and the appellant was taking her She died immediately. Neighbors soon came in, and the explanation of his wife's death which the appellant then gave, and which he always afterwards gave to others (he did not testify at the trial), was, substantially, that the deceased and himself had been out together somewhere, and had just returned home, and sat down to the table to eat supper; that a little altercation had taken place between them; that they had contradicted each other about some matters of difference; that he said, "That is not so, threw a butcher knife which he had in his hand upon the table; and that the knife got out of his hand, and glanced or bounded from the table, and struck the deceased, making the wound which caused her death. It was amply shown that his character was good. The relations between him and the deceased had not been pleasant, although the trend of the testimony was to the point that she was

of an unamiable and irritable disposition, and did most of the quarreling; he generally remaining silent when she found fault with him, at least when in the presence of others. However, he complained to a friend of the difficulty he had in getting along with her. It is contended strenuously by counsel for appellant that the evidence was not inconsistent with the theory of his innocence, and that, therefore, he should have been acquitted. But there were many things to be considered by the jury in determining whether or not his account of the homicide was true. His story, though not entirely impossible, was not prob-The kuife, which entered the abdomen, made an incision into the person of the deceased 9 inches long,-the entire length of the blade of the knife. It passed through the skin, through fatty tissue from 11/2 to 2 inches thick, through the muscles of the abdomen, and through the intestines, to the muscles of the back. Nothing appears in the record as to the sharpness of the knife, but the jury The character and direction of the saw it. wound, the relative positions of the parties when last seen, the disposition made of the knife after the occurrence, the prior feelings of the parties towards each other, the appearance and manner of the witnesses,-these and many other things, which cannot be pictured here as they were in the trial court, were legitimate matters to be considered by the jury in coming to their conclusion. Moreover, weight must be given to the denial of a new trial by the judge of the trial court, not only because he had the advantage of observing the witnesses and seeing the whole trial but because it is his province and duty to pass, in the first instance, upon questions in volving the sufficiency of evidence. After carefully examining the whole case, and giving due weight to every consideration urged by counsel for appellant, we do not feel it our duty to disturb the denial of a new trial by the court below. Judgment and order affirmed.

We concur: BEATTY, C. J.; FITZGER-ALD, J.; HARRISON, J.; GAROUTTE, J.

104 Cal. 269

TOON v. HUBERTY. (No. 18,299.)
(Supreme Court of California. Sept. 29, 1:94.)
MARRIAGE—CONSENT WITHOUT SOLEMNIZATION.

Civ. Code, § 55, provides that mere consent, without solemnization or a mutual assumption of marital rights and duties, does not constitute a valid marriage. Civ. Code, § 75, provides for the signing and recording of a declaration of marriage by all persons married without a solemnization. Held, that such declaration does not constitute a valid marriage, in the absence of a mutual assumption of marital rights and duties.

Department 2. Appeal from superior court, Calaveras county; C. V. Gottschalk, Judge.

Action by Charles T. Toon against Mary Huberty, alias Mary Toon, to determine the validity of their marriage. Judgment for plaintiff, and defendant appeals. Affirmed.

Snyder & Snyder and Colin Campbell, for appellant. Paul C. Morf, for respondent.

BEATTY, C. J. This is an action to obtain a decree adjudging and declaring that the plaintiff and defendant never were and are not husband and wife, and for the cancellation of a declaration of marriage. The defendant made default, and the court made and entered its judgment and decree in accordance with the prayer of the complaint. From this decree the defendant appeals, and the only question to be determined is whether the complaint makes a case for the relief granted. Appellant contends that the facts alleged in the complaint constitute a valid marriage. It appears that the parties united in a declaration of marriage, conforming in all respects to the requirements of section 75 of the Civil Code,1 which was duly witnessed, acknowledged, and recorded; but, prior to and at the time of making said declaration, it was expressly and mutually agreed by the parties that they should never assume any marital rights, duties, or obligations, and should not cohabit as husband and wife, but should live separate and apart from each other, and they have ever since lived separate and apart and independent of each other.

Consent alone does not constitute marriage; it must be followed by solemnization, or by a mutual assumption of marital rights, duties, or obligations. Civ. Code, § 55. It is conceded that in this case there was never any assumption of marital rights, duties, or obligations, but appellant contends that the signing, acknowledging, and recording of the declaration of marriage was solemnization. The statute will not, in our opinion, bear this construction. Civ. Code, §§ 68-79. On the facts alleged and found, there was no marriage. Judgment affirmed.

We concur: McFARLAND, J.; DE HAVEN, J.

CRAIG et al. v. PUEBLO PRESS PUB. CO. (Court of Appeals of Colorado. Sept. 24, 1894.)

LIBEL-SUFFICIENCY OF COMPLAINT.

Where the complaint alleges that, at the time of the publication of the allegel libel, plaintiffs were controlling and doing all, or almost all, of a certain kind of business in a certain city, and the libelous article, though it does not specifically describe the persons to whom it refers, yet refers to them as "Dagos" owning and controlling nearly the whole of such business, it sufficiently shows the application of the publication to them, though they were not in fact Dagos.

Error to district court, Pueblo county.

Action by Henry Craig and J. D. Sexton, partners as Craig & Sexton, against the Pueblo Press Publishing Company. There was a judgment for defendant, and plaintiffs bring error. Reversed.

J. J. McFeely, for plaintiffs in error. Drake & Collins and W. T. Jenison, for defendant in error.

THOMSON, J. The complaint, after alleging that the defendant, the Pueblo Press Publishing Company, was a corporation engaged in the printing and publishing of a newspaper in the county of Pueblo, having a general circulation in that county, and known as the "Pueblo Press," proceeds as follows: "Plaintiffs further say that they are a company composed of Henry Craig and J. D. Sexton, doing business under the name and style of Craig & Sexton, and they are now, and have been for six or seven months last past, engaged in the business of making and selling tomales in the city of Pueblo, county of Pueblo, and state of Colorado; that on the 28th day of November, 1891, to be referred to hereafter, plaintiffs were, and had been for some time immediately prior thereto, controlling, owning, and doing all, or almost all, of said business then and there being done within said city of Pueblo, county and state aforesaid; that plaintiffs had, by strict attention to business, honesty, and fair dealing towards their customers, built up said business until the daily receipts therefrom aggregated the sum of about \$10 per day net profit; and that plaintiffs are, and from their youth have been, of good fame and reputation among their neighbors for honesty and propriety of conduct, and are and ever have been free from the atrocious crime of selling diseased or unwholesome articles of food, and never were suspected of that crime, but have always supported themselves by honest and industrious attention to their said business and calling. Nevertheless, the defendant, not being ignorant of the premises, but fraudulently, maliciously, and wickedly contriving to injure, blacken, and defame the plaintiffs in their good fame and reputation, and injure them in their trade, and expose them to the pains and penalties prescribed by law for selling diseased and unwholesome articles of food, did on November 28, 1891, at the city of Pueblo, county of Pueblo, state of Colorado, utter, publish, and proclaim in the English language, through the columns of said newspaper called the 'Pueblo Press,' as aforesaid, the following false, malicious, and scandalous words of and concerning the plaintiffs, to wit: 'That fellow over there (meaning the plaintiffs) is dishing out to a confiding and unsuspecting public food rotten and poisonous as well (meaning the said plaintiffs, in the business as aforesaid, was selling rotten and poisonous food to the public, and that) (meaning

¹ Civ. Code, § 75. provides that "persons married without the solemnization provided for in section 70 must jointly make a declaration of marriage showing: (1) The names, ages, and residence of the parties: (2) The fact of marriage: (3) The time of marriage: (4) That the marriage has not been solemnized."

the defendant) would not eat one of them for a \$5.00 bill (meaning one of the tomales being sold by these plaintiffs as aforesaid). That nearly the whole business of Pueblo (meaning thereby the tomale business) is owned and controlled by one company, its members being Dagos (meaning thereby these plaintiffs). The tomales (meaning thereby the tomales made and sold by these plaintiffs) were made of hotel offal and other vile meats, mixed with meal (meaning thereby that these plaintiffs make and sell tomales, in their business as aforesaid, of hotel offal and other vile meats). Sometimes the meat actually stinks (meaning thereby the meats used by the plaintiffs in making tomales for sale in their business as aforesaid) but as the purchaser gets the tomales (meaning thereby those who purchase tomales of these plaintiffs) served hot, the odor of meal predominates, and the stink is not noticed (meaning thereby the stink of the vile meats used in making said tomales by plaintiffs as Let them once get cold, and aforesaid). try to eat a tomale, and you will soon find out (meaning thereby that, if said tomales sold by plaintiffs as aforesaid get cold before eating, you would find them stinking, from being made out of vile meats as aforesaid). That now one might expect to hear of chicken tomales (meaning thereby that chicken tomales would be made by these plaintiffs). The chicken part (meaning the part of said tomales made out of chicken by these plaintiffs) would be the offal of Thanksgiving meals at private residences, hotels, and restaurants.' Plaintiffs further aver that on December 3, 1891, at the city of Pueblo, county and state aforesaid, in aforesaid paper, the defendant did utter, publish, and proclaim the following false, scandalous, and malicious words of and concerning the plaintiffs, to wit: 'This paper (meaning thereby aforesaid paper published by defendant) has told the truth, and in fact only half of what it knows (meaning thereby the aforesaid malicious, false, and scandalous words published by it on November 28, 1891, were true). A prominent chemist is now analyzing three of the alleged tomales (meaning thereby said tomales made by said plaintiffs), and as soon as his work (meaning said chemist's work as aforesaid) is finished the result will be published. It is also known where three barrels of chickens were bought for a dollar a barrel because they were tainted (meaning thereby that said plaintiffs had bought said chickens for use in making said tomales). It can also produce evidence (meaning thereby that said defendant can produce evidence), sworn, from seven men made sick by eating tomales' (meaning thereby that said men were made sick by eating tomales bought of these plaintiffs, because of the said tomales having been made out of vile meats as aforesaid), by means of which false, scandalous, and malicious words the plaintiffs have been greatly injured in

their good name and reputation, and have suffered great anxiety of mind, and have been exposed to a prosecution for selling articles of food that was diseased and unwholesome, and have been greatly damaged in their business, to the damages of the plaintiffs in the sum of \$5,000." The answer of the defendant admitted that it was a corporation engaged in printing and publishing a newspaper in Pueblo county, having a general circulation in that county, but denied all the other averments of the complaint. The cause proceeded to trial, and evidence for the plaintiffs was given which showed the publication by the defendant of the matters complained of. The evidence also tended to prove that the publication was intended to apply to the plaintiffs, that it was understood by the public as applying to them, and that as a consequence their business suffered serious injury. It was shown that the plaintiffs were not Dagos, that they had not been classed as Dagos among their neighbors or by the public, that they were the only firm in the city engaged in the manufacture and sale of tomales, and that none were made or sold by Dagos. At the close of plaintiffs' case the defendant moved the court for a judgment of nonsuit. The motion was sustained, and judgment given for the defendant, to reverse which the plaintiffs prosecute this appeal.

The only question we are required to determine relates to the sufficiency of the complaint. The libelous character of the published words is not, and can not very well be, questioned; but it is contended that on their face they do not refer to the plaintiffs, and that the complaint does not contain the necessary averments to show the application of the defamatory matter to them. The persons alluded to in the libelous publication were termed "Dagos," and the plaintiffs were not Dagos, but the persons intended were otherwise described in such manner that their identity could easily be fixed. In reference to these persons it was stated in the publication that nearly the whole business of Pueblo was owned and controlled by one company. From this description it could not have been difficult for the citizens of Pueblo to ascertain what persons were meant, notwithstanding they were not named, and notwithstanding the term "Dagos" was applied to them. Section 68 of the Code provides that in actions for libel or slander it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff. It has been held under a similar statute that, even where the person against whom the libelous charge is made is so ambiguously described that without the aid of extrinsic facts his identity cannot be ascertained, it is sufficient to state

generally that it was published concerning the plaintiff, and that the averments and colloquium which were formerly necessary to connect the libel with the plaintiff may be dispensed with. Petsch v. Printing Co., 40 Minn. 291, 41 N. W. 1034. The complaint avers that the words in question were published of and concerning the plaintiffs, and upon the authority of the case cited no further allegation was requisite to apply the words to the plaintiffs; but, conceding that this averment is not sufficient in itself, and that the allegation of some extrinsic fact or facts identifying the plaintiffs with the persons alluded to in the publication was necessary, we find a statement in the complaint which fully satisfies the requirement. It is set forth by way of inducement that at the time of the publication the plaintiffs were, and had been for some time previously, controlling, owning, and doing all, or almost all, of the business mentioned, which was being done within the city of Pueblo. This is substantially the language used in the publication to describe the persons to whom it referred, and is a sufficient identification of the plaintiffs as being those persons. We are of the opinion that the defendant's objection to the complaint is not well taken, and as the evidence given was ample, in the absence of any showing by the defendant, to authorize a verdict for the plaintiffs, the court erred in granting the nonsuit. The judgment must be reversed. Reversed.

DWELLE v. PLUMMER.

(Court of Appeals of Colorado. Sept. 24, 1894.)

Officer of Voluntary Association—Powers.

A person who is merely acting as treasurer of a voluntary association, without having been elected to the office.—the original appointee having gone out of office,—whose constitution provides that the treasurer shall have the custody of its personalty, cannot sue for the recovery of such property.

Appeal from Arapahoe county court.
Action by L. C. Dwelle against F. E. Plummer. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Benjamin Staunton, for appellant.

BISSELL, P. J. Mrs. Dwelle brought replevin against the appellee, Plummer, to recover possession of a piano. The case originated before a justice, and, having been afterwards tried on appeal before the county court, she brought the case here to reverse the judgment which had been rendered against her. It would seem that in 1892 there was an organization called the "Women's Association of Progressive Workers," consisting of some 18 or 20 different women. The association occupied some premises which were owned by Plummer,

and at some time during the occupancy it had placed the piano in the rooms. The matter is not made entirely clear by the testimony, but the association had evidently changed its quarters, or were about to change them; and, when Mrs. Dwelle called to get the piano, Plummer refused to let her have it. The reason of the refusal is not clear, since the rent was paid; but, under some sort of a notice, Plummer reserved the right to retain the instrument, or at least to refuse to surrender it to Mrs. Dwelle. Prior to the trial the Association of Workers incorporated under the statute. Whether they had incorporated at the time of the demand, and before the suit, was not shown. On the trial the plaintiff, in support of her claim of right to the possession of the property, introduced the constitution and by-laws which had been adopted by the voluntary organization of the parties. Under that constitution and those by-laws the secretary and treasurer of the organization was intrusted with the custody and care of what personal property might belong to the body. The particular custody was evidently given to the one elected or appointed to that position. At the time that Mrs. Dwelle went for the piano she was discharging the duties of treasurer, but had never been either elected or appointed to the office by the board of directors, which had the power of election and appointment. The original appointee or elective officer had in some way gone out of office, and Mrs. Dwelle, by the consent of the parties, was discharging the duties appertaining to the position. So far as the evidence goes the property had never been turned over to her, or in any way put into her possession. This statement of facts disposes of the present appeal, and renders it necessary to affirm the judgment. It is always true that some sort of property, either general or special, must exist, to carry with it the right to the possession of personal property replevied, and to entitle the plaintiff to maintain this kind of an action. It is wholly unnecessary to go into distinctions between property general and property special, and the statement of the kind of right which will support the action as against an intruder, or one without any sort of claim, which would seem to be the position occupied by Plummer. In actions of this description the plaintiff must recover on the strength of her own title, and she must make proof which in some way establishes a right in her to the possession of the thing replevied. Having failed to do this, Mrs. Dwelle manifestly could not maintain the action. The association, of course, is not without a remedy, whether it be or be not incorporated, and that remedy the parties are probably still at liberty to pursue. The judgment of the court below being in accord with these views, it must be affirmed. Affirmed.

STEVENS V. BOARD OF COM'RS OF SEDGWICK COUNTY.

(Court of Appeals of Colorado. Sept. 24, 1894.)
Schools — Duties of County Superintendent—
Attending "District Normal."

As neither Gen. St. c. 97, as amended by Laws 1887, p. 397, defining the duties of a county superintendent of schools, nor Laws 1891, p. 320, providing that the county superintendents of each normal institute district shall out of their number annually select an executive committee to fix the time and place of holding a normal institute, requires a county superintendent to attend a "district normal," a county superintendent who does so is not entitled either to mileage or a per diem compensation, though he is a member of the executive committee of the normal district.

Error to district court, Sedgwick county. E. H. Stevens, county superintendent of schools, presented his claim to the board of county commissioners of Sedgwick county for mileage and per diem compensation during his attendance at a "district normal." The claim was disallowed, and on appeal to the district court judgment was rendered against him, and he brings error. Affirmed.

This is a controversy between Stevens, the plaintiff in error, and the commissioners of Sedgwick county, over a claim which Stevens makes as county superintendent of schools for services which he rendered. The cause was heard upon an agreed statement of facts, which substantially recites that what is called a "district normal" was regularly called in April, 1802, and was holden 11 days,-from August 1 to August 12, 1892,-at Sterling. which was 116 miles distant from Julesburg. the residence of the superintendent, Stevens. Stevens was regularly elected a member of the executive committee when the normal was called, and served in that capacity. He was not elected as an instructor to conduct the institute, but simply as a member of the executive committee, for the purposes of its organization, with the other county superintendents. Stevens presented his claim to the board of county commissioners, and it was disallowed. He took an appeal to the district court, where the matter was again heard, and judgment was rendered against him. He sued out a writ of error to reverse this judgment.

W. D. Kelsey, for plaintiff in error. J. S. Carnahan, for defendant in error.

BISSELL, P. J. The controversy is an exceedingly narrow one, and presents but one question for consideration. Chapter 97, Gen. St., as amended by Acts 1887, p. 397, defines the duties of a county superintendent. Without attempting to quote the statute, or state in detail what those duties are, it may be observed that they relate solely to the schools established in his own county, their superintendence, an oversight of the teachers and various officers, and the management within defined limits of the funds used for school

purposes. The same act provides that his compensation for this labor shall be five dollars per day and ten cents a mile for the distance necessarily traveled in counties of the class within which Sedgwick is included. There is nothing in these various acts and amendments which imposes on the superintendent the duty of attending the district normal, nor has he any connection with it under the act which established it (Sess. Laws 1891. p. 320), save to aid in the selection of an executive committee, which determines the time and place for holding the institute, and selects the conductor or instructor for it. There are certain duties imposed by the act upon those who are selected as members of the executive committee, but these do not include an attendance upon the institute, nor the discharge of any duties in immediate connection with its sessions. Under these circumstances, it is not easy to see any reasonable basis for the contention that the county superintendent is entitled to a per diem and mileage for an attendance at its sessions. It is always true that, where the duties of an officer and his compensation are prescribed by statute, it alone can be looked to for the purposes of ascertaining and settling what his rights may be in respect of such matters. Where the duties are defined, and the compensation definitely provided, no claim can be made for any fees other than those specifically stated. In the present case no duty is laid on the superintendent to attend the normal institute, and, if he does attend, such attendance cannot be held to be the performance of a statutory duty entitling him to the compensation provided for in the other section of the act. judgment accords with our views of the proper construction of the statute, and it will accordingly be affirmed. Affirmed.

WOODRUFF v. HENSEL.

(Court of Appeals of Colorado. Sept. 24, 1894.)

Action on Order—Acceptance by Drawbe—Novation—Consideration.

1. To sue the owner of a building on an order drawn on him by a contractor, to whom he was indebted, in favor of a subcontractor, an acceptance of the order by the owner must be shown.

2. For a creditor to substitute his creditor to his right of action on claims against his debtor, a new contract must be made releasing the original debt.

Appeal from Arapahoe county court.
Action by William S. Hensel against Warren Woodruff on contract. Judgment for plaintiff, and defendant appeals. Reversed.

E. E. Edmonds, for appellant. John Hipp, for appellee.

REED, J. Appellant contracted with George W. Dade for the building of two houses at \$816 each. Hensel (appellee) was employed 70

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to work upon the buildings. The buildings | that there had been no acceptance of the orwere completed in the spring or early summer of 1892. At the time of their completion Dade, the contractor, was indebted to appellee about \$106 for labor. Appellant from time to time had paid Dade various sums of money, but late in the fall (about Thanksgiving) there had been no settlement between appellant and Dade. It appears that appellee had previously applied to appellant for money on account of Dade, and had on one occasion been paid \$5. At a later date he again applied, and was informed that he must get an order from Dade. At about the date mentioned (late in November, 1892) Dade drew a written order upon appellant in favor of appellee for \$100. Dade and appellee went together to the house of appellant. The order was presented. Although the evidence is somewhat conflicting, that of both parties establishes the fact that the written order was not accepted by appellant. Plaintiff testified that the order was handed to appellant, who read it, and said: "'I can't pay this all now,' but he went up and got his time book. He said, I will pay twenty dollars,' and says, 'I will settle the middle of the week; maybe the middle, and it may be the last." Dade testified: "I had written an order for a hundred dollars, and Mr. Hensel then passed the order to Mr. Woodruff. Mr. Woodruff took the order, and looked at it, and then paid Mr. Hensel twenty dollars. He did not object to the payment of the twenty dollars. He simply stated that was all he could spare at that time." Appellant testified: "I said to Mr. Dade: 'Why, it is an order for a hundred dollars. It is a question whether I owe you any money, but I am very sure I don't owe you a hundred dollars, and I will not have anything to do with the order,' and passed it back to Mr. Hensel." The other parties said the order was retained by appellant. However the fact may be, that was the last seen or known of the order by either of the parties. Appellant paid appolice twenty dollars on account of Dade, and appellee left. After he was gone, according to the evidence of Dade, he and appellant looked over accounts, or had a partial examination, which showed appellant still indebted to Dade about \$40. This, substantially, is all the evidence of any importance in the case. Appellee brought suit before a justice of the peace. There were no written pleadings. As near as can be gathered from the proceedings, counsel of appellee proceeded upon the theory that the transaction was an acceptance of the order, and appellant legally obliged to pay the remaining \$80, and suit was brought upon the lost instrument. An appeal was taken to the county court, a trial had to the court without a jury, resulting in a judgment for the plaintiff (appellee) for \$40, from which this appeal is prosecuted.

It is apparent that the court correctly found

der, consequently no liability on account of it; but the court evidently regarded the transaction as a legal or an equitable transfer of the \$40 found to be due from appellant, and gave judgment for it. In this the court erred. By the refusal to accept the order it became of no legal importance or significance. and could not, without acceptance in full, or a limited acceptance and promise to pay some fixed sum, be the basis of any action, nor operate as a transfer or assignment or promise to pay any amount whatever, and must be ignored, and treated as if it had never existed. The liability, if any, must have arisen from other sources, and from a contract, promise, or agreement on the part of appellant to pay appellee whatever sum on settlement should be found due Dade, and a request from Dade that the balance should be so applied. No promise is alleged or claimed to pay any amount whatever. Appellee left before it was accertained what, if any, balance was due Dade; nor was there any agreement to pay it to appellee. Woodruff was the debtor of Dade, he the debtor of Hensel. To have made the transfer and substitution, so as to enable Hensel to maintain this action against appellant, a new contract-novation—was necessary. In order to effect it. the three parties must have agreed either that a definite amount, or whatever balance was due Dade, should be paid appellee. Woodruff must have agreed to pay it to Hensel. It must have operated as a release from Dade to Woodruff, and a release from Hensel to Dade to the extent of the money paid. No such formalities occurred, hence no action at law could be brought by appellee against Woodruff. "It is the case of a new contract formed and a former contract dissolved, and the general principles in regard to consideration attach to the whole transaction. Thus, to give to the transaction its full legal efficacy, the original liabilities must be extinguished; for if the debt from A. to B. be not discharged by A.'s promise to pay it to C., then there is no consideration for this promise, and no action can be maintained on it." Pars. Cont. 217-220; Tatlock v. Harris, 3 Term R. 174; Wilson v. Coupland, 5 Barn. & Ald. 228; Thompson v. Percival. Barn. & Adol. 925; Langley v. Berry, 14 N. H. 82; Giddings v. Coleman, 12 N. H. 153; Legro v. Staples, 16 Me. 252; Ford v. Adams, 2 Barb. 349; Owen v. Bowen, 4 Car. & P. 93. Counsel devote much argument to the proposition that, if not sustainable at law, it may be regarded and enforced as an equitable assignment. An examination, under the authorities, shows the transaction to have been lacking in the necessary requisites, but it is sufficient to say that the proceeding instituted was not in the nature of one to enforce an equitable assignment. The judgment will be reversed, and the cause remanded. Reversed.

LAMAR MILLING & ELEVATOR CO. v. CRADDOCK.

(Court of Appeals of Colorado. Sept. 24, 1894.)
VALIDITY OF CONTRACT—MEETING OF MINDS—DE-LIVERY—VERDICT—REVIEW ON APPEAL.

1. A written contract for the purchase of brick to be manufactured by plaintiff required defendant to furnish plaintiff money up to a certain amount to pay his employés. The contract was made, but not delivered. Plaintiff, though he had told defendant that his brothers would work for him, and therefore the pay roll would be light, afterwards demanded that not only their pay, but also pay for himself, should be included, contrary to defendant's understanding. Held, that the minds of the parties did not meet, and therefore there was no contract.

2. Where one copy of a contract which is to be executed in duplicate has been signed by the parties, but is left with the attorney of one party, to have a duplicate executed, there is not a sufficient delivery of the instrument to constitute a contract.

 Where there is no serious conflict in the evidence, a verdict evidently the result of mistake or dictated by prejudice will be set aside.

Appeal from district court, Prowers county.
Action by E. A. Craddock against the Lamar Milling & Elevator Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Appellant, being about to construct a mill and elevator at the town of Lamar, entered into negotiations with appellee to make and deliver the brick necessary for the structure, estimated to be about 450,000. Correspondence had been had between appellee and appellant in regard to the matter, resulting, as was supposed, in an agreement, and appellant sent a contract to appellee to be executed, which he declined to execute. About March 10, 1893, Mullen, manager of appellant, went to Lamar, saw appellee, who said he found he would have to have some money advanced, which was not provided for in the contract. He required \$200 to fit up the yard, a sum not to exceed \$150 per week for current expenses and to pay men, some indefinite sum for each kiln to buy fuel when ready to be burned; the \$200 to be advanced at the time of executing the contract, the money for expenses to be paid weekly, on a sworn statement of appellee of the requisite amount. Appellant seems to have acceded to the terms, and the parties had the agreement reduced to writing. It was to be in duplicate. One copy was made, signed by the parties, and left with the attorney, to have the other prepared. It appears there had been previous talk in regard to appellee giving a bond or security for the advances of money and performance of the contract. No duplicate was made. No contract was delivered to appellee. The manager of appellant took possession of and retained the executed paper. The parties again met, and entered upon a discussion of the affair, particularly of the weekly advances. It appears that appellee had previously informed the manager that he had three brothers who

would work, and that expenses for hired help would be comparatively light. In the discussion last alluded to, it transpired that the weekly disbursements were to include the wages of the three brothers, and wages to appellee at \$3.50 per day. The previous talk had been in regard to security in the sum of \$500. The manager then required \$1,000. Appellee declined, refused or neglected to give or offer any security, and claimed the contract as executed and obligatory, required the \$200 to be advanced, which was declined, and the whole transaction declared off by the manager. A day or two later, a contract was made with other parties, who furnished the brick at an advance of 25 per cent. per thousand over the price appellee was to receive. The executed paper was retained and destroyed by appellant's manager. No consideration passed between the parties. It is not claimed that appellee expended any money or made any preparations for the manufacture of brick. The suit was brought for profits expected to be made in furnishing the brick. A trial was had to a jury, resulting in a verdict and judgment for appellee for \$300 damages.

C. C. Goodale, for appellant. D. Mc-Caskill, for appellee.

REED, J. (after stating the facts). There are several errors assigned. Only one or two need to be considered. The verdict of the jury was against all the evidence in the case. The testimony shows that there was no contract. Appellant was to advance a comparatively large amount of money, to enable appellee to enter upon the making of brick,-\$200 to fit up a yard, not to exceed \$150 per week for expenses for an indefinite number of weeks, and money to buy fuel,before any return could be had or any brick delivered. The requirements of the appellee show conclusively that he was without necessary money to enter upon the contract, and probably not pecuniarily responsible for advances. It is testified by manager of appellant, and conceded by appellee, that security was to be given for advances. None was offered or given. amount was not settled, and certainly \$1,-000, required by appellant for performance of the contract and advances, was not exorbitant under the circumstances. It is true that a contract was drawn and signed by both parties. That of itself was of no legal importance, only as an incident or step towards the conclusion or consummation. It was to be in duplicate, and the other was not signed. The one signed remained in the hands of appellant's attorney. was no delivery. The delivery of the contract and receipt of the bond or security should have been contemporaneous, unless waived by appellant. Until the conclusion and interchange of papers all incidental

acts are only considered in limine, and either party may withdraw from the negotiation. If the terms of a contract founded upon mutual promises have not been fully agreed upon, if either party withholds or has not given his full assent to them, the contract is incomplete. It binds neither of the parties, and can give rise to no cause of action. 1 Add. Cont. 15; Routledge v. Grant, 1 Moore & P. 717; Cope v. Albinson, 8 Exch. 185; Bish. Cont. § 318, 319, 323, 334; Rommel v. Wingate, 103 Mass. 327; Belfast & M. L. Ry. Co. v. Inhabitants of Unity, 62 Me. 148.

Not only had there been a failure to furnish bond or security which should have been done contemporaneously with the execution of the contract, and an essential to its completion, but there was a misunderstanding in regard to the application of the weekly sum of \$150 to be advanced for the payment of wages. It was said by appellee that his bills for wages would be comparatively light, as he had three brothers The manager who would work with him. of appellant understood that they were not to have wages advanced, but, on further conversation, it transpired that he not only intended to pay the three brothers full wages weekly, but also intended to pay himself, for his own services, \$3.50 per day, weekly,-a condition so novel and unprecedented in contracts of that kind, as far as he was concerned, that it must of necessity have created doubts in regard to the bona fides of his intentions. At any rate, it is apparent that there was a misunderstanding, and the minds of the contracting parties had not met; consequently, no contract.

The custodian of the signed paper was the attorney of the appellant. There had been "Every written contract must, no delivery. to take effect, be delivered, and the delivery must be absolute." "The delivery of a written contract is any act whereby the party delivering it relinquishes his power over the writing, whether by passing it directly to the other party, or to any third person, or otherwise, with the express or implied intent that shall operate as a contract." Cont. \$\$ 349, 350; Fay v. Richardson, 7 Pick. 91; Hawkes v. Pike, 105 Mass. 560; Thatcher v. Wardens, etc., Church, 37 Mich. 264. The contract was to be duplicated. Until the signing of both and delivery of one to appellee, there was no contract. written paper in the possession of the legal agent of appellant was as much in its custody and under its control as if in the hand of the manager. Until fully executed and delivered, the contract was in limine; either party could revoke or withdraw.

The following question was by the court submitted to the jury: "The first question for you to determine is, did the defendant make the delivery of the contract in evidence?" It was found affirmatively by the jury. It was not only entirely unsupported, but negatived, by all the evidence in the

case, which clearly showed the contract incomplete and undelivered. The finding of the jury was against the law and the evidence, and must be set aside. The wellsettled rule of the supreme court and this court is: Where the testimony is conflicting, a finding of the jury will not be disturbed. Where there is no serious conflict, and the verdict is evidently the result of mistake and misapprehension, or dictated by bias and prejudice, it should in all cases be set aside. Ullman v. McCormic, 12 Colo. 553, 21 Pac. 716; Coon v. Duckett, 18 Colo. 14, 21 Pac. 905; Newell v. Giggey, 13 Colo. 16, 21 Pac. 904; Caldwell v. Willey, 16 Colo. 169, 26 Pac. 161; Hockaday v. Goodwin, 1 Colo. App. 90, 27 Pac. 875; Investment Co. v. Harrison, 1 Colo. App. 466, 29 Pac. 462; Lawrence v. Weir, 3 Colo. App. 401, 33 Pac. 646. The judgment will be reversed, and the cause remanded. Reversed.

(5 Colo. A. 117)

PERSSE V. ATLANTIC-PACIFIC RAIL-WAY TUNNEL CO.

(Court of Appeals of Colorado. Sept. 24, 1894.)
CORPORATS BONDS — DELIVERY IN PAYMENT OF
DEST—ACCOUNTING FOR SURPLUS—SUBSEQUENT
FRAUDULENT SALE—CANCELLATION.

1. In an action to cancel bonds of a corporation, on the ground that an agent in whose hands they were placed for sale had fraudulently disposed of them, a former secretary of the company, whose sole knowledge of the matter is derived from conversations with one who was its president at the time of the transaction, cannot testify as to the conditions of the delivery.

action, cannot testify as to the conditions of the delivery.

2. Where a corporation delivers to a creditor its bonds, in order that the latter may sell them, and satisfy his claim out of the proceeds, and account to the company for any surplus, the title to the bonds passes to the creditor, and they will not, in an action by the corporation, be canceled in the hands of a transferee of the creditor because the purchase by him was not made in good faith.

Error to district court, Arapahoe county.
Action by the Atlantic-Pacific Railway Tunnel Company against Henry S. Persse to cancel bonds issued by plaintiff. Judgment was rendered for plaintiff, and defendant appeals. Reversed.

H. B. Johnson, for plaintiff in error. Pence & McGinnis, for defendant in error.

BISSELL, P. J. The Atlantic-Pacific Railway Tunnel Company, in April, 1891, filed a bill against Persse to cancel five bonds, of \$100 each, which had been issued by the Atlantic-Pacific Railway Tunnel Company in 1883. It is unnecessary to particularly describe the bonds, for the bill rested for its equity, if it has any, upon the arrangement under which the bonds were delivered to John A. Coulter, of Georgetown. The bill charged that in the month of April, 1884, the tunnel company placed the five described bonds in the hands of Coulter to sell for \$90 each. It charged that the proceeds were

to be turned over to the company after the This was the bill. The evidence showed nothing of that sort. The railway tunnel company introduced no evidence which even tended to establish the case as made by their complaint, and offered no evidence tending to show that the bonds had ever been placed in Coulter's hands for sale. only witness which the company produced was one Whitaker, who was formerly secretary of the company, and whose sole knowledge of the original transaction was derived from conversations with Pomeroy, who was president of the company at the time of the transaction. Necessarily, this was not evidence which would support a decree. The court, however, refused to dismiss the complaint upon the plaintiff's proofs, and the defendant was compelled to go into his case. The defendant proved that, prior to the time of the delivery of the bonds, Coulter had been employed by Pomeroy, the president of the company, to perform certain legal services upon their behalf with reference to the trial of a case then pending in Georgetown. After Coulter had performed these services, Pomeroy stated that neither he nor the company had any money, and substantially that Coulter would have to accept these bonds in payment for his services. They were delivered to him for the purposes of liquidating his claim for the work, with authority to sell, and apply the proceeds to the satisfaction of his demand, accounting to the company, in case of a sale, for any surplus which he might receive over and above the amount of his demand. It is scarcely worth while to state the evidence on the subject. since it is wholly uncontradicted, and in legal effect amounts to a delivery of the bonds to Coulter for the liquidation of his claim, with the power to sell. There was nothing whatever in the transaction which gives color to the contention that it was the purpose or intention of either of the parties that it should amount to a mortgage or a pledge, but it was evidently an attempt by Pomeroy to pay Coulter's claim by the delivery of these bonds. The bonds remained in Coulter's possession from 1883 to the time that he disposed of them to one Jennings, who was the vendor of the plaintiff in error, Persse. There is no necessity to discuss the question of the good faith of the transfer between Coulter and Jennings, nor the query whether this was a cover for the sale to Persse, who became a purchaser from Jennings at \$225, while the consideration which passed between Jennings and Coulter was only \$5. If there is any question concerning that transaction, there is nothing in the record to show it; and, according to our view of the legal relations of the parties, the only remedy which the company would have, if any, would be to recover of Coulter the difference between his demand and the sum for which the bonds were sold to Persse, provided they were able to impeach the

transaction between Jennings and Coulter. There is nothing in the record which at all tends in this direction, but it manifestly is the only possible remedy.

This statement makes it very clear that the tunnel company wholly failed to prove any case which entitled them to the relief which they demanded, and which they got, to wit, the cancellation of the bonds, and their surrender by Mr. Persse. It is always true that a transaction of this sort is open to investigation, and, if the parties are able to show that the transaction was one by way of mortgage or pledge, they are entitled to relief, unless the matter concerns mercantile paper which has passed into the hands of an innocent purchaser for value. But, wherever there is an absence of any such condition as the law requires to change an absolute sale into a mortgage or into a pledge, it is always upheld as a valid transfer, and the title of the transferee is not subject to impeachment. Reeves v. Sebern, 16 Iowa, 234; Com. v. Reading Sav. Bank, 137 Mass. 431.

There is quite a dispute in the case, growing out of the purchase which was made by Persse. The secretary of the company, who was the only witness for the plaintiff, contends that he gave Persse notice of Jennings' want of title, and that he bought with full knowledge of the claim of the company that Coulter held the bonds for sale, and was without any title. This evidence was totally contradicted by Mr. Persse, who claims that he bought without knowledge or notice of Jennings' title, or of the way and manner in which Coulter acquired possession, and that he inquired of two directors of the company as to the validity of the securities, and received information that they were valid claims against the company. In this he is strongly supported by various circumstances in the case, among which are the facts that Coulter retained possession of these bonds for upwards of six years, and at one time left the bonds with the secretary, Mr. Whitaker, for sale, and afterwards received them from him when informed that no disposition of them was possible. These circumstances tend to rebut the idea that there was any condition attached to Coulter's title, and likewise tend to support Persse in his denial of Whitaker's claim that he was informed of any defects in Coulter's title. Since the plaintiff wholly failed to prove the case as he laid it, and there is nothing whatever in the record to show that the bonds were delivered to Coulter for sale, and it is evident from the proof that he acquired an absolutely good title as against the company, with the power of disposition, the plaintiff was not entitled to a decree canceling the bonds in the hands of Mr. Persse, regardless of the situation as to the bona fides of his purchase.

The appellant requests this court to enter a decree of foreclosure on a cross complaint which he filed. We are doubtful as to our power to grant this request, and in any

event should decline to accede to it, since the case was fought on another basis, and it is not evident that Persse is entitled to a foreclosure against the present appellee, who was the plaintiff below, and there is a lack of proof as to interest and parties in the record which would justify the procedure. Since the judgment which the court below entered, canceling the bonds, is in hostility to our views of the rights of the parties, the judgment will be reversed, and the case remanded for further proceedings in conformity with this opinion. Reversed.

McBRIDE v. PEOPLE.

(Court of Appeals of Colorado. Sept. 24, 1894.) HOMICIDE-EVIDENCE-DYING DECLARATIONS-IN-STRUCTIONS.

1. In a prosecution of a husband for the murder of his wife, evidence of previous drunken quarrels, ending in no serious injury, and in which it was not shown which was the ag-

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in which it was not shown which was the ag-gressor, is not admissible.

2. Where the autopsy shows that the ex-ternal injuries were not the cause of the wife's death, her dying declaration as to who inflicted the injuries are not admissible.

3. The fact that deceased told her doctor he need not call again, as she did not think he could do her any good, does not show a sense of expected death. of expected death.

4. Where deceased merely nods her head to

questions asked as to the cause of her death, she being in a very low condition, evidence thereof is not admissible as dying declarations

- 5. A statement by the deceased that "my husband has killed me," based on the theory of her physician that her death is the result of certain external injuries, being merely deceased's opinion, is inadmissible as a dying deceased. laration
- 6. When, in a prosecution of a husband for the murder of his wife, alleged to have been caused by kicks and blows inflicted by him, the evidence shows that, for two weeks after the blows were inflicted defendant remained with his wife, and then only left on her suggestion to escape arrest for selling liquor without a license, his family knowing where he had gone, an instruction that defendant's flight can be considered as showing guilt is erroneous.

Error to district court, Arapahoe county. Edward McBride was convicted of murder in the second degree, and brings error. Reversed.

In March, 1892, plaintiff was tried for the murder of his wife, was convicted of murder in the second degree, and sentenced for life. The wife died December 31, 1891, as supposed and alleged, from injuries inflicted by the husband in beating and kicking her, some three weeks previous. The husband and wife kept a grocery store, and sold spirituous liq-According to all the testiuors and beer. mony, both were confirmed inebriates, and had been for two or three years, getting stupidly drunk, sometimes jointly or in company with each other, and at other times individually and separately. When under the influence of liquor, which was most of the time towards the close of the wife's life, quarrels and personal encounters were fre-

quent. Previous to any evidence establishing the corpus delicti, being the first evidence introduced, the prosecution, by several witnesses, made proof of former drunken quarrels of the husband and wife, proving frequent personal conflicts for two years before the death, throwing bottles and other missiles at each other, but no evidence that those thrown by the husband hit the wife. The evidence of all was that they never saw him hit or kick her. The conditions were tersely and pathetically described by the 12 year old son in his evidence, as follows: "Defendant is my father. Mother died December 31, 1891, at night. Father was at Houston's. He went away Monday morning. Mother's eyes was black. Saw disturbance between father and mother. Don't know how many times. Threw cups and bottles at each other; sticks and brickbats. He kicked her out of the door. Father hit her with a boot, and she hit him." Cross-examination by Mr. Dunklee: "They were both drunk. Have seen them drunk often. When they were drunk, they would fight." The evidence establishes the fact that the wife was so addicted to the use of liquor that, for a long time previous to the alleged injuries, she was hardly ever free from its influence, and at times helplessly drunk; that, previous to the alleged assault by the husband, she had fallen down cellar; had fallen in other places. Once she was found lying outside of the house. At another time she was found, with two children, some distance from the house, in a ravine, without cover or consciousness, in cold, inclement weather. Some two weeks before her death, she was confined to her bed, and on December 28th a physician, Dr. Bilby, was called. Her condition until the time of death he gave as follows: "Was called to see Mrs. McBride, December 28, 1891, in the morning. Saw Mc-Bride himself, his wife, and two or three children. Mrs. McBride was in a critical condition. Had an inflamed throat; was vomiting blood; had a pain in her stomach; also complained of her throat. Saw her five times before she died, December 31st. Her throat was in a very bad condition, and she said she had not been able to take any nourishment for two weeks. Throat looked as though she had been taking carbolic acid. He said she had been on a protracted spree, and had drank about two gallons of liquor in two weeks. I made an examination the second visit, on the 29th. Found a bruise on her eye, a number of bruises on her body, and bruises on the right side, one on left hip, and one an inch and a half below the nipple That was all the bruises I found. She continued to get worse; could not retain any nutrition; vomited blood as often as every ten or fifteen minutes. Q. State to the jury the condition of deceased when you called December 28th. A. I stated yesterday, I found her very much emaciated, complaining of throat trouble, vomiting blood, pain in the

bowels, little grievance in abdominal cavity. That was her condition. Skin pale. Face poor and emaciated. Made no chemical examination of her urine. Q. Doctor, what, in your opinion, caused the death of this woman? (Objection. Overruled. Exception.) A. Lack of nutrition and loss of blood, caused by some internal injury. Q. From your examination, what, in your opinion, caused the internal injury? (Objection. Overruled. Exception.) A. From the blows that had been delivered on the external parts." Cross-examination by Mr. Dunklee: "She told me December 28th that she had been drinking, for stimulants. Her throat looked as though she had been taking something. That is why I asked her. On the first visit, I gave her bismuth, to try to allay the vomiting, chloride of potash and tincture of iron for the throat trouble, with fomentum over the She was much run down. It seemed to be a case of extreme exhaustion. I told Mr. McBride that she had what some people might call 'la grippe.' Her skin was pale, whitish. Gave a Dover's powder the third visit. Made no examination of urine, except looking at it. Can tell by the color of urine whether there is albumin in it or not. It was a careful examination. Think there was no albumin in the urine, because it was a normal color. Do not know that the urine I examined was Mrs. McBride's except what the nurse said. Q. Doctor, it is a fact, then, that you believe that was an internal injury? A. Yes, sir. Q. Believe that now? A. Yes, sir. Q. Believe it was a rupture? A. Yes, sir; of the stomach and intestines. Q. Suppose that on a post mortem examination of the person, in which all parts of the internal organs were examined, and there was no rupture and no internal injury whatever, would you still say that the blood came from a rupture? A. I would not if I made the examination or seen the examination made. Q. But you would not trust any other physician,—is that right? A. Under that condition, I would, of course, have to give up that I was wrong." Dr. Bilby was asked the following question in regard to his first visit (December 28th): "Didn't her husband say to you in her presence that she had been on a two-weeks spree? A. Yes, sir; she said she had been drinking. * * * He said she had been on a protracted spree, and had drank about two gallons of liquor in two weeks." An official autopsy was had, made by Drs. E. R. Axtell and R. B. Knight. Dr. Knight testified, after stating in regard to external bruises and discolorations: "I would say that she died of hemorrhage and exhaustion. * * * We found evidences of an old inflammation of the mitral valve of the heart of deceased, in the last stages of Bright's disease, and of hemorrhage from the nostrils; and, the patient lying in bed, the blood would naturally go into the stomach, and be thrown off by vomiting. There was no rupture of the stomach. None of the bruises

would reach the internal organs." When recalled, in answer to an elaborate hypothetical question, wherein it was assumed that the woman had been knocked down, jumped upon, and violently kicked in the abdomen and near the kidneys: "Assuming all those added to the post mortem, what do you now say in your opinion? A. That the woman died of exhaustion, and from chronic alcoholism, with probably the Bright's disease as a factor in it. The blood would have a marked effect in bringing about the dissolution." And, in answer to questions by the jury, he testified as follows: "By the Jury: Could not tell the cause of death from the autopsy? A. To tell whether the deceased died of Bright's disease, would have to take into consideration the symptoms while living. This woman did not die of a shock. There were no evidences of any disease except Bright's. By the Jury: If this woman received the blows that caused those black and blue spots that was on the body, that you testified to, they would cause the stomach to be ruptured,that would cause death? A. If the stomach was ruptured; but the stomach was not ruptured. Q. What would cause the throwing off of blood? A. I don't know. A dozen causes,—an inflammation of the membrane of the stomach; indigestion; of taking things into the stomach that could not be digested: a degeneration and breaking down of the walls of these vessels,-dozens of causes. By the Jury: In the early part of your examination, you said that a kick in the abdomen, and also striking the front part of the stomach, might produce congestion of the kidneys? A. Yes, sir. Q. Did you find, on your post mortem examination, any indication of a blow on the front part of the person? A. We did not." Dr. Axtell testified: "We found the mitral valve of the heart affected. The kidneys were affected; also the capsule strips indicated Bright's disease. * * We found no internal rupture, * * no internal wounds. * * The stomach was normal. Q. From the symptoms you saw there, did she have Bright's disease? A. I did not see the woman until after her death, but what we saw in her kidneys, she had Bright's disease. The diagnosis I made at the time was a chronic form."

Statements made by deceased shortly before death were allowed in evidence as dying declarations. The foundation for their admission was as follows: On the morning of December 29th (Dr. Bilby), "I says to her, You might just as well tell me what brought you on.' She says, 'He first struck me with his fist, and knocked me down, and jumped on me, and kicked me. That is what caused these bruises, and also the bruise on my eye.' She told me she did not think it was worth while for me to come back; did not think I could do her any good." On the evening of the 30th, at 5 o'clock, 36 hours after having told how the bruises were received, "I told her that her chances for life

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were slim; that I did not see any chance. I could not relieve her." "She said she was going to die; did not think there was any hope for her. This was about 5 o'clock in the evening This was not this visit that she told me what caused the bruises on her body. That was on the morning of the 29th. She made no statement to me a: this time,the time she said she was going to die,-because we had talked the matter over before." William H. Reno testified that on the 31st, the day of her death, "I asked her if she was suffering from injuries inflicted by her husband, and she nodded her head, 'Yes.' I then asked her if she had received these injuries some two or three weeks previous, and she nodded her head, 'Yes.' That was about the only conversation I had with her. She was in very low condition. I took the nod of the head as meaning 'Yes.' That was all the reply I got." Frank Mulock testified: "Had a conversation with Mrs. McBride the night she died, December 31st, concerning her condition, and who caused her injuries. (Objection, because his name was not on information before trial. Overruled. Exception.) A. I asked her what seemed to be the matter, and she said. I am going to die.' 'Oh,' I says, 'I guess you will not.' said, 'Who hit you?' She says- (Objected to as incompetent. Objection overruled. Exception.) 'My husband has killed me.' I says, 'What did he do to you?' She said, 'He kicked me here' [on side]; and it hurt her arm and her eye. I told her, 'You will be all right in the morning;' and she says, 'No. I am afraid.' She said this occurred about two weeks ago, and that he was in the habit of kicking her. She was in a bad condition." Henry Caswell was the only witness that testified to having seen the defendant strike or kick the deceased: "I saw McBride and his wife on or about the 19th day of December, 1891. Mrs. McBride was in the kitchen. I could see through the open door. Don't know what they said. I looked around in about two minutes. Mrs. McBride was out in front. Mr. McBride was over her. He kicked her once; I do not know whether in the back or side. He said, 'You God damned son of a bitch, I will kill you.' Saw them pretty near every day for three years. Never saw him kick her before. I saw him pick up a rock, and hit her in the back, about a year and a half ago, I think. Saw him twice throw rocks at her." witnesses, Switser and Franklin, called to impeach Caswell, testified, after usual foundation, that they would not believe him under oath.

George F. Dunklee and O. E. Jackson, for plaintiff in error. Eugene Engley, Atty. Gen. (H. T. Sale, of counsel), for the People.

REED. J. (after stating the facts). There are several errors assigned, only a few of which it will be necessary to discuss. The

admission of the evidence of several witnesses in regard to quarrels of the husband and wife and violent altercations when both were drunk, in a period of two years previous to the death, is assigned as error. evidence was the first introduced. corpus delicti had not been proved or attempted. "The corpus delicti in murder has two components,-death as the result, and the criminal agency of another as the means." And. Law Dict. "The corpus delicti in all cases of homicide must be proved as an essential condition of conviction. To the corpus delicti, in this sense, * * * it is requisite (1) that the deceased should have been shown to have died from the effect of a wound; (2) that it should appear that this wound was unlawfully inflicted, and that the defendant was implicated in the crime." 2 Whart. Cr. Law, § 311. "And even when the body has been found, and although indications of a violent death be manifest, it shall be fully and satisfactorily proved that the death was neither occasioned by natural causes, by accident, nor by the act of the deceased himself." Starkie, Ev. 862, 863. "The proof of the charge in criminal causes involves the proof of two distinct propositions: First, that the act itself was done; and, secondly, that it was done by the person charged, and none other." 3 Greenl. Ev. \$ 30. The facts proved were no part of the res gestae; were in no way connected with the offense charged. Proof of periodical drunken quarrels of the husband and wife, carried on for two years, ending in no serious injury, and not characterized by any apparent intention to do great bodily injury. when the violence and altercation appeared to be mutual, and there was no proof of which was the aggressor and precipitated the collision, should not have been admitted at that stage of the proceeding. Such evidence was only admissible in connection with a well-established corpus delicti, and it is very doubtful whether proof of such indefinite facts and acts would have been admissible in the case at any time. No corpus delicti having been proved, it was error to admit the evidence to assist in establishing a subsequent, doubtful corpus delicti. Such evidence is never admissible except after the corpus delicti has been fully established: then only for the purpose characterizing the offense, as proof of malice, motive, or criminal intention. "In the proof of criminal intent or guilty knowledge, any other acts of the party, contemporaneous with the principal transaction, may be given in evidence; * * yet such evidence, regularly, ought not to be introduced until the principal fact constituting the corpus delicti has been established." 3 Greenl. Ev. § 19; Shaffner v. Com., 72 Pa. St. 60; 1 Greenl. Ev. § 53. The whole of such evidence admitted only went to the proof of such facts and altercations when the parties were crazed and irresponsible from liquor, and that they continued to

live together as husband and wife, and, as far as the proof went, peaceable when sober. Such being the established facts, the proof of such acts neither gave character to the offense charged nor proved criminal intent or malice, and consequently were not admissible for any purpose, and must have been prejudicial to the defendant, furnishing a basis from which the jury might infer the fact of a subsequent killing.

The court erred in admitting evidence of the statements of deceased characterized and admitted as dying declarations. The law in regard to the admission of such evidence is well settled, and has been for an indefinitely long period; so well settled that it is hardly necessary to cite authorities, and only to state the well-established elementary principles that control it. Dying declarations are in their nature secondary and hearsay evidence,—an exception to the general rule. Such being the case, they are very carefully scrutinized. "Dying declarations are statements of material facts concerning the cause and circumstances of homicide, made by the victim under the solemn belief of impending death, the effect of which upon the mind is regarded as equivalent to the sanctity of an oath. They are substitutes for sworn testimony, and must be such narrative statements as a witness might properly give on the stand if living." People v. Olmstead, 30 Mich. 431; Starkey v. People, 17 Ill. 21. They are admissible only in case of homicide, where the death of the deceased is the subject of the charge, and the circumstances of the death are the subjects of such declarations. As before stated, the corpus delicti must be clearly, unequivocally established, that the condition and contemplated death were caused by violence, and the evidence must be such as to negative clearly all probability of death from natural causes. Then the circumstances attending the infliction of the fatal injuries, and by whom inflicted, are admissible, not otherwise. Tested by these well-settled rules, the supposed dying declarations were clearly inadmissible.

The attending physician at first supposed and reported it as a case of "grippe;" next, after an examination of the patient, and finding external bruises or discolorations, he adopted the supposition that the effect of the external violence had been to rupture internal organs, and that the patient was dying of such rupture. Dr. Bilby was asked, "Now, doctor, please state to the jury what Mrs. McBride said to you at this time [morning of December 29th] * * concerning these bruises upon her body." And he answered that she, in reference to each of them, said that they were inflicted by her husband. Reno testified: "I asked her if she was suffering from injuries inflicted by her husband, and she nodded her head, 'Yes.' I then asked her if she had received these injuries some two or three weeks previous. She nodded her head, 'Yes.' That was about the only conversation I had with her. * * * She was in very low condition. I took the nod of the head as meaning 'Yes.' That was all the reply I got." Mulock testified: "She said she was going to die. 'Oh,' I says, 'I guess you will not.' I said, 'Who hit you?' She says, 'My husband has killed me. * * • He kicked me here [on side]; and it hurt her arm and her eye. I told her, 'You will be all right in the morning;' and she said, 'No, I am afraid.'" It will be observed that the theory of death by internal rupture adopted by the doctor had been accepted by the deceased and the parties Reno and Mulock, and in each instance she was asked who inflicted the external injuries, and she made the statements. Dr. Bilby stated that, if the autopsy showed that there was no internal rupture, "I would, of course, have to give up that I was wrong. The autopsy showed conclusively no rupture, no connection whatever between the external injuries and the cause of death; hence the theory of Bilby was exploded, and the supposed dying declarations were inadmissible. pertaining to facts entirely independent of, and in no way connected with, the cause of death. The alleged declarations made to Bilby were clearly inadmissible from the fact that they were made on the morning of the 29th, when he was giving her a hope of living, and the only evidence she gave of expected death was that she informed him that he could do her no good, and need not return. Thirty-six hours afterwards he informed her there was no hope, and she realized the fact of impending death; but the declarations were not repeated, and he admitted that the two interviews had been combined. The alleged declarations testified to by Reno were clearly inadmissible for another reason than the one stated above. To be admissible, the condition of the person must be shown,-that there was sufficient consciousness and intelligence to comprehend and intelligently answer the questions. She did not speak; simply nodded her head. "She was in very low condition." There is no evidence of sufficient consciousness to comprehend the questions asked. Mulock's evidence was inadmissible, as it only pertained to the external injuries, and the alleged statement of the deceased, "My husband has killed me," was clearly inadmissible. It was her opinion, based upon that of her attending physician and perhaps others. Opinions in dying declarations are never admissible. 1 Greenl. Ev. § 159; 1 Bish. Cr. Proc. § 1211.

From what has already been said, it will be apparent that the jury was misled by the improper evidence admitted, and by the instructions of the court giving undue and unwarranted importance to the theory of the prosecution, persisted in and permeating the whole trial, which common justice required to be abandoned on the incoming of the evidence in regard to the corpus delicti. As al-

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ready shown, the evidence must have been such as to absolutely establish the death resulting from violence, and clearly negativing the possibility, or. at least, probability, of death from natural causes. The testimony clearly showed that the cause or causes of death were entirely disconnected from the external injuries. The cause or causes of death were not obscure, but patent,-alcoholism, exposure, and exhaustion. After the supposed injuries were received and the supposed rupture of internal organs occurred, over two weeks had elapsed, during which, according to the statement made by her husband in her presence, and acquiesced in by her, she had been on a "prolonged spree," had consumed two gallons of liquor. She had taken no nutrition. According to the evidence of the attending physician, by the use of alcohol or some other agent, the lining membrane of the mouth and throat had been destroyed, turned white, as if burned by carbolic acid. Bright's disease may have been an important factor, but an unnecessary one. The history of the woman's habits for two years and the uncontradicted evidence established more natural causes of death than were necessary, without Bright's disease. In their periodical drunken conflicts, she was, undoubtedly, the victim of violence and abuse. The external injuries, if inflicted by him, may have affected, more or less, a person in her prostrate condition; but there is an utter want of evidence that they caused death. As to how they were received is left equally in doubt. They may have been caused by the husband, or by falling over furniture in the house, when she fell down cellar, when she fell in the yard, or in the ravine. Her own unfortunate habits, shown, were such that the external injuries might readily have been the result of her own accidents.

One instruction (No. 2014) is particularly objectionable. It is: "The fact, if it be a fact, that the defendant fled from the neighborhood in which he was living at the time of the commission of the alleged offense, is a circumstance proper to be considered by you in connection with all the other circumstances proved upon this trial." There was no evidence in its support. It was at variance with the testimony. He was with his wife and the doctor on the morning of December 28th, and informed the doctor he was going away. The supposed injury was inflicted two weeks or more before that time. All the evidence there is is to the effect that he went, by the advice of the wife, to avoid arrest for the sale of liquor without a license, and only went into an adjoining county, the distance of a few miles. The family knew where he was. The boy testified: "Mother died December 31st, at night. Father was at Houston's. He went away Monday morning." In view of the entire evidence, as discussed above, several of the instructions should not have been given, but it is unnecessary to review them.

The other assignments of error need not be considered. For the causes stated, the judgment must be reversed. Reversed.

BRANSOM v. BOARD OF COM'RS OF LARIMER COUNTY.1

(Court of Appeals of Colorado. June 11, 1894.) SHERIFF'S FEES-FUND FOR PAYMENT - TRAVEL-ING EXPENSES.

1. Laws 1891, p. 307, provides that the sheriff's traveling expenses shall be "paid out of and not exceeding" a certain mileage allowance, and that the sheriff must turn over all fees to the county. Held, that the sheriff's traveling expenses must be paid out of the fees turned over to the county, and not out of the general county fund.

2. To charge the county with costs in criminal prosecutions, it must appear either that the defendants were convicted and unable to pay costs, or that they were acquitted, and the prosecuting witness was not adjudged to pay them, or that the charges were for expenses in behalf of a defendant by order of court.

3. In civil cases the county is not chargeable for costs and expenses which the sheriff

able for costs and expenses which the sheriff has failed to collect.

Error to district court, Larimer county.

Action by William T. Bransom, sheriff, against the board of county commissioners of Larimer county, to recover mileage and expenses. Judgment for plaintiff for part of his claim, and he brings error. Affirmed.

Frank J. Annis and E. A. Ballard, for plaintiff in error. Robinson & Love, for defendant in error

THOMSON, J. The plaintiff in error presented sundry claims against Larimer county to its board of county commissioners, which were disallowed. An appeal was taken to the district court, where the cause was heard. upon the following agreed facts: "State of Colorado, Larimer county-ss.: In the Dis-William T. Bransom, Plaintiff, trict Court. vs. The Board of County Commissioners of Larimer County, Defendant. Agreed Statement of Facts. It is expressly understood and agreed that, at the times mentioned herein, the said William T. Bransom was the duly-elected, qualified, and acting sheriff of said Larimer county, and that, in the discharge of his duties in certain civil and criminal business in the district and county courts of said Larimer county, he incurred certain expenses for team hire and car fare, which said claims were duly presented to the board of county commissioners, and disallowed by said board at the April meeting, 1892. That the claims which were disallowed are hereinafter set forth, and more specifically described in the exhibits, consisting of certified copies of said claims, duly made by the clerk of said board of county commissioners. for the purpose of determining the questions

¹ Rehearing denied October 8, 1894.

growing out of the disallowance of said claims by the said board of county commissioners, it is expressly agreed that the following statement of facts shall be submitted: First. That at the March term of the district court of said Larimer county, 1892, the said William T. Bransom, as sheriff, incurred actual expense for team hire and railroad fare in certain criminal cases, to the amount of \$128.35; that of this amount the sum of \$42.90 was expended for sheriff's car fare and prisoners' to Canon City and return, paid out in transporting prisoners to the state penitentiary, and is more specifically set forth in the exhibit hereto attached marked 'A.' Second. That between the 12th day of January and the 26th day of February, 1892, the said William T. Bransom, as sheriff, paid out and expended for team hire and car fare, in certain civil causes pending in the county and district courts of said Larimer county, the sum of \$28.45, which is more particularly set forth in the exhibit hereto attached marked 'B.' Third. That the said William T. Bransom, as sheriff of said Larimer county, paid out and expended, as actual traveling expenses, for team hire and car fare, in certain civil causes pending in both county and district courts of said Larimer county, the sum of \$59.25, which is more particularly set forth in the exhibit hereto attached, and marked 'C.' This agreed statement of facts is submitted to the court for the purpose of determining the following questions: First. Is it lawful for the said sheriff to charge traveling expenses in the service of any criminal or civil process, not to exceed ten cents per mile, and shall the same be paid out of the sheriff's salary fee fund, or is it lawful to pay the same from the general fund of the county to said sheriff for said traveling expenses, and is the said county of Larimer liable for the payment of said expenses? Second. Is it lawful for the sheriff to charge actual traveling expenses to and from the state penitentiary at Canon City for himself or his deputies, or in transporting prisoners to said penitentiary, and shall the same be paid out of the general fund of the county?" A supplemental agreement was made in open court, as follows: "It was agreed and stipulated in open court by the respective parties hereto, by their attorneys, as shown by the stenographer's notes, that in Exhibit A the charge for car fare from Fort Collins to Canon City and return, of \$17.50, is exclusive of and in addition to all other expenses which have been allowed and paid by defendant. It was also further stipulated and agreed in open court by the said parties, as shown by the stenographer's notes, that the charge for mileage from Canon City to Fort Collins, of \$25.40, is exclusive of and in addition to plaintiff's mileage of 20 cents a mile, which amount has been allowed and paid, this charge being for coming back." The court rendered judgment in plaintiff's favor for \$17.50, and disallowed the entire

residue of his claims. He has prosecuted error to this court to reverse the judgment.

The foregoing statements are quite general, and not very satisfactory. The controversy is evidently over the construction of the statutes concerning officers' fees and salaries; but, for the purpose of determining the questions sought to be raised, there is not such definite presentation of facts as could be desired. The act concerning fees (Sess. Laws 1891, p. 200) fixes the charges of officers for the several classes of service they are required to perform. The fees of sheriffs for serving and returning process and for mileage are prescribed. The fees for mileage are, in counties of the class to which Larimer county belongs, 10 cents for each mile actually and necessarily traveled in serving process, and 20 cents per mile for transporting prisoners. By the salary act (Sess. Laws 1891, p. 307), all fees collected by officers are required to be paid over to the county treasurer, and to be kept by him in separate funds, to which appropriate names are given, those collected by the sheriff being placed in the "sheriff's fee fund." Officers are held responsible for the collection of their fees, and are required, so far as practicable, to collect them in advance. Their only compensation for their services rendered is an annual salary, payable out of the fees, commissions, and emoluments of their offices; that of each officer coming from his own proper fee fund, and from no other source. If there is a surplus in any fund at the end of the year, after salaries and compensation chargeable to it are paid, it is turned into the general county fund. In the counties with which Larimer county is classified, the sheriff's salary is \$3,500 per year, payable quarterly out of the sheriff's fee fund. Deputies also receive salaries out of the same fund. In the case of sheriffs, the law contains, in addition to the regulations concerning salaries. the following further provision: "Sheriffs in counties of the first class shall be allowed actual traveling expenses, which shall be payable out of, and not exceeding, a mileage at the rate of five cents per mile, for each mile actually and necessarily traveled in the performance of all official duties in all cases. In counties of all other classes he shall be allowed actual traveling expenses which shall be paid out of, and not exceeding, a mileage at the rate of ten cents per mile, actually and necessarily traveled in the performance of duty." The last sentence of the foregoing applies to Larimer county. There is nothing in either of the two acts which is obscure or of doubtful meaning. The sheriff must collect his fees, and deposit them in the treasury. where they must be kept apart in the sheriff's fee fund. The fee act includes mileage in the term "fees," and the same disposition must be made of it as of other fees. From this fee fund alone must be paid the salaries of the sheriff and his deputies. There is no other source from which they can come. If

the fund is sufficient, the salaries will be paid in full; but, if not, they must be diminished to the extent of the deficiency. It was not, however, the intention of the legislature that the sheriff's salary should be burdened with the expense necessarily incurred by him in the performance of his duties. His actual and necessary traveling expenses, provided they do not exceed a certain limit, are to be refunded to him out of the mileage allowed for the services in which the outlay was made. The language is: "Out of, and not exceeding, a mileage at the rate of ten cents per mile." The allowance for traveling expenses is not a payment for services; it is a reimbursement of money expended, and is in addition to, and independent of, salary. If the traveling expenses should exceed the amount of mileage, at the rate limited, against which they are chargeable, the full expenses could not be paid, and a proportionate loss would be suffered; but when mileage in either a civil or criminal case has been collected and deposited, it is the duty of the board of commissioners to allow the traveling expenses incurred in the case, payable out of the mileage, if it amounts to so much, or, if not, to the extent of the mileage deposited. The salary is receivable quarterly, but there are no regular times for the repayment of traveling expenses. They are therefore due and payable upon the collection and deposit of the mileage.

In civil suits between individuals the adjustment of the officer's expense account is a simple matter, because he collects all his fees in advance, and nothing but computation is required to ascertain the amount to be allowed; but in criminal causes the matter is more complicated, by reason of the statutory provisions concerning costs in such cases. In case of a conviction, judgment must be rendered against the defendant for the costs of prosecution, and, when rendered, is a lien upon his property, if he has any. and is collected by execution. Gen. St. 1883, \$\$ 964, 965. But if he is acquitted, and the prosecuting witness is not adjudged to pay the costs, or if he is convicted, and is unable to pay them, in either of such cases the costs of the prosecution are a charge against the county. Sess. Laws 1880, p. 100. Or if a defendant makes a proper showing of want of means to procure the attendance of witnesses, the court will order them summoned, and their fees and the costs incurred by the process are payable in the same manner that similar costs are paid in case of witnesses in behalf of the people. Gen. St. 1883, § 1001. Except upon some one of the foregoing conditions, a county cannot be held for any costs in a criminal proceeding. Board v. Wilson, 3 Colo. App. 492, 34 Pac. 265. Where it is sought to collect from the county the costs of prosecution, it must appear, if the defendant was convicted, that they cannot be collected from him; or, if he was acquitted, that the prosecuting witness was not adjudged to

pay them; or, where a claim is made for the defendant's costs for witnesses, it must be shown that they were authorized by an order of the court duly made. Without a showing of one of these facts, there is no cause of action against the county; but, when it is made to appear, it is the duty of the commissioners to allow the proper fees of the officer for his services in the case, so that they may go into the fund out of which his compensation and legal expenses are to be paid. If their allowance is refused, he can compel payment. Although, when collected, they are not to be retained by him, but placed in the treasury, yet he is charged with the duty of collecting them, and the liability of the county, in the first instance, is to him. Henderson v. Board (Colo. App.) 35 Pac. 880. They are a general debt of the county, and are therefore payable out of its general fund. When they are collected and paid into the treasury, the sheriff is entitled to his traveling expenses, which must be allowed, payable out of the mileage included in the fees. In no case, civil or criminal, do fees or mileage belong to the sheriff. They belong to the county. When he has performed the duty of collecting them, he must pay them to the county. His salary, payable out of the fees, and his traveling expenses, payable out of the mileage, are all that he is in any event entitled to.

We gather from the agreed statement that the plaintiff, as sheriff, transported certain prisoners from Ft. Collins to Canon City. and that all the expenses of transportation were allowed and paid by the county. The plaintiff recovered judgment for his own traveling expenses. Mileage at the rate of 20 cents per mile was allowed, but it seems doubtful whether this included the return trip, because a separate charge against the county of \$25.40 was made for that. But this is a matter which it is not important to know. Judgment having been rendered in plaintiff's favor for his traveling expenses, he recovered all that he was entitled to on that account, and upon such recovery the mileage became a matter of no further concern to him.

There are three exhibits in the record, marked "A," "B," and "C," respectively. hibit A contains the charges connected with the transportation of prisoners which were settled. Besides those, it embraces charges in a number of other criminal cases for team hire, car fare, etc. We are not informed whether these are for transporting prisoners, or are the personal expenses of the plaintiff. It is not stated that the defendants were convicted, and unable to pay the costs; or were acquitted, and the prosecuting witness was not adjudged to pay them; or that the charges were for expenses made in behalf of the defendants, under the order of the court. None of the statutory conditions upon which the liability is based are set forth. Exhibits B and C are composed of fees, costs, and expenses in a number of civil causes, to none of which

the county was a party. Why an attempt was made to charge the county with such fees and costs is not explained. It was the duty of the plaintiff to collect these from the party in whose behalf he acted, and, having collected them, to turn them into the county They were no more chargeable treasury. to the county than to any other stranger to the record. If he had collected and deposited them as the law requires, it would have been the duty of the county to return to him, from the amount, his actual and necessary traveling expenses incurred in the performance of the duties out of which the costs arose; but, until such collection and deposit, he had no claim against the county for moneys expended. No reason why these expenses should be allowed to him is stated.

There is nothing in the agreed facts to warrant a judgment different from the one rendered, which, therefore, we shall not undertake to disturb. Affirmed,

MERCHANTS' STATE BANK v. PORTER. (Supreme Court of Colorado. Oct. 1, 1894.)

SUIT TO QUIET TITLE--WHEN LIES.

Plaintiff, who was the owner and in possession of land, leased it through an agent. The tenant paid the rent to the agent until notified by defendant that it had obtained title under sheriff's sale, after which the rent was paid to it for several months, in spite of plaintiff's protest. *Held*, that plaintiff had such possession of the land as entitled her to bring suit to quiet title thereto.

Appeal from district court, Prowers county. Action by Clara L. Porter against the Merchants' State Bank to quiet title to land. There was a judgment for plaintiff, and defendant appeals. Affirmed.

O. G. Hess, for appellant.

PER CURIAM. But one question is raised in this court, viz. did the plaintiff have such possession of the property as will enable her to maintain this action? The undisputed evidence shows that at one time she was the owner in possession of the property, and that while such owner she employed the witness Himes, as her agent, to rent the property, collect and transmit the rent to her, less his commissions. Himes, as such agent, rented the property to Frank Holmes. Holmes took possession under his lease, and for a time paid the rent as agreed. Appellant, having in the meantime purchased the property at sheriff's sale, after the lapse of statutory time for redemption obtained a sheriff's deed to the same, served notice upon Himes of its title, and demanded payment of rent from the tenant. In pursuance to this demand the rent was paid to appellant for some months, apparently with the acquiescence of Himes; but as soon as his principal was notified of this she protested, and notified her agent to this effect, and that there would be a suit between her and

the Merchants' State Bank "to settle this matter as to the ownership and title of this property."

As we have stated, Holmes was appellee's tenant, and put in possession by her agent. His possession was the possession of plaintiff. She never consented to the rent being paid to appellant, or acknowledged in any way the title it set up to the property. The district court, upon issues joined, found for the plaintiff, and quieted the title in her, no evidence being offered to show that the title had ever passed from her. Under these circumstances, her possession of the property is sufficiently shown to enable her to maintain this action. Civ. Code, § 255. The judgment is accordingly affirmed. Affirmed.

GREIG v. CLEMENT et al.

(Supreme Court of Colorado. June 18, 1894.) Estoppel by Pleading—Descriptio Personae— Additional Answee — Bill of Exceptions— Irregularity in Authentication—Waiver.

1. Plaintiff in replevin for goods seized under an attachment is not estopped to show that defendant was not a deputy sheriff by the fact that, in the caption of the complaint, defendant's name was followed by the words "Deputy Sheriff," without the word "as," such designation being presumably merely descriptio personae.

2. Though an "additional answer" is unknown to the Code, issues on such answer are

issues in the case.

3. Where a defendant in error enters a general appearance, and files briefs for a hearing, without taking exception to the correctness or authentication of the bill of exception, he waives the irregularity involved in the grant by the trial court, without notice, of an extension of time in which to sign the exceptions.

Error to district court, Garfield county.
Replevin by Carlisle N. Greig against J. F.
Clement and another for goods wrongfully
seized under attachment. Judgment for defendants, and plaintiff brings error. Reversed.

Max Morris, the owner of a certain stock of merchandise in the town of Glenwood Springs, in Garfield county, Colo., executed a chattel mortgage to plaintiff in error, Greig, upon the property, to secure the payment of certain promissory notes executed by Morris. and made payable to plaintiff in error, Greig. This chattel mortgage contains the usual provision authorizing the mortgagee to take possession of the mortgaged property in case he should for any reason feel insecure or unsafe in his security, or in case the property should be attached or taken, or about to be attached or taken, by a third party. Certain creditors of Morris instituted suits against him, and caused writs of attachment to be issued. These writs in some way came into the hands of defendant in error Clement, the other defendant in error, Kendall, being the sheriff of Garfield county. Clement having served the writs upon the stock of merchandise covered by the Greig mortgage, the

action of replevin was brought by Greig against both Kendall and Clement. The complaint and cause were entitled "Greig, Plaintiff, v. J. F. Clement, Deputy Sheriff, and James C. Kendall, Sheriff, of Garfield County, Colorado." A joint answer was filed on the part of the defendants, in which, after putting in issue nearly all the allegations of the complaint, the defendants, by way of further answer, justified under the attachment writs. This plea sets up, inter alia, "that defendant James C. Kendall is, and was at the time of the commencement of this action. and at the time of the service of the writ of replevin herein, and at all the times hereinafter mentioned was, the duly elected, qualified, and acting sheriff of the county of Garfield and state of Colorado; that defendant J. F. Clement is, and was at all of the said times herein mentioned, a duly qualified and acting deputy sheriff of said county of Garfield: that on the 6th day of September, A. D. 1888, in a certain suit or civil action then pending in the district court of the ninth judicial district of the state of Colorado, in and for the county of Garfield, wherein Samuel Butler and Isaac Butler, copartners doing business under the firm name and style of Butler Bros., were plaintiffs, and Max Morris was defendant, a writ of attachment duly issued out of said district court, directed to the sheriff of said Garfield county, commanding him, the said sheriff, to attach and safely keep all the property of said Max Morris, defendant in said action, or so much thereof as might be sufficient to satisfy the demand of said plaintiffs in said action, which said demand was stated in said writ to be the sum of eight hundred and forty-one and 13-100 dollars." And after describing the attachment it is alleged "that the said three several writs of attachment came into the hands of said J. F. Clement, one of the defendants in this action, as deputy sheriff of said county of Garfield, to execute according to law; that by virtue of said several writs of attachment said defendant J. F. Clement, as such deputy sheriff as aforesaid, acting for and in the name of defendant J. C. Kendall, sheriff of said county of Garfield, did on the said 6th day of September, A. D. 1888, at the county aforesaid, take the goods and chattels mentioned and described in plaintiff's complaint herein, and levy upon the same, by virtue of the said several writs of attachment, as the property of the said Max Morris." The replication to this answer contains the following, among other things: "Plaintiff, for reply to defendants' further answer to plaintiff's amended complaint: Admits that, at the time mentioned in said further answer, James C. Kendall was the duly elected, qualified, and acting sheriff of Garfield county, Colorado. Denies that at the times mentioned in said further answer, or at any other time, or at all, the defendant J. F. Clement was a duly or otherwise qualified and acting (deputy) sheriff of said Garfield

county. * * * That as to whether the said three several or any writs of attachment came into the hands of defendant J.F. Clement, as deputy sheriff, or otherwise, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief. but this plaintiff avers the fact to be that the said J. F. Clement was not at the time mentioned in said further answer, or at any other time, or at all, a deputy or other sheriff of said Garfield county, lawfully appointed and qualified to act as such deputy sheriff. That as to whether the said defendant J. F. Clement took said goods and chattels as the property of said Max Morris, or otherwise, by virtue of said several or other writs of attachment or otherwise, and as to whether he was acting for said defendant James C. Kendall or otherwise, this plaintiff has not and cannot obtain sufficient knowledge or information upon which to base a belief."

Charles H. Toll and W. M. Maguire, for plaintiff in error. C. S. Thomas, Bryant & Lee, and M. J. Bartley, for defendants in error.

HAYT, C. J. (after stating the facts). the pleadings the official character of the defendant in error Clement was put in issue by direct allegation and positive denial. To maintain the plea of justification, it was therefore incumbent upon the defendants to establish such official character. They having failed to introduce any proof in support thereof, the plaintiff undertook to prove affirmatively that Clement at the time of the levy was not a deputy sheriff of Garfield county, but the court, in response to objections interposed by the defendants, excluded all evidence upon this issue. This ruling was based upon the assumption that plaintiff had sued Clement in his capacity as deputy sheriff, and was for this reason estopped from denying that he was such an officer. Thereupon plaintiff asked permission to strike out the words "Deputy Sheriff," after Clement's name in the caption of the amended complaint, this constituting the only reference in this pleading to the official character of the defendant. The motion was denied. To sustain the plea of justification, it is admitted that the official character of Clement is material; but it is argued here, as in the district court, that proof of such character was not necessary, for the reason, as it is claimed, that plaintiff had sued him as deputy sheriff. The premise upon which the argument is founded is unsound. The fact that plaintiff, in the caption of his complaint, follows the name of this defendant by the words "Deputy Sheriff," does not make the action one against the defendant as deputy sheriff. The word "as" does not precede such official designation, and in its absence the presumption is that he is sued as an individual, and that the words "Deputy Sheriff" are merely descriptio personae. Fryer v. Breeze, 16 Colo. 323, 26 Pac. 817. There

is, as we have said, nothing in the body of the complaint to charge him in any official character whatever, and, taking the answer and replication, we find a distinct issue made upon the official character of this defendant. We have, then, in addition to the presumption arising from the omission of words showing that Clement is charged as deputy sheriff, which have been held necessary to indicate that the party is sued in an official capacity, a direct issue in the pleadings upon the very point in controversy, i. e. as to whether Clement, in seizing the chattels, was acting in an official capacity. This was material and essential to the plea of justification. In the absence of proof showing his official character, the plea is not sustained. For this error the judgment must be reversed and the cause remanded.

In view of a new trial, we deem it necessary to notice a question of pleading raised by the record. This relates to what is termed an "Additional Answer." Such a pleading is unknown to the Code, but as the plaintiff, without questioning the pleadings by motion or otherwise in the first instance, joined issue thereon, the court properly held the issue thus made as one of the issues in the case.

The other rulings complained of are not such as are likely to arise upon a new trial, and need not be considered. Judgment reversed. Reversed.

On Rehearing.

The petition for a rehearing is based upon the claim that there is no bill of exceptions properly before the court for its considera-As the judgment of reversal heretofore rendered is based upon errors brought before the court by this means alone, the validity of the bill of exceptions is of primary importance. The contention of counsel is based upon the fact that the time for signing the bill was extended without notice after the district court had lost jurisdiction of the case, as it is claimed. The case of Taylor v. Derry, 4 Colo. App. ---, 35 Pac. 60, is relied upon in support of this proposition. In that case it was held that an order made without notice, extending the time for filing a bill of exceptions, is absolutely void, and beyond the jurisdiction of the court to make.

The facts in that case were as follows: On the 18th day of May, 1892, the plaintiff recovered a judgment. On the same day an appeal was allowed, and the defendant given 60 days within which to prepare and tender his bill of exceptions. On the 8th day of the following month of July, upon defendant's motion, an order was made extending the time 30 additional days. This order was made ex parte, and without notice to plaintiff or his attorney. A bill filed within the time as extended was stricken out in the appellate court upon motion of appellee. The motion in that case was made promptly upon the case reaching the higher court. In this

particular the case is essentially different from the one now under consideration. In this case the defendant in error appeared. and moved to dismiss the writ of error on the ground that plaintiff in error was not the real party in interest. This motion was withdrawn by stipulation of counsel, and the defendant in error entered a general appearance, and filed written briefs upon the merits of the case. In these briefs no exception was taken to the correctness or proper authentication of the bill of exceptions, but the same was treated throughout as properly a part of the record. Afterwards the case was set down for oral argument. Upon such argument, objection to the bill of exceptions was made for the first time. Assuming that the action of the district court or judge, in extending the time, was irregular, the irregularity was certainly waived by defendant in error, if it was within his power to do so; and the existence of this power must be upheld upon both principle and authority. Without doubt, the case of Taylor v. Derry. supra, was correctly decided; but in saying that the Code requirements as to notice must be complied with, to give the court jurisdiction, is, at best, true in a qualified sense only. Two cases are cited in support of the opinion, and an examination shows that neither goes to the extent of holding that the jurisdiction of the court depends upon a notice of a motion. In the first (Mallan v. Higenbotham, 10 Colo. 264, 15 Pac. 352) the defendants were allowed in the lower court. without notice to plaintiff, to withdraw a demurrer previously filed, and to file instead an answer to the complaint, accompanied by a cross demand against the plaintiff. The court thereupon entered a rule for plaintiff to reply to said answer and cross demand within a stated time; and afterwards, on like motion and without notice, the court entered the plaintiff's default for failure to comply with the rule, and gave judgment for defendants for the amount of their cross demand. Upon a reviewing of these proceedings this court held that under these circumstances the judgment was unwarranted and erroneous, but this cannot be construed as an authority in support of the conclusion that the district court was without jurisdiction to enter the order complained of. Can it be doubted that if the plaintiff had complied with the order, and filed a replication, the court would have had jurisdiction to have proceeded and determined the case upon its merits? The other case relied upon is that of Nevitt v. Crow, 1 Colo. App. 453, 29 Pac. 749. The point determined in that case, so far as the case has any application to the present controversy, is that the Code provision requiring every order entered by court, other than during the trial of a cause, to be made upon motion, is mandatory, and consequently that an order obtained upon motion of one party, and without notice to the opposite party, shortening the time to

take a deposition, was irregularly executed, and a motion to suppress the deposition for that reason should have been sustained. In both of these cases, orders made without notice are treated merely as irregularities, and certainly such irregularities may be waived. The early case of Murphy v. Cunningham, 1 Colo. 467, is directly in point. The record shows affirmatively that the bill of exceptions was not filed until the lapse of nearly 60 days after the adjournment of the term at which the judgment complained of was rendered, and the record failed to show that time was given to present such bill of exceptions. as the defendant in error joined in error in this court, and assented to the submission of the cause upon written arguments, the court held that it would assume that all matters appearing in the transcript were properly before the court. The decision has never been modified or reversed, and it is conclusive against the position taken by the defendants in error in this case. The failure to give notice when required by the Code provisions in reference to motions does not necessarily deprive the court of jurisdiction, although it may defeat jurisdiction in the particular case if there is an appropriate and timely objection interposed. Elliott. App. Proc. § 503. The objection to the bill of exceptions came too late in this case to be available. The petition for a rehearing will be denied. Rehearing denied.

TAYLOR v. WALLACE et al. (Supreme Court of Colorado. Oct. 1, 1894.) GENERAL WARRANTY—DAMAGES FOR BREACH— ACTION BY REMOTE GRANTER.

In an action by a subsequent purchaser of land against the original grantor on his general warranty of title in case of a complete failure of title and eviction, the measure of damages is the amount paid by plaintiff for the land, with interest, not exceeding the amount paid by the original grantor.

Error to district court, Weld county.

Action by Henry C. Taylor against John

M. Wallace and another. From a judgment in his favor, plaintiff brings error. Affirmed. This action was brought on the 20th of February, 1890, by plaintiff in error, Henry C. Taylor, against defendants in error, John M. Wallace and Sidney S. Wallace, to recover for breach of covenant. The facts upon which he predicates his cause of action are, in substance, as follows: On the 14th day of December, 1880, at Chicago, Cook county, Ill., the defendants, by their warranty deed, with full covenants of warranty, conveyed to Samuel Sharp the S. 1/2 of the N. E. 1/4 of section 1, township 32 N., range 8 W., in Lake county, Ind., containing 80 acres, for the alleged consideration of \$588. On September 3, 1884, Sharp conveyed to the plaintiff, Henry C. Taylor, by warranty deed, with like full covenants of warranty.

the undivided three-fourths of the 80 acres in question; and afterwards, on November 29, 1886, by a quitclaim deed, the other undivided one-fourth. A duly authenticated transcript of the record of an action to quiet title to the land in question, instituted on January 2, 1889, in the circuit court of Lake county, Ind. (the county wherein the land was situate), by John Brown and William B. Brown against John M. Wallace, Sidney S. Wallace, Samuel Sharp, Henry C. Taylor, and others, and of a decree duly entered therein on the 1st day of March, 1889, adjudging and decreeing the plaintiffs in that action to be the owners in fee simple and entitled to the possession of the land, and forever quieting and setting at rest the title to the same in them, and enjoining the defendants therein from asserting any right, title, or interest or claim in or to said lands, or any part thereof, was introduced. The defendants, in their answer, admit the execution of the conveyances, with the warranties aforesaid, but deny that any consideration was received by them therefor, and set up the statute of limitations.

Look & Bennett, for plaintiff in error. James W. McCreery, for defendants in error.

GODDARD, J. (after stating the facts). The court below, upon the evidence introduced on the trial of the cause, found the issues in favor of plaintiff, and further found that, by the judgment of the Indiana court. the title to the land in question was settled, and that the title warranted by defendants had been overthrown, and that defendants were liable upon their warranty, but held that, as there was no evidence of the amount of the consideration paid by plaintiff to Sharp, he was entitled to recover only nominal damage, and thereupon entered judgment in his favor for one dollar and costs. The sole question, therefore, presented for our consideration by the assignments of error, is whether the court below adopted the correct measure of damages. It held that in this character of action, where the assignee of a covenantee sues the original covenantor, the amount of the recovery is the consideration paid by him to his immediate grantor, with interest not exceeding the consideration paid for the original conveyance. Counsel for plaintiff in error strenuously insist that the measure of recovery is the value of the land at the time of the conveyance by the original covenantor to the covenantee, and that that value is conclusively fixed by the consideration then paid. There is an irreconcilable conflict in the decisions of the courts of the different states that have passed upon this question, and they are nearly equally divided; the measure of damages adopted by the trial court having been approved by the courts of North Carolina, Minnesota, Tennessee, Missouri, and Maryland, while that contended for by counsel for plaintiff in error is announced as the correct rule by the

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courts of South Carolina, Iowa, Kentucky, and Mississippi. The question being an open one in this state, we are at liberty to follow that line of decision which, in our judgment, is the more consonant with reason and justice. It is now well settled by the great weight of authority that, by the covenant for quiet enjoyment and of general warranty, the grantor binds himself to pay his immediate grantee, in case of failure of title and eviction, the value of the land when conveyed, and this value is determined by the price paid, and that sum, with interest, is the limit of the measure of damages recoverable by such grantee; that these covenants run with the land, and any subsequent grantee, upon eviction, may sue for the breach. To hold otherwise is to construe the covenant as one of indemnity,-a view that was rejected in the earlier cases, with few exceptions. In the case of Staats v. Ten Eyck's Ex'rs, 3 Caines, 111, and Pitcher v. Livingston, 4 Johns. 1, it was held, in analogy with the rule applied in the common-law action of warrantia chartae, that the value of the land at the time of the conveyance was the criterion of damages, and not the enhanced value of the land at the time of eviction, whether owing to increase from natural causes or by improvements made by the grantee. There are rules that may reduce the amount of recovery within this limit. Interest is allowed for the time that the grantee is liable to the true owner for mesne profits; and when, by the statute of limitations, mesne profits are recoverable only for a certain number of years, interest will not be allowed for any longer time; and where by the payment of a judgment which is an incumbrance, or where the defect of title is remedied by purchase, the amount of recovery is limited to the amount that was fairly and reasonably paid for that purpose. If, therefore, the measure of damages may be diminished by the disallowance of interest when the profits are equivalent thereto, and a deduction of the principal allowed in the case of a pro tanto eviction in an action by the immediate grantee, it is difficult to perceive why the same rule should not apply as to a remote grantee, and his recovery be limited to his actual damage. As was said in the case of Mette v. Dow, 9 Lea, 93: "The covenant is a peculiar one, and not like an ordinary covenant for so much money. It is rather in the nature of a bond, with a fixed sum as a penalty, the recovery on which will be satisfied by the payment of the actual damages. Each vendor subject to this rule may be treated as the principal obligor to his immediate vendee, and as the surety of any subsequent vendee, to hold him harmless by reason of the failure of title; and the ultimate vendee, when evicted, is entitled to be subrogated to the rights of his immediate vendor against a remote vendor, to the extent necessary to indemnify him. Such a vendee, to use the language of the supreme court of North Carolina, sues a remote vendor on the covenant to redress his (the plaintiff's) own injuries, not the injuries of the immediate vendee of such remote vendor. Accordingly, that court held, in a case like the one before us, that the measure of damages was the consideration paid by the plaintiff to his immediate vendor, with interest, and not the consideration paid by such vendor to the defendant. In other words, the damages recovered were limited to the actual injury sustained. Williams v. Beeman, 2 Dev. 483."

A remote grantee may simultaneously sue his immediate grantor and all previous covenantors, and recover several judgments against each o. them, although entitled to but one satisfaction; and the amount of recovery against each can in no event exceed the consideration received by him. Under the rule contended for by counsel for plaintiff in error, it would follow that his recovery would be in such an event as variable as the various amounts received by each covenantor; and, in case the consideration paid by him to his immediate grantee is less than the consideration received by the original covenantor, his recovery would be less against such grantee than it would be in an action against the original covenantor; while, under the rule that the amount of his recovery is the amount of consideration actually paid by him for the land, not exceeding the original purchase price, the recovery in both cases would be the same. The rule limiting the measure of damages in a case like this, where the remote grantee elects to sue the original covenantor, to the actual loss sustained by him, seems to us not only equitable, but is in principle analogous to the doctrine that applies in an action by the original covenantee. Compensation for his loss is all that any evicted grantee can reasonably ask; and, when this can be obtained by the recovery of the consideration paid, with interest, the ends of justice are attained. We think, therefore, that the court below adopted the correct rule of damages, and the judgment is accordingly affirmed. Affirmed.

PEOPLE ex rel. REGENTS OF STATE UNI-VERSITY et al. v. STATE BOARD OF EQUALIZATION OF COLORADO et al.

PEOPLE ex rel. BOARD OF TRUSTEES OF STATE NORMAL SCHOOL OF COLO-RADO et al. v. SAME.

(Supreme Court of Colorado. Sept. 27, 1894.)
STATE TAXATION—EXCESSIVE LEVIES—REDUCTION
BY BOARD OF EQUALIZATION—PRIORITIES.

1. Where the constitutional limit for the total state levy has been exceeded, the relative priority of both general and special levies is fixed by the dates when the acts providing for each took effect, giving preference, however, to levies to meet appropriations for the support of the executive, legislative, and judicial departments.

ments.

2. Where an act is amended "so as to read," etc., sections of the amending act which

are copied verbatim from the original act take effect as of the date of the original act.

3. A reduction of the tax levy for general 3. A reduction of the tax levy for general revenue for state purposes is within the discretion of the board of equalization, under Sess. Laws 1885, p. 318, providing that the tax for state purposes shall be four mills on a dollar "when no lower rate is fixed by the state board of equalization."

4. Where the total state tax levy has exceeded the constitutional limit, reductions in different levies authorized by the same act of the legislature must be made pro rata, if no

preference is given in the act.

Petitions for mandamus, on the relation of O. J. Pfeiffer and others, regents of the State University, against Davis H. Waite and others, comprising the board of equalization of the state of Colorado, and on the relation of the board of trustees of the State Normal School against the same, to compel a correction and adjustment of the tax levies. Writ denied in the first case, and granted in the

The cases were commenced by the filing of sworn petitions. The petitions and answers are, in substance, the same in both cases. The opinion of the court was rendered upon demurrers to the answers, the petitioners not desiring to plead over. In the case of the regents of the State University the pleadings are as follows, to wit:

"To the Honorable the Supreme Court of the State of Colorado and the Justices Thereof: Your petitioners represent and show unto your honors that they, and each of them, now are the duly elected, qualified, and acting regents of the State University of Colorado, situated at Boulder, in said state, and that the said Davis H. Waite is the duly elected. qualified, and acting governor of the state of Colorado; that the said N. O. McClees is the duly elected, qualified, and acting secretary of state; that the said Albert Nance is the duly elected, qualified, and acting treasurer of the state; that the said F. M. Goodykoontz is the duly elected, qualified, and acting auditor of state; and that the said Eugene Engley is the duly elected, qualified, and acting attorney general of the state; and that the said defendants, by virtue of the several offices to which they have been elected, and which they now hold and enjoy, constitute the state board of equalization. Your petitioners further show unto your honors that it was and is the duty of the said defendants, and each of them, at the September meeting of said board of equalization, as provided by law, to adjust, assess, and levy on behalf of the said University of the State of Colorado, located at Boulder, as aforesaid, in addition to the regular tax and levy provided therefor by the laws, a certain other special tax, consisting of one-tenth of one mill on each and every dollar of the assessed valuation of all taxable property in the state, which is to be collected in the same manner and at the same time as is now provided by law in the assessment and collection of all other state taxes, as was especially provided by an act entitled 'An act to provide a special fund to meet urgent needs of the State University by an additional assessment of one-tenth of a mill for the years 1893 and 1894,' which said act was duly passed and enacted by the general assembly of the state of Colorado for the year 1893, and was approved thereafter on, to wit, the 8th day of April, A. D. 1893, and published at page 475 in the Session Laws of said year; that, in pursuance of said act, the said defendants, constituting the said board of equalization, did theretofore, and during the year 1893, assess and levy the said special tax of one-tenth of a mill in addition to the regular tax for the said year 1893; but that at the regular meeting of said board, on, to wit, the 8th day of September, A. D. 1894, at which time the said levy should have been made by the said board, and transmitted by them to. the proper officers of each of the counties in said state for assessment and collection as a part, and together with the regular general state tax, the said board, notwithstanding the demand of your petitioners, refused, and still continue to refuse, to make said adjustment, levy, and assessment. Your petitioners further say that they are informed and believe, and so charge the fact to be, that the said defendants, constituting the said board, refused to make and transmit the said special levy on behalf of the university for the year 1894, because, in their judgment, they do not consider that the said university was in absolute need of said extra funds; whereas, in truth and in fact, your petitioners allege that, without said special tax, it will be impossible for them to maintain and conduct the said university in a satisfactory manner, or to furnish instruction and educational opportunities for the large number of students who will attend during the following school year. Your petitioners further show unto your honors that, under the provisions of the law, it is necessary for the said board of equalization to transmit to the county clerk of each of the several counties of the state a statement of the assessments and the rate of taxes which are to be levied and collected within his county for state purposes for that year, and that this statement shall be made on or before the 20th day of September in each year. And your petitioners further say that the said statement which has been or is being prepared by the said defendants for such transmission does not contain the special tax of one-tenth of a mill, as it should under the provisions of the law; that if your petitioners should institute this suit, and ask the relief first of any district court having jurisdiction thereof, the necessary delay in having such court hear the same, and the right of appeal, which the said defendants would undoubtedly exercise, would produce such further delay until the matter could have finally been adjudicated and passed upon by this tribunal that the said statement would have been made by the said defendants to the different county clerks, and it would not be possible to com-

pel the said defendants to insert the said special tax within the levy for said purposes on or before the said 20th day of September, nor until a long time thereafter, and when it would be entirely too late for the said defendants to act as a board for the year 1894; that it would then be necessary for your petitioners to bring a multitude of suits, by mandamus or such other writs as they should be advised, against each and every county clerk within the entire state of Colorado. Wherefore your petitioners pray that an alternative writ of mandamus may be issued against the said defendants, and each of them, returnable at some short day, compelling them to make, assess, adjust, and levy the said special tax of one-tenth of a mill for the benefit of the State University at Boulder, in addition to the regular tax already therefor provided by law to be inserted in the general tax for state purposes for the year 1894, and to transmit the same therewith, on or before the 20th day of September, 1894, to the county clerk of each and every county in the said state, as provided by law, or to show cause why they should not do so. And in duty bound your petitioners will ever pray."

"Answer.

"Now come the above-named defendants, and, for their return and answer to the alternate writ and petition herein, say that it is not true that the defendants refuse to make or transmit the said special levy in behalf of the said university for the year 1894 because they do not consider that the said university was in absolute need or any need of said extra funds, but because the said board, at the said September meeting of the year 1894, had, by making other levies required by law which have a constitutional and statutory preference and priority over said special tax, already made levies aggregating four mills on the dollar of the taxable property of the state, before they reached the levy provided by the act of 1893, mentioned in plaintiffs' writ and petition; that the levies so made, as aforesaid, are as follows, viz:

For general revenue. Interest on capitol building bonds. Mute and blind asylum. University Agricultural college School of mines. Insane asylum Capitol building fund. Stock inspection Normal school	1/6 II 1/5 II 1/6 II 1/6 II 1/6 II 1/6 II 1/2 II 1/30 II	nills. nills. nills. nills. nills. nills. nills. nills. nills.
Total	4 n	nills.

"Defendants further say that the said levy of two and nine-thirtieths mills for general revenue is necessary for the payment of the ordinary expenses of the executive, judicial, and legislative departments of the state government for the fiscal year A. D. 1894, and legislative appropriations, payable out of the general revenue of said fiscal year, having a preference and priority in law to said special

university tax; that the other said levies, except that of the capitol building bond sinking fund, as made by said board, are based upon statutory continuing appropriations, and constitute a fixed tax required by law to be annually levied by said board, said appropriations having been made by the general assembly of Colorado prior to the enactment of said special university tax; that the levy for said capitol building fund is made in pursuance of a law passed by said general assembly long before the enactment of said special university tax, and for the purpose of liquidating an existing obligation of the state. Defendants further say that the aggregate of the levies so made, as hereinbefore alleged, amount to four mills on all the taxable property of the state, and that they are prevented by an inhibition of the state constitution from levying a greater sum than said four mills. Defendants, answering, further allege that the payment of said statutory appropriations for the fiscal year A. D. 1894 out of and from the general revenue of said year will exhaust said revenue. Wherefore defendants pray that said alternate writ may be discharged, and for costs."

Thomas, Hartzell, Bryant & Lee, J. W. McCreery, and S. A. Giffin, for petitioners. C. J. Hughes, amicus curiae. Eugene Engley, Atty. Gen., and H. T. Sole, for respondents.

HAYT, C. J. (after stating the facts). These actions are brought for the purpose of compelling the state board of equalization to correct and adjust the tax levies for the year 1894. The levies for that year, as declared at the September meeting of the board, are as follows:

For general revenue. Interest on capitol building bonds. Mute and blind asylum. University Agricultural college School of mines. Insane asylum Capitol building fund. Stock inspection Normal school	1/80 mills. 1/6 mills. 1/6 mills. 1/6 mills. 1/6 mills. 1/2 mills. 1/2 mills. 1/2 mills.
Total	4:11-

The foregoing levy omits a special tax of one-tenth of one mill provided by the legislature for the State University, and reduces the levy for the State Normal School from five-thirtieths of a mill to four-thirtieths, and also reduces the amount of the stock inspection tax from one-fifteenth of a mill to one-thirtieth.

This action of the board was taken for the purpose of bringing the total levy within the limit fixed by the state constitution, viz.: "Sec. 11. The rate of taxation on property, for state purposes, shall never exceed four mills on each dollar of valuation." Article 10. It is claimed by petitioners that the special levies should have been made for the full amount provided by the various legisla-

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tive acts, and that the reduction necessary to ! bring the total within the constitutional limit should have been made from the levy for general revenue. The duty of the state board in the premises is fixed by section 3849 of Mills' Annotated Statutes: "Sec. 3849. It shall be the duty of said board, in the absence of any legislation on the subject, to enter an order at its September meeting declaring what rate of taxes shall be levied for state purposes for the coming year, which in no case shall exceed the amount provided for in the constitution." The duty of the auditor is fixed by the preceding section: "Sec. 3848. On or before the twentieth day of September in each year the said board shall complete its equalization, and the auditor of state shall transmit to the clerk of each county a statement of the changes, if any, which have been made in the assessments, and the rate of taxes which is to be levied and collected within his county for state purposes for that year." An examination of the law on the subject, constitutional and statutory, discloses that, primarily, the state board of equalization has nothing to do with the levy of taxes. The board is created for the purpose of assessing certain property, and equalizing and adjusting the valuation upon all property in the state. There is one apparent exception to the above rule. This exception has reference solely to the rate to be levied for state purposes, the legislature having provided with reference to this levy that "there shall be levied and assessed upon the taxable real and personal property within the state in each year the following taxes: For state purposes four mills on a dollar when no lower rate is directed by the state board of equalization." Sess. Laws 1885, p. 318. In respect to other levies, the duty of the board is merely clerical in charac-

In the various arguments, oral and written, presented to this court on the part of those interested in the various special levies, it has been urged that all such levies should be accorded precedence, and the levy for general purposes be reduced to a rate to be ascertained and fixed by deducting the aggregate of the special levies from the maximum rate of four mills permitted under the constitution. The leading case upon the subject of tax levies in this state is that of People v. Scott, 9 Colo. 422, 12 Pac. 608. The principal contention in that case was whether the special levies should be considered as a part of the aggregate of four mills beyond which the legislature could not go, or whether the legislature, in its discretion, might levy a tax of four mills for general revenue in addition to the special levies for particular purposes. Upon a careful review of the subject in the light of the constitutional provisions and statutes then in existence, it was decided that the special levies were to be taken into consideration in determining the aggregate, and that such aggregate could in no event exceed four mills upon the dollar. The action was brought by the people, at the relation of the attorney general, against Scott, as county clerk of Arapahoe county; Scott having refused to extend a greater levy for general purposes than the rate of four mills on the dollar, less the rates required by law to be extended for the support of state institutions. In this position he was sustained by the court. While no authorities have been cited upon the question, and none have been found by the court, we think that, where excessive levies have been made, the true rule is to allow the levies precedence in the order in which they were passed, giving preference, when necessary, to levies for the purpose of meeting appropriations for the support of the executive, legislative, and judicial departments of the government, as indicated in Re Appropriations by General Assembly, 13 Colo. 316, 22 Pac. 464.

It has been urged by the attorney general with great force that the levy for general purposes is to be preferred over all oth-In support of this contention, he cites the opinion in Re Appropriations by General Assembly, supra, and urges that the legislature cannot by indirection do that which it is inhibited from doing directly; but we do not find it necessary to determine the question thus raised in this case, as the general levy must be maintained for another reason. The opinion in the Scott Case has been cited in support of the conclusion that all special levies fixed by the legislature must first be provided for. A careful reading of the opinion in that case discloses that the special levies allowed precedence were fixed by the general assembly by acts prior to the act providing a four-mill levy for state purposes, and were for this reason given a priority over the levy for general revenues. The opinion will not bear a construction which militates against fixing the priorities of all levies, including that for general revenue, as of the date of the taking effect of the acts providing for the same. No question of preference as to the necessary expenses of the executive, legislative, or judicial departments of the state were presented or considered in that case. It is conceded that the power of the legislature in the premises is plenary, except as limited by the constitution. It being restricted to a levy of four mills, the question arises as to what levies shall be eliminated where, as here, an excessive levy has been made. The legislature having power to levy taxes aggregating four mills in amount, its mandates must, if not contrary to other constitutional requirements, be enforced until the four-mill limit is reached. The power being then exhausted, further levies cannot be made. When the total levies aggregate more than four mills on the dollar, it is the plain duty of every officer connected with the levy and collection of the revenue to refrain from doing any act which falls within the inhibition of

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the state constitution. In Re Appropriations by General Assembly, supra; People v. Scott, supra. The levy for state purposes is as much a legislative levy as the levy for any special purpose. It is a levy of four mills when no lower rate is directed by the state board of equalization. This, therefore, is to be treated as an absolute levy of four mills, subject to two conditions: First, that all prior levies, if not repugnant to constitutional requirements, shall be respected; second, a reservation of power in the state board of equalization to reduce the general levy. This levy is fixed by the legislature subject to the right of the state board of equalization to reduce the rate to an amount sufficient merely to meet appropriations, should the assessment justify such reduction. In determining the rate, the board has only to take the appropriations and the assessment into consideration, and fix a rate that will produce the required revenue. The tax thus levied is of primary importance. It is specially provided for by the state constitution in the following unmistakable language: "The general assembly shall provide by law for an annual tax, sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year." Article 10, § 2. It is made the imperative duty of the legislature under this section to provide by law a tax sufficient to defray the estimated expenses of the state government for each fiscal year. Speaking of this provision, this court has said: "Considering the great care thus taken to secure and guard such appropriations, we cannot doubt that the ordinary expenses of the legislative, executive, and judicial departments of the state are the expenses primarily intended to be provided for by section 2, art. 10." In re Appropriations by General Assembly, supra.

Aside from the character given to this levy by the constitution, we find that it is prior in point of time to many of the levies designated as "special levies." It is a mistake to suppose that this levy is to be given a date as of the act of 1891. It goes back at least to the year 1885. The former act provided that "there shall be levied and assessed upon taxable real and personal property within this state in each year, the following taxes: For state purposes four mills on a dollar, when no lower rate is directed by the state board of equalization." Sess. Laws 1885, p. 318. The act of 1891, which purports to be an amendment of the above, is an exact rescript thereof, in so far as this levy is converned. It must therefore be treated as a confirmation and continuance of the former act, and as having priority from the date of that act. The form of making amendments by declaring that a section shall be amended so as to read in a particular way has been a favorite one with our legislature since the organization of the state government. By it, obscurity and confusion are avoided, and the legislature is presented with the amendment and the previous act together, and intelligent action thereby aided. Of such amendments, Denio, C. J., in Ely v. Holton, 15 N. Y. 595, says: "The portions of the amended sections which are merely copied without change are not to be considered as repealed and again enacted, but to have been the law all along." See, also, Suth. St. Const. § 133. The same is true of the act providing for a special levy of one-half of a mill for capitol building purposes. A levy for this purpose first appears in the Session Laws of 1883. The erection of a state capitol building, suitable for the purposes of this growing young commonwealth, has been kept steadily in mind by each succeeding legislature, and levies for this purpose have been made at the same rate annually since the passage of the original act. The reasoning in connection with the levy for state purposes applies with equal force to the levy for the state capitol building, and this levy must stand as of the date of the original act in 1883.

The priority of the general levy for state purposes and the special levy for the state capitol building being thus ascertained under the principles announced, the standing of other special levies must be fixed as of the date of the taking effect of the several acts. and those levies which the legislature has attempted to authorize after the constitutional limit of four mills was reached fall under the constitutional inhibition, and must be treated as void. Of these, the last in point of time is the special levy of one-tenth of a mili for the State University; the act attempting to authorize this having been approved April 8, 1893. Sess. Laws 1893, p. 475. The next in point of time is the act of 1891, entitled "An act to provide for the assessment, levy and collection of a state tax, for the support and maintenance of certain state educational institutions, mentioned therein; to define the duties of the county treasurer in connection therewith; to provide for the election of a treasurer of each of said institutions, define his duties and to repeal all acts and parts of acts inconsistent therewith." Acts 1891, By this act, a levy of one-sixth of one mill is provided for each of the following institutions: Agricultural college, school of mines, normal school, and institute for the mute and blind. As authority for a levy for these purposes is given in one and the same act, we cannot assume that the legislature intended to favor one of these institutions in preference to another, in the absence of words indicating such intent, but rather that all should stand on an equality; hence such reduction as may be found necessary to bring the total levy for all purposes within four mills should be made from these several levies pro rata.

We shall not attempt to determine the constitutionality of this act at this time, as several of the beneficiaries under it are not now before the court, and the necessity for an

early opinion upon the other questions presented is of the greatest importance, as the time fixed for the certification of the levy has already passed. Moreover, the constitutional objection urged applies with greater force to the appropriations than to the levy, and may properly be considered hereafter, should it be presented in some appropriate proceeding.

The stock inspection tax being one of the first provided for by the legislature, the board was in error in reducing the levy for this purpose from one-fifteenth of one mill to one-thirtieth. No justification for this reduction has been offered, and we are unable to sustain the action of the board in respect thereto.

Our conclusion upon the other questions presented is: (1) That the action of the state board of equalization, in fixing a rate of 29/30 mills for the levy for general revenue for the year 1894, was within the discretion of the boa. L. and cannot be changed by any court; (2) that the omission of the one-tenth of a mill special tax for the State University was necessary, in order that the total tax should be kept within the limit fixed by the constitution; (3) that it was proper to reduce the levy for the State Normal School, but that the reduction necessary should fall equally upon the four institutions named in the act, and not alone upon one. These conclusions have not been reached without difficulty. The revenues of the state have been sadly crippled by reason of the great financial panic that has seized upon the nation, and the loss may not fall where the public interests will be injured the least. It is not, however, for the courts to correct this inequality, but to construe the various statutes according to established legal principles, and, where all cannot be given effect, to at least bring order out of the confusion by determining which are entitled to preference under the law. Fortunately, the time for the biennial meeting of the legislature is near at hand, when an adjustment may be had, if found advisable. The legislative department of the state has for many years made appropriations in excess of the limit permitted by the state constitution. As a result, confusion and litigation have followed, and the credit of the state has thereby suffered. The plan of levying special taxes for particular purposes adds to, rather than lessens, the difficulty. If the legislature would marshal the assets of the state, and estimate the revenue necessary to run the state government, and levy a tax in gross sufficient, with the revenue derived from other sources, to meet all demands upon the state treasury, the matter would be greatly simplified.

In the case of the State University (No. 3,440) the peremptory writ will be denied, and the proceeding dismissed. In that of the State Normal School (No. 3,441) a peremptory writ of mandamus will issue, in accordance with this opinion.

STATE ex rel. NEW YORK SHEEP CO. v. EIGHTH JUDICIAL DISTRICT COURT.

(Supreme Court of Montana. July 19, 1894.)
RECEIVER—GROUNDS FOR APPOINTMENT—CONTEST
BETWEEN ATTACHING CREDITORS.

1. Code Civ. Proc. § 229, subd. 1, authorizes the appointment of a receiver in an action by a vendor to vacate a fraudulent purchase, "or" by a creditor to subject any fund to his claim, "or" between partners or others jointly owning or interested in any property, "on application" of plaintiff or of any party whose right or interest in the property is probable, "and" where the property is in danger of material injury. Held, that such appointment is authorized only in the cases mentioned in the first part of the section, and the words after the phrase "on application" merely show when, in the cases before mentioned, the receiver may be appointed, and does not provide an additional case; and hence a receiver of property attached by different parties in actions at law for the recovery of money only cannot be appointed though the property is in danger of material injury.

and hence a receiver of property attached by different parties in actions at law for the recovery of money only cannot be appointed though the property is in danger of material injury. Harwood, J., dissenting.

2. Code Civ. Proc. § 229, subd. 6, author izing the appointment of a receiver in all other cases where receivers have been heretofore appointed by the usages of the court of equity, does not authorize such appointment in a sim-

ple law action on debt.

Application for writ of certiorari by the state of Montana on the relation of the New York Sheep Company against the Eighth Judicial District Court. Granted.

This court is asked to review, upon writ of certiorari, the appointment of a receiver by the district court. The facts upon which the application for writ of certiorari is made are as follows: On May 31, 1894, in the eighth judicial district court for Cascade county, L. G. Phelps commenced an action against the New York Sheep Company, the relator herein, to recover the two sums of \$7,303.09 and \$5,000, and interest. same day the Severance Mercantile Company commenced an action against the same defendant to recover \$5,935.24. Two writs of attachment were issued in each case, one to O'Marr, sheriff of Meagher county, and one to Deaton, sheriff of Fergus county. The two sheriffs each levied upon a large band of sheep belonging to the defendant, and in their respective counties. Under each writ, in the hands of each sheriff, the Phelps levy was first, and prior to the levy of the Severance Mercantile Company. Afterwards the Severance Mercantile Company filed a complaint in the eighth judicial district court against the two sheriffs, O'Marr and Deaton, and Phelps and the New York Sheep Company. That complaint set up the facts above recited, and then stated facts tending to show that the attached property was in danger of being lost or materially injured if it remained in the hands of these two sheriffs. The Severance Mercantile Company asked in that complaint for the appointment of a receiver of the sheep attached, as above described. That appointment was made by the district court. That action by the district court the New York Sheep Company now asks us to review on certiorari, claiming that the court had no jurisdiction or power to make the appointment.

Thompson & Maddox, for relator. Toole & Wallace and A. J. Shores, for respondent.

DE WITT, J. (after stating the facts). The question of the discretion of the district court is not before us, so it may be considered as a conceded fact that it was properly shown to the district court that the sheep were in danger of suffering material loss and injury if left in the hands of the sheriffs, and that the appointment of a receiver would tend to avoid this loss and injury.

We will turn our attention for a moment to one matter which we meet at the threshold of this case. It seems that the Severance Mercantile Company filed a complaint, and commenced a separate action, asking to have this receiver appointed. It is objected that there is no such thing known as an action for the appointment of a receiver, but that such appointment is ancillary to another action; that is, an action of such a nature that a receiver may be appointed therein. French Bank Case, 53 Cal. 495; Jones v. Bank, 10 Colo. 464, 17 Pac. 272. But perhaps it would be fair to regard what appears to be a complaint of the Severance Mercantile Company against the New York Sheep Company, Phelps, and the two sheriffs, as simply a petition or application of the Severance Mercantile Company, looking to an appointment of a receiver in the case which was already pending in the district court, namely, the Severance Mercantile Company against the New York Sheep Company. We are willing at least to so regard the situation of the parties. Then, the question of discretion not being under review, it remains to be decided whether, under the facts shown, the court had jurisdiction to appoint this receiver; that is to say, the question is this: If two creditors each sue one and the same debtor on simple money demands, and each creditor sues out in his case a writ of attachment, under which writs two sheriffs of different counties levy upon property of the debtor in their respective counties, then has the court jurisdiction to appoint a receiver of the property so attached and held by such sheriffs? It is also conceded, of course, that the showing was made of danger of loss and material injury. Stated more simply, the proposition perhaps may be reduced to this: In an action on a simple money demand, for a plain money judgment, in which action property has been attached, has the court power to appoint a receiver of the attached property, if it appears that there is danger that it will be materially injured? The statute-quoting the portion which is pertinent, or which was relied upon by respondent-is

as follows: "A receiver may be appointed by the court in which an action is pending, or by the judge thereof: First. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to, or interest in, the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed or materially injured. * * * Sixth. In all other cases where receivers have been heretofore appointed by the usages of courts of equity." Code Civ. Proc. § 229. Counsel for the respondent said that he relied partly upon the sixth subdivision of the section. But it is scarcely seriously urged that the appointment of the receiver was justified by that subdivision of the section, or that receivers have heretofore been appointed by the usages of courts of equity in a simple law action on debt. The California supreme court said. in reference to this subdivision, as follows: "The five subdivisions containing such specifications are followed by the sixth, which provides for the appointment where 'receivers have heretofore been appointed by the usages of courts of equity,' which expression we may conceive to be equivalent of that employed in the third subdivision of the 143d section of the former practice act,-'such cases as are in accordance with the practice of courts of equity jurisdiction.' Either of these expressions simply means that, in addition to the particular instances mentioned in the preceding subdivisions, the appointment should be made by the district court, as a court of equity, in the other suits in which the power could have been employed had there been no statute on the subject, and cannot be construed as authorizing the appointment in an action at law.' Bateman v. Superior Court, 54 Cal. 285.

Counsel for respondent next urge that avthority for this appointment is found in subdivision 1 of section 229. Before proceeding to read that subdivision, we remark, in passing, that there is some argument of expediency as to the making of the appointment of the receiver in this case, as well as in perhaps other actions of debt where there are numerous attachments of property. That argument should, of course, be addressed to the lawmaking department of the government, and cannot be seriously entertained by a court when it stands in the face of plain language of a statute. We have examined our statute with some assiduity in search of the power of the district court to make this appointment, for we believe that the discreet exercise of such a power would sometimes be beneficial; but we cannot find the power given by the law. But the attachment law is not unmindful of the care and disposition of the attached property. A bond must be

given by the party attaching. Code Civ. Proc. § 182. The sheriff is under the duty to "safely keep" the property. Id. § 184. The sheriff is an officer of the court, and subject to the court's proper orders. Again, if it appear to the court that the interests of the parties will be subserved by a sale of the attached property, the court may, upon determining such fact upon a hearing of both parties, order the property sold as property is sold under execution. Id. § 541. We will then proceed for a moment to analyze the statute. Turning again to subdivision 1, § 229, it is observed that the first sort of case in which a receiver may be appointed is in an action by a vendor to vacate a fraudulent purchase of property. This, of course, may be passed without comment. Next, we find that a receiver may be appointed in an action by a creditor to subject any property or fund to his claim. We should be inclined to say that this might be passed without comment, were it not that counsel for the respondent has relied upon it. We therefore examine it a moment. The action here was a simple one of debt. Surely it cannot be contended that a simple action of debt, asking only a straight money judgment, is an action by a creditor to subject property or a fund to his claim. The action is not for such a purpose. It does not seek such relief. There is nothing about such an action which looks to an obtaining of the relief of subjecting a fund or property to the plaintiff's claim. Nor does the fact that a writ of attachment was issued change the nature of the action from a money demand to one for the relief of subjecting a fund to plaintiff's claim. Again, it has been suggested that the following portion of subdivision 1, § 229, is sufficient to grant the power to the district court. The portion reads as follows: "A receiver may be appointed * * an action * * * between partners, or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to, or interest in, the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured." But no partners are concerned here, and no other persons jointly owning any property or funds. Omitting these words, the statute, for the purposes and facts of this case, would read: "A receiver may be appointed * * * in an action * between persons jointly interested in any property or fund, on the application of." etc. Does this portion of the section give authority to appoint a receiver of property attached in a simple money-demand action? We do not think such view should obtain. Is the action between persons jointly interested in any property or fund? It seems not. The action has nothing to do with property of any one, or of any kind. No property is the subject of litigation. The

action is upon a debt only, and seeks only a money judgment. The plaintiff and defendant in such an action are not jointly interested in any property or fund, so far as anything appears in the action. It is true that when the action was commenced a writ of attachment was issued ancillary thereto, and in pursuance to such writ property was seized by the sheriffs, to be by them held to answer any judgment that plaintiff might obtain. Does this ancillary circumstance inject into the action the fact that the action is between parties jointly interested in property or a fund? It does not seem to us that it does. The action not being about property at all, the issuance of an attachment does not change the nature of the litigation, and convert it into an action between persons jointly interested in any property. We think the section means that the action must be in regard to property in which the parties are jointly interested. The whole context indicates this. The context speaks of "between partners" and "others jointly owning" and "others jointly interested." It is actions between such people that are being described. We think the section certainly means that the action here described, in which a receiver may be appointed, is one in regard to property or a fund in which there is a joint interest of the parties. The only possible construction by which this portion of the section could be made to apply to such an action as the one before us is the holding that the creditor and debtor, plaintiff and defendant, in an action on a money demand, and for a simple money judgment, are "jointly interested" in property which is not the subject of the action, but is confessedly the sole property of the defendant, and in which the plaintiff has no rights whatever except what rights it may be held that he obtains by virtue of the fact that the sheriff has seized said property under writ of attachment; that is to say, it must be held that an attaching creditor has a joint interest, within the contemplation of the statute, with defendant in defendant's property which has been attached. We do not think that such plaintiff has such joint interest as is contemplated by the statute. We do not think the statute, in its text and context, conveys this meaning. The plaintiff. by attachment, has acquired a right to have the property held by the sheriff awaiting the judgment, but we cannot think that he has such a joint interest in the property as this statute had in view when it spoke of partners and other persons jointly owning or interested in any property. If the legislature had intended to give the power to appoint a receiver in attachment suits, it is such an important matter that it would seem that they would have mentioned it. The California supreme court said, as to a kindred subject: "If it had been intended to confer the power to appoint an officer of that character [a receiver] in an action at law

for the recovery of the possession of real property, it is not credible that the legislature would not have said so in terms, since it was apparent that it was their purpose to specify all cases, whether at law or equity, in which receivers could be appointed." Bateman v. Superior Court, 54 Cal. 289. The court was construing a statute similar to our own. Therefore, upon such analysis as we are able to give subdivision 1, § 229, Code Civ. Proc., we cannot find therein the jurisdiction to appoint the receiver in this case.

There seems to be nothing in the further portion of the subdivision which is applicable. The rest of the language states on whose application the receiver may be appointed. The section has already stated the kinds of action in which the appointment may be made. These we have considered. Then it states on whose application, and under what circumstances, the appointment may be made in such actions. The appointment may be made "on application of the plaintiff," or it may be made on the application "of any party whose right to, or interest in, the property or fund, or the proceeds thereof, is probable." (See the section, with subdivision 1, quoted fully above.) The statute, in this latter language, is not defining actions in which the receiver may be appointed. That it has done. Now it comes to defining who may make the application, and it says not only the plaintiff, but any party whose right, etc., is probable. If this part of the section which we are now considering does not relate to the first part of the section, and if it does not simply describe the persons who may apply in the sorts of action which have been before set forth; and if this portion is to be cut off from the preceding; and if it is to stand alone as describing another condition when a receiver may be appointed, then the reading would be about as follows: "A receiver may be appointed in any action on the application of the plaintiff, or of any party whose right, etc., is probable, where it is shown that the property is in danger of material injury," etc.; that is to say, this construction would give the authority to appoint a receiver in any case where it was shown that there was danger of material injury to property. It may be expedient to have such a statute. It seems that Indiana has one as broad as this. 20 Am. & Eng. Enc. Law, p. 59. But we do not think that subdivision 1 of section 229 would bear that construction. If such were the meaning of the statute, the word "or" would have been inserted before the word "on," at the top of page 116, Comp. St., at the eighth line of the section. And the section would have read, in effect, that a receiver may be appointed in an action by a vendor to vacate, etc., or by a creditor to subject, etc., or between partners or others jointly interested, etc, "or" (this being the "or" that would have to be inserted) on the application of plaintiff, or of any party, etc., upon the danger of the material injury shown.

But the statute does not read in that way. The "or" as written in quotation marks in the above sentence is not in the statute. The section describes the sort of actions in which the receiver may be appointed, with the disjunctive "or" between the different sorts. and then goes on and states who may make the application in such actions, and under what circumstances in such actions. section closes with the statement that to allow a receiver in the cases enumerated it must appear furthermore that there is danger of loss, etc. This clause of the section is introduced by the word "and," connecting it with the language preceding it, which is the language describing who may make the application in the cases which have been theretofore set forth. The descriptions of the sorts of actions in which the receiver may be appointed are all connected with the word "or," and not "and." This last clause of the section speaks of "the property or fund." The natural construction seems to us to be "the property or fund" which the section has theretofore mentioned. We do not think it is within the meaning of the section to cut off this last clause, and read it: "A receiver may be appointed in an action 'where it is shown that the property or fund is in danger of being lost, removed, or materially injured." Such a clause, so read, would be meaningless, for there would be nothing in it to indicate the nature of the action, or what was "the property or fund" referred to. We cannot see any other reading of the statute than that which we have above pointed out. and such reading does not include the appointment of a receiver in such a case as the one before us. This does not seem to us to be construing the statute at all. It seems to be nothing further than reading its plain terms. We are of opinion that this writ of certiorari should be granted, and that the order of the district court in appointing the receiver should be annulled.

PEMBERTON, C. J., concurs.

HARWOOD, J. (dissenting). I dissent from such a narrow and rigid construction of the provisions of our remedial statutes relating to the administration of justice in civil actions, as will compel courts of original jurisdiction to permit damage and waste of property in custodia legis, by pursuing inflexibly a certain method of administration: while such waste could readily be avoided without detriment to the rights of any litigant or others interested, but with advantage to all, by employing another well-known and usual method of custody and administration of the things involved in the litigation. the foregoing treatment it is conceded that by holding the attached property in the custody of several sheriffs, and without change of situation, great loss would be involved, which could be avoided by placing the property in the custody of a receiver. It has been the

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practice of trial courts for a long period in this jurisdiction to appoint a receiver in such a case, and put him in charge of the property attached and held under various attachment liens, where the conditions were such as to entail injury and loss if such method were The Code provides in very not pursued. broad and general terms that a receiver may be appointed in cases where partners "or others" are "jointly owning, or interested, in any property or fund, on the application of plaintiff, or of any party whose right to, or interest in, the property or fund, or proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured." Code Civ. Proc. § 229. In the face of this provision, and the further provisions of the Code that all its provisions must be liberally construed, so as to work out substantial justice, and in the face of the conceded fact that unless the court interposes a receiver in this case great loss would result, and in view of the showing that the appointment of a receiver therein would avoid such loss and work great advantage to all parties concerned, still it is held by a majority of this court that no receiver can be appointed in such a case. In order to reach that conclusion it is unavoidably held by implication that attaching creditors who have by regular proceedings levied attachment liens upon property of their debtor, and who have a clear right (subject only to other direct liens in advance of theirs) to the funds or proceeds arising from such property, still have no "right or interest in" the property attached, "or probable interest in the funds arising therefrom," in contemplation of the statute providing for appointment of receivers. If we were applying a provision of the Criminal Code, under the more rigid and technical rule applicable to the interpretation of criminal statutes. I hardly see how we could reasonably confine the broad and general language of the statute under consideration to such narrow limits.

On Rehearing.

DE WITT, J. Counsel on the argument on rehearing seem to have obtained the impression that the original decision was based upon the ground that the receiver should not be appointed because there was another adequate remedy. Whatever was said as to the creditor's rights and remedies under his attachment was simply a suggestion to meet counsel's argument ab inconvenienti. the question of the expediency of giving the courts power to appoint a receiver in certain plain money-demand actions is a matter to be addressed to the legislature, and not to the courts. In the original opinion we endeavored to make a plain, simple reading of the statute as to receivers. Reading that statute in whole, and not in part, we cannot find any authority to appoint the receiver in this case. As we remarked in the original opinion, such power might be beneficial in some cases.

That subject we commend to the legislature, where only it belongs. It is ordered that the original decision shall stand.

PEMBERTON, C. J., concurs.

WAGGONER v. OURSLER et al.

(Supreme Court of Kansas. Oct. 6, 1894.)

CHATTEL MORTGAGE—DESCRIPTION — SUFFICIENCY
— ERRONEOUS DESCRIPTION OF PART OF MORT-- SPECIAL VER-GAGED CATTLE-EFFECT-TRIAL -DICT-AUTHORITY OF COURT TO TAKE.

1. A description in a chattel mortgage which gives the age, sex, ownership and location of a number of cattle is held to be sufficient, under the circumstances, to enable third parties to identify those intended to be mortgaged with reasonable certainty, and to charge them with notice of the lien.

2. The fact that they were held in a pasture

with similar cattle belonging to others will not render the mortgage ineffectual, where, by inquiries suggested by the instrument itself, the mortgaged cattle can be distinguished from those with which they are held.

3. The fact that a part of the property in-

tended to be mortgaged was incorrectly described will not invalidate the mortgage as to that portion which is correctly described, and which may be identified with reasonable certainty.

4. The district court, in the exercise of its inherent power, and without the request of either party, may submit to a jury appropriate special questions that will aid the court in reaching a correct result.

(Syllabus by the Court.)

Error from district court, Brown county; R. C. Bassett, Judge.

Action by Charles A. Oursier and Alfonso R. Oursler, partners as Oursler Bros., against William A. Waggoner, for the conversion of cattle. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

Hayden & Hayden, for plaintiff in error. James Falloon, for defendants in error.

JOHNSTON, J. This was an action to recover for the alleged unlawful conversion of mortgaged property. William R. Baxter, who was indebted to Oursler Bros. about the sum of \$2,000, executed a chattel mortgage upon some cattle to secure the same. The description in the mortgage was, "45 head of three year old steers, 59 head of two year old steers, now being pastured on the Pottawatomie reserve by said party of the first part." The mortgage was duly uled for record, after which Baxter sold 50 head of the steers to William A. Waggoner, who at once transferred them to another, and the cattle so sold were taken beyond the limits of the state. The remainder of the cattle described in the mortgage, or so many of them as could be found, were afterwards sold at the instance of the mortgagees, and the proceeds applied upon the mortgage debt. This action was then brought to recover the value of the special ownership of the mortgagees in the 50 head of cattle alleged to have been converted by Waggoner. The answer of Waggoner denied that he had either actual or constructive notice of the mortgage, or that Oursier Bros. had any claim or lien upon the cattle, and, further, that Baxter was the duly-authorized agent of the mortgagees to dispose of the cattle, and had sold and disposed of them upon their authority, and that subsequent to the sale and delivery they had ratified the same. The trial, which was had with a jury, resulted in a verdict in favor of Oursier Bros. for \$1,071.88, the jury having found that that was the value of their special interest.

Several errors are alleged, but the principal controversy arises upon the description in the mortgage. It is urged that the description is too general and indefinite to make the mortgage effectual, and that this defect is emphasized by the mingling of the Baxter cattle with about 400 others of a similar kind and description in the same pasture. The claim is that the description is not such as would enable third persons to distinguish and identify the property intended to be included in the mortgage, and that, therefore, it is invalid as against one who has purchased in good faith, and without actual notice of the mortgage. It appears that Baxter was pasturing a large number of cattle besides those owned by himself, and that his own, as well as about 400 others, which he was pasturing for the season, were branded with the same herd brand. There is testimony to show, however, that those owned by himself were distinctly branded "B" on the left hip. and it does not appear that those of the herd owned by others were so marked. While the description of the mortgaged property is very general, we think it furnished the means of identification, and is sufficient to charge third persons with notice. The trial court correctly stated the rule that a description which will enable third parties, aided by inquiries which the instrument itself suggests, to identify the property is sufficient, and that a slight variance in the description would not invalidate the mortgage, if, from the entire description, third persons, aided by inquiries which the instrument itself suggests, could identify the property. The mortgage in this case gives the age, sex, ownership, and location of the property intended to be included within it. By going to the pasture where the cattle were kept, it would have been found that the mortgage covered all the two and three year old steers which Baxter owned, and, further, that those owned by him had a distinguishing brand not found upon the others.

There is a provision in the mortgage that the property was to remain in the possession of Baxter until default in the payment of the debt, or until there was some violation of the conditions of the instrument. It seems that Baxter did not have as many steers as were named in the mortgage, and that he attempted to make up the number by putting in a few helfers of the same age. The mortgage.

however, covered all the steers of the specified age which Baxter owned, and these were the ones which were sold by him, and converted by Waggoner. The fact that a part of the property was incorrectly described will not invalidate the mortgage as to that which is correctly described, and which may be identified with reasonable certainty. Within the rule of our own authorities, we think the description is sufficient and the mortgage is valid. Crisfield v. Neal, 36 Kan. 278, 13 Pac. 272; Schmidt v. Bender, 39 Kan. 437, 18 Pac. 491; Cattle Co. v. McLain, 42 Kan. 680, 22 Pac. 728, and cases cited.

The contentions that Baxter acted as the agent of the mortgagees in the sale of the cattle, and that they subsequently ratified the sale, are disputed by the testimony, and that dispute has been finally settled in their favor by the verdict of the jury.

The court, of its own motion, submitted to the jury three particular questions of fact: and it is contended that this was done without statutory authority and is therefore erroneous. Under section 286 of the Civil Code. provision is made for the submission of particular questions of fact upon the request of either of the parties to the action. While this provision requires the submission of special questions when requested, it does not forbid the court, in the exercise of its inherent power, from submitting on its own motion some special questions that will aid in reaching a correct result. We think the court, in its discretion, may, without request, submit such questions; and, while there may have been some objectionable language in those submitted, we find nothing in them which we think prejudiced the substantial rights of the plaintiff in error.

There are some other objections, all of which have been examined, but in them we find no sufficient cause for setting aside the verdict. The judgment of the district court will be affirmed. All the justices concurring.

MEREDITH v. MEREDITH et al.
(Supreme Court of Kansas. Oct. 6, 1894.)

EJECTMENT—TRIAL BY COURT — FINDINGS—JUDGMENT.

Plaintiff, claiming under a quitclaim deed from one of the defendants and her deceased husband, brought suit to recover 80 acres of land. The defendants answered, alleging that the quitclaim deed was intended as a mortgage to secure payment to the plaintiff of \$1,000 and interest. On the trial the plaintiff admitted the facts alleged in the answer, and asked leave to amend the petition in accordance therewith. This was refused by the court. The court made special findings of fact, sustaining the averments of the answer, and showing that the transaction was a mortgage; that the sum of \$1,000, with interest from the date of the deed, is secured thereby; but refused to grant the plaintiff any relief, and entered judgment for the defendants. Held error, and ordered that Judgment be entered on the special findings, directing the sale of the lands in controversy to satisfy the plaintiff's lien.

(Syllabus by the Court.)

Error from district court, Brown county; R. C. Bassett, Judge.

Action of ejectment by John M. Meredith against Sarah Meredith and others. There was a judgment for defendants, and plaintiff brings error. Reversed.

This was an action of ejectment brought by the plaintiff in error to recover 80 acres of land in Brown county. The defendants answered, denying the plaintiff's title, and alleging that on April 17, 1880, Sylvester T. Meredith borrowed from the plaintiff \$1,000, and with his wife, the defendant Sarah Meredith, executed a quitclaim deed, conveying this land to the plaintiff, as security only, for the payment of said sum of money; that the plaintiff and the defendants had always regarded and treated said deed as a mortgage: that on April 20, 1885, the plaintiff brought suit to recover said \$1,000, with interest, and to have said quit-claim deed treated as a mortgage, and the mortgage foreclosed for the payment of said sum of money. The defendants are the widow and children of said Sylvester T. Meredith. To the answer of defendants Sarah and Nettle Meredith, a copy of the plaintiff's petition in the action referred to in the answer is attached. To that petition a copy of the quitclaim deed and of a bond to reconvey on payment of the \$1,000 were attached as exhibits. The action was tried by the court, without a jury; and after both plaintiff and defendants had introduced their testimony in chief, and rested, the plaintiff asked leave to amend his petition to conform to the facts shown in the case, which were substantially as stated in his petition in the former action. This the court refused to permit. After the conclusion of the testimony, the court made special findings of fact, as follows: Findings of fact: "(1) I find that on April 17, 1880, one Sylvester T. Meredith was the owner of, and in the possession of, the west half (1/2) of the northeast quarter (1/4) of section No. fifteen, in township No. three, range No. seventeen, Brown county, Kansas. (2) That on said mentioned date, for the purpose of paying off a mortgage on said premises, and also on the east eighty acres on said quarter section, to one John S. Buell, the holder thereof (which mortgage was for the sum of one thousand dollars), the said Sylvester Meredith obtained a loan of the plaintiff for said sum of money; and, to secure the payment thereof, said Sylvester Meredith and Sarah Meredith executed and delivered to plaintiff their quitclaim deed, conveying to said plaintiff the west half of the southeast quarter of section No. fifteen, township No. three, range No. seventeen, Brown county, Kansas. Said deed was duly acknowledged at said date of its execution, and a copy of said deed was on the 27th day of November, 1880, recorded in the office of the register of deeds for Brown county, Kansas. (3) That, ever since the conveyance of said land as aforesaid, the defendants have been in the actual possession thereof; and the said Sylvester Meredith died on or about the 18th day of September, 1881, leaving his widow and the following named children: Nettie Meredith, John M. Meredith, Jr., Charles Meredith, and Lois Meredith, his only surviving heirs at law. (4) That it does not sufficiently appear from the evidence when said loan was to be paid. No part of the same has been paid to plaintiff. (5) That on April 20, 1885, the said plaintiff, John M. Meredith, filed his petition in this court against Sarah M. Meredith and the other defendants herein upon the 'quitclaim deed' mentioned in the second finding, and a certain contract or bond for a deed, dated April 17, 1880, purporting to be signed by John M. Meredith and Delilah Meredith, and agreeing to convey the same land in said deed mentioned to Sylvester T. Meredith, on the payment by him of one thousand dollars on or before April 17, 1885, which said petition prayed for a judgment for \$1,000, and interest, and certain other sums of money expended for taxes on said land; and praying that, in default of payment of said several sums of money, said land be ordered sold, and the proceeds applied in payment thereof; and praying, further, that, in case the court shall fail to find that said quitclaim deed and title bond to be in effect a mortgage, then that the plaintiff be adjudged the absolute owner in fee simple of said real estate. (6) That defendant Sarah Meredith filed her answer, denying, under oath, the execution of said title bond by John M. Meredith and Delilah Meredith, and said defendant further pleading the three-years and five-years statute of limitations, respectively, as against said alleged indebtedness and said title bond, and setting up certain other defenses; and said other defendants also filed their answer, denying the execution of said title bond, and pleading the statute of limitations. (7) Said suit was on the 31st day of October, 1885, dismissed, without prejudice to a future action, on the application of the plaintiff, and at the costs of the plaintiff." Conclusions of law: "From the foregoing facts, I find, as conclusions of law applicable thereto, that the quitclaim deed of Sylvester Meredith and Sarah Meredith to the plaintiff is, in effect, a mortgage to secure the payment of a loan of one thousand dollars; and the plaintiff is not entitled to recover in this action, and defendants should have judgment for costs." And thereupon the court rendered judgment for the defendants.

A. F. Martin and J. F. Tufts, for plaintiff in error. James Falloon and Ira J. Lacock, for defendants in error.

ALLEN, J. (after stating the facts). Objection is made by the defendants in error to the consideration of this case, on the ground that the petition in error was not filed within one year after the rendition of judgment.

The trial appears to have been commenced on the 22d day of November, 1887. The record recites: "On the 29th day of November, during said term of court, the court made, found, and filed the following findings of fact and conclusions of law." As the record was filed in this court on the 26th day of November, 1888, the objection is untenable.

It is also objected that there is no certificate of the clerk attesting the genuineness of the copies of the pleadings and proceedings in the action. As this is a case made, no such certificate is necessary. The case was duly settled by the trial judge, and, as his signature is attested by the clerk of the court, it is all that is required.

While the conduct of the parties with respect to the enforcement of their rights is peculiar, the facts disclosed by the record are very simple, and there is no substantial conflict whatever in the testimony, which fully supports the findings of the court. Sylvester T. Meredith borrowed from his father. the plaintiff, \$1,000. To secure the payment of this sum, he and his wife executed a quitclaim deed to the plaintiff. The plaintiff and his wife then executed a bond covenanting to reconvey the lands to said Sylvester T. Meredith, on the payment of said \$1,000. with 8 per cent. interest, on or before April 17, 1885. Sylvester T. Meredith and the defendants, who are his widow and children, continued to occupy the land, and the defendants were still in possession of it at the time this suit was brought. There is no claim that this money, or any part of it, has ever been repaid to the plaintiff. The two instruments, construed together, constitute a mortgage as effectually as though embodied in one instrument. The plaintiff is entitled to a foreclosure of this mortgage and sale of the premises for the payment of the debt. . Can he obtain such foreclosure and sale in this action?

The plaintiff, in his petition, sought to recover the land. The defendants, in their answer, admitted the conveyance of the legal title to the plaintiff, and asserted that it was for the purpose of securing the payment of this money. On the trial, the plaintiff confessed the contention of the defendants, and asked leave to amend the petition to conform to the allegations of the answer. We think no such amendment strictly necessary. When the plaintiff confessed the truth of the answer, the controversy came to an end, and the court should then have pronounced judgment in accordance with the facts disclosed. The contention that the defendants had a right to again change their position, and raise new issues, is not sound. It was incumbent on the defendants, after setting up the facts showing the conveyance to the plaintiff to be only a mortgage, to show that the mortgage was paid or otherwise discharged, if that were the fact. It is the policy of the law to settle all controversies with reference to the subject-matter in one action, wherever it is practicable to do so; and we think it was incumbent on both parties to fully state their claims in this case. The plaintiff claimed the whole property. Under averments of the answer which were sustained by the evidence in the case, it was disclosed that he was not entitled to the whole property, but was entitled to a lien for the payment of the money secured by the quitclaim deed. We think the bond for reconveyance clearly shows that the defendants had until the 17th of April, 1885, to repay the money borrowed.

The contention of the plaintiff that the defendants, having denied the execution of the bond to reconvey, under oath, are now estopped from setting it up, is not sound, and especially so in view of the fact that that denial was only made by one of the defendants. An affidavit on information and belief, such as that made by the defendant Sarah Meredith in the former action, for the purpose of raising an issue, and with reference to a fact of which she would not necessarily have any personal knowledge, does not contain the elements necessary to constitute estoppel.

The judgment in this case is reversed, with directions to the court below to enter judgment for the sale of the lands in controversy for the payment to the plaintiff of \$1,000 and 8 per cent. interest from April 17, 1880, and costs of suit, and the balance, if any, to be distributed among the defendants according to their respective interests. All the justices concurring.

HOFMAN v. DEMPLE.

(Supreme Court of Kansas. Oct. 6, 1894.)
HOMESTEAD-JUDGMENT ESTABLISHING LIENNECESSARY PARTIES.

No judgment can be entered, establishing or foreclosing a lien on a homestead, unless both husband and wife are made parties to the suit, when the lien claimed is neither for taxes, for the purchase of the premises, nor the erection of improvements thereon.

(Syllabus by the Court.)

On rehearing. Motion granted. For prior report, see 35 Pac. 803.

PER CURIAM. The facts in this case appear in the report contained in 52 Kan. 756. 35 Pac. 803. On the original hearing in this court, while the correctness of the judgment as rendered was challenged by the plaintiff in error, our attention was not especially called to the want of a necessary party to make the judgment effective. The land which is the subject of the controversy is a homestead of the plaintiff in error and her husband, Michael Hofman, if the findings of the trial court are correct. The court found that the defendant, having paid off a morigage and tax liens amounting to \$173 on the faith of the deed from Hofman and wife to the defendant, which was set aside by the

court, ought in equity to be subrogated to the rights of the original mortgagee. The judgment entered directs a foreclosure of this lien and sale of the premises. While we are satisfied that sound equitable principles were applied by the court to the facts found, and that the defendant in error ought, under all the circumstances stated in the findings, to be subrogated to the rights of the original mortgagee, and receive payment for the moneys advanced by him to discharge the incumbrances out of the homestead, the court could not, in the absence of Michael Hofman, enter a judgment directing a sale of the lands. Nor is Michael Hofman concluded by the findings of the court in this case. He may contest every question which was passed on by the court in any action to which he may be made a party. A sale made under process, issued on this judgment, would clearly be invalid. The court cannot fully adjust the rights of these parties until Michael Hofman is brought into court. If this property is a homestead of Hofman and wife, no judgment rendered in an action to which both are not parties can affect it. It therefore follows that a rehearing must be granted, and the judgment reversed.

HORTON, C. J. (dissenting). This was an action in the court below to have the signature of the plaintiff to a deed conveying away her homestead declared void on account of the fraud of the defendant. Upon the allegations of the petition, and the proof introduced thereon, the plaintiff was entitled to the decree prayed for. The defendant, in his answer, demanded that he might be subrogated to the rights of a mortgagee whose mortgage he had paid after he obtained the conveyance. As the mortgage purported to be signed by both the plaintiff and her husband, and as the husband was not a party to the suit, its validity, or the amount due thereon, could not be properly litigated. Hence I express no opinion upon the alleged equities discussed, nor upon the right of subrogation claimed by defendant.

MARTIN et al. v. MARSHALL, Sheriff. (Supreme Court of Kunsas. Oct. 6, 1894.)
FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE.

Where a purchaser obtains a stock of goods of a debtor, who is making the sale with the fraudulent intent of delaying and defrauding his creditors, and is a party to the fraud, or has knowledge of facts sufficient to excite the suspicions of a prudent man and put him upon inquiry, he cannot be said to act in good faith. (Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturgis, Judge.

Action by Mcdore Martin & Co. against Edward Marshall, as sheriff of Cloud county, Kan., to recover damages for the conversion of a stock of goods. There was a judgment

for defendant, and plaintiff brings error. Affirmed.

In December, 1888, and early in January, 1889, Edward Pelletier and George Pelletier were engaged in the retail grocery business in Concordia under the firm name and style of Pelletier Bros., and were largely indebted to wholesale and jobbing houses, and much of this indebtedness was past due. They were being urged by their creditors to pay the demands owing by them. Neither of them owned any property subject to execution, other than this stock of groceries. Early in January, 1889, when pressed by their creditors, Pelletier Bros. made various promises to pay money on their demands, but failed to do so. On January 3, 1889, they made a pretended sale of all their stock of goods to John Martin and Medore Martin, partners as Medore Martin & Co., receiving, as the Pelletiers and Martins state, \$200 in cash, a deed to some property in Concordia, which was at the time mortgaged, and a note for \$500, then in litigation in the courts of Arkansas. Attachments were levied by some of their creditors upon this stock of goods, and judgments were obtained against Pelletier Bros. The goods were sold, and the money received from the sale of the goods applied in part payment of the judgments and costs. On January 22, 1889, this action was brought by Medore Martin & Co. against the sheriff, Edward Marshall, to recover \$5,000 damages. The case was tried by court with a jury. The jury returned a verdict for the defendant, and judgment was entered thereon. The plaintiffs bring the case here.

J. W. Sheafor, for plaintiffs in error. Caldwell & Ellis and Theo. Laing, for defendant in error.

HORTON, C. J. (after stating the facts). Martin & Co. claim that on the 3d day of January, 1889, they purchased of Pelletier Bros., at Concordia, a stock of groceries, fixtures, etc., for \$2,500. Edward Marshall, as sheriff of Cloud county, levied on the property under attachments in his hands from creditors of the Pelletier Bros. The question tried in the court below was as to the validity of the sale claimed to have been made by Pelletier Bros. to the plaintiffs. It appears that on the afternoon of January 3, 1889, there was a pretended sale of the property, evidenced by an agreement in writing signed by the parties. This agreement provided that the Pelletier Bros. were to accept as part payment for the stock of goods, etc., the south half of block 3 in Gaylord & Matthews' addition in the city of Concordia, subject to a mortgage of \$800, and a note given by Preston L. Williams for \$400. After an inventory of the goods had been taken the balance due upon the inventory was to be paid in cash. The inventory was completed in the forenoon of January 4, 1889. It shows that the goods, at cost price, were worth about \$2,700. The Pelletiers agreed to take \$2,500. The lots in

Concordia were to be taken by them at the value of \$1,800, subject to the mortgage of \$800, and the Williams note, with interest, as \$500. The balance of \$200 was paid in cash.

The lots in Concordia were only worth \$700 or \$800,-not more than the mortgage. The note of \$500 was not only clouded with litigation, but one of the Pelletier brothers knew that the maker alleged in his defense that it was obtained fraudulently. The Pelletiers, at the time of making a sale of the stock, were heavily indebted to their creditors, who were pressing them for payment, and the evidence clearly shows that the sale was made by them with the fraudulent intent to delay and defraud their creditors. That good faith is essential to support the sale cannot be questioned. If Martin & Co. knew of the fraudulent intent of the Pelletiers, and bought with that knowledge, they cannot claim to be bona fide purchasers. "Knowledge of facts sufficient to excite the suspicions of a prudent man, and put him upon inquiry, is, as a general proposition, equivalent to knowledge of theultimate fact." Phillips v. Reitz, 16 Kan. 396; Tridm. Sales, § 329; Schulein v. Hainer, 48 Kan. 249, 29 Pac. 171. There is ample evidence in the record tending to show that the property turned over to the Pelletiers by Martin & Co. as part payment for the stock of goods, etc., was not worth one-half the sum for which it was accepted. Martin & Co. did not allow adequate prices for the property purchased, and in view of all the evidence the jury were justified in finding that they did not act in good faith. McDonald v. Gaunt. 30 Kan. 693, 2 Pac. 871; Lewis v. Hughes, 49 Kan. 23, 30 Pac. 177. The trial court charged the jury sufficiently upon all the material propositions of law involved in the case.

Various objections are presented in the briefs concerning the reception and rejection of evidence. We have examined all of these questions carefully, but find no material error contained therein. The invoice offered was competent evidence, and ought to have been received, but witnesses were permitted to describe the goods referred to, and to state the amount of the invoice. Further, it appears that the Pelletier Bros. finally agreed to sell the stock in bulk for \$2,500. The invoice, therefore, was not important. It is not necessary to comment upon the other matters referred to in the briefs. The judgment of the district court will be affirmed. All the justices concurring.

CHICAGO, R. I. & P. RY. CO. v. McBRIDE. (Supreme Court of Kansas. Oct. 6, 1894.)

PLEADING — PETITION — AMENDMENT TO MEET PROOF—RAILHOAD COMPANIES — FIRES—ACTION FOR DAMAGES — NEGLIGENCE — FINDING — EVIDENCE—SUFFICIENCY.

1. An amendment to a petition for the alleged purpose of conforming to the verdict and special findings of the jury, which does not

strengthen the plaintiff's allegations, nor really change the petition, as construed by the trial court, is at most a mere irregularity, and not prejudicial to the defendant's rights.

2. In an action to recover damages from a railway company, caused by fire, the trial court ruled that the allegations in the petition, "in the operation of" (its railway), and "in the running of its trains on its said railway," embraced more "than the mere act of running the train," and, as the railway company did not ask any continuance for further preparation for trial, there was no error in receiving evidence that the fire was "caused by the operating of the railway."

3. Under the statute of this state, in all actions against any railway company for damages by fire caused by the operating of the railroad, proof of the fact that the fire was caused by the operating of the railroad, and the amount of damages thereby, is prima facie evidence of pregligence on the part of the reilroad.

damages thereby, is prima facie evidence of negligence on the part of the railroad.

4. When the jury finds specially upon all the evidence introduced upon the trial that a railway company failed "to exercise such care and caution that a man of ordinary prudence would have exercised under similar circumstances in not burning off the right of way," and such finding is supported by evidence, it is immaterial whether the burden of proof of such fact was upon the plaintiff or the defendant.

5. Railroad Co. v. Stanford, 12 Kan. 354, followed.

The evidence and special findings examined, and held to support the judgment rendered.

(Syllabus by the Court.)

Error from district court, Kiowa county; S. W. Leslie, Judge.

Action by Leila V. McBride against the Chicago, Rock Island & Pacific Railway Company to recover damages caused by fire set by defendant's locomotive. There was a judgment for plaintiff, and defendant brings error. Affirmed.

On the 16th of September, 1890, Leila V. McBride commenced her action against the Chicago, Rock Island & Pacific Railway Company to recover \$1,180 and \$100 attorney's fee for damages alleged to have been caused by a fire set out on the 4th day of February. The petition alleged, among other "That on the 4th day of February. things: 1889, said defendant controlled and operated a certain railway known as the Chicago, Kansas & Nebraska Railway, with the track, cars, locomotives, and other appurtenances thereunto belonging, which said railway runs in and through Kiowa county, in this state. * That on or about the 4th day of February, 1889, said defendant, its agents, servants, and employes, in the operation of and the running of its trains on its said railway, negligently and carelessly permitted its locomotive to emit sparks and fire into the dry grass and weeds along the right of way, and the land adjoining thereto, at or near the town of Mullinville, in said Kiowa county. which said sparks and fire ignited and set fire to the prairie grass and weeds along said right of way and the adjoining lands; which said fire, so started as aforesaid, spread and burned continuously to and over the plaintiff's premises above described, burning the grass on plaintiff's said lands, and in her

said pasture, thereby destroying plaintiff's grazing lands, and damaging plaintiff's fence by burning the posts and wire thereof, and burning fifty tons, or thereabouts, of plaintiff's hay in the stack, and burning and killing the said timber and young trees standing and growing along and near the said Kiowa creek." The railway company filed an answer to the petition, containing a general denial. Trial had before the court with a jury at the March term for 1890. The jury returned a verdict in favor of the plaintiff, and against the defendant for \$678.29, and \$100 for attorney's fee. The jury also made the following special findings of fact: "(1) Was not said engine, on the day this fire is said to have occurred, managed in a skillful and proper manner? Ans. Yes. (2) If your answer to interrogatory numbered one should be 'No,' then please state fully in what particular the said engine was not skillfully or properly managed. Ans. ----. (3) Could the defendant or its agents, by the exercise of reasonable diligence, at or before the time of permitting said fire to escape, if such was the case, have anticipated the burning of plaintiff's property, at a distance of 10 miles from the railroad track, as likely to occur, and as the natural and probable consequence of permitting said fire to escape? Ans. Yes. (4) Did not the defendant exercise such care and caution in the use and operation of its engine, at the time said fire is said to have occurred, as a man of ordinary prudence would have exercised under similar circumstances? Ans. No. (5) If your answer to interrogatory numbered four should be in the negative, then please state wherein the defendant failed to exercise such care and caution that a man of ordinary prudence would have exercised under similar circumstances. Ans. By not burning off right of way; defective engine, and fitted with defective netting in the stack. (6) Is it not a fact that the fire and damage to plaintiff were caused by an accident? Ans. No. (7) Did the fire escape by reason of the engine being out of repair? Ans. Yes. (8) Did the fire escape because of the negligence of the engineer? Ans. No. (9) If the jury return a verdict for the plaintiff, they will state specifically what negligence the defendant was guilty of, upon which the jury base their verdict,-whether defective engine, condition of right of way, or negligence of the defendant's servants in operating the train. If on account of defective engine, state in what particular it was defective. If on account of the condition of the right of way, state what the defendant did or omitted to do that constitutes the negligence. If on account of the negligence of the defendant's servants, state what they did or omitted to do, constituting the negligence of the defendant. Ans. By not having right of way burned off; also, defective engine. The netting was defective. (10) Did not the defendant use such care in the construction, maintenance, and use of its property—the engine in question—as a man of ordinary prudence would have used under like circumstances? Ans. No. (11) If you answer number 10 in the negative, state what it did or omitted to do that a man of ordinary prudence would have done under like circumstances. Ans. Would have burned off the right of way; would have a perfect spark arrester, and the best modern engine. (12) Is it probable that this plaintiff's property would have been destroyed by the fire, had it not been for the unusual high wind prevailing on that day? Ans. No; it is not probable, but it is possible. (13) If an ordinary wind had been blowing on the day plaintiff's property is alleged to have been burned, is it probable that it would have been destroyed? Ans. No; it is not probable, but it is possible. (14) If you find for plaintiff, how much damage do you allow per acre for buffalo grass? Ans. We allow 15 cents per acre. (15) How much damage do you allow for blue stem per acre? Ans. Nothing. (16) How much damage do you allow per ton for hay? Ans. Eighty cents per ton. (17) How much damage do you allow for trees? Ans. Two hundred and forty dollars. If you find for the plaintiff, state fully the amount of such damages, and for what it is allowed. Ans. Six hundred and thirty-six dollars. Timber, \$240; grass, \$306; hay, \$40; fence, \$50; int., \$42.29; total, \$678.29. (19) How much do you allow per acre for damages to the plaintiff's land? Ans. Nothing. (20) What is the distance south from the railway track to the plowed fire guard? Ans. About one hundred and fourteen feet. (21) How far south from the railway track does the right of way extend? Ans. Fifty feet. (22) How far north of the plowed fire guard did the fire start,—about what distance? Ans. About 65 feet." On the 14th day of March, 1890, the defendant filed its motion for judgment upon the special findings of the jury. The plaintiff filed its motion to amend its petition to conform to the special findings and verdict of the jury. The motion to amend the petition was granted, and the motion of defendant for judgment upon the special findings was overruled. Thereupon the defendant filed its motion for a new trial, containing the usual statutory grounds. This motion was also overruled, and judgment rendered in favor of the plaintiff and against the defendant upon the general verdict for \$778.29, with costs. The railway company excepted, and brings the case here.

M. A. Low, W. F. Evans, and J. E. Dolman, for plaintiff in error. J. W. Davis, for defendant in error.

HORTON, C. J. (after stating the facts). It is insisted that the trial court erred in granting the motion of plaintiff below to amend her petition to conform to the verdict

and special findings of the jury. This involves also the question whether the court erred in admitting evidence to prove the locomotive engine was defective, and the condition of the right of way, and further concerns the rulings upon the special findings of the jury, and the instructions given and refused. The argument is that the trial court permitted negligence to be proved upon issues not made by the pleadings, which the railway company was unprepared to meet. If this were true, prejudicial error would exist. The petition reads as follows: "* * * Said defendant, its agents, servants, and employes in the operation of, and in the running of its trains on its said railway, negligently and carelessly permitted its locomotive to emit sparks and fire into the dry grass and weeds along the right of way, and the land adjoining thereto, at or near the town of Mullinville, in said Kiowa county, which said sparks and fire ignited and set fire to the prairie grass and weeds along said right of way and the adjoining lands; which said fire, so started as aforesaid, spread and burned continuously to and over plaintiff's premises above described." The trial court, in its construction of the petition, ruled that "the allegations in the operation of [its said railway]," and "in the running of its trains on its said railway," covered more than the mere "act of running the train," and, therefore, that it was competent for the plaintiff below to show that engine No. 178, on train No. 23, going west through Mullinville from Pratt to Liberal, in the forenoon of February 4, 1889, was defective, and that dry grass and other combustible material were permitted to accumulate on the right of way. The plaintiff below offered evidence to establish the fact that the fire complained of was caused by the operation of the railroad, and the amount of her damages. That is made a prima facie case under chapter 155, Sess. Laws 1885. railway company offered evidence tending to show that the engineer of train No. 23 was not careless or negligent; that the engine and train were managed in a skillful and proper manner, and also that engine No. 178 was not defective, but in a good condition; and that the right of way had been recently burned off, and was free from dried grass or weeds. The plaintiff below, in rebuttal, was permitted to show that the right of way had not been burned off recently, and that dry grass and weeds had accumulated thereon. The railway company offered evidence upon all the issues of the petition, as construed by the trial court, and that included the issue whether the fire was "caused by the operating of the railroad." Railway Co. v. Merrill, 40 Kan. 404, 19 Pac. 793; Railway Co. v. Cady, 44 Kan. 633, 24 Pac. 1088. No motion at any time was made for a continuance of the cause, and it cannot be said that there is anything in the record tending to show the railroad company was

misled or surprised by the issues actually tried. If the trial court had ruled that the only negligence charged in the petition was "in the operation and running of its train," the railroad company would have had good cause of complaint that other issues were proved than those alleged; but the construction given by the trial court to the petition, and the evidence received upon the trial for and against its allegations, show that the issues concerning the engine and the right of way were fully and fairly tried. Under the construction given to the petition, the amendments after the verdict were unnecessary, and added nothing to the strength of plaintiff's case. At most, the permission to amend was a mere irregularity. Under the petition, the general verdict, and the special findings of the jury that the fire was not caused by accident, the judgment has support, and the court committed no error in receiving the evidence objected to.

It is next insisted that the burden of proof was cast upon the company concerning the combustible material which it was alleged was upon the right of way. It appears from the evidence that on the 4th of February, 1889, the train of the railway company, going west, passed through Mullinville about 10 o'clock in the forenoon, and about a mile and a half after the train left the depot a fire sprung up along the railway on the south, and went in a southeastern direction as far as the Cimarron, in the Indian Territory. W. B. Burnett, who was at the Rock Island depot at Mulliaville with the mail on the 4th of February, at the time the train left for the west, testified he was employed by the railway company to fight the fire, and that he followed it about 20 miles south. The petition alleged that the sparks and fire thrown from the engine "ignited and set fire to the prairie grass and weeds along the right of way and the adjoining lands." The lands or ranch of the plaintiff below consisted of over a thousand acres, a part of which were burned over, and are situate 10 miles or more south of Mullinville. The right of way, where it is alleged there was a large accumulation of dry grass and weeds, was under the direction and care of the employes of the railway company. The caring of the right of way is within the control of the company, and the plaintiff below, whose property was consumed by fire, had less opportunity in this case to learn the true condition of the right of way than others. It is true that the right of way was open to public inspection, the same as the land or fields of other persons; but the presumption of negligence concerning the caring for the right of way arising from the statute, if any, does not seem to have affected the verdict, because there was evidence from both plaintiff and defendant upon the condition of the right of way before the fire, and the jury specially found that the railway company failed to "exercise such care and caution

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that a man of ordinary prudence would have exercised under similar circumstances, in not burning off the right of way." They also specially found as follows: "Q. State what the defendant's servants did or omitted to do, constituting the negligence of the defendant. A. By not having the right of way burned off." Therefore it is unnecessary in this case, on account of the facts found, to discuss the question whether, under the statute, the presumption of negligence applies only to defects in the engine, and negligence of employés in operating it. But see Railway Co. v. Merrill, 40 Kan. 404, 19 Pac. 793; Railway Co. v. Cady, 44 Kan. 633, 24 Pac. 1088; Railroad Co. v. Westover, 4 Neb. 269.

It is next insisted that the findings of the jury that the engine was defective, and that the fire caught within the right of way, are wholly unsupported by any evidence. There was very much evidence offered tending to show the engine was well equipped with all the latest modern improvements for arresting sparks, that they were all in good repair, and that it is not possible to entirely prevent the escape of sparks from an engine, and also that the fire started from 110 to 120 feet from the track. While possibly the conclusion of the trial court may not have been the same we would have arrived at from the evidence, as disclosed in the record, yet it cannot be said, we think, that the findings are without support. Mr. Kuntz, who lived near the railroad, had frequently seen the engine set other fires previously. Wallace Burnett saw the engine throw sparks and fire about a week previous to the fire complained of. It was proved that the engine had caused another fire on the same day a few miles east of the fire complained of. James B. Forbes testified that he had been a locomotive engineer for four years, and that he was acquainted with the construction and different parts of a locomotive or engine. He also testified: "Q. You may tell the jury whether an engine properly equipped with the most approved appliances will throw sparks sufficient to ignite combustible material along the track? A. Not when I run. I don't think I ever set fire to anything, either with diamond stack or straight shot. Q. If an engine is in proper condition and properly handled, and if the netting is perfect, the smokestack in good condition, will such an engine throw sparks sufficient to ignite combustible material? A. I never knew them to. Q. Then, if an engine should throw sparks any great distance, and these sparks were of sufficient size to live and ignite combustible material, wouldn't you say the engine was either out of repair, or that it was mismanaged in some way? A. I should say that it was out of repair." Several witnesses called for the plaintiff below testified that the fire started within the right of way. Two witnesses testified that it started within 10 to 15 feet of the track. J. B. Kuntz testified it started about 40 feet from the track; that he went down to the track for the purpose of seeing whether it had caught on the right of way; that he stepped the distance from the burned ground to the track. J. H. Sanders testified he saw the fire burn a part of the McBride ranch on the 4th of February; that he was coming over the north of the ranch which the fire had burned; that he followed the fire back to the railroad; that the fire had burned from south of the Rock Island Railroad. Railroad Co. v. Stanford, 12 Kan. 370; Railroad Co. v. Bales, 16 Kan. 252.

The jury also found in answer to special interrogatory as follows: "Ques. 12. Is it probable that this plaintiff's property would have been destroyed, had it not been for the unusual high wind prevailing at the time? Ans. No. it is not probable, but it is possible. Q. 13. If an ordinary wind had been blowing on the day plaintiff's property is alleged to have been burned, is it probable that it would have been destroyed? Ans. No, it is not probable, but possible." As a high wind was blowing at the time the train passed through Mullinville west, it is urged that the injury complained of was too remote. It is said that the "result was a mere possibility." The wind was blowing at the time the fire was set, the flames spread rapidly from the place where it started over the prairie until it reached the property destroyed, yet it burned without intermission. The plaintiff's property would not have been destroyed, except for the fire which the railway permitted to escape. Under the findings of the jury the railway company was negligent in permitting the fire to escape, and the company, by the exercise of reasonable diligence before the fire, knowing that the weather was very dry and windy, could have anticipated that sparks escaping from an engine would have set fire to the dry grass and weeds along the right of way and adjoining lands, and that the grass and weeds thus set on fire would likely burn without intermission, over the prairie, to a great distance. In the Stanford Case, 12 Kan. 354, the wind was very strong, and the fire from the engine did not fall upon the plaintiff's property, but spread, and finally reached his property about four miles distant from the railroad track, and there did the damage for which the recovery was allowed. In that case, Valentine, J., speaking for the court, observed: "A wrongdoer is not merely responsible for the first result of his wrongful act, but he is also responsible for every succeeding injurious result which could have been foreseen, by the exercise of reasonable diligence, as the reasonable, natural, and probable consequence of his wrongful act. He is responsible for any number of injurious results consecutively produced by impulsion, one upon another, and constituting distinct and separate events, provided they all necessarily follow from the first wrongful cause

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Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence; and if they are such as might, with reasonable diligence. have been foreseen, the last result, as well as the first, and every intermediate result, is to be considered in law as the proximate result of the first wrongful cause." In Huyett v. Railroad Co., 23 Pa. St. 373, the weather was very dry and windy, and the sparks flew from the engine to a great distance, setting fire to several fields and fences near the same time and place, and it was left for the jury to decide whether there was sufficient evidence of carelessness. In Kellogg v. Railway Co., 26 Wis. 223, the fire was set out in a drought and high wind. In that case the damages were held not to be remote, and the verdict was permitted to stand. In this case at the time of the fire a high wind was prevailing, but there was no "perfect gale, no hurricane, no cyclone." The wind did not arise suddenly after the sparks set the grass and the weeds on fire. "In the present case there was but one burning, one continuous conflagration, from the time the fire was set on the railroad until the plaintiff's property was destroyed. The combustible material extended, and the ground was burned over, all the way from the railroad to the plaintiff's property; and the fire, driven by the wind, was carried to his property in that manner. There was no distinct or separate setting fire to or burning of the stacks or buildings, and then a communication of the fire by sparks through the air from one stack or building to another. There was no succession of events, but only one event." Kellogg v. Railway Co., supra. It cannot be said that the blowing of the wind at the time of the fire must be regarded as extraordinary. In Kuhn v. Jewett, 32 N. J. Eq. 647, it appeared that a railway train laden with petroleum was wrecked through the negligence of the defendant, and the oil, escaping, took fire, ran down into a stream of water, and was borne down in a blaze against the plaintiff's stable, some distance below, in consequence of which the stable was destroyed. The defendant was held liable, and the vice chancellor said: "There can be no doubt, I think, if in this instance the flames of the burning oil had been carried by the wind directly from the point of collision to the petitioner's building, and it had thus been set on fire and destroyed, that the injury would, in judgment of law, have been the natural and direct or proximate result of the collision. So, too, if the burning oil had descended from the point where it was first ignited, by the mere force of its own gravity, upon the petitioner's building, and destroyed it, the connection between cause and effect would have been so close and direct that the defendant's liability could not have been successfully questioned. So, also, if the fire had been carried from the place of its origin to the petitioner's building by a train of com-

bustible matter deposited in its track by the operation of the laws of nature, the petitioner's injury, I think it could not have been doubted, would have been esteemed the direct result of the defendant's negligence. These principles must rule this case. Their application is obvious, for, although water is almost universally used as a means to extinguish fire, and it seems, at first blush. absurd to say that it can be used for the purpose of extending it, yet it is true, as a matter of fact, that as an agency for the transmission of burning oil it is just as certain and effectual in its operation as the wind in carrying flame, or a spark or combustible matter in spreading a fire. In keeping up the continuity between cause and effect it may be just as certain and effectual in its operation as any other material force." If it had not been for the high wind prevailing, the jury found that it was not probable that plaintiff's property would have been destroyed; that is, that it is not probable the fire, if not driven by the wind, would have spread so far. But, within the Stanford Case, "the last result," the burning of the plaintiff's property, is to be considered "as a proximate result of the first wrongful cause." In the Kuhn Case the flames of the burning oil were carried by water. It was insisted by the defendant in that case that this result could not have been foreseen, yet the injury was held to have been the proximate result of the collision wrecking the railway train and causing the oil escaping to take fire, although after taking fire the burning oil was carried to the property which it destroyed by a stream of water.

It is unnecessary to make further comments upon the alleged errors as presented. The judgment will be affirmed. All the justices concurring.

UNITED STATES INV. CO. et al. v. PHELPS & BIGELOW WIND-MILL CO (two cases).

(Supreme Court of Kansas. Oct. 6, 1894.)

MECHANICS' LIENS — CONTRACT MADE OUTSIDE

STATE— HOMESTEAD — JOINT CONSENT OF HUSBAND AND WIFE.

1. A lien for materials furnished for the erection of improvements on lands in Kansas may be maintained where the contract is entered into in Missouri as well as if it were made in Kansas.

2. In order to create a lien on the homestead for improvements erected thereon, the joint consent of husband and wife is not necessary.

(Syllabus by the Court.)

Error from district court, Rooks county; Charles W. Smith, Judge.

Two actions tried together,—one by the Phelps & Bigelow Windmill Company against W. H. Barnes and wife, the United States Investment Company, and others, and the other by the same plaintiff against William Bunn and wife, the United States

Investment Company, and other, to foreclose mechanics' liens. There was a judgment for plaintiff in each case, and defendants bring error. Affirmed.

W. W. & W. F. Guthrie, for plaintiffs in error. W. B. Ham, for defendant in error.

ALLEN, J. These two cases were tried together in the court below, and a single record is brought to this court. The first action was brought by the Phelps & Bigelow Windmill Company against W. H. Barnes and wife, the United States Investment Company, et al., to foreclose a mechanic's lien on a quarter section of land in Rooks county. The second action was brought by the same plaintiff against William Bunn and wife, the United States Investment Company, et al., to foreclose a mechanic's lien on another quarter section of land in the same county. The cases are designated as the Barnes Case and the Bunn Case. We shall accept the statement contained in the brief of counsel for plaintiff in error, that the findings show all the facts, in the consideration of the case.

The United States Investment Company claimed liens on the same lands under mortgages executed by the respective owners. The lien of the defendant in error was for windmills erected for the purpose of pumping water, and for appliances connected therewith. We will consider the claims of error in the order stated in the brief.

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1. "That the contract was a Missouri contract, the goods delivered to the landowner in Missouri, and therefore no rights could be predicated thereon under the Kansas mechanic's lien law." The findings show that the order for the windmill, etc., was solicited by the plaintiff's agent in Rooks county; that it was accepted by the plaintiff's agent at Kansas City, Missouri; that the goods were shipped to Rooks county, freight charges being prepaid by the plaintiff and charged to the defendant, and under the contract the plaintiff was required to and did send a man to superintend the erection of the windmills. The orders for the windmills contained definite descriptions of the lands on which they were to be erected. The plaintiffs are as clearly entitled to the benefit of our mechanic's lien law as though every part of the transaction had taken place in Kansas.

2. "That the windmill company, having failed to complete the Barnes job in material respects, without other fault than their own, are not entitled to enforce their lien against third parties." The finding of the court is, "The erection of the Barnes mill was completed on July 20, 1887." We are not cited to anything different in the findings.

3. That the pump, tanks, and the item of freight were in no event subjects of lien, and the windmill company, having attempted to obtain and enforce a lien for the same

largely in excess of that to which they were legally entitled, cannot insist on any lien at all." The pump, tanks, and windmill were all connected, and formed a part of the same improvement. There are no separate findings with reference to the value of each. The item of freight was deducted by the court from the amount for which liens were enforced. We find no error here.

4. "That the windmill company is not entitled, as against third parties, to enforce a lien for a grossly excessive price." The parties agreed as to the price, and the court finds that, while it was greater than the usual price, there was no evidence of a conspiracy to defraud plaintiff or any one else.

5. "That the windmill company, by varying the terms of the contract after the rights of the plaintiff in error intervened, lost their rights to a lien in the Barnes Case." The only variation was that, under the contract, Barnes was to settle by giving two notes, due in one and two years, each for one-half of the amount due plaintiff, while, under the settlement in fact made, three notes were given for the same aggregate sum, due in one, two, and three years, with the same rate of interest. We do not think the plaintiff lost its lien by this change in the terms of payment.

6. "That the lands, being homesteads, were not subject to the lien, except under contract jointly assented to by both husband and wife, which was not shown." Liens for the erection of improvements are expressly excepted in the constitutional provision with reference to a homestead, and in order to create them, the joint consent of the husband and wife is not necessary. We perceive no error in the judgment of the court, and it is affirmed. All the justices concurring.

BOCK ISLAND LUMBER & MANUF'G CO. v. EQUITABLE TRUST & INV.

CO. et al.

(Supreme Court of Kansas. Oct. 6, 1894.)
GARNISHMENT — PROPERTY SUBJECT TO SPECIFIC FUND—RIGHTS OF GARNISHOR —FINDINGS—SUFFICIENCY OF EVIDENCE.

1. Where a mortgage loan is made with which to erect a building upon land, and there is a concurrent agreement between the parties that the fund derived from the loan shall be set aside and used for that specific purpose, a portion of which is to be paid out as the work progresses and the remainder after its satisfactory completion, and there is also an assignment of the fund by the borrower to a third person, who is to superintend the construction of the building and the proper application of the fund, no part of such fund is subject to garnishment for the ordinary debts of the borrower, created for other purposes, until the building is completed, and then only so much of it as remains after carrying out the agreements of the parties under which the loan is made and the fund set apart for a defined purpose.

2. A garnishment proceeding is no more than a substitution of the plaintiff for the de-

fendant debter in the enforcement of any liability against the garnishee, and therefore the plaintiff can acquire no greater rights against the garnishee than the debter himself possessed or could enforce.

3. The testimony examined, and held to be sufficient to sustain the findings and judgment

of the trial court.

(Syllabus by the Court.)

Error from court of common pleas, Sedgwick county; Jacob Balderston, Judge.

Action by the Rock Island Lumber & Manufacturing Company against D. W. Aaron on a promissory note, in which there was a judgment for plaintiff, and the Equitable Trust & Investment Company and James H. Lynch were summoned as garnishees. There were judgments against the garnishees for part only of the amounts claimed by plaintiff to be due defendant, and plaintiff brings error. Affirmed.

Sankey & Campbell, for plaintiff in error. Stanley & Hume, for defendant in error.

JOHNSTON, J. This controversy arises upon the garnishment of a fund derived from a loan upon real estate, and which was set apart for the specific purpose of constructing a building on such real estate. D. W. Aaron, who was the owner of a lot in the city of Wichita, applied to the Equitable Trust & Investment Company for a loan of \$8,000, in which application he represented that he was the owner of the property, and that there were no liens or claims against it. The application was accepted, and an agreement was made by which Aaron was to construct a three-story stone and brick building upon the lot, according to certain plans and specifications provided by J. H. Lynch, an architect. It was further provided that the building was to be constructed under the direction of Lynch, and to his satisfaction, the company agreeing to loan \$8,000 on a first mortgage, and the amount of the loan was to be paid out as the work progressed,-that is, 50 per cent. of the value of the materials furnished and work done was to be paid out in that way, and the remaining 50 per cent. upon the completion and acceptance of the entire work after the expiration of 15 days. It was further agreed by the parties that the 50 per cent. reserved should be held by the investment company as security for the faithful completion of the work, to be applied under the direction of the superintendent in liquidation of any damages which the former might sustain. Afterwards, Aaron and wife executed and delivered a promissory note for \$8,000, and a mortgage upon the property to secure the same. Before any money was paid out upon the loan Aaron and his wife executed an assignment in writing of the money derived from the loan, as follows: "June 12, 1889. Pay to J. H. Lynch or order the full amount due us on the loan negotiated by you for us, and this shall be your receipt therefor. D. W. Aaron. Manda C. Aaron. To the Equitable Trust & Investment Com-

pany, Wichita, Kansas." This order of assignment was accepted by the investment company on the day of its date. The construction of the building was commenced about June 15, 1889, and was not completed until some time in December, 1889. Aaron was indebted to the Rock Island Lumber & Manufacturing Company in the sum of \$2,000 upon a promissory note, and on September 25, 1889, an action was brought by that company against him to recover the amount of the debt. Upon the same day an affidavit for garnishment was filed, by which the plaintiff sought to charge the investment company and J. H. Lynch as garnishees, and subject a portion of the building fund to the payment of its debt. Each of the garnishees answered, denying the allegations of the affidavits, and that there was any indebtedness to Aaron. Issue was taken upon their answers, and upon a trial had in January. 1890, judgment was rendered in favor of the garnishees, and they were discharged. On November 23, 1889, the plaintiff recovered a judgment against Aaron, without controversy, in the sum of \$2,045. After the plaintiff was defeated in the first proceeding in garnishment, other affidavits were filed against the investment company and J. H. Lynch, seeking to charge them as garnishees for money and property of Aaron's alleged to be in their possession. In due time both parties answered, denying the affidavits for garnishment of the plaintiff, and upon these answers issue was taken, and another trial had. in which the court found in favor of the plaintiff and against the Equitable Trust & Investment Company for the sum of \$105 and its costs since the 4th day of January, 1890, and also for an attorney's fee of \$25. Judgment was also given against Lynch for \$500 and costs since January 4, 1890, and also for an attorney's fee of \$25. The plaintiff was not satisfied with the recovery, and brings the case here, alleging numerous errors.

The main controversy, however, arises upon the testimony, in which there is much conflict. It is contended that when the first garnishment notice was served there was a large amount of unexpended money in the hands of the garnishees, which should have been subjected to the payment of the plaintiff's judgment. According to the testimony of the prevailing parties, the money was loaned and set aside for a specific purpose. It was a trust fund, devoted to the erection of a building upon the mortgaged property, under an agreement between all the parties concerned. The trust company cautiously provided that the money could only be used for that purpose, and that it should only be paid out as the work progressed, and, further, that a portion of the same should be reserved until the building was completed, as a guaranty against any mistakes or losses. To make it more secure, Aaron and wife, by assignment, transferred the fund to Lynch, the superin-

tendent of construction. The garnishment could not affect or annul the contract made when the loan was obtained, nor divert the fund from the well-defined purpose to which it was to be devoted. It is well settled that the plaintiff could not acquire any greater rights against the garnishees than the defendant himself possessed or could enforce. The agreements between the garnishees and Aaron being valid, he could not have reclaimed the money, or any portion of the same, until the agreements or trust were carried out; and the plaintiff had no greater rights or other recourse against the garnishees than might have been asserted by Aaron. Any residue remaining after the execution of the trust would belong to Aaron, and might be subjected to the payment of his debt; but until the trust was carried out, and the building completed, it could not be determined that any portion of the fund would be unexpended. Until that time the fund was not subject to garnishment, nor could the investment company or Lynch be charged as garnishees. Drake, Attachm. §§ 454b, 517; Wap. Attachm. 199; Wade, Attachm. §§ 449, 473; 8 Am. & Eng. Enc. Law, 1179, 1194. The first garnishment proceeding was begun several months before the completion of the building, and at that time no part of the fund was subject to garnishment. Aaron could not have reclaimed any portion of it, and the general theory is that garnishment proceedings amount to no more than a substitution of the plaintiff for the defendant debtor in the enforcement of any liability against the garnishee. The second proceeding was not begun until January 4, 1890, at which time, as the trial court has found, the building was completed. Aaron was then entitled to the unexpended balance of the fund, and from that time the garnishees became liable for such portion as was in their hands. The findings of the court as to what was actually paid out under the agreements of Aaron and the garnishees, and as to what remained, are based on conflicting testimony, and hence those matters are not open for our consideration.

Counsel for plaintiff makes an extended argument upon the testimony, attempting to show that there was bad faith and sharp practice on the part of the garnishees as to the cancellation of a mortgage which plaintiff held before the building loan was perfected, as well as in the purchase and payment of the lumber sold by the plaintiff to be used in the construction of the building. But upon all these matters the evidence of the parties differed as widely as the claims which they have made. There was testimony tending to sustain the theory and claims of the garnishees, and on this state of the case the finding of the court is equally as conclusive upon us as would be the verdict of a jury. The various claims which were paid out of this fund appear to have been legitimate, and only proper allowances were made by the court. Considerable objection is made to the payment of taxes, insurance, and interest on the loan out of this fund. These payments were made to protect the loan, and they appear to have been justified by the agreements of the parties. They were made before the last garnishment proceeding was begun. There are some objections to the rulings upon the admission of testimony and to comments made by the court, but in neither do we find any substantial error. The judgment of the court of common pleas will be affirmed. All the justices concurring.

SAFFORD et al. v TURNER.
SCHRAM et al. v. SAME.
(Supreme Court of Kansas. Oct. 6, 1894.)
On rehearing. Denied.
For prior report, see 37 Pac. 121.

PER CURIAM. These causes were assigned for hearing at the May session, and were then continued until June. Briefs were filed by the plaintiffs in error on the merits. The defendant in error appeared, and presented motions to dismiss, which were sustained. The plaintiffs in error now move that the cases be reinstated and considered on the merits. As no brief was filed by the defendant in error, and no sufficient notice of the motion to dismiss was given, we shall treat the cases as though the motions to dismiss were now presented for the first time. Afnuavits are now presented by the plaintiffs in error for the purpose of showing that counsel for the defendant in error was notified of the time when the cases would be presented for settlement, and was present at the time they were settled. The counsel in the cases have each filed affidavits flatly contradicting each other. The judge who tried the cases testifies that he has no distinct recollection as to these particular cases; that it was his custom to require the presence of counsel on both sides, or a written acknowledgment from absent counsel, that a case was satisfactory; and that he is confident that he never signed any case without these conditions being complied with. The records, however, produced in court, fail to show any notice or appearance at the settlement of the cases on the part of the defendant in error. The practice of omitting these matters from the record, and resorting to outside proof to show notice of the time of settlement or actual presence of the parties, is not to be encouraged. This court should not have its time taken up by controversies of this character. It is very easy to make the record itself show the facts. If notice has been given, it should be incorporated in the record. If the parties appear at the time of the settlement, the certificate should so state. Parol agreements of counsel, made out of court, cannot be considered, and unseemly controversies over matters outside of the record are not to be encouraged. The former order of the court dismissing the cases must be allowed to stand.

BLANCHARD v. JACKSON et al. (Supreme Court of Kansas. Oct. 6, 1894.)

VENDOR AND PURCHASER — OPTION CONTRACT —
ACTION BY PURCHASER — FINDINGS—SUFFICIENCY OF EVIDENCE.

1. An option was obtained to purchase a body of land upon one of several plans. The cost of the land and the terms of payment were to be determined by the plan which the purchaser should elect to take. Small payments of money were to be made to secure the option, and, under the option agreement, it was provided that an election of plans should be made, a contract entered into, and payments made by the purchaser within a limited time, and that a failure to comply with the conditions of the option would forfeit the money paid and all rights under it. Only a portion of the money to secure the option was paid by the purchaser, and some improvements were made upon the land without authority; but no contract of purchase was made, and, long after the time that the option expired, the land was old to another. In an action wherein the purchaser seeks specific performance, or a recovery of damages, it was substantially held by the trial court, upon conflicting testimony, that the purchaser never elected upon which plan he would purchase the land, nor complied with the conditions of the option agreement; that no contract of purchase was ever made; and that he was not entitled to any relief. Held, upon an examination of the record, that there is sufficient testimony to sustain the finding and judgment of the court.

2. A general finding of a trial court, based upon conflicting testimony, will not be disturbed by the supreme court.

(Syllabus by the Court.)

Error from district court, Chase county; John Martin, Judge pro tem.

Action to quiet title by Joseph R. Jackson against Ben Blanchard and others. There was a judgment in favor of plaintiff and all the defendants except Blanchard, and he brings error. Affirmed.

This action was brought in the district court of Finney county by Joseph R. Jackson to quiet title to several tracts of real estate in Finney county, amounting in the aggregate to about 10,000 acres, alleged to have been purchased by him from Ott & Tewksbury in August, 1886, who had obtained title from the Atchison, Topeka & Santa Fe Railroad Company, which company had derived the property through a grant from the United Ben Blanchard and other parties States. who claimed an interest in the land were made defendants, and the prayer of the petition was that their claims of title or interest be adjudged null and void, and the title to the premises quieted in the plaintiff, as against them. Blanchard answered, alleging a purchase of the land from the railroad company in December, 1884, under which he took possession of and made improvements upon the land of the value of \$20,000, and that the company had knowledge that such improvements were being made. He alleges

that the purchase was made in the name of M. A. Carpenter, although he was the real party in interest, and that he paid to the company upon the contract the sum of \$4,000, to apply on the purchase price of the land; that Carpenter, in April, 1885, assigned his rights under the contract to Blanchard; that this assignment was duly approved by the land commissioner of the railroad company. and that under the contract he was to pay to the company \$1.25 per acre for a portion of the lands, and \$1.50 per acre for the remainder; that he built houses, dug wells, and broke lands upon the land, and, by reason of these improvements, the lands were greatly enhanced in value, and are worth \$10 per acre; that, in consideration of the purchase price and the making of said improvements, Blanchard was to have one year to pay out on the land under his contract. It is alleged that Ott & Tewksbury knew of his possession and improvements before their purchase of the land on May 25, 1886, and that Jackson knew, or ought to have known, of his possession and claim of title. He averred that the railroad company had refused and neglected to convey the lands to Blanchard, although he had offered to pay the whole of the purchase money, and that he was now ready to pay all of said purchase money upon receipt of the deeds for the land. He alleged that, by reason of the failure of the company to keep its contract, he was damaged in the sum of \$150,000; and he asked for a decree adjudging him to be the equitable owner of all the land, and to a specific performance of the contract, upon his paying the amount of the indebtedness due under his contract; and, second, that. in case such judgment could not be rendered in his favor, he be awarded judgment against the company in the sum of \$150,000. The railroad company filed an answer, containing a general denial, and further alleging that in December, 1884, the company withdrew from the market, upon the application of one Holmes, 18 sections of land, upon condition that a deposit of \$100 per section should be made, and was to hold the land for a term of 60 days, when Carpenter, for whom Holmes was acting, had the option to purchase the land upon any of the regular Subsequently, terms given by the company. and about December 18th, the company agreed with Holmes to hold for his further advice and prompt remittance of \$50 per section, as a deposit, the remainder of the That, on February 3d, there was deposited with the company the sum of \$2,000, \$1,800 thereof being \$100 per section in consideration of reserving 18 sections which lie north of the Arkansas river from sale for 30 days; and it was agreed that, if Carpenter failed to make the further payment before the expiration of the time, the deposit should be forfeited. The remaining \$200 were to be applied as a part of the deposit of \$50 per section on the balance of the lands

which lie south of the river, it being stipulated that the remainder of the deposit on the latter land should be forthwith deposited, in order to reserve the lands and protect the option; and it was agreed that, if the residue of the deposit was not forthwith made, the deposit should be forfeited. It is alleged that no further payment was made on any of said lands; that the deposit was forfeited, and due notice thereof was given to the interested parties. It is alleged that, in the erection of houses and the making of improvements, Blanchard was a trespasser upon the said lands; and that the houses were mortgaged and conveyed by him by bill of sale, to secure the indebtedness of Blanchard for the purchase price of lumber and other materials used in the erection thereof; and that afterwards said houses were sold at public auction, to satisfy that debt, and Blanchard has wholly abandoned any possession of the land, if any he ever had. It is further alleged in the answer of the company, which was verified, that Holmes, with whom Blanchard claimed to have made a contract, had no authority to make the contract alleged to have been made. change of venue was taken to the district court of Chase county, where, upon stipulation of the parties, a trial was had before the Honorable John Martin, sitting as judge pro tem. A jury was waived, and, upon the issues joined, a general finding was made against Blanchard, and in favor of Jackson, the railroad company, and the other defendants in error. Blanchard excepted to the findings and judgment subsequently rendered, and has brought the case up for review.

James McKinstry, Samuel R. Hamill, and J. D. McFarland, for plaintiff. A. A. Hurd, Robert Duniap, and C. N. Sterry, for defendants.

JOHNSTON, J. (after stating the facts). The lands purchased by Jackson, the title of which has been determined and quieted in this action, were part of a large grant formerly owned by the Atchison, Topeka & Santa. Fe Railroad Company. To dispose of these lands, the railroad company organized a land department, and placed a commissioner in charge, who employed local, field, and foreign agents to assist him. Blanchard had been employed as an agent of the company, and was therefore familiar with the different terms and plans upon which the lands were sold by the company. A list of prices was fixed upon the lands, but they were disposed of upon several well-known plans, one of which was the cash plan, under which a purchaser paid cash, and was allowed a large discount from the list price. Another was the three-year plan, where there was a smaller discount,-one-third of the price paid down, and the balance in two annual payments. Another was the six-year plan, nnder which a purchaser got a small discount. A small portion of the price was paid in

cash, and the balance in six annual installments. There was an eleven-year plan, under which there was but little discount, and the payments were made in eleven annual installments. The company also made provision whereby a proposed purchaser might, upon the payment of \$100 upon a section, withdraw such land from sale from 30 to 60 days. during which time the purchaser had the option to purchase the land at the list price under any of the plans of sale which have been mentioned; but, if he failed to exercise his option and make a purchase within the time limited, the money advanced was forfeited to the company. It appears that the terms of this provision were sometimes varied, and that the company at times reserved the land for a smaller amount per section than \$100. Blanchard had taken several options upon railroad lands, and in some cases had succeeded in negotiating a sale of the lands reserved before the expiration of the option. In 1884, he had deposited money and obtained an option, in the name of Wolf, for a body of land; and, having failed to purchase the same within the prescribed time, the reservation had been revoked, and the money declared forfeited. About December 12, 1884, Blanchard went to Garden City, where he talked with Holmes & Co., who were the local agents at that place for the sale of the company's lands, about taking an option on the lands in controversy. The result of the talk was that he gave Holmes a check for \$1,700, to reserve 17 sections of land, for which a receipt was given. On the next day, a further conference was had between them, in which it was agreed that Holmes should go to Topeka, and intercede with the land commissioner in behalf of Blanchard to set aside the forfeiture upon the Wolf land, and also to make a further arrangement by which 25 sections of the cheaper lands on the south of the river might be reserved upon the payment of \$50 per section. In connection with this arrangement, and to assist in carrying it out, Blanchard gave Holmes an additional check for \$8,-375.68. There is little, if any, dispute between the parties as to the facts stated, but there is a sharp conflict in the testimony as to the terms of the options and the subsequent transactions between the parties. It is conceded that Holmes went to Topeka at the instance of Blanchard, and secured a reinstatement of his Wolf option, which had been forfeited, by using the \$1,700 which had been advanced as a deposit to reserve a portion of the lands in controversy; and that he also induced the land commissioner to withdraw these lands for a few days, without a deposit, upon condition that a deposit of \$100 per section on the lands north of the river and \$50 per section for 25 sections of the lands south of the river should be forwarded on or before January 1, 1885. No money was paid to the commissioner with which to reserve the land until February 4th, when

Holmes made a deposit of \$2,000, taking a receipt therefor; and this was the only writing which ever passed between the parties in regard to this option. As will appear, the reservation was taken by Blanchard in the name of M. A. Carpenter, for a period of 30 days. The following is the document: "Topeka, Kansas, February 4, '85. Mesars. I. R. Holmes & Co., Garden City, Kansas-Dear Sir: In reply to yours of closing two thousand dollars as deposit for thirty days, account of M. A. Carpenter, on the following lands [here follows description of 18 sections north of the river and 25 sections south of the river], we await receipt of further advice and application. Yours, truly, A. S. Johnson, Land Commissioner."

On May 29, 1885, the land commissioner notifled Blanchard that the deposit had been forfeited, because of noncompliance with its provisions. Blanchard asserts that on December 13, 1884, he entered into an agreement with Holmes by which he was to go to Topeka, and arrange with the land commissioner to give him an option of one year from that time upon the lands, on condition that he would pay \$100 per section for 18 sections and \$50 per section for 25 sections, and the further arrangement that he would build some houses and make certain improvements upon the land, and that Holmes afterwards notified him that such an arrangement had been made. He claims to have paid \$3,200, under this agreement, with which to reserve the land, and that subsequently, at considerable expense, he erected several houses and made other improvements upon the land. He further claims that once in April, 1885, he arranged a sale of 30 sections to a man named Cole, and that a draft for \$25,000 was actually sent to the land commissioner to pay for the land; but it appears that the letter transmitting the draft contained conditions which prevented its acceptance, and the draft was returned. On July 13th, Blanchard says that he arranged a sale or transfer to one Crawford for 24 of the sections for \$25,000, and a draft for that sum was actually forwarded to the commissioner, who responded that the amount forwarded was more than sufficient to pay for the lands described; that no more than \$21,359.30 would be required; and an inquiry was made as to what should be done with the excess, \$3,640.70. It appears that this information was not in keeping with the representations made by Blanchard to Crawford, and the latter telegraphed the commissioner to hold the draft until explanations Afterwards Crawford directwere obtained. ed the return of the draft, and no other or further attempt was ever made by Blanchard to comply with the conditions of his option, nor were any further steps taken towards a purchase of the land. Holmes says that no more than \$2,000 was ever paid upon the option, and positively denies that he made any agreement with reference to improvements, or that the option should be extended for a period of one year. It is conceded that he had no authority to make such a contract without obtaining the express consent of the commissioner, and it is further conceded that Blanchard knew, at the time he paid the \$2,000 to Holmes, that Holmes had no such authority.

There is a large volume of testimony of the most contradictory character, but there being no special findings, and the general finding of the court being against the plaintiff in error, all these disputes must be resolved against him. There is much said in his brief respecting the weight of the testimony which in this state of the case is unavailing. We cannot weigh the testimony to determine the preponderance, nor go further than to inquire whether there is sufficient to sustain the general finding of the trial court. The case might have been reviewed more satisfactorily if special findings of fact had been made; but without them we must infer that the general finding of the court includes in it every material fact, and that, where there is some proper testimony to support every essential element of the general finding, a judgment based thereon cannot be disturbed by the supreme court. Railroad Co. v. Foster, 39 Kan. 329, 18 Pac. 285; Mushrush v. Zarker, 48 Kan. 382, 29 Pac. 681. In this view, we must conclude that Blanchard did not at any time pay sufficient money to reserve the land for any period; that no agreement was made that he might have an option for a year by reason of making certain improvements upon the land; that he has not even complied with the terms of the option which he alleges was given to him; that he has never purchased the land, nor elected under which one of the plans upon which it was offered for sale he would purchase it; that he has never at any time paid or tendered the purchase price of the land under any plan; and that, before the lands were sold by the company, he abandoned his option, and surrendered any claim which he ever had to a right to pur-Blanchard asks a specific enforcement of a contract of purchase when no purchase has in fact been made. During the limit of the option, he could select any one of four or five different methods under which the company sold its land, and such selection would fix the amount of the purchase price and the terms of payment. Until that was done, no one could know how much land was to be taken, nor the price to be paid, nor what would be the times of payment. The option agreement was binding on the parties, and might have been enforced at the instance of Blanchard, if he had elected to purchase and had complied or offered compliance with the terms of the agreement within the stipulated time. Bras v. Sheffield, 49 Kan. 702, 31 Pac. 306. There was no such compliance, however, within the time fixed in the written option, nor yet within the year which Blanchard said was agreed upon. It appears that Blanchard made several unsuccessful efforts

to dispose of the land early in the year 1885, and, although the time had elapsed, it seems that the commissioner was still willing to let him have the land on his option as late as July 15, 1885. Blanchard earnestly contends that the draft which was then forwarded by Crawford from Chicago entitled him to 24 of the sections included in the option. It appears, however, that the money was withdrawn before it could be applied on account of misrepresentations made by Blanchard with regard to the cost of the land.

We fail to find anything in the testimony indicating a purpose on the part of the commissioner or other of the agents of the company to frustrate the efforts of Blanchard in disposing of the land within the specified time. Looking at the testimony of the defendants in error as we are required to do, it would seem that considerable indulgence and leniency had been shown to Blanchard in carrying options for him even after some of the conditions had been broken. After the Crawford transaction in July, 1885, no effort was made by Blanchard to exercise his option, or comply with any of its conditions. Indeed, it appears that soon afterwards trouble arose which caused him to flee the country; and there is testimony that on his return, in December, 1885, he acknowledged that he had lost the lands in question, and made statements indicating an abandonment of his option. It is true that he made improvements on some of the lands, but the houses were soon sold and removed to satisfy claims and liens against them. They were placed on the land, as we must assume, without authority, and with a knowledge by Blanchard that he would lose them, as well as the deposit, in case he failed to exercise and protect his option. There is testimony that he was advised not to make any improvements upon the land, because of the risk he would run of losing the deposit and improvements in case he was unable to make the purchase; but he insisted that he was positive that he would be financially able to close the deal, and was therefore willing to assume the risk. Proof was offered that the land was vacant and unoccupied when it was sold to Jackson, and, as the testimony stands, Blanchard is not in a position to claim anything by reason of the improvements that were made upon the same. He failed to sustain the allegations of his cross petition, and was therefore denied relief. Under the testimony and general finding, he had nothing more than an option, by which the cost of the land and terms of sale were to be determined upon election of one of the plans under which the land would be sold; and, as no election was ever made, the price of the land and terms of payment were never determined. No contract of sale was ever made, and, as the parties have never settled upon what the contract should be, the court certainly could not make and enforce one for them. Considerable testimony was offered by Blanchard

to sustain his view, and much is said in his behalf about the overwhelming weight of evidence being in his favor; but, as has been seen, his testimony is contradicted by that of the other parties, and the general finding of the court upon the conflicting testimony is conclusive here. That finding determines that Blanchard utterly failed to comply with the conditions of his option, and that he has forfeited all rights under it.

There are some objections to rulings upon the admission of testimony, but we find nothing in them of a substantial character, or which requires special comment. The judgment of the district court will be affirmed. All the justices concurring.

EASTMAN v. HOUSEHOLDER et al.

(Supreme Court of Kansas. Oct. 6, 1894.)

STATE OFFICERS — SUPERINTENDENT OF INSANE ASYLUM—FORCIBLE REMOVAL—MANDAMUS—SUFFICIENCY OF PETITION.

1. Mandamus is an appropriate remedy to restore to the possession of his office a superintendent of an insane asylum of the state, from which he has been arbitrarily and wrongfully removed without cause, before the expiration of his term of office, by the board of trustees of the state charitable institutions.

2. A superintendent of an insane asylum of the state, who is arbitrarily dismissed from office, without any sufficient cause, and in violation of the statute, by the board of trustees having charge of such asylum, and is deprived by them of his office room, fixtures, books, papers, etc., which are turned over to another person acting in concert with them, so that he is thereby prevented from discharging his official duties, is wrongfully removed from office. It is not necessary that any forcible collision between him and the trustees, or the person acting with them, to prevent him from exercising the duties of his office, shall occur, over the office, or the possession of the office room, books, records, etc., before he can apply to the courts to be restored.

3. The allegations of the alternative writ of mandamus examined, and held not to show a voluntary abandonment of the office of superintendent of the insane asylum at Topeka by the plaintiff, nor such laches upon his part in applying for a writ of mandamus to be restored to his office, from which he alleges he has been arbitrarily and wrongfully removed, as to forbid the relief he prays for.

(Syllabus by the Court.)

Action by B. D. Eastman against M. A. Householder and others, as the board of trustees of state charitable institutions, and J. H. McCasey, for a writ of mandamus to compel defendants to reinstate plaintiff, as superintendent of the insane asylum of the state of Kansas, from which office he had been illegally removed. An alternative writ was issued, and defendants separately move to quash the writ. Motions overruled.

On the 16th day of August, 1894, there was issued out of this court an alternative writ of mandamus, at the instance of the plaintiff, and against the defendants, which stated, among other things, that B. D. Eastman is a citizen of the United States and of the

state of Kansas, and a resident of said state of Kansas; that said defendants M.A. Householder, W. S. Waite, M. N. Hinshaw, Mary E. Lease, and Walter N. Allen, are the duly appointed, qualified, and acting members of the board of trustees of state charitable institutions of said state of Kansas; that prior to the 1st day of March A. D. 1894, said plaintiff herein had been duly selected, appointed, and elected superintendent of the insane asylum, located at Topeka, in Shawnee county, Kan., for the term expiring June, 30, 1895, by the duly appointed, qualified, and acting board of trustees of state charitable institutions of said state of Kansas, the insane asylum being one of the charitable institutions of the state of Kansas; that in pursuance of said selection, appointment, and election, the plaintiff duly qualified, and was installed in and entered upon the performance of his duties as such superintendent of said insane asylum. and so remained and continued in such office, in the performance of said duties, until on or about the 1st day of March, 1894, when said plaintiff was wrongfully, illegally, and unlawfully removed from said office through the erroneous and illegal conduct of the then board of trustees of state charitable institutions of the state of Kansas, by striking from the pay roll of the officers and employés of said asylum the name of plaintiff, and by delivering the office room, office fixtures, books, papers, and records pertaining to said office to the above-named defendant, J. H. McCasey, and informing said plaintiff that he was relieved from his official duties as said superintendent, and thereby dispossessing said plaintiff of said office, and depriving him of the use, salary, and emoluments of the same; that at said time there was no vacancy in said office, nor had any charges been presented or filed against said plaintiff for his removal from said office as by law in such cases made and provided, nor had the official term for which said plaintiff had been selected, appointed, and elected as said superintendent expired by operation of law or otherwise: hat said plaintiff on or about August 15, 1894, while said board of trustees of state charitable institutions was duly convened and in session for the transaction of business, made a demand upon said board to be restored to and reinstated in said office as superintendent of said asylum, which demand was by said board refused and denied, and said board still refuses to allow said plaintiff to perform his duties as said superintendent of said insane asylum, and still refuses to allow to him his salary and emoluments of said office. The writ commanded the defendants, M. A. Householder, W. S. Waite, M. N. Hinshaw, Mary E. Lease, and Walter N. Allen, as the board of trustees of the state charitable institutions of the state of Kansas, to restore the plaintiff to his official position as superintendent of the insane asylum, and to install him in the office, and further commanded the defendant J. H. McCasey to sur-

render to the plaintiff the office room of such superintendent together with the office fuzniture, fixtures, papers, books, and records belonging to or under the control of the superintendent of the insane asylum, or to show cause before this court why they have not done as so commanded. On September 6, 1894, the board of trustees of the state charitable institutions and J. H. McCasey separately filed motions to quash the alternative writ for the following reasons: "(1) That from the face of said writ it appears that mandamus is not the proper remedy for the matters therein alleged, but that there is another plain, adequate, and complete remedy therefor, to wit, the action of quo warranto. (2) That from the unexplained laches of said plaintiff, appearing upon the face of said writ, it affirmatively appears that, if said plaintiff ever had any right to be restored to said office, he had fully abandoned said office before applying for said writ, and is forever barred from asserting such right. (3) That. upon the showing made on the application therefor, said writ was improvidently granted." The demurrers were presented and argued at the September sitting of this court for 1894. B. D. Eastman appeared by his attorneys, W. A. S. Bird, Esq., and S. L. Seabrook, Esq. The board of trustees of the state charitable institutions appeared by Hon. John Little, attorney general, and J. H. McCasey appeared by his attorney, G. C. Cemens, Esq.

S. L. Seabrook and W. A. S. Bird, for plaintiff. John T. Little, Atty. Gen., and G. C. Cemens, for defendant.

HORTON, C. J. (after stating the facts). This is an application to this court, in the exercise of its original jurisdiction, for mandamus to compel the defendants, as trustees of the state charitable institutions, having control of the insane asylum at Topeka, to restore B. D. Eastman to his official position as superintendent of that asylum, and to permit him to exercise the duties of his office without any interruption or intrusion from the defendants, or either of them.

It is contended by the defendants that the petitioner has mistaken his remedy, and that mandamus will not lie. It is said that his appropriate remedy, if he has any, is by quo warranto. The great weight of authority is that the courts will refuse to lend their extraordinary aid by mandamus to compel the admission of a claimant to an office in the first instance, where he has never been in the actual possession of the office, or discharged its duties. Where, however, one has been in the actual and lawful possession and enjoyment of an office, from which he has been wrongfully removed, a different case is presented. Prior to the 3d of July, 1888. George T. Neally was the city engineer of the city of Topeka. D. C. Metsker was the mayor. On that date, Metsker, as mayor, attempted to suspend Neally from his office, and place therein William Tweeddale. John C. Carter acted in concert with the mayor, and assisted in preventing Neally from exercising the duties of his office. Subsequently, Neally was restored to his office by a peremptory writ of mandamus issued from the district court of Shawnee county. The judgment of that court was excepted to, and the proceedings reviewed and affirmed by this court. Metsker v. Neally, 41 Kan. 122, 21 Pac. 206. In that case, Valentine, J., speaking for the court, observed: "In fact, it is not seriously disputed by the defendants that mandamus would be the proper remedy to restore a party to an office from which he had been illegally removed. same reasons given to sustain this remedy in cases of removal apply with equal force where the occupant of an office had been illegally suspended." The authorities fully sustain the practice of this court that mandamus is the proper remedy to restore an officer to his office, from which he has been wrongfully removed or suspended. Spelling, in his new work upon Extraordinary Relief (paragraph 1576), says: "Mandamus is the proper remedy to restore one to the full enjoyment of an office or position of trust and emolument of a public nature, from which he has been wrongfully removed, or which is wrongfully withheld. There is an important distinction to be taken between cases where mandamus is sought to induct a claimant into an office already filled, and those where one actually in office has been removed or deprived of his rights and privileges therein. In the former cases, as has been shown, the incumbency of another under such color of right as constitutes him an officer de facto, rather than a mere intruder, will be a complete answer to the petition; but, where one has been wrongfully deprived of an office by the illegal appointment of another, mandamus will issue to effect his restoration, even though such appointee be in possession de facto. It is essential, however, to entitle a relator who has been removed to mandamus for his restoration, that he be clearly entitled de jure to the office from which he has been removed. It is not sufficient that he show himself to be an officer de facto, but he must also show a clear legal right, and his failure to do so will warrant a refusal of the peremptory writ." See, also, Merrill, Mand. \$\$ 148, 150, and cases cited; High, Extr. Rem. (2d Ed.) § 67; People v. Scrugham, 20 Barb. 302. The facts alleged in the writ show that the plaintiff's term of office had not expired at the time of his removal, and also that such removal was arbitrarily made, without any sufficient cause, investigation, or trial. Therefore, upon the facts as alleged, it appears that the defendant was wrongfully and illegally removed from his office. If this action had been

brought against J. H. McCasey alone, we would have declined the writ until the incumbent had been removed by a quo warranto, but this action is primarily against the board of trustees of the state charitable institutions. The trustees not only appoint the superintendent, but are authorized to adopt such rules as may be necessary for the management of the insane asylum. To them belongs its government. Before any superintendent can obtain a warrant from the auditor for his salary, the voucher must be approved by the trustees. Sess. Laws 1879, c. 10; Sess. Laws 1893, c. 1. If J. H. McCasey is in possession of the office room, fixtures, books, etc., of the superintendent of the insane asylum, as stated in the writ, he has such possession under the authority of the trustees only. He is merely acting in concert with them and under their direction. Dew v. Judges, 3 Hen. & M. 1; Ex parte Strong, 20 Pick. 484; People v. Board of Ed. (Sup.) 16 N. Y. Supp. 676.

2. Authorities are to the effect that where an officer voluntarily abandons his office. or when the demand for mandamus has become stale, no restoration can be secured by There is no statement in the writ the writ. showing that the plaintiff voluntarily abandoned his office, and his demand has not become stale by great lapse of time. There was no necessity for a forcible collision between the plaintiff and defendants, over the office, or the possession of the office room, books, records, etc., before the plaintiff could bring his cause in this court. Feizel v. Trustees, 9 Kan. 592. The wrongful removal is alleged to have taken place on or about the 1st of March, 1894. This action was commenced in this court in less than six months thereafter. We cannot say, as a matter of law, upon the allegations of the writ, that the plaintiff has been guilty of such laches as to forbid him the relief he demands. The motions to quash will be overruled. The defendants will have 10 days in which to file their answers. All the justices concurring.

(54 Kan. 68)

BRUN v. HOUSEHOLDER et al. (Supreme Court of Kansas. Oct. 6, 1894.)

Action by John Brun against M. A. Householder and others, as the board of trustees of state charitable institutions of the state of Kansas, and J. H. Butler, for a writ of mandamus. An alternative writ was issued, and defendants separately move to quash the writ. Motion overruled.

W. A. S. Bird and S. L. Seabrook, for plaintiff. John T. Little, Atty. Gen., and G. C. Cemens, for defendants.

PER CURIAM. The motions to quash the alternative writ of mandamus will be over-ruled, upon the authority of Eastman v. Householder (just decided) 37 Pac. 989. The defendants will have 10 days in which to file their answers.

STATE v. CONKLING.

(Supreme Court of Kansas. Oct. 6, 1894.)

CONTEMPT—FINE—PAYMENT UNDER PROTEST—EF-FECT ON RIGHT OF APPEAL.

Upon attachment issued by the district court, C. was found to be guilty of contempt of court, and adjudged to pay a fine and costs. Under protest he paid the fine and discharged the judgment, stating that he reserved the right to appeal from the judgment, which he subsequently attempted to take. Held, that his protest and reservation are unavailing, and that an appeal from a judgment that has been executed and discharged is not permissible.

(Syllabus by the Court.)

Appeal from district court, Kingman county; S. W. Leslie, Judge.

I. G. Conkling was adjudged guilty of contempt, and appeals. Dismissed.

L. M. Conkling, for appellant. C. W. Fairchild, for the State.

JOHNSTON, J. An attachment was issued by the district court of Kingman county for I. G. Conkling, requiring him to appear before the court to answer a charge of contempt; and on December 26, 1891, he was adjudged guilty of contempt in obstructing a receiver of the court, and was sentenced to pay a fine of \$50, and stand committed until it was paid. Motions for a new trial and to arrest the judgment of the court were made and overruled. Afterwards, on December 29, 1891, I. G. Conkling appeared in open court and paid the fine assessed against him. The statement was then made that he paid the fine under protest, and that he reserved the right to appeal, and all rights that he might be entitled to in the premises. He has attempted to bring the case here on appeal. It appears that the sentence of the law has been executed, and nothing is left for further controversy. By his own act, Conkling has satisfied and discharged the judgment entered against him. His protest and attempt to reserve the right of appeal are unavailing. The statute does not provide for nor contemplate an appeal from a discharged judgment. Neither payment nor protest was necessary to protect his rights. Under the statute the judgment of conviction which was entered against him would have been stayed by the mere taking of an appeal, without any order of the court or the giving of a bond. Gen. St. 1889, par. 5349. The appeal will be dismissed. All the justices concurring.

STATE v. DIEBOLT.

(Supreme Court of Kansas. Oct. 6, 1894.)

HOMICIDE-SUFFICIENCY OF EVIDENCE.

To sustain a conviction of murder, every element of the crime must be established by competent evidence; and, where this court can say from the record that every fact shown by the testimony is consistent with the innocence of

the defendant, the conviction must be set aside. In this case it is held that there is not sufficient evidence to uphold the verdict.

(Syllabus by the Court.)

Appeal from district court, Doniphan county; J. F. Thompson, Judge.

John Diebolt was convicted of murder in the second degree, and he appeals. Reversed.

Fenlon & Fenlon, for appellant. John T. Little, Atty. Gen., and Alcid Bowers, for the State.

ALLEN, J. The appellant was convicted in the district court of Doniphan county of murder in the second degree, and sentenced to confinement in the penitentiary for 10 years. There is very little conflict in the evidence. The important facts, as testified to by the witnesses for the state, are as follows: The defendant is a boy about 17 years old, who resided with his mother on a farm a short distance from Denton, in Doniphan county. A party of young men, on the evening of September 8, 1893, went to a melon patch on the Diebolt farm, with the previous knowledge and consent of the defendant, for the purpose of getting some melons, and also of having some fun by scaring one Marion Cornelius Pinyard, who was one of the party. As a result, Pinyard was shot and killed, and the defendant has been convicted of having purposely and maliciously killed him. Frank Buck, a witness for the state, testified, among other things, that he was 40 years old. "Q. Prior to that time, what arrangement, if any, had you made to go to the watermelon patch of the defendant, Diebolt? A. A few evenings before that I was over northeast of Denton there, on Mr. Kirwin's place, and a fellow by the name of Wickline, I believe his name is,-I won't say positively that that is his name,-got some peaches, and came back by Mr. Diebolt's there, and drove in the barnyard there, and saw Johnnie, and spoke to him in regard to coming down there to get some melons, to have some fun with this young Pinyard, some evening in the future. Q. What did John Diebolt say to that? He said that was all right; for us to come on; we could have all the melons we wanted. Q. State all that he said to you at that time. A. I asked Johnnie if he had a shotgun, and he says, 'Yes; I have got a shotgun and revolver both.' I says, says I, 'Fetch up the shotgun, and load it with just powder and paper.' Says I, 'I want to have a little fun out of Neil.' Q. What did he say to that? A. He said, 'All right.' Q. What did you say as to fixing a time? A. I told him that I would let him know in regard to the time that we would be down there. I could not say just at what time we would be there." On the evening of September 8th, Buck met Murray, Redebaugh, Pinyard, and Black near the railroad crossing just east of Den-

ton. He also met the defendant and George Palmer, a colored man who worked for the Diebolts, on their way to town. Buck, Pinyard, Murray, Redebaugh, and Black started down the railroad towards the melon patch, but Black turned back after going part way. The balance of the party went on past the Diebolt place, where they stayed until they heard Diebolt and Palmer return from Den-Buck then further testified: ton. waited there until we heard Diebolt and Palmer coming down the track singing. heard them coming down the track, and we waited until they turned in somewhere about the crossing that they had to cross the railroad there; I suppose somewhere about the gate there where they left the railroad track. I went over inside of the field there, and met them in there.-met them somewhere about the end of the melon patch,and we walked on up the road together, going up towards the house, and was talking in regard to the location in the patch, and I went back then, and met Mr. Murray and Redebaugh and Cornelius Pinyard at the south end of the patch. They had gotten over inside of the right of way then, and at the south end of the patch was muskmelons. I told the boys. 'The watermelons is further out this way,' and I says, 'We will go round up in this road along the fence.' We went up until I thought we was coming to about where the melons was, and we went across those potato rows there, and through the corn, and into the melons. We was walking along up through the melon patch there. Q. When you went up with John Diebolt and Palmer, up towards his house, what did you say to them? A. I told Mr. Palmerhe said he did not know which one of the boys it was to a certainty, in the dark there, was Pinyard-I told him how Mr. Pinyard was dressed. The arrangement was that when we got in there, that Mr. Palmer was to catch Mr. Cornelius Pinyard, and hold him until Mr. Murray was to fire the shot, and then he was to fall; that is, Palmer was to fall, and commence hollowing that he was shot. Q. Did John Diebolt hear that conversation? A. Yes, sir. Q. What, if anything, was said by you in regard to the manner in which Pinyard was dressed? A. I told him that he had on dark pants, a dark vest, and a light shirt, and a brown hat." On cross-examination he testified: "Q. And the colored man was to gather Pinyard, and hollow and scream, and then Murray was to shoot a gun off? A. Yes, sir. Q. And then the colored man was to fall and hollow he was shot, and scream? A. Yes, sir. After that, Diebolt was to fire a shot into the air? A. Yes, sir." On his direct examination the witness further testified as follows: "Q. Well, after you had passed by the muskmelons up towards the watermelons, what was the next thing that was done? A. We was walking along the melon patch, -along through the melon patch,-and the

first thing that I knew Mr. Palmer jumped up. He hollows out, 'You ----, I've got you now,' or something to that effect. I think that is about the exact language. He grabbed hold of Mr. Murray, and there was a kind of commotion there for just a little bit, and he let loose of Murray, and started to run towards the east, and Murray and myself we run off in a southwesterly direction a few steps, and Murray, he jerked his pistol out of his pocket, and shot in a southwesterly direction, threw up his arms in that manner, and I looked around to see whether the colored man would carry out his part of the programme; and, when the pistol shot was fired off,-that is, when I looked around,-I saw Palmer drop, and commence hollowing. Q. What did Diebolt do? A. Well, when I saw Diebolt, he was running after Pinyard; that is, the next I saw of him after he raised up out of those rows of corn, he was running after Pinyard. Q. How far behind Pinyard? A. Oh, he was a few feet behind him. Q. What direction was Pinyard running? A. He was running in a southeasterly direction. Q. Who fired the first shot that you heard there that evening? A. John Murray fired the first shot that I heard there that evening. Q. Was there any other shots fired? A. When I looked around to see Palmer fall, I saw John Diebolt throw his hand up, and fire,-fire a shot. Q. What direction did he fire? A. Well. he was running to the southeast, and he threw his arm up, kind of off from him like, and the flash of the pistol was upwards. It was an upward direction, with the flash from the pistol, and rather to a-might be asoutherly direction; that is, more south, the way he held his arm. Q. What was the next thing you heard? A. Well, there was considerable hollowing down there. The colored man was hollowing and groaning there, and Johnnie was hollowing,-considerable hollowing being done. I didn't pay very much attention to the hollowing, only I noticed there was considerable hollowing being done by some of the party. Q. Well, did you hear any more shooting after John Diebolt shot? A. Why, in a short time after that I heard a shot down in a southeasterly direction from where we were laying there in the grass,-Mr. Redebaugh, Mr. Murray, and myself. Q. Well, what was the next thing that was said or done after the third shot was fired? A. The next that I knowed anything in regard to where Mr. Diebolt was, Mr. Diebolt came running back. He says, 'Boys, Pinny is hurt;' that is, 'Pinny,' or 'Neil,' or something. I could not say exactly the words he used in regard to calling his name." It appears that Pinyard and Diebolt had gone out of the field in which the melon patch was located, across the corner of a little pasture, to the fence of the railroad right of way. Pinyard was found a little way over the fence, lying on his face, unconscious; with a gunshot wound

in the back of his head. On the way down to where Pinyard lay, Buck asked Diebolt how it happened, to which Diebolt answered: "I was running, and run into the wire fence, and the pistol went off accidentally,—went off over in the direction of where Pinyard was." Palmer, the colored man, was sent after the doctor, and soon afterwards Diebolt also started after the doctor. Diebolt at all times claimed that his pistol went off accidentally.

From all the evidence in the case, there seems to be no doubt that the wound received by Pinyard was produced by a pistol shot from the hand of the defendant. Was this wound purposely inflicted? As tending to show malice, we are cited to the testimony of Joseph Whitney, who testified that in a conversation a short time before the shooting, speaking of Pinyard, the defendant said, "The bastard can't play ball," and "I would like to slap him," or something of that kind. The same witness testified that, on the evening of the shooting, he overheard Diebolt say to somebody else something like this: "This is what will get them, damn them, if they go into my watermelon patch." The rule is elementary that, to sustain a conviction, the evidence which is accepted as true by the jury must not only be consistent with the guilt of the defendant, but inconsistent with his innocence. Home v. State, 1 Kan. 47; State v. Grebe, 17 Kan. 458; State v. Fry, 40 Kan. 311, 19 Pac. 742. What fact developed by the evidence in this case is inconsistent with the claim that the defendant's pistol went off accidentally, and inflicted the fatal wound? When viewed in the light of the principal facts in the case, we think the testimony of Whitney is too trifling to merit serious consideration. A statement of a boy, 17 years old, that he would like to slap another boy, cannot be distorted by any sensible person into an expression of such malice as would induce him to take life. Such expressions among boys are entirely too common, and ordinarily too meaningless, to be given any weight. The other expression which Whitney claims to have overheard, "That this is what will get them," would show malice against the others as much as against Pinyard. On the other hand, the whole testimony offered by the state shows that the plan to scare young Pinyard was not laid by the defendant at all, but was first communicated to him by the witness Buck, a man 40 years old. That plan was that firearms should be used for the purpose of frightening Pinyard, and the defendant was expected to play his part. The impression to be conveyed to Pinyard was that Diebolt was shooting at those in the patch because they were stealing melons. All of the witnesses who were in the melon patch that night testified that all parties were entirely friendly and good natured. Palmer and Diebolt came back from Denton singing. It seems that Pinyard was informed, before he went into the patch, that a plan had been laid to scare him, but, notwithstanding the fact that he was forewarned, he evidently was thoroughly frightened. With the exception that the colored man made a mistake, and grabbed Murray, the programme was carried out as prearranged. The defendant appears to have chased the deceased somewhere about 200 feet. Nothing could be more natural than this in carrying out the plan. Is there anything unreasonable or improbable in the statement of the defendant that his pistol went off accidentally? His actions after the shooting are much more consistent with innocence than with guilt. There can be little, if any, doubt that the fatal shot struck Pinyard just after crossing the right of way fence, nor can there be serious doubt that at that time the defendant was close to the fence. It is argued that because the defendant says the pistol was in his hand, hanging down by his side, the deceased could not have received a wound in the back of his head while the pistol was so held. The defendant says he thinks he threw his hand up as he struck the fence. This is natural and probable. We think there is nothing like certainty as to the position of these parties at the time the fatal shot was fired. The night was rather dark, and it is not probable that the defendant knows just what position he was in when he ran into the fence, just where the deceased was, or just how he held his pistol. That he did run into the fence, as he testified, is corroborated by the fact that his clothes were torn. The sport engaged in by these parties was reprehensible. The use of firearms for the purpose of terrifying anyone in the night, as was done in this case, should never be indulged in. Those who planned, and all who participated, in the scheme are at fault, but it does not follow that all or any of them are murderers. If the shooting was accidental, the defendant is not guilty. Every fact disclosed by the testimony is entirely consistent with his claim that the pistol was discharged accidentally. We are well aware that the verdict of a jury and the approval of the trial court should not be disturbed upon any view of this court as to the relative weight of conflicting testimony, but after a most careful scrutiny of the evidence in this case we are unable to say that there is enough to support the verdict. The judgment is therefore reversed. All the justices concurring.

SHULL v. BOARD OF COM'RS OF GRAY COUNTY et al.

(Supreme Court of Kansas. Oct. 6, 1894.)

Mandamus to County Canvassing Board — Action by Candidate — Another Action by County Attorney—When a Bar.

^{1.} A candidate for election to a county office, who, upon the face of the returns, is elected, may maintain an action in his own name to compel the county canvassing board, which rejects a portion of the returns, to reconvene and canvass the full returns of the election; and

this may be done although the county attorney may have already brought an action in the name of the state for substantially the same

purpose.
2. In this proceeding it appears that returns hoard because were rejected by the canvassing board because of alleged fraud in the count and return of the or alleged fraud in the count and return of the votes cast. *Hrld*, that the showing made to the board was insufficient to impeach the returns, and that it was the duty of the board to canvass the full returns, and declare the result shown by them.

(Syllabus by the Court.)

Action by J. T. Shull against the board of county commissioners of Gray county, Kan., and others, for a writ of mandamus to compel defendants to reconvene as a board of canvassers, and canvass the full returns as made of the votes cast for plaintiff and others as candidates for treasurer of such county at the general election in 1893. Writ grant-

H. F. Mason, for plaintiff. Sutton & Mc-Garry, for defendants.

JOHNSTON, J. At the last general election in Gray county, J. T. Shull, C. S. Warner, and A. R. Moebius were candidates and received votes for county treasurer. According to the face of the returns, Shull received 207 votes, Warner 194, and Moebius 24. county canvassing board, however, rejected the returns from Logan township, as to the office of county treasurer, and upon the remaining returns found and declared that Warner was elected. This action is brought by Shull to compel the county commissioners and county clerk to reconvene as a board of canvassers, and canvass the full returns as made to them, including those from Logan township relating to the office of county treasurer, and declare that Shull was elected. it being alleged that the election returns show upon their face that plaintiff was elected to that office. The defendants answered that the returns from Logan township were not legal and genuine election returns, and that, as presented to the defendants, they "bore upon their face the appearance of having been tampered with and altered, in that erasures appeared to have been made upon the tally sheets, and the envelopes containing the ballots cast appeared to have had the seals broken and replaced." It was further alleged that 16 voters of Logan township had made affldavit that they voted for Warner, while the returns from that township only gave him 8 votes. As a further answer, it is alleged that an action of mandamus had been begun in the name of the state against these defendants in the district court of Gray county, in which it was sought to compel the canvass of the votes, and for the same relief that is asked in this action.

Testimony has been taken upon the charges made, but it fails to convince us that fraud was committed by the election officers of the township, or that the returns were altered or tampered with. It is shown that the count was watched by voters who

represented the different political parties, and no one detected any error or wrong in the The returns made to the county clerk and to the township trustee showed no trace of any erasure, and while they were out of the hands of the judge who carried them to the county clerk, for a few minutes, there is nothing to show that there was any atttempt or disposition to tamper with the returns. They appear to have been received by the county clerk in the condition in which they were sealed up, and the evidence introduced is not sufficient to impeach the genuineness of the returns. It is true that 16 men made affidavit before the board of canvassers that they voted for Warner for county treasurer at the election in Logan township. One of them, however, afterwards admitted that he was mistaken, and there is that in the testimony of some of the others which weakens their statements, and shows the unreliability of that class of evidence, upon which to set aside the returns of an election. The duty of a canvassing board is almost wholly ministerial. They are to ascertain and declare the result of the voting as shown by the returns. In the first place, they are to determine that the returns are genuine, but when they are satisfied of that "they may not reject any returns because of informalities in them or because of illegal and fraudulent practices in the election." Lewis v. Commissioners, 16 Kan. 102. When it appears that returns made to a canvassing board are grossly and manifestly fraudulent, as was the case in State v. Stevens, 23 Kan. 456. the court, in the exercise of judicial discretion, may refuse to compel a canvass of such returns. In this case, however, we think the testimony fails to impeach the returns, and that the commissioners were not justified in refusing to canvass the returns from Logan township.

The institution of the mandamus proceeding in Gray county does not prevent the maintenance of this action by the plaintiff. former was brought by the county attorney in the name of the state, and the plaintiff in this action has no control over the same. He has an interest in the canvass, and is entitled to maintain an action in his own name to require a canvass of the full returns upon the office for which he was a candidate.

It is said that there has been a change in the board of county commissioners and county clerk since the refusal was made to complete the canvass. It was the duty of the successors to canvass the full returns, and a peremptory writ of mandamus will issue to them, commanding such a canvass.

As this proceeding was begun before the change in the board was made, the costs will be adjudged against the officers who originally refused to make the canvass. A peremptory writ will issue requiring the county commissioners and county clerk to reconvene as a canvassing board, and canvass the full returns of the election, and to declare the result, in accordance with the prayer in the plaintiff's application. All the justices concurring.

STATE v. RAY.

(Supreme Court of Kansas. Oct. 6, 1894.)
WITNESS-IMPEACHMENT -- CONTRADIOTORY STATEMENTS-IRRELEVANT TRANSACTIONS.

A witness cannot be impeached by showing that he has made statements out of court, on matters not relevant to the issues in the case, differing from those made on the witness stand. Nor can a witness be impeached by showing transactions not connected with the issue being tried which are denied by the witness.

(Syllabus by the Court.)

Appeal from district court, Lyon county; W. A. Randolph, Judge.

Man Ray was convicted of selling intoxicating liquors in violation of the prohibitory law, and appeals. Affirmed.

J. Jay Buck, for appellant. John T. Little, Atty. Gen., and W. C. Simpson, for the State.

ALLEN, J. The defendant was charged with violations of the prohibitory law, in three counts. The first and second counts alleged sales of intoxicating liquors on September 18, 1893, and November 6, 1893. The third count charged him with maintaining a nuisance. He was convicted under the first and second counts, and acquitted as to the third. Several errors concerning the introduction of testimony are alleged. was some evidence to identify the bottle, which was offered in evidence, and we do not think the court erred in permitting it to be shown to the jury. The testimony offered for the purpose of overthrowing the testimony of the witness Davis was inadmissible. The circumstances sought to be shown by other witnesses had no necessary connection with the material facts of this case. Where it is sought to impeach a witness by showing declarations, made out of court, inconsistent with his statements on the witness stand, such declarations must be with reference to matters material to the issue in the case. Whether Davis ever took alcohol or whisky in his pocket into Ray's place of business was entirely irrelevant to the issue in the case. The testimony with reference to the sale of the keg of beer to Zelotes Galliher ceases to have any importance, in view of the verdict, which acquitted the defendant on the nuisance count, and convicted him only on the sales to Davis and Zoder Galliher. The verdict is sustained by direct and positive evidence; which the jury appear to have believed. We find no substantial error in the case, and the judgment is affirmed. All the justices concurring.

STATE v. BROWN.

(Supreme Court of Kansas. Oct. 6, 1894.)

ATTEMPT TO RAPE — SUFFICIENCY OF EVIDENCE—WANT OF CONSENT.

1. In a prosecution for an attempt to commit rape, where there is testimony that force was used in the attempt by the defendant, and a determined resistance made by the woman, the fact that no outcry was made will not necessarily defeat the conviction, especially in a case where the resistance made was effective in frustrating the attempt.

2. There must be a real want of consent, and the facts that no outcry was made by the woman, or that she did not mention the matter to others until a long time afterwards, are proper considerations for the jury in determining whether her resistance was honest, or only

a mere pretense.

3. The testimony examined, and keld to be sufficient to sustain the conviction.

(Syllabus by the Court.)

Appeal from district court, Pottawatomie county; William Thomson, Judge.

John Brown was convicted of an attempt to commit rape, and appeals. Affirmed.

Codding & Challis, for appellant. John T. Little, Atty. Gen., and B. H. Tracy, for appellee.

JOHNSTON, J. The defendant was convicted upon a charge of assault with intent to ravish and carnally know Edna L. Davis, and the punishment adjudged was 10 months' imprisonment in the county jail. The only objection made upon this appeal is that the testimony is insufficient to sustain the conviction. Although there is considerable testimony that little, if any, force was used by defendant, and although some of the circumstances are inconsistent with an earnest resistance by the girl, we think the judgment must stand. The testimony of Edna tends to show that, while walking with defendant towards a neighbor's house, he solicited sexual intercourse with her; and when she refused, and attempted to leave him, he seized and dragged her into some standing corn that was near to them, pulled up her clothes, and, when she escaped from him, he again ran after her, and caught her, pulled up her clothes, and attempted to draw her person to his. She says that he caught her foot, and tried to trip and throw her down, when she slapped his face; that he unbuttoned his clothes, and disclosed his private parts; and that while the struggle was in progress, and before he accomplished his purpose, a young man named Elmer Ray approached, and said, "What has all this hallooing been about?" This interruption ended the attempt. The defendant admits that he asked her to submit to him, but testified that she willingly consented; and together they retired into the cornfield, where she lifted her skirts, and intercourse was had between them in a standing posture, without objection or resistance by her. There is some testimony tending to corroborate that of the de-

fendant, as well as some which tends to discredit it: but the jury chose to believe the statements of the girl, and, upon the whole record, we cannot say that the verdict is without support.

It is contended that there was no outcry or determined resistance made by the girl, and that her conduct did not show a want of consent. It is true there was but little, if any, outcry, and that she did not tell any one of the attempt until some time after it was made. Her own testimony, however, shows that she rejected his advances, and that there was such a determined resistance on her part as to prevent the accomplishment of his purpose, until a third person came along and terminated the struggle. There must be a real want of consent, and the facts that no outcry was made, or that she did not mention the matter until a long time afterwards, were a proper consideration for the jury in determining whether her resistance was honest, or only a mere pretense. To sustain the conviction, it is not necessary that there should have been the greatest possible resistance of which she was capable, and especially is that true in a case where the resistance made was effective in frustrating the attempt. State v. Montgomery, 63 Mo. 296; Com. v. McDonald, 110 Mass. 405; State v. Shields, 45 Conn. 256; 19 Am. & Eng. Enc. Law, 951. Perhaps a showing of a greater resistance and more outcry would have been required to sustain a conviction for a consummated offense: but accepting her testimony to be true, as we must, we cannot say that the resistance was not made in good faith, nor that she did not make an honest and successful effort to defeat his lustful purpose. The judgment of the district court will be affirmed. All the justices concurring.

STATE v. FORLINE.

(Supreme Court of Kansas. Oct. 6, 1894.) APPEAL-REVIEW-RECORD-SUFFICIENCY.

1. It devolves upon appellant who alleges error to bring so much of the evidence and proceedings of the trial court as will affirmatively

show that prejudicial error was committed.

2. The sufficiency of the evidence to sustain the finding or verdict cannot be reviewed, in the absence of all the evidence that was of-

fered in support of the same.

3. A judgment will not be reversed in such a case because of rulings upon instructions, when there is no statement in the record that the testimony tended to sustain any particular claim or theory, nor anything to show that the objectionable rulings may not have become unimportant on account of that which was omitted from the record.

(Syllabus by the Court.)

Appeal from district court, Osborne county; Cyrus Heren, Judge.

Charles M. Forline filed a complaint against certain persons, charging them with robbery in the third degree. Defendants were acquitted, and judgment was rendered against Forline for costs. He appeals. Affirmed.

Robinson & McBride and Smith & Nicholas, for appellant. John T. Little, Atty. Gen., M. E. Smith, and J. K. Mitchell, for the State.

JOHNSTON, J. Charles M. Forline filed a complaint and instituted a prosecution against seven persons, charging them with robbery in the third degree. At the trial the jury were instructed that the evidence was insufficient to sustain the charge, and the court directed that a verdict of not guilty should be rendered. A hearing was had upon the question whether there was probable cause for instituting the prosecution, and as to the motives of the complaining witness, and, after the jury had been instructed upon that question, it found that the prosecution was instituted without probable cause, and from malicious motives. Upon this finding the court adjudged that Forline should pay the costs of the prosecution. He appeals from this finding and judgment, and the principal objections discussed arise upon the testimony.

The transcript first brought here shows that it contains all the evidence upon the question of whether the prosecution was instituted without probable cause, and from malicious motives. The question being raised as to the sufficiency of the record, the parties stipulated that the original bill of exceptions should be substituted for the copy, and upon an examination of the original it is disclosed that all the testimony is not preserved, and no statement is contained in the record as to the character of the testimony omitted. It is therefore impossible for this court to review the testimony, or to determine what was established by it. The condition of the record also precludes a review of the rulings upon the instructions which were given or refused.

There is no statement in the record that the testimony tended to sustain any particular claim or theory, nor anything to show that the objectionable rulings may not have become unimportant on account of that which was left out of the record. Some of the instructions may have been correct in the abstract, but something in the omitted testimony may have rendered them inapplicable and immaterial. Even if some of those given were incorrect in some particular, the error may have become immaterial by the admissions or concessions of the appellant. As he alleges error, it devolves upon him to bring enough of the proceedings and evidence to affirmatively show that there was error, and that it was prejudicial. If he admitted that he began the prosecution without cause, and to gratify a spiteful feeling which he entertained towards the defendants, the errors complained of, if there were any, would be immaterial. We cannot overthrow the judgment unless it affirmatively appears from

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the record that prejudicial error was committed, and the record which appellant brings here is insufficient to overcome the presumption which prevails in favor of the correctness of the rulings of the trial court. Insurance Co. v. Curry, 44 Kan. 741, 25 Pac. 221. The judgment will be affirmed. All the justices concurring.

DONOHUE v. DONOHUE et al.

(Supreme Court of Kansas. Oct. 6, 1894.)

WILLS-CONSTRUCTION - EVIDENCE IN AID OF - CONDITIONAL DEVISE - EFFECT - LIABILITY OF DEVISEE.

1. While no construction can be indulged which is in conflict with the intention of the testator, as expressed in his will, yet when the will has been written by an illiterate person, without any punctuation marks whatever, and its language is at all doubtful, evidence as to the condition of the testator's property, family, etc., is admissible in construing its terms.

2. It is the rule that a condition or direction imposed on a devisee to pay a sum of money enlarges the devise to him, without words of limitation, into an absolute estate in fee.

3. Where a will burdens the youngest daughter of the testator, who is first named in the will, with the duty of paying \$1,500 of legacies to the other heirs of the testator after the death of her mother, "off the estate," the fund is designated, as well as a personal liability imposed.

(Syllabus by the Court.)

Error from district court, Atchison county; B. F. Hudson, Judge pro tem.

Action by Joseph Donohue against Louise Donohue, administratrix with the will annexed of the estate of Thomas Donohue, deceased, and others, for the construction of such will. There was a judgment favorable to defendants, and plaintiff brings error. Affirmed.

This action was brought on the 23d day of January, 1889, by Joseph Donohue against Louise Donohue, administratrix with the will annexed of Thomas Donohue, deceased, Louise Donohue, Catherine McFadden, Jennie Ashe, John J. Donohue, Bridget Donohue, and George Saxton, Salina Ruth Saxton, Alice Saxton, and Thomas Clayton Saxton, minors, defendants, for a judicial construction of the last will and testament of Thomas Donohue, deceased. The will is in words and figures as follows: "Farmington Kansas Atchison county September the 26 1887 Last will and testiment of Thomas Donohue being of sound mind do agree to dispose of my real estate and personal property in the following manner the south east quarter of Sec. fifteen (15) in town ship six (6) in range ninteen (19) and forty (40) acres in the south west quarter in Sec. (15) fifteen in town ship (6) six in range 19 ninteen cituated in the county of Atchison and in the state of Kansas the above described property must remain in bee half of Louise Donohue and Bridget Donohue her mother during said Bridget Donohue natiural life or as long as said Bridget Donohue remains the wife of |

said Thomas Donohue and all of the above said personal property to remain in behalf of said Louise Donohue and said Bridget Donohue her mother after the death of said Bridget Donohue the said Louise Donohue shall pay off the estate to the followin ares the sum of three hundred dollars each to Joseph Donohue or his ares the sum of three hundred dollars to the deceased Ellin Saxon ares the sum of three hundred dollars to John J. Donohue or his ares the sum of three hundred dollars to Katherine McFaden or her ares the sum of three hundred dollars to Jane Ash or her ares the sum of three hundred dollars. Thomas Donohue Bridget Donohue. (Witnesses) M. T. Burk John Diebolt. I do hear by sertify that this is a true statement made be for me this 26 day of September 1887 I being a qualified justis of the peace J. L. Quiett." December 17, 1887, Thomas Donohue died seised in fee simple of the real estate described in the will. Trial had on the 1st day of July, 1889, before the court, without a jury. The court, having heard the evidence and argument of counsel, found "that on September 26, 1887, Thomas Donohue duly executed his last will and testament, a copy of which is set forth in the plaintiff's petition; that on December 17. 1887, Thomas Donohue departed this life, leaving this will as his last will and testament, and leaving, as his sole heirs at law, Bridget Donohue, his widow, Joseph Donohue, John J. Donohue, Jennie Ashe, Catherine McFadden, and Louise Donohue, his children, and George Saxton, Salina Ruth Saxton, Alice Saxton, and Thomas Clayton Saxton, his grandchildren, being the children of his deceased daughter Ellen Saxton, the above being the sole and only heirs at law of the said Thomas Donohue; that on January 10, 1889, the will was duly probated in Atchison county, state of Kansas, and Louise Donohue was duly appointed the administratrix with the will annexed thereunder, and duly qualified as such administratrix. That Thomas Donohue died possessed of \$1,832 worth of personal property; that the funeral expenses, together with the sums owing by the testator at the time of his death, amounted to about \$500, which has been paid out of the personal property by the administratrix; that Thomas Donohue also died possessed in fee simple of the southeast quarter of section fifteen (15) and the southeast quarter of the southwest quarter of section fifteen (15), all in township six (6), in range nineteen (19). in Atchison county, state of Kansas, amounting to 200 acres; that, by his will, Thomas Donohue bequeathed his personal property jointly to Louise Donohue and Bridget Donohue, and devised his real property to Louise Donohue in fee simple, subject only to its joint use and occupancy by Bridget Donohue equally with herself during the widowhood of Bridget Donohue, and the payment of \$1. 500 in legacies to the other heirs, as provided therein, at the death of Bridget Donohue.'

In accordance with the foregoing findings, the court decreed that the personal property belonging to Thomas Donohue at his death was, by the terms of the will, the joint property of Louise Donohue and Bridget Dono-The court further decreed that Louise Donohue took a fee-simple title to the real estate described in the will, subject to the joint use and occupancy by Bridget Donohue during her widowhood; and that, at the death of Bridget Donohue, Louise Donohue was required to pay to each of the following persons the sum of \$300: Joseph Donohue, John Donohue, Jennie Ashe, Catherine McFadden, George Saxton, Salina Ruth Saxton, and to Alice and Thomas Clayton Saxton, jointly, \$300. Judgment was rendered for the defendants for costs against the plaintiff. Joseph Donohue excepted, and brings the case here.

Solomon & Bland, for plaintiff in error. C. D. Walker, for defendants in error.

HORTON, C. J. (after stating the facts). Upon the trial, evidence was received showing that Louise Donohue was the youngest child of Thomas Donohue; that, at the time of his death, the family consisted of himself. his wife, Bridget, and his daughter Louise; that, prior to and at the time of the execution of his will, Joseph Donohue and his father were unfriendly; also the value of the personal and real property of which he died possessed, together with the amount of his debts. It is insisted that all of this evidence should have been rejected, upon the ground that the terms of the will are clear and unambiguous. The will was written by an illiterate person, without a punctuation mark of any kind. Every will should be construed in accordance with the intention of the testator, as expressed in or implied from the language; "yet a court of construction cannot shut its eyes to the statement of facts under which the will was made. On the contrary, an investigation of such facts often materially aids in the elucidation or scheme of disposition which occupies the mind of the testator. To this end, it is obviously essential that the judicial expositor places himself as fully as possible in the situation of the person whose language he has to interpret." 1 Jarm. Wills, 736. Therefore, evidence as to the condition of the testator's property, family, etc., is often admissible. We think, in this case, the trial court committed no error in receiving the evidence complained of.

2. The contention is that the will devises a joint and equally limited estate in the real estate to Lousie and to Bridget Donohue, and that that estate will terminate on the death or marriage of the latter. The trial court decided that Thomas Donohue, by his will, devised his real property to Louise Donohue in fee simple, subject only to its joint use and occupancy by her mother and her-

self during the widowhood of her mother. and the payment of \$1,500 in legacies to the other heirs of Thomas Donohue, at the death of her mother. It will be observed, by the terms of the will, Louise was to pay "off the estate" the sum of \$300 to each of the five heirs, at the death of her mother. It is not a fair construction of the will to say that this is a charge against the personal property of the estate alone. The will provides that these legacies shall not be paid till "after the death of said Bridget Donohue." The personal property was appraised at \$1,-832. The funeral expenses and the debts owing by the testator at the time of his death amounted to about \$500. After paying the debts, there was left about \$1,300 of personal property, to be divided between Louise and Bridget Donohue, or \$650 each, provided the personal property brought the amount it was appraised at; hence the personal property alone belonging to Louise Donohue was not sufficient to pay the \$1,500 of legacies. The statute provides that "every devise of real property, in any will, shall be construed to convey all the estate of the testator therein, which he could lawfully devise, unless it shall clearly appear by the will that the testator intended to convey a less estate." Gen. St. 1868, c. 117, § 54, Oct. 31st (Gen. St. 1889, par. 7258). It is the rule that a condition or direction imposed on a devisee to pay a sum of money enlarges the devise to him, without words of limitation, into an absolute estate in fee. In this case, the \$1,500 to be paid by Louise Donohue after the death of her mother is a charge both upon the estate devised and upon Louise, for the legacies are to be "paid off the estate" by her. The fund is designated, and a personal liability imposed. Barheydt v. Barheydt, 20 Wend. 576. It is not reasonable to suppose that it was the intention of Thomas Donohue, considering his affection for his daughter Louise, who was first named in the will, that he would burden her with the duty of paying, after the death of her mother, \$1,500 of legacies out of his estate to the other heirs, if the balance of the realty, or the proceeds thereof, were to be distributed equally among all the heirs. Upon the record, we must sustain the construction given to the will by the trial court, and therefore the judgment will be affirmed. All the justices concurring.

KENNETT v. PETERS et al. (Supreme Court of Kansas. Oct. 6, 1894.)

CHATTEL MORTGAGE—CONDITION BROKEN—EFFECT ON TITLE—REPLEVIN—CONVERSION—PETITION— APPEAL—REVIEW.

1. Under the statutes of some of the states, the authorities hold that after condition broken the title to mortgaged personal property becomes absolute in the mortgagee, without redemption, but the chattel mortgage act of this state contemplates a different rule.

2. Under the statutes of this state, and in accordance with the practice existing, in an action of replevin or for the conversion of personal property, if the plaintiff is not the absolute owner, the petition must set forth the special ownership or interest of the plaintiff in the property, stating the facts in relation thereto.

3. A petition for the conversion of personal property must allege, if the plaintiff was not in possession at the time of conversion, that "he was entitled to the immediate possession of the

was entitled to the immediate possession of the

property.

4. A petition for conversion, alleging plain tiff's ownership or special interest in the property in the present tense, or prior to the time of conversion, is insufficient, as it does not show that the plaintiff was the owner of, or had any special interest or possession of, the property at

the date of the conversion.

5. Where a petition is fatally defective for

o. where a petition is ratally defective for want of material averments, and such averments are not supplied by the answer, the petition is not cured thereby.

6. When a petition is fatally defective, and the verdict and the judgment are against the plaintiff, the supreme court will not examine, at the instance of the plaintiff, the alleged errors occurring upon the trial. rors occurring upon the trial.

(Syllabus by the Court.)

Error from district court, Clay county; R. B. Spilman, Judge.

Action by Homer Kennett against Peters & Co. and others for the conversion of certain cattle. There was a judgment in favor of defendants Peters & Co. and Charles W.

Lord, and plaintiff brings error. Affirmed. On the 22d day of September, 1888, Homer Kennett commenced his action against Peters & Co., Elisha Parker, William Parker, and Charles W. Lord, and in his petition alleged: "Plaintiff says that he is and was the owner and entitled to the possession of thirty-six head of steers, one and two years old, of the value of \$850; twenty-nine head of hogs, of the value of \$260; ten cows, of the value of \$200; six calves, of the value of \$70; and two bulls, of the value of \$50; all of the total value of \$1,430. On or about the 11th day of September the defendants unlawfully obtained possession of said property, refused to deliver it to plaintiff, and converted it to their own use, to the damage of plaintiff \$1,500, for which he asks judgment, with interest from September 11, 1888, and costs of suit." Peters & Co. and Charles W. Lord filed answers containing general denials only. Elisha and William Parker made default. Trial had before the court, with a jury, on the 9th day of June, 1890, in Clay county, the venue of the action having been changed from Cloud county. Upon the conclusion of the evidence the plaintiff moved for an instruction in his favor for a verdict against both defendants, which was refused and excepted to. The court submitted the case to the jury as to Lord, but instructed that no recovery could be had against Peters & Co. The jury returned the following verdict for the defendants: "We, the jury impaneled and sworn in the above-entitled case, do, upon our oaths, find for the defendants M. S. Peters and W. G. Peters, partners as Peters & Co., and we do find for the defendant Charles W. Lord." The plaintiff filed motions for a new trial, which were overruled, and brings the case here.

Kennett, Peck & Matson, for plaintiff in error. Ellis & Cook and D. C. Chipman, for defendants in error.

HORTON, C. J. (after stating the facts). It is claimed that the petition does not state facts sufficient to constitute a cause of action, and that, under an allegation of general ownership, a chattel mortgage permitting the property to remain in possession of the mortgagor until default in payment of the debt secured thereby is not evidence to sustain the same. The points are well taken. The petition fails to state that the plaintiff was the owner of or in the possession of the property on the date of the conversion, fails to state that the plaintiff was entitled to the immediate possession of the property at the time of the conversion, fails to state the year in which the conversion occurred, and fails to state the special ownership or interest in the property. In trover, plaintiff must either have the possession, or the immediate right of possession, of the property, to entitle him to recover. Wilson v. Fuller, 9 Kan. 176, 190, 191; Hoisington v. Armstrong, 22 Kan. 110, 113; Chit. Pl. 167; Owens v. Weedman, 82 Ill. 409-417; Middlesworth v. Sedgwick, 10 Cal. 392. The precedents from all the books upon pleadings require the petition to show that the plaintiff was in the actual possession of the property at the time of conversion, or, if not in possession, that he was entitled to the immediate possession of the property. 2 Estee, Pl. & Pr. Sec. 2098; Maxw. Code Pl. 637. Swan on Pleadings expressly states that the petition for the conversion of chattels must allege, "if the plaintiff was not in possession," that he "was entitled to the immediate possession of the property." The petition does not state that the plaintiff was the owner of the property at the time of the conversion, but merely charges that the conversion was on "the 11th day of September." The year is omitted. Sawyer v. Robertson (Mont.) 28 Pac. 456; Smith v. Force, 31 Minn. 119, 16 N. W. 704; Bouv. Inst. § 3538; Cruger v. Railroad Co., 12 N. Y. 190-201. Cobbey, on the Laws of Replevin, says: "Where the plaintiff claims as sole owner, he must stand or fall on that claim, and cannot, if his alleged title turns out to be invalid as against the true owner, fall back upon an alleged lien. The claim of title is a waiver of any lien, and, in any event, before he can claim the chattel by virtue of the lien, the false claim of title must be abandoned, the title of the true owner conceded, and the claim reduced to one of lien." Section 601. Our statute provides that in an attidavit for an order for the delivery of property the plaintiff must show that he is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto. Civ. Code, § 177. The Code prescribes that there can be no feigned issues in pleadings, and that all pleadings must be written statements by the parties of the facts constituting their respective claims. Civ. Code, §§ 11, 84. A petition in replevin, or for conversion, ought to advise the defendant of the nature of the plaintiff's claim to the property, to the end that he can intelligently defend. Of course, the proof must sustain the material allegations of the judgment. Kern v. Wilson, 73 Iowa, 490, 35 N. W. 594.

The plaintiff's interest in the property, upon the evidence offered, was only that of a mortgagee. There are authorities in some of the states holding that after condition broken the title to mortgaged personal property becomes absolute in the mortgagee, without redemption. Our state contemplates a different rule. Wolfley v. Rising, 12 Kan. 535; Kern v. Wilson, supra. In the mortgages offered, the possession of the property was retained by the mortgagor until condition broken. Therefore, although the plaintiff, under the statute, had the legal title to the property referred to in his mortgages. if they were sufficient in description, and embraced the property sold, he was not entitled to the possession of the property until he had shown to the satisfaction of the court that the indebtedness, or a part thereof, secured by the mortgage, was due and unpaid, but even then his title was not absolute. We are referred to Miller v. Adamson (Minn.) 47 N. W. 452, in support of the claim that a plaintiff may, in replevin or trover, allege generally he is the owner of the property, and prove either general or special ownership. The decision is not satisfactory to us. According to the common and usual practice, as it exists in this state, a plaintiff in replevin sets forth in his petition the facts which constitute his special interest or ownership in the property. Lewis v. Burnham, 41 Kan. 540, 548, 21 Pac. 572; Ream v. McElhone, 50 Kan. 409, 31 Pac. 1075; Coder v. Stotts, 51 Kan. 382, 32 Pac. 1102. "A party to an action should not be allowed to obtain benefits from contradictory and inconsistent allegations, deliberately made by himself in his pleadings. Our Civil Code does not contemplate any such thing. The spirit of our Civil Code is that a party shall state in his pleadings the real facts of his case, and not falsehoods or fictions; and when each party states what he believes to be true, and the real facts of his case, the court may know precisely where the parties differ." Losch v. Pickett, 36 Kan. 216, 12 Pac. 822; Wilson v. Fuller, 9 Kan. 176; Wolfley v. Rising, 12 Kan. 535; Hoisington v. Armstrong, 22 Kan. 110.

Where the petition is defective for want of material averments, and such averments are not supplied by the answer, the petition is not cured thereby. Wilhite v. Williams, 41 Kan. 288, 21 Pac. 256. The general denials filed by the defendants did not supply the omissions in the petition. Upon the petition and the evidence introduced, the defendants

were entitled to verdict and judgment. When the pleadings and the evidence show that the judgment is correct, it will be sustained, notwithstanding errors may have occurred upon the trial. Dry-Goods Co. v. Khan (Kan.) 36 Pac. 327; Commiskey v. Mc-Pike, 20 Mo. App. 82-84; Johnson v. Simpson, 77 Ind. 417. If a verdict had been rendered for the plaintiff, we might have permitted the petition to be amended to conform to the facts proved; but when a petition is fatally defective, and will not support a judgment, this court will not examine, at the instance of the plaintiff, alleged errors occurring upon the trial. The attention of the district court and counsel was directly called to the defects in the petition and to the incompetency of the evidence, according to the record now before us. No amendments were made to the petition, and no request was made therefor. Under all the circumstances, the judgment of the district court will be affirmed.

FIRST NAT. BANK OF CLYDE v. PARK-HURST et al.

(Supreme Court of Kansas. Oct. 6, 1894.)
REPLEVIN—HARMLESS ERROR—INSTRUCTIONS—BURDEN OF PROOF.

1. The overruling of a motion to withdraw all the testimony of the plaintiff relative to his special ownership of the property sued for in a replevin action, in which the petition alleges general ownership, is not necessarily prejudicial to the defendant. Such evidence, in the absence of amendment to the petition, tends to defeat the plaintiff, not to sustain him.

2. In a replevin action, both parties claimed title under the same person,—the plaintiff, by bills of sale and collateral agreements in writing; the defendant, by chattel mortgages. In the case the trial court committed no error, under the facts disclosed, in refusing to instruct the jury that the burden of proof was upon the plaintiff to establish the allegations of his petition by a preponderance of the evidence, as it appeared that the plaintiff was entitled to recover unless the defendant established by the burden of proof that he had authority, outside of the written conditions of his chatter mortgages, to retain \$449 out of the proceeds of the mortgaged property to apply upon notes not described or secured by the mortgages.

(Syllabus by the Court.)

Error from district court, Cloud county; F. W. Sturges, Judge.

Action of replevin by Frank C. and C. T. Parkhurst against the First National Bank of Clyde, Kan. There was a judgment for plaintiffs, and defendant brings error. Affirmed.

This was an action of replevin brought on the 15th of March, 1889, by Frank C. and C. T. Parkhurst against the First National Bank of Clyde, to recover certain personal property, consisting of cattle, horses, and agricultural implements, of the alleged value of \$1,476. The petition alleged, inter alia, that plaintiffs were the owners, etc., of the property. Trial had before the court, with a jury, at the April term for 1889. The jury

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returned a verdict in favor of the plaintiffs and against the defendant, and fixed the value of the property unlawfully taken by defendant at \$965. Judgment was rendered in favor of the plaintiffs for the recovery of the property, and, in case return could not be had, that plaintiffs recover from the defendant \$1,032.50 for the value of the property and interest. The bank filed its motion for a new trial, alleging the various statutory grounds, which was overruled and exceptions taken. The bank brings the case here.

Pulsifer & Alexander, for plaintiff in error. Kennett, Peck & Matson, for defendants in error.

HORTON, C. J. (after stating the facts). It is insisted that the trial court erred in not striking out the testimony of Frank C. Parkhurst, and in overruling the objections to the testimony of George Parkhurst relative to the ownership of the property described in the petition, on the ground that it was at variance with the allegations thereof. The petition alleged the plaintiffs "were the owners of, and entitled to the immediate possession of, the property." We have ruled recently that, where a plaintiff has a special ownership or interest in property which he seeks to recover, he ought to state in his petition all the facts in relation thereto. Kennett v. Peters, 37 Pac. 999. In this case, however, plaintiffs below introduced in evidence bills of sale of the property, given to them by George L. Parkhurst. These bills of sale, upon their face, transferred absolute ownership of the property to the plaintiffs below. They were properly received to support the allegations of the petition. The special ownership or interest of plaintiffs in the property was partially disclosed by their testimony on crossexamination, but the collateral written agreements to George L. Parkhurst were not offered in evidence until after the plaintiffs rested. These collateral agreements probably made the bills of sale merely chattel mortgages, but by all the parties thereto they were considered as conveying absolute title, and the collateral agreements as permitting a repurchase only. The jury specially so found. In the briefs filed by defendant below, and in the oral argument in this court, no exceptions were taken to the special findings of the jury. The evidence objected to tended to prove that the plaintiffs were not entitled to recover under the general allegations of ownership, and if proper instructions had been requested to fairly present this question to the jury, or if a verdict had been rendered against the plaintiffs below upon the evielence submitted, the point presented and discussed, concerning the allegations in the petition and the variance of proof, might have been raised by the defendant with some substantial benefit, in the absence of any amendment of the pleadings; but this was not done, and the trial court committed no material error in refusing to strike out the evidence, or in overruling the objections.

2. It is next insisted that the trial court erred in refusing to instruct the jury "that the burden of proof was upon the plaintiffs below to establish the facts alleged in their petition by a preponderance of the evidence." Generally, such an instruction should be given, but it appears in this case that both parties claimed under George L. Parkhurst, -the plaintiffs, under two bills of sale executed February 8th, 1889, on account of certain debts of George L. Parkhurst, for which they were sureties, and for \$600 which they were to advance to satisfy other debts. The bank claimed the property under four chattel mortgages. The contention of the plaintiffs was that the proceeds of a part of the mortgaged property taken and sold by the bank, together with the tender made, more than satisfied all the liens on the property. On the other hand, the bank claimed that, having authority to use \$449 out of the proceeds of the mortgaged property to pay two notes,-one of \$424 and another of \$25,-not secured, the indebtedness described in the chattel mortgages had not been paid or tendered. There really was no controversy between the partles as to the right of the plaintiffs below to recover if the mortgaged indebtedness of George L. Parkhurst to the bank had been satisfied or tendered. There was no controversy between the parties but that the bank, under its chattel mortgages, took and sold certain fat cattle, and that the proceeds received were sufficient to pay all the indebtedness secured by the mortgages, except about \$30. This amount was tendered before this action was commenced. If the bank had no authority from George L. Parkhurst to pay the two notes of \$424 and \$25, not secured. the proceeds of the mortgaged cattle sold by it, with the tender, fully satisfied the mortgages. Therefore, in this case, the burden of proof upon the pivotal question, whether the bank had the right to retain \$149 out of the proceeds of the fat cattle to pay off the two notes not secured by the mortgage, was upon the bank, not upon the plaintiffs. If the trial court had given the instructions prayed for concerning the burden of proof, then it would have been its duty to have stated further that upon the uncontradicted evidence the plaintiffs had shown themselves entitled to recover, unless the defendant has established by a preponderance of the evidence an agreement with George L. Parkhurst to apply first from the proceeds of the cattle \$449 to pay the two notes not secured. Under these circumstances the court committed no error in refusing the instruction requested.

It is not urged in any of the briefs that the special fludings are contrary to the evidence. It appears from examination that they support the judgment rendered under the allegations of the petition.

The foregoing are the only errors referred

to in the brief of the bank, although they are again discussed in the brief as third and fourth errors. The judgment of the district court will be affirmed. All the justices concurring.

RENO LODGE, NO. 99, I. O. O. F., HUTCH-INSON, et al. v. GRAND LODGE, I. O. O. F., OF KANSAS, et al.

(Supreme Court of Kansas. Oct. 6, 1894.)

BENEVOLENT SOCIETIES—LAWFUL PURPOSES—CONTROL BY COURTS — ODD FELLOWS' HOME FOR ORPHANS—ASSESSMENTS—INJUNCTION.

1. Persons voluntarily becoming members of a fraternal and benevolent society are bound by all reasonable rules and regulations of the

society.

2. Courts will not undertake to direct or control the internal policy of such societies, nor to decide questions relating to the discipline of its members, but will leave the society free to carry out any lawful purposes in its own way, and in accordance with its own rules and regulations.

3. The method of raising funds to carry out one of the benevolent purposes for which the association was established, and the amount to be so raised, is ordinarily a matter of policy, which the association has never to determine

which the association has power to determine.

4. The plaintiffs are subordinate lodges of the Independent Order of Odd Fellows in Kansas. The defendants are the grand lodge of the order in Kansas, and its principal officers. All the parties recognize the Sovereign grand lodge of the United States as having full legislative and judicial power in determining matters relating to the order, and an appeal lies from a decision of the grand lodge of the state of Kansas to the Sovereign grand lodge. In October, 1893, the grand lodge of the state of Kansas levied an assessment of \$1.50 per capita on all the subordinate lodges in Kansas for the purpose of aiding in establishing a home for the maintenance and education of the orphans of deceased Odd Fellows of Kansas on lands conveyed by E. V. De Bolssiere to trustees in trust for the maintenance of such a home. Plaintiffs seek to enjoin the collection of this assessment. No appeal appears to have been taken to the Sovereign grand lodge. The district court refused an injunction. Held not error.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Reno Lodge, No. 99, I. O. O. F., Hutchinson, and others, against the Grand Lodge, I. O. O. F., of the State of Kansas, and others, for an injunction. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

This action was instituted in the district court of Shawnee county, in the name of Reno Lodge, No. 90, I. O. O. F., Hutchinson, and 91 other lodges of Odd Fellows, against the Grand Lodge of the Independent Order of Odd Fellows of the State of Kansas, J. A. Campbeil, Grand Master, John A. Bright, Grand Secretary, and Louis C. Stine, Grand Treasurer. The petition says that the grand lodge was chartered on the 10th day of March, 1858, by an act of the legislature of the territory of Kansas, and is now a duly organized and existing corporation. It is averred "that the said defendant, grand

lodge of Kansas, derived its sole power and authority from the Sovereign Grand Lodge, I. O. O. F., of the United States, and the constitution, laws, and resolutions of the corporation; that the said defendant corporation has the supreme legislative, executive, and judicial authority within the state of Kansas, under the constitution, laws, and resolutions of said Sovereign grand lodge." The other defendants named are the general officers of the grand lodge of the state. It is further alleged "that the plaintiffs hereinbefore mentioned, and each of them, are duly authorized, chartered, and instituted subordinate lodges of the Independent Order of Odd Fellows of the State of Kansas, working under the jurisdiction of the defendant the Grand Lodge, I. O. O. F., of Kansas, and that each of them are duly incorporated and existing as such corporations under the laws of Kansas; that as such subordinate lodges these plaintiffs are subject to the laws, regulations, rules, and resolutions of the grand lodge of Kansas, and to the supervision and direction of the grand master of said defendant grand lodge." It appears from the pleadings and evidence that on the 11th day of May, 1892, E. V. De Boissiere conveyed to Louis C. Stine, George A. Huron, Milo B. Ward, George W. Jones, and Charles L. Robbins, and their successors, 3,156 acres of land in Franklin county, and a large amount of personal property, in trust to provide a home on the lands conveyed for the orphaned children of deceased Odd Fellows of the state of Kansas. This conveyance was made with the understanding that the Odd Fellows should assume and pay an indebtedness of about \$17,500. At the session of the grand lodge held in Ft. Scott in the fall of 1892, the grand lodge accepted the gift, and undertook to raise money to pay off the indebtedness and make needed improvements. this purpose they called on the various lodges in the state for voluntary contributions. In response to this call about \$12,500 was received. Some lodges, however, failed to respond, and from others individual contributions, only, were forwarded. At the session of the grand lodge held in Topeka in October, 1893, a per capita tax of \$1 on the membership of the subordinate lodges in the state was levied to pay off the indebtedness on this property, and a further per capita tax of 50 cents was levied to maintain and equip the orphans' home. The lodges which had made voluntary contributions were to receive credit on their assessments for the amounts already paid. The petition alleges that this assessment was made without lawful authority by the grand lodge of the state; that the grand lodge has no control over the property conveyed by De Boissiere; that the assessment discriminates against the plaintiffs and other subordinate lodges; that it is without authority, and against the laws of the Sovereign grand lodge, and not in accordance with the objects and purposes of

the order: that the funds sought to be raised by this tax are proposed to be paid over to an independent corporation, which has been organized for the purpose of managing the property, not under the jurisdiction or control of the grand lodge of Kansas; that the defendant Campbell, as grand master, threatens to collect said tax by every means in his power, by refusing to communicate through the deputy grand masters the semiannual and annual passwords, and by refusing to allow installation of elective officers, and by threats of suspension if payment is not made. The petition concludes with a prayer for an injunction restraining the defendants from collecting the tax, and asks that the grand master be compelled to transmit the passwords and install officers. The answer is long, and alleges many things with reference to the right of the respective lodges to appear as plaintiffs in the suit, and sets forth certain proceedings of the state and Sovereign grand lodges, which it is not necessary to recite at length. Afterwards, on motion of the plaintiffs the case was dismissed as to a considerable number of the plaintiff lodges, and went to trial between the remaining parties. The court refused to grant the plaintiffs any relief, and entered judgment in favor of the defendants

Geo. W. Wright, R. A. Campbell, D. W. Kent, and J. Jay Buck, for plaintiffs in error. Bertram & Nicholson and J. G. Wood, for defendants in error.

ALLEN, J. (after stating the facts). The conclusion we have reached in this case renders it unnecessary to cover so extensive a field of inquiry as has been gone over in the briefs and on the oral argument.

The right of the plaintiffs to jointly maintain this action is challenged, and justified by the plaintiffs on the ground that it is an action to enjoin the collection of a tax. We do not think that this is a tax, within section 253 of the Code of Procedure. Neither the grand lodge of the state, nor its officers, claim any power to enforce payment of the tax by any of the means provided by law for the collection of taxes. The assessment of the contribution derives its only force from the regulations of the Odd Fellows organization. The only penalties for nonpayment are such as the grand lodge and its officers may inflict, as a matter of discipline, within the order. While the joinder of the plaintiffs is not warranted by the section of the statute referred to, it may be, however, that such of the plaintiffs as are incorporated under the laws of the state, and the individual members of the lodges not so incorporated, might join in this action, as one of common interest affecting a great number of persons.

A more serious obstacle in the way of the maintenance of this action by the plaintiffs is presented by the character of the acts it

seeks to enjoin. The main contention within the lodge has been as to the right of the state grand lodge, under the constitution and laws of the order, as established and declared by the Sovereign grand lodge, to raise funds by assessments on subordinate lodges for the purpose for which the assessment under consideration was made. The plaintiffs contend (1) that the state grand lodge has no power to levy a tax on subordinate lodges for the purpose of establishing or maintaining an orphans' home; (2) that the property was given by Mr. De Boissiere to trustees not subject to the control of the state grand lodge, and that the state grand lodge, having neither title to nor control over the land on which the home is to be established, could not levy a tax to be used in connection therewith, even if it had the general right to establish and maintain orphans' homes by assessments on its members.

It is conceded by the parties that an appeal lies from the decision of the grand lodge of the state to the Sovereign grand lodge of the United States. It is also conceded that the Sovereign grand lodge has full and unrestrained legislative power as to all matters relating to the purposes of the order, and that all subordinate lodges and their members are bound by its actions. No appeal is shown to have been taken by plaintiffs from the action of the grand lodge of Kansas to the Sovereign grand lodge, but they seek to have this court decide what the rights of the parties are, under the constitution, by-laws. rules, and regulations established by the Sovereign grand lodge for the government of the order. That all benevolent and fraternal organizations are subject to the laws of the state and the jurisdiction of the courts, in proper cases, there can be no doubt. Nor will the courts hesitate, where property rights are involved, to entertain jurisdiction and afford relief. Bauer v. Lodge (Ind. Sup.) 1 N. E. 571; Genest v. L'Union St. Joseph, 141 Mass. 417, 6 N. E. 380; Torrey v. Baker, 1 Allen, 120; Austin v. Searing, 69 Am. Dec. 665, and note; Dolan v. Court, 128 Mass. 437; Goodman v. Lodge, 67 Md. 117, 9 Atl. 13, and 13 Atl. 627. But in granting relief the courts take into consideration the objects and purposes of the organization, and the modes provided by the charter, constitution, and by-laws of the society for determining the rights of the members. Where the question involved is one of policy or discipline, courts will not ordinarily interfere, but will leave all such questions to be settled in the manner pointed out by the regulations of the order. Such societies are formed by the purely voluntary association of individuals for the accomplishment of such objects as they have mutually agreed on. The selection of the purposes for which the association is established, and the determination of the means by which those purposes shall be accomplished, are peculiarly matters to be decided by the association alone. In this case the question is whether

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the grand lodge of the state of Kansas shall undertake to provide for the maintenance and education of the orphans of deceased members, by making use of the property conveyed in trust by De Boissiere. It is conceded that the care of the orphans of deceased members is one of the fundamental objects of the order. The mode in which that purpose shall be accomplished is one which the Odd Fellows' organization alone can determine. No power rests anywhere to compel action, nor is there any law to prohibit it. The grand lodge has determined to carry out this purpose by making use of this trust property, and levying an assessment on the members of the order within the state for the purposes of paying off the indebtedness and making needed improvements. The right to do so is challenged, not because in violation of any law of the state, but because it is claimed to be in violation of the laws and regulations of the Sovereign grand lodge, which act as a restriction on the subordinate lodges. It appears that an appeal lies directly from the action of the grand lodge of the state to the Sovereign grand lodge. This appeal may be either with the consent of the grand lodge of the state, or without its consent; but, in case an appeal is taken without the consent of the grand lodge, the subordinate lodge appealing must comply with the decision of the grand lodge of the state, and in case of an expulsion must surrender its effects to the state grand lodge. It does not appear in this case that the consent of the defendant grand lodge to an appeal has been asked, nor that any appeal has been attempted without it. The mode in which the orders of the grand lodge of the state are threatened of enforcement is by severing connection with and by the expulsion of the subordinate lodges which refuse to pay the assessments. There are many authorities which hold that, where a mode is pointed out for redressing grievances in an association of this kind by the charter or by-laws, members of the organization are bound to pursue that remedy before resorting to the courts, and that where a right of appeal is given to a tribunal provided by the society the members must pursue that remedy. Nibl. Mut. Ben. Soc. §§ 79, 130; Bac. Ben. Soc. § 94; Harrington v. Association, 70 Ga. 340; Chamberlain v. Lincoln, 129 Mass. 70; Lafond v. Deems, 81 N. Y. 507; The Osceola Tribe v. Schmidt, 57 Md. 98; Oliver v. Hopkins (Mass.) 10 N. E. 776.

It is said in argument that property rights of the subordinate lodges will be affected by the action of the state grand lodge in taking away their charter privileges, but there are no averments in the petition showing that any other property rights are involved in this case than the \$1.50 per capita assessment and the funds heretofore voluntarily contributed. Upon the funds contributed by other lodges for these specific purposes, the plaintiffs have no valid claim. It is not in any sense their property. All benevolent societies,

of necessity, raise funds by contributions from their members. The amounts of these contributions, and the purposes to which they shall be devoted, are matters to be determined by the association alone. It appears to us manifestly inappropriate for the court, in this case, to decide as to the rightfulness of this assessment. The plaintiffs are free to pay, or not to pay, as they see fit. They have a right to have the question as to the power of the state grand lodge determined by the Sovereign grand lodge, which is designated as the tribunal to finally settle the question. It would present a singular state of affairs, were this court to construe the charter and by-laws against the right to make the assessment, and the Sovereign grand lodge, the authority of which the plaintiffs not only recognize, but assert, should thereafter decide in favor of such right. If the plaintiffs persist in their refusal to pay the assessment, and property rights are thereafter affected by the action of the grand lodge of the state, it will be time enough, when questions in relation thereto are properly presented, for this court to consider them, in any actions properly framed for that purpose. It will then also be time enough to determine how far the parties are concluded by the action of the designated tribunals of the order.

The specific relief asked in this case, that the grand lodge be enjoined from collecting the assessment, and that the grand master be required to transmit the annual and semiannual passwords, and install the officers elected, seems to us of a kind which a court should grant, if at all, only in a case of extraordinary merit and necessity. The trial court in this case refused the application on the merits on its construction of the constitution, by-laws, and regulations of the order. We have not deemed it necessary to go so far in our consideration of the case, but shall decline to interfere, on the record presented, with the order of the district court. The judgment is therefore affirmed. All the justices concur-

STATE v. WELLS.

(Supreme Court of Kansas. Oct. 6, 1894.)

CRIMINAL LAW — PRIVATE COUNSEL FOR STATE—WITHDRAWAL OF ERRONEOUS INSTRUCTION — HOMICIDE — FAILURE TO CHARGE AS TO LOWER DEGREE—DEFENDANT AS WITNESS — CROSS-EXAMINATION.

1. It is not error for the court to permit private counsel to assist the county attorney, by his request, in prosecuting a criminal action, and to make the opening statement of the case to the jury.

case to the jury.

2. Where an erroneous instruction is included in the written charge of the court, and read to the jury, the court not only has the right, but rests under the duty, to withdraw the erroneous instruction from the consideration of the jury; and, where this is done in such a manner that it must necessarily have been clearly understood by the jury, the error in the original draft of the instructions is cured.

3. The defendant was charged with murder

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in the first degree, and convicted of murder in the second degree. That he killed the deceased by shooting him was conceded. The court correctly defined the crime of murder in the first and second degrees, and of manslaughter in the several degrees, but failed to charge the jury that, if they were in doubt in which of two or more degrees the defendant was guilty, they should convict of the lowest degree only. No instruction to this effect was asked by the defendant. The evidence showed that the killing was willful and malicious, if it was not justifiable, and did not fairly tend to prove manslaughter in any degree. Held, that no error was committed in failing to charge on this point.

4. A defendant who takes the stand, and

4. A defendant who takes the stand, and testifies as a witness in his own behalf, may be cross-examined upon matters affecting his character and credibility the same as other witnesses; and the facts developed on the cross-examination, even though they incidentally tend to show that the defendant is guilty of other offenses than that for which he is on trial, become proper evidence in the case, to be considered by the jury so far as they tend to prove any issue in the case.

Subsequence of the district court at

5. Where a term of the district court at which a criminal case is properly triable lapses without any formal adjournment, and without any special order continuing the case till the next term, the court does not thereby lose jurisdiction of the case, but may proceed with the trial at the next regular term

the trial at the next regular term.
6. The evidence in the case examined, and

held sufficient to sustain the verdict.
(Syllabus by the Court.)

Appeal from district court, Ford county; A. J. Abbott, Judge.

James W. Wells was convicted of murder in the second degree, and appeals. Affirmed.

The defendant was charged with having murdered Loren E. Warren, and was convicted of murder in the second degree. was shown on the trial that the defendant was the keeper of a gambling room in Dodge City. The deceased, Warren, was a bartend-The two parties had passed the night preceding the tragedy in the defendant's gambling room. The defendant commenced drinking about 4 o'clock in the morning, and drank until he became intoxicated. About 9 o'clock he lay down on a table in a saloon in the basement of the Oriel block, where he slept until somewhere about 1 o'clock in the afternoon, when the deceased came and woke him up. The two went out of the saloon together, and soon came back, when Warren said to the bartender, "Belmere, some one has 'touched' Jimmie," meaning that some one had taken his money. Warren told Wells that he had the money inside his vest pocket. Wells then ran his hand in his pocket, and pulled out his money. The two appear to have been together more or less from that time until the occurrence of the tragedy, the defendant at various times still declaring that he had been robbed. A short time before the tragedy, the two were together in the Palace drug store. Wells was still insisting that Warren had his money. Warren said: "No, I haven't. I have got \$10 that belongs to you." Warren then gave Wells \$10. They then left the Palace drug store together. Soon afterwards they were together inside an iron railing, which incloses a stairway leading into the saloon where the deceased worked, under the Delmonico Hotel building. Mr. Wells was still claiming that he had been robbed. Warren was trying to persuade him to go down in the basement to talk the matter over. Some of the time Wells said: "Let Warren had hold of him. me go. I want to go home,"-and called for Warren appears to have been detaining him there inside of the rail. He told Wells, if he would come around when he was sober, and say he had robbed him, he would make it all right with him or pay him. Warren finally let go of Wells, and he climbed out over the railing. After Wells had started away, he said, "I'll show you whether I'll go home or not." The defendant then went to Zimmerman's hardware store, and tried to buy a gun. The proprietor refused to sell one to him. While he was in the store, Mr. Fitzgerald came in, and the defendant asked him to intercede with the proprietor to help him get a gun, saying that he believed they had one, but would not sell it to him. He wanted Fitzgerald to say he was all right. This Fitzgerald refused to do, but told Wells that he did not think he was in a fit condition to have a gun. They then talked the matter of the difficulty between Wells and Warren over, Fitzgerald advising the defendant to go home, and not have any trouble. During the conversation, Wells said, in substance, that, if he could get a gun, he would "make Warren fight or hide out." Fitzgerald offered to go home with him, but the defendant did not seem inclined to have him do so. From the hardware store, which was the next building to the Delmonico Hotel, he appears to have gone into Laubner's cigar store, where he asked Laubner for a gun. Laubner refused, saying that he had not any. "You have got one in The defendant said: the safe." Being asked what he wanted a gun for, he said to pawn it. The defendant then went to a secondhand store kept by A. P. Coons in the next block west, where he succeeded in buying a pistol. The defendant also asked for cartridges, and tried to open the gun, but did not seem to understand it. Mr. Coons showed him how to open it, and the defendant put the cartridges into it. As the defendant went out of the door, Mr. Coons noticed that he staggered slightly. The defendant then went back east on Front street to the Delmonico Hotel building, and down the stairway leading to the saloon. After a very short time, he came back up the stairway, and again started west. Soon afterwards the deceased, Warren, came down the street, going east. As they approached each other, several parties called out to Warren to look out; that Wells had a gun. The parties continued walking towards each other. There were a number of persons on the street, and one man seems to have been walking between Wells and Warren, so that Wells did not see Warren until they were within a short distance of each other. When they

were very close together, Wells raised his pistol and fired. Warren then rushed on him, threw him down, and choked him. Some of the bystanders took hold of Warren, and pulled him off from Wells. As they did so, Warren said: "Let me alone. I know what I am doing. I am shot," After he was raised up, he kicked Wells in the face. Shortly afterwards he sank down on the sidewalk. He was then taken up and carried into one of the neighboring store buildings, where he very soon expired, the ball having penetrated the lower part of the heart. The defendant is shown to be a small man, weighing not much over 100 pounds. The deceased was a large man, weighing over 200. The parties had always been good friends until the day of this occurrence.

Ed. H. Madison, J. W. Ady, and B. F. Milton, for appellant. John T. Little, Atty. Gen., F. A. Mitchell, and Sutton & McGarry, for the State.

ALLEN, J. (after stating the facts). Numerous questions are raised by the appellant, which we will consider in the order in which they are presented in the brief. appears that the opening statement of the case to the jury was made by W. M. Sutton, who was neither the prosecuting attorney of the county nor his deputy. The defendant objected at the time, and insisted that, under the statute, it was a personal duty resting on the county attorney, which he could not delegate to private counsel. The court overruled the objection, and the opening statement was made by Mr. Sutton; the county attorney, Mr. Mitchell, being present, however, and requesting that Mr. Sutton be allowed to make the opening statement. This question was considered in the case of State v. Wilson, 24 Kan. 189, where Mr. Ady, one of the counsel for the defendant in this case, was employed to assist the county attorney in a prosecution, and was paid by the father of the deceased, for whose murder the defendant was tried. It was there held that it was not error to permit private counsel to assist the public prosecutor. In this case it appears that the county attorney was personally present, and that Mr. Sutton acted with his consent. We do not think that paragraph 5295 of the General Statutes of 1889 declares any special rule with reference to the opening statement to the jury. The law makes it the duty of the county attorney to conduct criminal prosecutions on behalf of the state, and all steps in the trial are alike under his supervision and control. See, also, State v. Smith, 50 Kan. 69, 31 Pac. 784.

2. Objection was made to the competency of Barrow and Torline as jurors. The only shewing of anything like a fixed impression as to a material fact in the case was disclosed by the examination of Torline, and that was with reference to the fact that Warren had been killed. While the word

"murdered" was used by the juror, he evidently did not use it in the legal sense, and stated that he had no opinion as to whether the killing was justifiable or not. As there was no conflict whatever in the evidence with reference to the fact that Warren was killed, nor as to the further fact that the defendant killed him, we do not perceive that the defendant could be prejudiced in any manner by the impression this juror had with reference to it before the trial. We think the case comes within the rule declared in State v. Medlicott, 9 Kan. 257, and State v. Wells, 28 Kan. 321. The facts in this case are not as strong as in the last case cited.

3. It is claimed that a part of the thirtyseventh instruction, as written by the court and read to the jury, was erroneous, and that, having proceeded so far, the court had no power to withdraw it; that the error, having been once made, was irremediable. The record shows that, after the instruction had been given, the court, at the request of counsel for the state, withdrew the objectionable part of it. Check marks were made showing where the part withdrawn commenced and where it ended, and pencil lines were drawn across the part withdrawn, and the attention of the jury was pointedly called to the portion withdrawn by the court, and the instructions so marked were taken by the jury to their room. There can be no doubt as to the right of the court to modify or withdraw an erroneous instruction at any time before the case is finally submitted to the jury. The very purpose of allowing exceptions to instructions is that the attention of the court may be directed to any part that may be erroneous, and that the court may then and there review and correct the error. This proposition is amply supported in the authorities. Sittig v. Birkestack, 38 Md. 158; Jones v. Talbot, 4 Mo. 279; Hall v. State, 8 Ind. 439; Sage v. Railroad Co., 134 Ind. 100, 33 N. E. 771; Thomp. Char. Jur. § 93.

It is urged in this connection that the language used by the court at the time this part of the instructions was withdrawn indicated that the court still believed it to be sound, and that the jury might have been influenced by it, notwithstanding its withdrawal, believing that the judge was right in the arst instance. We do not perceive any special force in the argument. In all cases where a trial judge gives an erroneous instruction, it is to be presumed that, at the time he wrote it, he thought it was a correct expression of the law; and, in any case where an instruction is withdrawn, it might be argued that, because the judge had once asserted that it was a correct proposition of law, it would necessarily have influenced the jury. Juries are presumed to act intelligently, as well as courts; and, when the court has withdrawn from their consideration a portion of the instructions, it is to be

presumed that they will not give it any weight in their deliberations.

4. We think the definition of "reasonable doubt" is about as good as is ordinarily given, and the expression that all that can ordinarily be obtained in human affairs is reasonable certainty does not convey an essentially different idea from that of the absence of reasonable doubt.

5. Error is claimed because the court failed to instruct that, if the jury were in doubt in which of two or more degrees of an offense the defendant is guilty, he may be convicted of the lowest degree only. No instruction on this point was asked, and it may well be doubted whether, under the former decisions of this court, a reversal could be had on this ground. State v. Pfefferle, 36 Kan. 96, 12 Pac. 406; State v. Peterson, 38 Kan. 211, 16 Pac. 263; State v. Ester, 44 Kan. 572, 24 Pac. 986. The defendant was charged with murder in the first degree. His defense was that his mind was so aifected by intoxicating liquors that he did not know what he was doing, and consequently was incapable of entertaining a purpose in his mind to do any act, and wholly incapable of judging between right and wrong. On the witness stand he testified that he had no recollection whatever of having shot the deceased, and had very little recollection as to what transpired at any time after he awoke in the saloon until his family visited him at the jail, in the evening. It seems clear that the defendant was guilty of murder, or no offense punishable by law. We are unable to find anything in the evidence indicating the commission of manslaughter in any degree. Instructions should only be with reference to the law applicable to the facts disclosed by the testimony. The court, however, did instruct fully as to what constitutes the various degrees of manslaughter.

The forty-second instruction is criticised. and especially the first part of it. When read in connection with the one which immediately follows it, we do not perceive that it is open to the criticism urged by counsel, nor that the two instructions, as a whole, could be at all prejudicial to the defendant. Ordinarily, it may be better to omit anything like a discussion of general policy, or of the duty of jurors in reference to the enforcement of criminal laws, and of the effect that a verdict may have on the welfare of the body politic; yet we are not prepared to say that it would in all cases be improper for the court to advert to such matters. We perceive nothing harmful in the language used in this case.

6. The scope of the cross-examination of the defendant on the witness stand is complained of. In the case of State v. Pfefferle, supra, the second and third paragraphs of the syllabus are as follows: "(2) Where a defendant in a criminal case takes the witness stand to testify in his own behalf, he

assumes the character of a witness, and is entitled to the same privileges, and subject to the same tests, and to be contradicted. discredited, or impeached the same, as any other witness. (3) The extent to which a witness may be cross-examined on matters irrelevant and collateral to the main issue, with a view of impairing his credibility, depends upon the appearance and conduct of the witness, and all the circumstances of the case, and necessarily rests in the sound discretion of the trial court; and only where there has been a clear abuse of that discretion will error lie." Many authorities bearing on the question were carefully reviewed, and are cited in the opinion. See, also, Rice, Cr. Ev. p. 350, note.

The defendant having testified in his own behalf, counsel for the state, on cross-examination, asked him with reference to his occupation, his past life, and particular difficulties and quarrels he had had, and with reference to his having carried and used dangerous weapons at other times. It is insisted that such examination was improper, and that it was, at least, the imperative duty of the court to instruct the jury that the evidence given by the defendant in answer to these questions could be used only for the purpose of affecting his credibility. No such instruction was given. In the case of People v. Casey, 72 N. Y. 393, it was said by Earl, J., in delivering the opinion of the court: "Upon the trial the prisoner was a witness in his own behalf, and it is now complained that the counsel for the people, on cross-examination, was permitted to question him as to other altercations in which he had been engaged and other assaults which he had committed. This complaint is not well founded. When a prisoner offers himself as a witness in his own behalf, he is subject to the same rules upon cross-examination as any other witness. He may be asked questions disclosing his past life and conduct, and thus impairing his credibility. Such questions may tend to show that he has before been guilty of the same crime as that for which he is upon trial, but they are not on that account incompetent. When he offers himself as a witness, and seeks to take the benefit of the statute which authorizes him to testify in his own behalf, he takes the hazard of such questions. He must determine, before he offers himself, whether his examination will benefit or injure him. The extent to which such an examination may go to test the witness' credibility is largely in the discretion of the trial court." See, also, People v. Irving, 95 N. Y. 541.

7. The information in this case was filed on the 4th of September, 1893. The September term of the district court of Ford county commenced on the next day. An application was made for a continuance of the case till the January term, 1894, which was overruled. The court then announced that an adjourned session of the court would be held

on the 8th of November, at which time this case would be called for trial. The September term was thereafter adjourned until the 10th of October, which was the regular day for convening court in Hamilton county, in the same district. The court convened in Hamilton county on that day, and a judge pro tem. was selected in Ford county, who attempted to adjourn the Ford county term until the 8th day of November; the district judge not being present either in Ford or Hamilton county. On the 8th of November, court did not convene in Ford county, and no further order with reference to the case was made after that continuing the trial to that date. A motion was made in the district court to discharge the defendant, on the ground that the court had lost jurisdiction of the case. This motion was overruled, and the trial proceeded at the January term, 1894. We do not think these facts show any loss of jurisdiction. The information was still pending against the defendant. The offense was committed in Ford county. The defendant was in custody. No provision of the statute is called to our attention which could by any construction take away the jurisdiction of the court, and we have no knowledge of any such provision. We suppose the general rule is that all business remaining undisposed of at the end of a term of court goes over to the next term, whether any formal order to that effect is entered or not.

8. On the oral argument it was strenuously insisted by counsel that the evidence in this case fails to uphold the verdict; that it is apparent from the testimony of all the witnesses that the defendant was not only drunk, but so drunk that he utterly failed to know what he was doing at the time he killed Warren. This, really, was the main question passed on by the jury at the trial. That the defendant had been drinking, and was under the influence of liquor at the time of the tragedy, cannot be doubted; but this alone does not render him necessarily irresponsible. If he knew the nature of his acts, and could judge between right and wrong, the law holds him responsible to the same extent as though not under the influence of intoxicants. While at the head of the stairs leading into the saloon in the basement of the Delmonico Hotel building, he asked the deceased to let him go, claiming that he wished to go home. As soon as he got away from him, he manifested no disposition to go home. On the contrary, he made unsuccessful efforts to get a pistol at two different places. He then went to a store in another block, where he succeeded in buying a pistol and cartridges, and loading the pistol. Instead of going home then, he turned back, and went to the place where he had left the deceased, and where he might reasonably expect to find him, evidently in search of him. After looking in at the door, failing to find him there, he ascended the steps to the sidewalk, and started west on the street with the pistol in his hand, evidently looking for the deceased; and on meeting him, after going only a very short distance, he at once raised his pistol, and shot Warren through the heart. If a jury, under these facts, testified to by many witnesses, could have accepted the defendant's statement that he remembered absolutely nothing as to what transpired during that time, it woud have been a most unusual exhibition of credibility on their part. It is certainly very difficult to believe, if not absolutely incredible, that the defendant could in so many ways have indicated a settled purpose to take the life of the deceased. and have sought and obtained means to carry that purpose into effect with so much care, and then have hunted and found his victim, and accomplished his purpose, without knowing anything at all about what he was The jury evidently discredited his story, and so do we; and while there are many circumstances showing deliberation and premeditation, thus indicating murder in the first degree, the jury have acquitted the defendant as to these elements of criminality; but the facts disclosed by the testimony are still ample to show that the killing was done purposely and maliciously. It may be that the defendant would not have committed the crime if sober, and that, in a certain sense, the intoxicants which he had taken are the cause of the crime; yet he had taken them of his own volition, and it is universally held that intoxication voluntarily induced is neither an excuse for nor a justification of crime. We perceive no substantial error in the record, and the judgment is affirmed. All the justices concurring.

BRYAN v. CONGDON.

(Supreme Court of Kansas. Oct. 6, 1894.)

ARREST IN CIVIL ACTION—APPIDAVIT—SUFFICIENCY — WHEN PART OF RECORD — STORAGE OF GRAIN—TITLE.

1. An affidavit filed under the provisions of the Code of Civil Procedure, as a basis on which process is issued ministerially by the clerk of the court, becomes a part of the record in the case.

2. An affidavit filed under section 148 of the Code of Civil Procedure to obtain an order for the arrest of the defendant becomes a part of the record, and where its sufficiency is attacked by motion, and sustained by the district court, its ruling thereon may be reviewed by this court without incorporating the affidavit in a bill of exceptions. Being a part of the record, it may be included in the transcript of the proceedings of the trial court.

3. An affidavit for the arrest of the defendant in a civil action, brought to recover the value of a quantity of wheat deposited by the plaintiff in the warehouse of the defendant, for which negotiable receipts were issued by the defendant, which charges an unlawful sale and conversion of the wheat by the defendant without the written assent of the plaintiff, but fails to state either that there was no oral assent, that the plaintiff was still the owner and holder of the receipts, or that the receipts were re turned or presented to the defendant to be surrendered on delivery of the wheat, is insufficient to warrant the arrest of the defendant.

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4. Grain deposited in a public warehouse, and receipted for under the provisions of chapter 248 of the Laws of 1891, to be mingled with other grain, does not thereby become the property of the warehouseman; but the grain stored in a warehouse, of a particular kind and grade, is the property of the holders of the receipts outstanding against it.

(Syllabus by the Court.)

Error from district court, Harvey county; F. L. Martin, Judge.

Action by William Congdon against S. J. Bryan to recover the value of certain wheat delivered by plaintiff to defendant to be stored in the latter's public warehouse, and which plaintiff alleged defendant converted. On affidavit by plaintiff that the debt for which the action was brought was fraudulently contracted, the court entered an order for the arrest of defendant. There was an order refusing to vacate the order of arrest, and defendant brings error. Reversed.

A. L. Green, for plaintiff in error. Bowman & Bucher, for defendant in error.

ALLEN, J. Various objections are raised by the defendant in error to the consideration of the record in this case.

We think the certificate of the clerk to the transcript is sufficient, and that there is no difficulty in determining what it contains, or what is referred to in the petition in error as a "transcript."

It is next contended that the affidavit for the arrest of the plaintiff in error is not a part of the record in the case, and that in order to make it a part of the record, and have it considered by this court, it must be incorporated in a bill of exceptions. It is true that it has been often decided by this court that affidavits used as evidence on the hearing of a motion before a district court must be incorporated in a bill of exceptions before they can be considered by this court. But this affidavit was one filed with the district clerk for the purpose of complying with the provisions of section 148 of the Code of Civil Procedure, and obtaining an order for the arrest of the defendant. It was the foundation on which an order of arrest issued as process of the court, by the clerk, was based. Under the statute no judicial officer was required to pass on its sufficiency. Section 173 of the Code provides that the defendant may at any time before judgment move the court to vacate an order of arrest, and section 174 reads: "If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same, by affidavits or other evidence, in addition to that on which the order of arrest was made." Under this section it is clear that the defendant may at any time before judgment require the court to pass judicially on the sufficiency of the affidavit. Where no counter affidavits are offered in evidence the sufficiency of the original affidavit is tested in substantially the same man-

ner as the sufficiency of a pleading is tested on demurrer, the court being called on to determine whether the matters stated in the affidavit are sufficient to authorize the order of arrest which had been issued thereon by the clerk. We think an affidavit of this character is properly a part of the record, like an affidavit for publication, as it is the foundation on which the process of the court is based. If other affidavits were used on the hearing of the motion to discharge the order of arrest, such affidavits could only be made a part of the record by bill of exceptions, because their only purpose would be to furnish evidence on the trial of a contested question of fact. Affidavits, however, which are required by law to be filed as a prerequisite to the issuance of process, and which are not required to be passed on judicially, may properly be denominated a part of the proceedings in the case, and become a part of the record. It has been repeatedly held by this court that an affidavit for publication of summons, which is totally deficient in a material point, confers no jurisdiction, and may be attacked, not only in the case in which it is filed, but in a collateral action, at any time. See Harris v. Claffin, 36 Kan. 543, 13 Pac. 830, and cases cited; also, Adams v. Baldwin, 49 Kan. 781, 31 Pac. 681.

This action was brought by William Congdon, as plaintiff, against S. J. Bryan, to recover the value of 2,122% bushels of wheat which the plaintiff delivered to the defendant to be deposited in defendant's public warehouse for storage, which it is alleged the defendant unlawfully converted to his own The affidavit filed to obtain the order of arrest, after stating the nature of the case, and alleging grounds for the arrest of the defendant, in the language of the statute, contains the following: "That said affiant is justified in the belief of the existence of the above particulars by the following facts and circumstances, threats, and declarations: That ever since the first day of August, A. D. 1892, the defendant has been, and still is, a keeper of a public warehouse for the purpose of storing grain at the city of Sedgwick, in Harvey county, Kansas; that during the months of August and September, 1892, the plaintiff delivered to and stored with said defendant, in the defendant's warehouse aforesaid, twenty-one hundred and twenty-two and two-thirds bushels of wheat, for which said defendant issued and delivered to said plaintiff three separate warehouse receipts, copies of which are hereto attached, marked 'Exhibits 1, 2, and 3;' that since the storing of said grain as aforesaid said defendant has sold, shipped, transferred. and removed said grain beyond the control of said defendant, wrongfully, and without the written assent of said plaintiff, and has not now said grain, or any grain of like quality, to deliver to said plaintiff; and said defendant has wholly failed to reimburse or

pay said plaintiff for said grain so wrongfully shipped, removed, transferred, and converted, unlawfully and wrongfully, to the defendant's own use, as aforesaid." The receipts are all in the same form, and differ only in dates and quantities. No. 1 is as follows:

"City Elevator. S. J. Bryan, Proprietor. No. ——. J. W. Quail, Manager. Sedgwick, Kansas, Sept. 24th, 1892. This certifies that we have received in store from Wm. Congdon seventeen hundred and ninety-seven and twenty bus. No. 2 hard wheat, subject to the order hereon of Wm. Congdon, and the surrender of this receipt and payment of charges. It is hereby agreed by the holder of this receipt that the articles herein mentioned may be stored with others of the same grade and quality. Loss by fire or heating at owner's risk. This is stored at ½ cents per bu. first month, and ½ cents per bus. second, and each additional month or fraction thereof. J. W. Quail, Manager. 107,860 lbs."

Are these statements sufficient to show that the defendant fraudulently contracted the debt for which suit was brought? The statute requires that the affidavit contain a statement of the facts on which the plaintiff justifies his belief in the ground for arrest. These facts must be sufficient to establish the charge. Gillett v. Thiebold, 9 Kan. 427; Tennent v. Weymouth, 25 Kan. 21; Hauss v. Kohlar, Id. 640. The affidavit states that the defendant sold and removed the grain without the written assent of the plaintiff, and counsel for the defendant in error calls our attention to paragraph 1437 of the General Statutes of 1889, which reads: "No warehouseman, wharfinger or other person shall sell or encumber, ship, transfer, or in any manner remove beyond his immediate control any goods, wares. merchandise, grain or other produce or commodity, for which a receipt shall have been given as aforesaid, without the written assent of the person or persons holding such receipt." On the other hand it is contended that this section, together with the whole of chapter 206 of the Laws of 1872, of which it was a part, was repealed by chapter 248 of the Laws of 1891. The latter act does not repeal the former by direct reference, but repeals all laws inconsistent with its provisions. It is contended on behalf of the defendant in error that the act of 1872 is in force, at least, as to warehouses having a capacity of less than 75,000 bushels, and that the act of 1891 relates only to public warehouses having a capacity of 75,000 bushels or more. Section 6 of the act of 1891 provides for receipts to be issued by the warehouseman to the owner of the grain, and requires the receipt to state "that the grain represented thereby is deliverable upon the return of the receipt, properly endorsed, by the person to whose order it was issued, and the payment of proper charges for storage." Sec-

tion 7 provides for issuing a duplicate in case of the loss of the original. Section 8 contains provisions requiring cancellation of the receipt on the delivery of the grain, and also for the surrender of the original receipt, and the issuing of new ones, in case of desire to divide the grain and have it represented by two or more receipts. Section 10 provides: "On the return of any warehouse receipt, properly endorsed, and the tender of all proper charges upon the property represented by it, such property shall be immediately delivered to the holder of such receipt, and shall not be subject to any further charges for storage after demand for such delivery shall have been made." Whether this case is to be determined by the act of 1872 or by that of 1891, the grain deposited in the warehouse is subject to delivery only to the person holding the receipt. Section 11 of the act of 1872 expressly makes warehouse receipts negotiable instruments, and the provisions of the act of 1891 fully recognize their negotiability. The statement of the affidavit is that the sale and removal was without the written assent of the plaintiff. There is no averment anywhere that the plaintiff was still the holder or owner of the outstanding receipts, nor is there any averment in the affidavit that the receipts had been returned or presented to the defendant, and the grain represented by them demanded. Under either act the defendant not only had a right to refuse to deliver the grain without a return of the receipts, but it was his duty to do so. The act of 1891 contains numerous provisions designed expressly to prevent warehousemen from having receipts for grain outstanding which do not represent grain actually in store in their warehouses. In order that the defendant might be deprived of his liberty, it was incumbent on the plaintiff to state every fact in the affidavit which was essential to show proper ground for the arrest. One of these facts was that the receipts outstanding were represented by the plaintiff to the defendant to be surrendered on delivery of the grain. We do not think that even the fact that the defendant had no grain in his possession to deliver on return of the receipts would excuse the plaintiff from presenting them. If the defendant had shipped or delivered the grain in accordance with oral directions from the plaintiff, even assuming that paragraph 1437 of the General Statutes of 1889 is in full force and applies, could it be said that the defendant had committed a fraud on the plaintiff? It seems to us that the assent of the plaintiff to the acts of the defendant, however given, would relieve him from a charge of fraud, preferred by the plaintiff in a civil action. The general averments in the affidavit to the effect that the defendant sold and removed the wheat wrongfully and unlawfully do not materially help the matter. They are mere conclusions, and not statements of specific facts from which conclusions can be drawn. We think the affidavit insufficient to authorize an arrest

We might stop here, and decline to consider the further question which had been extensively argued by counsel,—whether the transaction stated in the affidavit amounted to a sale of the wheat by the plaintiff to the defendant. Many authorities are cited by counsel for the plaintiff in error holding that where grain is delivered to a warehouseman to be mingled with other of like kind, and where it is not in expectation or intention of the parties that the same grain will be returned to the depositor, but that on demand he will receive either the same quantity of grain of like kind and grade, or the market price at the time of the demand, the transaction constitutes a sale, and that the title to the grain passes on delivery to the warehouseman. This doctrine appears to be well supported by the authorities cited by counsel. The act of 1891 provides, among other things, that no public warehouseman shall be responsible for loss or damage to grain in store by fire occurring without negligence on his part. It also contains long provisions. with reference to the delivery of grain on receipts, and also with reference to the disposition of grain that is becoming damaged. The provisions, when construed together, seem to be framed on the theory that the grain in store, of a particular grade, is the property of the persons holding outstanding receipts against it, notwithstanding its changed identity. There is nothing in the record in this case showing whether this warehouse has a capacity of 75,000 bushels or not. The statute of 1872 recognized a distinction between public warehousemen and private warehousemen, and permitted public warehousemen to mix grain of like kind and grade belonging to different owners, while the act of 1891, in its first section, declares those warehouses having a capacity of 75.-000 bushels public warehouses. Many of the succeeding sections refer to public warehouses generally; using language broad enough to include all warehouses where grain is stored in bulk, and the grain of different owners mixed. We think, under the act of 1891, the title to the grain stored is in the holders of the outstanding receipts. Whether the warehouse of the defendant, in this case, is governed by the provisions of the act of 1891, we shall not now attempt to decide. The order of the district court, refusing to vacate the order of arrest, is reversed. All the justices concurring.

In re BRYAN.

(Supreme Court of Kansas. Oct. 6, 1894.)

Petition by S. J. Bryan for a writ of habeus corpus to obtain his release from the custody of the sheriff of Harvey county, Kan. Writ granted, and petitioner discharged.

A. L. Green for petitioner. Bowman & Bucher, for respondent.

PER CURIAM. We have just decided in the case of Bryan v. Congdon, 37 Pac. 1009, that the affidavit for the order of arrest on which was insufficient. It follows, as a necessary consequence, that he must be discharged, and it is so ordered.

UNION ST. RY. CO. et al. v. STONE. (Supreme Court of Kansas. Oct. 6, 1894.)

CORPORATIONS - DEFECTIVE STREET — PERSONAL INJURIES — DEFECTIVE CONSTRUCTION OF STREET RAILROAD—JOINT LIABILITY-ALLEGATION OF NOTICE-GENER-AL OBJECTION TO PETITION — PROXIMATE CAUSE—TRIAL—OBAL INSTRUCTIONS—HARM-LESS ERROR.

1. An objection to a petition that it does not state facts sufficient to constitute a cause of action is good only when there is a total failor action is good only when there is a total failure to allege some matter which is essential to the relief sought, and is not good when the allegations are simply incomplete, indefinite, or statements of conclusions of law. Laithe v. McDonald, 7 Kan. 262.

2. Where the defect or obstruction in a street of a city is patent or obvious, and has continued so long that notice may be reasonably inferred, or where the defect or obstruction is

inferred, or where the defect or obstruction is one which with reasonable or proper care should have been ascertained and remedied, the city is liable for the injuries resulting from such defect or obstruction. Jansen v. City of Atchison, 16 Kan. 358; Kansas City v. Bradbury, 25 Pac. 889, 45 Kan. 381.

3. Where a petition alleges that the city, on the date of the injury complained of, and for a long time before that date, negligently and care-lessly permitted a street-railway company to construct and maintain its track on a street of the city in such a careless and negligent manner as to dangerously obstruct travel, and further alleges that the railway company constructed its track over and along the street of the city in such a careless and negligent manner that the same was on the day of the injury, and for a long time before that day, a dangerous obstruction to travel on the street, held, that, in the absence of any attack upon the petition by demurrer or motion, the allegations were suffi-cient to charge the city with notice or knowl-edge of the defect or obstruction in the street caused by the construction and maintenance of the track of the street railway.
4. Where evidence is admitted which is not

materially prejudicial, the judgment will not be reversed therefor.

5. Where a street-railway company is under a contract with the city "to construct and keep its railway in such manner and condition as not to prevent the crossing of the streets by teams and wagons at any point with safety," and a person rightfully driving on the street or crossing the track of the railway exercises due care, and is injured by reason of the negligence of the railway company in the construction of its track, or in suffering it to become dangerous to travel, and the city permitted the railway to be so constructed as to be dangerous to travel, or had notice or knowledge that the railway was out of repair and dangerous to travel, both the

railway company and the city would be liable.

6. According to the weight of authority, a city is liable where a horse takes fright, without any negligence on the part of the driver, at some object for which the municipality is not responsible, and gets beyond the control of his driver, and runs away, and comes in contact with some obstruction or defect in the road or street, which the city has been negligent in not removing or repairing, if the injuries would not have been sustained but for the obstruction or defect.

7. The rule is that where two causes combine to produce the injury, both in their nature

proximate, the one being the defect or obstruction in the public street, and the other some oc-currence for which neither party is responsible, the city is liable, provided the injury would not have been sustained but for the defect in the

street.

8. At the conclusion of the evidence, and at the time when the court was about to give oral instructions to the jury, counsel for the de-fendants requested the court to give the in-structions in writing. This request was re-fused, upon the ground that a rule of the court required that, if either party desired the gener al instructions to be in writing, the request must be made at or before the time the jury was im-paneled. The instructions, as delivered orally. were taken down and transcribed by the official were then delivered to the counsel for defendants at the time they commenced their argument, and were also delivered to the jury. Held, the refusing to instruct in writing was not a prejudicial error.

9. Where it appears from the evidence and 9. Where it appears from the evidence and the special findings of the jury that no material error was committed in giving and refusing instructions, although such instructions may be criticised, no new trial will be granted therefor. 10. City of Wyandotte v. Agan, 15 Pac. 529, 37 Kan. 520, and Railroad Co. v. McGinnis, 26 Pac. 453, 46 Kan. 109, followed.

(Syllabus by the Court.)

Error from district court, Cowley county; M. G. Troup, Judge.

Action by Hille Stone against the Union Street-Railway Company and the city of Winfield to recover damages for personal injuries caused by a defective street, resulting from the negligent construction of a street railway thereon. After the action was commenced, plaintiff died, and it was revived in the name of Gustavus T. Stone, her administrator. There was a judgment for plaintiff, and defendants bring error. Modified and affirmed.

On the 19th of April, 1890, the plaintiff, Mrs. Hille Stone, filed her petition against the city of Winfield and the Union Street-Railway Company, as defendants, to recover \$5,000 damages for personal injuries. petition alleged that while she was driving along Ninth avenue, in said city, on the 24th day of May, 1888, she received the injuries complained of, by reason of the alleged negligent manner in which the street railway was constructed over and along Ninth avenue, and by which it was a dangerous obstruction to travel along the avenue; and that the city had carelessly and negligently permitted the street-railway company to construct and maintain the track of its line on the street in such a careless and negligent manner as to dangerously obstruct travel. The petitioner was answered by both defendants separately, and the case was tried on the 24th day of September, 1890, resulting in a verdict for \$650 in favor of the plaintiff. and against both defendants. The jury also returned the following special findings: "First. Is the place where the injuries are said to have been received by the plaintiff within the corporate limits of the city of Winfield? A. Yes. Second. Was the injury received on the line of the street-railway company, on a public street in the city of Win-

field? A. Yes. Third. What was the date of the accident in question? A. Twenty-fourth of May, 1888. Fourth. Was the plaintiff's team frightened and running away at the time of the occurrence of the accident? A. Yes. Fifth. If you answer the last question 'Yes,' state what caused the plaintiff's team to become frightened. A. Grating of the buggy wheel on the track of the street railway. Sixth. What route or course was pursued by the team after the same became frightened, if you find that to be the fact? A. About west. Seventh. Where did the accident occur with reference to the Santa Fé Railroad, and how far from it? A. About one hundred feet west. Twelfth. How much has the plaintiff expended for medical treatment and medical attendance occasioned by her injuries? A. Don't know. Thirteenth. How much do you allow the plaintiff for her bodily and mental anguish and suffering, if anything? A. \$200. Fourteenth. How much do you allow the plaintiff for the bodily injuries received? A. \$400. Fifteenth. How much, if anything, do you allow the plaintiff for loss of time and labor? A. \$50. Sixteenth. Where did plaintiff cross the street railway the first time with reference to the track of the Frisco road? A. East of Frisco Railroad track. Eighteenth. Could she not have gone straight west on the street on the south side of the railway track? A. Yes. Nineteenth. Was the front left wheel of the buggy dished or injured on account of plaintiff crossing the street-railway track the first time? A. Yes. Twenty-two. Was the plaintiff guilty of negligence in crossing the street-railway track either time? A. No. Twenty-three. What caused the buggy to turn over? A. Obstruction of the street-railway track in center of street. Twenty-six. At the time of the accident, was there room on each side of the street-railway track for teams to pass east and west on the street without coming in contact with the track of the street railway? A. Yes. Twenty-seventh. At the time of the injury, was the street on each side of the street-railway track, at the place where plaintiff was driving, in a condition that a reasonably prudent person could have driven along in safety at the place where the accident occurred? A. Yes. Twenty-eighth. Did the city in any way by its negligence contribute to the injury of the plaintiff? A. Yes. Twenty-ninth. If you answer the last question in the affirmative, please state how. A. By the city officials of the city of Winfield not enforcing the city ordinances of the city of Winfield, Kansas, compelling the Union Street-Railway Company to comply with said ordinance in the construction of said street railway." Judgment was entered in favor of the plaintiff, and against both defendants, upon the verdict. The defendants bring the case here.

Madden & Buckman, for plaintiffs in error. McDermott & Johnson, for defendant in er-Digitized by GOOGLE

HORTON, C. J. (after stating the facts). Upon the trial the railway company and the city of Winfield objected to the introduction of any evidence under the petition, upon the ground that it failed to state a cause of action against the defendants, or either of them. No demurrer was filed to the petition, nor was any motion presented to have it made more definite or certain. In the absence of a demurrer and motion, the allegations of a petition will be construed liberally, and, unless there is a total omission to allege some material fact which is essential, a petition will be held good. If the facts are all stated, even indefinitely or in form of conclusions, a petition will be regarded as sufficient. Laithe v. Mc-Donald, 7 Kan. 261; Fitzpatrick v. Gebhart, Id. 41; Crowther v. Elliott, Id. 235; State v. School-Dist., 34 Kan. 241, 8 Pac. 208.

It is argued that no notice to the city of Winfield is pleaded. The petition alleges "that prior to the 24th day of May, 1888, the railway company had constructed the track of its line of street railway over and along the West 9th avenue in the city of Winfield in such a careless and negligent manner that the same was on the 24th day of May, 1888, and for a long time before and after that day, a dangerous obstruction to travel along the street; and that the city of Winfield, on the 24th day of May, 1888, and for a long time before and after that day, negligently and carelessly permitted the railway company to construct and maintain the track of its line of street railway on West 9th avenue in such a careless and negligent manner as to dangerously obstruct travel on the street." Where the defect or obstruction in a street of a city is patent or obvious, and has continued so long that notice may be reasonably inferred, or where the defect or obstruction is one which with reasonable or proper care should have been ascertained and remedied, the city is liable for the injuries resulting from such defect or obstruction. Jansen v. City of Atchison, 16 Kan. 358; Kansas City v. Bradbury, 45 Kan. 381, 25 Pac. 889.

2. It is insisted that the court erred in admitting in evidence the opinion of witnesses as to the street-car track, at the point of the accident, being dangerous, and Ordinance No. 258 of the city of Winfield granting the railway its franchise to lay its tracks in the streets. Under the authority of City of Topeka v. Sherwood, 39 Kan. 690, 18 Pac. 933, the opinion evidence was not materially prejudicial. While certain sections of Ordinance No. 258 have been amended by Ordinance No. 300, yet section 3, providing the manner in which the tracks should be laid and maintained by the railway company, has not been amended or repealed. The sections amended were not in full force, and, if objection had been taken to these sections, the trial court would undoubtedly have rejected them. But the objection was to all the ordinance, as "incompetent, irrelevant, and immaterial," and was therefore properly overruled. Sections 1, 2, and 3 were material and pertinent to the issues.

3. At the conclusion of the evidence of plaintiff below, the defendants filed separate demurrers. These were overruled. It is now insisted that the trial court should have sustained these demurrers. The track of the railway company is located near the center of the street running east and west. There is room for teams and vehicles to pass and repass on each side of the track. At Bridge street the tracks of two railroads (the Frisco and Sante Fé) cross the street. East of the railroads the top of the track of the street railway is slightly elevated above the level of the street, sufficient to catch the wheels of vehicles when attempting to cross at almost any angle; and west of the railroad crossings the grade of the street descends, and the street railway track is elevated above the level of the street the full extent of the rails, about four inches; and on the north side of the track the ends of the cross-ties are exposed, making it almost impossible to cross the track with vehicles. While driving along the street, east of the railroad crossing. and while crossing the street-car track with her team and carriage, with one seat, occupied by Mrs. Stone and two other women and a child, the wheel caught in the track, and made a rasping or grating noise, which scared the horses, and they started to run. After crossing the railroad tracks, the horses being turned towards the track again, the wheel struck the protruding cross-ties and track, upsetting the carriage, and throwing the occupants, including Mrs. Stone, out, causing the injuries complained of. Mrs. Stone testified that, in going out of town, she always crossed the track from the south side to the north before reaching the railroad tracks, because it was the best road. Where she was thrown out of the carriage, the rails and ties of the street railway were above the level of the street, and a dangerous obstruction for teams with vehicles.

It is urged that there is no liability on the part of the railway company or the city of Winfield for the negligent defect or obstruction of the street, as the runaway team concurred in producing the injuries of Mrs. Stone. This is the rule in Massachusetts. Maine, Wisconsin, and West Virginia, but the contrary is held by the courts of New York, Pennsylvania, Georgia, Missouri, lndiana, Connecticut, New Hampshire, Vermont, and Texas. Beach, Contrib. Neg. § 245. Elliott, in his recent work upon Roads and Streets, says: "According to the weight of authority, the city is liable where a horse takes fright, without any negligence on the part of the driver, at some object for which the municipality is not responsible, and gets beyond the control of his driver, and runs away, and comes in contact with some obstruction or defect in the road or street which the city has been negligent in not removing or repairing, if the injuries would not have

been sustained but for the obstruction or defect." Pages 448, 449, and cases cited; Sherwood v. City of Hamilton, 37 U. C. Q. B. 410; City of Joliet v. Shufelt (Ill. Sup.) 32 N. E. 969. We prefer to follow the general weight of authority, and therefore cannot adopt the rule that cities are not liable for injuries to a runaway horse or his owner occasioned by an obstruction or defect in the streets. It is suggested that the city was not required to keep the whole width of the Ninth avenue in good condition, and City of Wellington v. Gregson, 31 Kan. 99, 1 Pac. 253, is referred to. In that case it was observed: "Whether, in any given case, a city can be charged with negligence in failing to improve and render safe for use the entire width of the street, and also whether, when it has put a portion in good condition, it can be charged with negligence on account of posts. stakes, or other obstructions outside of the traveled track, are ordinarily questions of fact for the determination of a jury." But the city of Winfield had opened for public travel all of the Ninth avenue, and the street railway in its contract with the city was required to construct its railway "in such manner and condition as not to prevent the crossing of the streets or avenues by teams and wagons at any point with safety." Ninth avenue was one of the principal streets of the city, and had been opened. It was the duty of the city to keep it in a reasonably safe condition for both pedestrians and teams. City of Olathe v. Mizee, 48 Kan. 438, 29 Pac. 754. Whether Mrs. Stone was guilty of contributory negligence in crossing the street railway where and in the manner she did, and whether she was guilty of any negligence connected with the driving of the team or their running away, were questions for the jury, not for the court.

4. It is further insisted that the court erred in refusing to charge the jury in writing. At the conclusion of the evidence, the railway company and the city of Winfield asked the court to give the instructions in writing, and separately number them. This request was refused, upon the ground that it was made too late. It appears from the record that it was a rule of the district court of Cowley county that, if either party desired the general instructions to be in writing, the request must be made at or before the time the jury was impaneled; and, if the request was not then made, it would not be considered. It appears in this case that the instructions, as delivered, were taken down by the official stenographer, and by him transcribed, and signed by the judge, and delivered to counsel for defendants at the time they commenced their argument, and were also sent out to the jury. It is of great advantage, if the request for instructions in writing is made at the commencement of the trial, so that, as the trial progresses, the judge can draw up those portions of his instructions which are applicable to the evidence as successively pre-

sented. Thomp. Char. Jur. p. 153, § 112. At the time of the decision in Railway Co. v. Franklin, 23 Kan. 74, the instructions were given when the argument of the case was concluded. This court held that, if the request for written instructions was not made until after the argument, the request was too late, and not available. Valentine, J., speaking for the court, remarked: "If counsel may wait until the close of the argument before making the request, it would necessarily cause great delay in the proceedings of the court, and materially increase costs and expenses. Generally, it would require an adjournment of the court to enable the judge to prepare his written instructions." The order of trial was changed by chapter 126, Sess. Laws 1881; so that the general instructions to the jury are now given when the evidence is concluded. Civ. Code, § 275. Therefore, if counsel may wait until the close of the evidence before making the request, it will generally require an adjournment of the court to enable the judge to prepare his instructions; but in this case, whatever view may be taken as to the time it is necessary to make the request, the court committed no prejudicial error, because both the counsel for the defendants below and the jury were furnished with the instructions in writing in ample time for any beneficial purpose. either party desires special instructions to be given to the jury, such instructions may be reduced to writing, and delivered to the court when the evidence is concluded. This is expressly permitted by the statute. Id. \$ 275.

5. It is further insisted that the trial court committed error in refusing and giving instructions. With a single exception, although the instructions may be criticised, yet, on account of the findings of the jury and the evidence in the case, we do not think the jury were misled thereby, or that there was anything prejudicial in those given or refused. Railway Co. v. Nolan, 53 Tex. 148; Railway Co. v. Delesdernier, 84 Tex. 82, 19 S. W. 366. The exception we refer to is the instruction concerning the measure of the damages, permitting a recovery for lost time and medical attention. Mrs. Stone was a married woman living with and keeping house for her husband. She was not engaged in any other business. Under the decisions of this court, her services as a wife were due to her husband. He was also bound to furnish her with medical attention. City of Wyandotte v. Agan, 37 Kan, 520, 15 Pac, 529; Railroad Co. v. McGinnis, 46 Kan. 109, 26 Pac. 453. The jury, however, allowed nothing for medical attention, and specially found that there was included in the verdict \$50 only for loss of time and incapacity to labor. This amount must be deducted from the judgment. The jury allowed in their verdict \$400 for actual injuries received by Mrs. Stone, and \$200 for bodily and mental suffering, as an element of the physical pain, or as the necessary consequence thereof. The mental was connected with the bodily suffering. This is admissible. City of Salina v. Trosper, 27 Kan. 544.

The judgment will be modified by deducting \$50 for lost time and incapacity to labor, but affirmed otherwise. The costs in this court will be divided. All the justices concurring.

WILLAMETTE IRON WORKS v. OREGON BY. & NAV. CO.

(Supreme Court of Oregon. Oct. 2, 1894.)

Eminent Domain — Additional Servitude on Public Street — Compensation of Abutting Owners—Injunction.

1. Where a private corporation, under special legislative enactment and municipal ordinance, constructed a practically solid structure as a bridge approach, 30 feet wide in the middle of a street 66 feet in width, the structure imposed a servitude on the rights of abutting owners, for which compensation must be made.

2. The granting of the right to the exclusive and permanent use of a portion of the public street, even where such permission includes as a consequence the construction of a solid roadway over and above the street surface, is not an exercise of the power to alter or change the grade.

3. Equity will restrain the taking of private property for public use, where provision has been made by statute for determining the compensation to be paid the owner, and such payment has been made a condition precedent, until the condition is compiled with

ment has been made a condition precedent, the til the condition is complied with.

4. Where the taking for public use of an easement in a street was with the knowledge of and without objection by the abutting property owner, but under representations that such taking was intended as temporary, and the property is put to no little public use, an injunction to restrain its further use should not be made mandatory until after a reasonable time, in which the easements of the private owners may be acquired.

Appeal from circuit court, Multnomah county; Loyal B. Stearns, Judge.

Suit by the Willamette Iron Works, an abutting property owner, to enjoin and restrain the Oregon Railway & Navigation Company from occupying a portion of the street in front of plaintiff's property with an approach to a bridge. The decree was in favor of the plaintiff, and defendant appeals. Affirmed.

W. W. Cotton and Snow & McCamant, for appellant. J. F. & E. B. Watson, for respondent.

BEAN, C. J. This is a suit by an abutting owner to enjoin and restrain the defendant from occupying a portion of the street in front of plaintiff's property with an approach to its bridge across the Willamette river at Portland. The plaintiff's premises are situated on the west side of Third street, and are bounded on the south by G street, on the north by H street, and on the west by Fourth street, and occupying that portion of the property abutting on Third street is a two-story brick and iron building, used as a foundry and machine shops. Third street is about 66 feet wide, and runs northerly

through the city to the north line of said H street. In 1887 the legislature granted to the defendant the right to construct and maintain a bridge, with proper and convenient approaches, across the Willamette river, between the then cities of Portland and East Portland, for the purpose of travel and commerce, as a railroad, wagon road, and passenger bridge, and to charge and collect tolls and fares thereon. Laws 1887, p. 252. Subsequently the city of Portland, by ordinance, granted to defendant the right to build on Third street "a solid roadway and approach to said bridge from the north line of G street to the center line of H street, said approach to be on an ascending grade from G street and to be built as a solid construction, not exceeding thirty feet in width." In pursuance of the permission thus given by the legislature and the city of Portland, the defendant proceeded to and did construct from a point about 600 feet east of Third street a double-decked steel bridge across said river, -not, however, as a part of or extension of any public highway,-and from the upper deck thereof, which is used for wagon and passenger traffic, constructed an elevated roadway, substantially at right angles to Third street, over and across private property, to the east end of H street, where, by a curve, it was connected to an approach in Third street, as provided in the ordinance referred to. This approach is 30 feet wide, and occupies the middle of the street in front of plaintiff's property for about three-fourths of the distance north from G street, and then turns to the east on a curve so that at a point opposite the north line of plaintiff's property it is about 35 feet from the west line of the street, while at the south end, and for a greater portion of the distance along the block, it is only about 20 feet from the street line and about 8 feet from the sidewalk,-a space not sufficient for wagons to pass each other. At the junction of Third and H streets, and opposite the north line of plaintiff's property, it is about 13½ feet above the street surface, and from that point descends southerly by a gradual descent, reaching the surface of the street at the intersection of Third and G streets, forming an effectual barrier to the crossing of that part of the street by vehicles. It is supported by timbers resting on the street surface, and is so constructed and timbered as to be practically a solid structure, necessarily constituting an exclusive and permanent occupation and appropriation to the use of the defendant of that portion of Third street covered by it. The decree of the court below was in favor of the plaintiff, and defendant appeals.

Counsel for defendant seeks to reverse the decree of the court below on the grounds (1) that the erection of the bridge and its approach in Third street, under legislative and municipal authority, violates no property rights of plaintiff, and consequently it is without remedy, although its property may be injured; and (2) the plaintiff's remedy, if

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it has any, is by an action at law to recover damages, and not by suit for an injunction.

But few questions have come before the courts in recent years involving larger pecuniary interests or of greater practical importance, or which have provoked more discussion, than those growing out of the enforcement by abutting lot owners of their right to compensation for the occupation and use of streets under legislative or municipal authority by private corporations for public use, under constitutions like ours, which provide that private property shall not be taken for public use without just compensation. It is quite generally agreed that any proper exercise of governmental power over a street in a municipality, for street purposes, which does not directly encroach upon the abutting property of an individual, though the consequences may be to impair its use, is not a taking, within the meaning of the constitution, and will not entitle the adjoining proprietor to compensation, or give him a right of action. Cooley, Const. Lim. (5th Ed.) 671; Transportation Co. v. Chicago, 99 U. S. 535. It is within this principle that changes of grade; the use of a street for a surface street railroad; the erection of lamps, hitching posts, telephone, telegraph, and electric light poles; the laying of sewer and water pipes; the crossing of streets over railway tracks by means of elevated viaducts,-are, when authorized by lawful authority, held damnum absque injuria, although the abutting owner may be seriously injured, and the value and usefulness of his property greatly impaired. This is upon the ground that individual interests in streets are subservient to those of the public, and that an adjoining owner received full compensation for such injury as might result to him or his grantees from the use of the street for proper street purposes at the time of the dedication or appropriation of the land therefor. But there is a limitation to legislative or municipal power over a street, which cannot be exceeded without invading the constitutional rights of abutting owners. An abuttlng proprietor is entitled to the use of the street in front of his premises, to its full width, as a means of ingress and egress, and for light and air, and this right is as much property as the soil within the boundaries of his lot; and therefore any impairment thereof or interference therewith, caused by the use of the street for other than legitimate street purposes, is a taking, within the meaning of the constitution, whether the fee of the street is in the abutting owner or not. He holds his property subject to the power of the proper legislative authority to control and regulate the use of the street as an open public highway, and hence any authorized use thereof, though a new one, gives him no cause of action. But such holding is not subject to the legislative power to divert the street from legitimate street purposes by authorizing a structure thereon which is inconsistent with its |

continuous use as an open, public street. Any structure on a street which is subversive of and repugnant to its use and efficiency as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners, for which compensation must be made. Elliott, Roads & St. 526; Tied. Mun. Corp. 301; Lewls, Em. Dom. § 126; Booth, St. Ry. Law, §§ 80, 81; 2 Dill. Mun. Corp. §§ 711, 712, 723c; McQuaid v. Railway Co., 18 Or. 237, 22 Pac. 899; Story v. Railroad Co., 90 N. Y. 122; Lahr v. Railway Co., 104 N. Y. 268, 10 N. E. 528; Reining v. Railway Co., 128 N. Y. 157, 28 N. E. 640; Kane v. Railroad Co., 125 N. Y. 165, 26 N. E. 278; Corning v. Lowerre, 6 Johns. Ch. 439; Barney v. Keokuk, 94 U. S. 324; State v. Jersey City, 52 N. J. Law, 65, 18 Atl. 586, 696. As said by Andrews, J., in Kane v. Railroad Co., supra: "However difficult it is to trace its origin, or to refer it to any exact legal principle, it is undoubtedly the prevailing doctrine of American jurisprudence that the owner of a lot abutting on a city street, the fee of which is in a municipality, has, by virtue of proximity, special and peculiar rights, facilities, and franchises in the street, not common to citizens at large. in the nature of easements therein, constituting property, of which he cannot be deprived by the legislature or municipality, or by both combined, without compensation." And in Story's Case, supra, the rule is thus stated by Tracey, J.: "While the legislature may regulate the uses of the street as a street. it has, we think, no power to authorize a structure thereon which is subversive of and repugnant to the uses of the street as an open, public street. Whether a particular structure authorized by the legislature is consistent or inconsistent with the uses of the street as a street must be largely a question of fact, depending upon the nature and character of the structure authorized." 90 N. Y.

This brings us to the question, then, whether the occupation of Third street by the approach to defendant's bridge is compatible with or destructive of its use as an open public street. As already stated, this street is about 66 feet in width, and the approach complained of is practically a solid structure 30 feet wide in the middle of the street, so that no use can be made of that portion of the street occupied by it except by persons desiring to use defendant's bridge and pay toll therefor. In other words, it is in fact an appropriation of a public street to the exclusive use of a private corporation, and to the manifest injury of an abutting proprietor. The plaintiff and the public are absolutely and permanently excluded from the use of all that portion of Third street covered by the approach for general street purposes. It practically terminates the street as an open public thoroughfare at the north line of G street, in place of the north line of H street, as it is laid out and dedicated; and the only

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roadway in front of plaintiff's property is but a few feet wide, and quite insufficient for the proper and necessary use of such property, or for the accommodation of public travel. While the city authorities undoubtedly have power to authorize the use of the street for legitimate street purposes, we do not think the public can justly demand or require such a sacrifice of private interests, or justify such an exclusive and permanent appropriation of a street in aid of a private enterprise, although for public purposes, as is contemplated in this case. It may be conceded that the general interests of Portland and the public at large are promoted by the appropriation of the street to the purposes of an approach to defendant's bridge; but it by no means follows that the burden of such a public improvement can rightfully be cast upon this plaintiff by appropriating its property for the public benefit, without compensation. We think, therefore, that, while it is competent for the legislature or municipality to authorize the use of a street for legitimate street purposes without making compensation to abutting owners for consequential injuries to their property, they cannot legally authorize structures of the character complained of to be erected thereon for the use and convenience of a private corporation, and which absolutely and permanently exclude the public and the abutting owner from the portion of the street so occupied, without compensating the adjoining proprietor for the injury sustained.

The argument that the building of the approach was a mere change of the grade of the street, authorized by proper municipal authority, is clearly untenable. The city of Portland has undoubted plenary power to alter or change the grade of a public street by proper proceedings under its charter, but the act of the municipal authorities in granting defendant permission to occupy the street did not purport to be an exercise of such power. It was simply conferring upon the defendant, so far as the city was able, the right to the exclusive and permanent use of a portion of the public street; and, while such permission included as a consequence the construction of a solid roadway above and over the street surface, it does not follow that what was done was in exercise of the power to alter or change the grade of a street. The street grade remained the same after the approach was built as before, and this approach is no part of the street, but is foreign thereto, and as useless for general street purposes as any of the structures referred to in the cases cited. We do not think a public street, or any portion thereof, can lawfully be appropriated to the exclusive and permanent use of a private corporation under the guise of an exercise of the power to alter or change the grade. The primary object of this grant of power is to enable the municipality to make the streets safe and convenient for public travel, and not to divert

them from legitimate street purposes to the exclusive use of some private corporation. Conceding, therefore, that defendant occupies this street by lawful authority, and hence its structure is not a nuisance, yet it invades the legal rights of an abutting owner, and is an appropriation of the property of such owner without compensation, which is beyond the power of the legislature or municipality, or both, constitutionally, to authorize or sanction.

The defendant's counsel also claims that plaintiff's remedy is by action at law to recover damages, and not by suit in equity to enjoin and restrain the defendant from maintaining the approach complained of. He relies principally upon the case of Osborne v. Railroad Co., 147 U. S. 248, 13 Sup. Ct. 299. This was a suit by an abutting owner to enjoin the defendant from laying down its railroad track at street grade under competent municipal authority, on the ground that the track would be a permanent obstruction, and the damage threatened to be done complainant was irreparable, and could not be compensated for by a recovery in an action at law. The constitution of Missouri provides that private property shall not be taken or damaged for public use without just compensation; but, while the statutes of that state contain ample provisions for the assessment of compensation for the taking of property, there is no provision therein for such assessment when the property is merely damaged. It was therefore held that as the laying down of defendant's track at the grade of the street was not an exercise of the power of eminent domain, or the taking of private property for public use, there was no proceeding authorized by law, which the railway company could avail itself of, to obtain an assessment of damages, while the complainant had an adequate remedy by action at law, and therefore the injunction should be denied, and the plaintiff remitted to his remedy at law. But in this case, as we have endeavored to show, the act sought to be restrained is a taking of private property for public use, and in such cases our statute has made adequate provision for the assessment of compensation therefor. Provision is not only made by statute for determining the compensation to be paid the owner, but its payment is made a condition precedent to the right to take the property, and it is within the power of the defendant to comply with this condition. In such case, as we understand the rule, an injunction will almost universally be granted, at least until the condition is complied with. The rule is very clearly stated by Mr. Chief Justice Fuller, in the case referred to, as follows: "Whenever the power of eminent domain is about to be exercised without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition. Equi-Digitized by **GOO**

table jurisdiction may be invoked in view of the inadequacy of the legal remedy, where the injury is destructive, or of a continuous character, or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded ex debito justitiae. But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damage in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damage is substantial, and the remedy at law in fact inadequate, before restraint will be laid upon the progress of a public work; and if the case made discloses only a legal right to recover damages, rather than to demand compensation, the court will decline to interfere." To the same effect is Booth, St. Ry. Law, 189; Elliott, Roads & S. 536; Tied. Mun. Corp. § 307; 2 Dill. Mun. Corp. § 723d; Story v. Railroad Co., 90 N. Y. 179; Lahr v. Railway Co., 104 N. Y. 268, 10 N. E. 528; Railway Co. v. Witherow, 82 Ala. 190, 3 South. 23; State v. Berdetta, 73 Ind. 185.

As the structure, the maintenance of which is sought to be restrained in this case, is permanent and exclusive in its character, and, if suffered to continue as now located, will inflict a continuing and permanent injury upon the plaintiff, we think it manifest that it is entitled to restrain the continuation thereof by an injunction; but as it was constructed with the knowledge and without objection by plaintiff, on the assurance, however, of the defendant, that it was only intended as a temporary expedient and not as a permanent structure, and the fact that it has become and is one of the principal avenues across the river, and daily used by a large number of electric cars, wagons, and foot passengers, the injunction should not be made mandatory until the defendant has had a reasonable time after the mandate is filed in the court below, to be determined by that court, to acquire the plaintiff's easements in the street, by agreement or by proceedings to condemn the same, if it should be so advised. It follows that the decree of the court below must be affirmed, and the cause will be remanded for further proceedings in accordance with this opinion.

OREGON RY. & NAV. CO. v. HERTZBERG. (Supreme Court of Oregon. Oct. 16, 1894.) PUBLIC LANDS-PATENTS -IMPEACEMENT-ACTION FOR LAND-PLEADING AND PROOF.

1. A certified copy of a decree of the United States supreme court, reversing a decree of the supreme court of the state, is not evidence of such reversal where no mandate thereon

was issued to the state court.

2. A land patent from the United States

cannot be impeached by a letter from the assistant commissioner of the general land office to a local register, written 20 years after the issuance of the patent, and directing the register to note in his records that the pre-emption of the patents had been encoded in warrance of the patentee had been canceled in pursuance of a decision of the United States supreme court. 3. A decision of the United States supreme

court that one to whom a patent for and was issued holds it in trust for a person who had previously pre-empted the land cannot be set up as a defense in an action by the patentee for the possession of the land against one claiming

the possession of the land against one claiming no title under such pre-emption.

4. Hill's Code, § 319, provides that a defendant shall not give in evidence any estate in himself, or any license or right to the possession of land, unless the same be pleaded in his answer. Held, that under an allegation that the land in suit is part of a public road, and was used as such for more than 10 years, and up to the time defendant went into possession, defendant cannot show a license or right to defendant cannot show a license or right to possession derived from the public authorities.

5. In an action for the possession of land, proof by plaintiff of prior possession under deeds conveying a colorable title is sufficient as against

a trespasser.
6. Where the evidence will support only one verdict, the court will direct it.

Appeal from circuit court, Multnomah county; H. Hurley, Judge.

Action by the Oregon Railway & Navigation Company against Charles Hertzberg to recover possession of land, for damages for removing earth therefrom, and for the rent thereof. Judgment was rendered for plaintiff, and defendant appeals. Affirmed.

A. Schutz, for appellant. W. W. Cotton. for respondent.

MOORE, J. This is an action to recover possession of a portion of block 188 in the city of Portland, damages for removing earth and stone therefrom, and for the reasonable value of the rents thereof. The complaint is in the usual form, alleging ownership in fee and right of possession of said premises by mesne conveyances and possession by plaintiff and its predecessors for more than 15 years under color of title and claim of ownership in fee. The defendant denied all the material matters alleged, except the allegation of possession, and for a separate defense in substance alleged that the title in fee simple absolute to said premises had never been granted by the United States with legal validity to any person, but that it is still in the United States, subject, under the donation act of congress, to the preferred rights of the heirs of Elizabeth Thomas, and that this right had never been asserted by any of said lawful heirs; that the defendant had taken possession of, established his residence, and made valuable improvements on said premises as a homestead settler, in order to procure the title thereto from the United States. And for a further defense he alleged that the land in dispute was dedicated by Elizabeth Thomas, the original settler, to the use of the public as a road, and that it had been used as such for a period of more than 10 years prior to defendant's occupancy thereof. The reply put

in issue all the material allegations of new matter in the answer, and, issue being thus joined, the trial thereof proceeded before the court and a jury, and, after hearing the evidence, and the arguments of counsel, the court directed the jury to find a verdict in favor of the plaintiff, the counsel for both parties agreeing that its damages should be one dollar. Upon the verdict thus ordered and returned by the jury, judgment was rendered for the plaintiff, and from this judgment the defendant appeals, and specifies several errors upon which he relies for its reversal. The alleged errors consist of objections to the admission and rejection of evidence and to the court's direction to the jury to bring in a verdict in favor of the plaintiff.

The record shows that the plaintiff, to maintain its action, introduced the following evidence: A patent of the United States to A. J. Knott; the deed of A. J. Knott and Wife to the South Portland Real-Estate Association, and the deed of the South Portland Real-Estate Association to the Oregon Railway & Navigation Company, dated June 25, 1880, each instrument conveying, with other property, the premises in controversy. The plaintiff also offered in evidence the judgment roll of the case of Silver v. Ladd, which showed that the suit was begun and prosecuted to final decree in the circuit court of the state of Oregon for Multnomah county. It also appears therefrom that one Elizabeth Thomas, a widow, on or about October 1, 1851, in pursuance of the provisions of the donation act of congress, approved September 27, 1850, established her residence upon a tract of the public lands of the United States, and, having filed her notification to hold said premises as her donation land claim, continued to reside thereon until some time in the year 1857, when she died intestate, leaving as her sole heir Finice Caruthers, her son, who, after the death of his mother, took possession of said premises, and continued to reside thereon until about September 1, 1860, when he died intestate, leaving neither widow nor issue. That C. S. Silver was appointed and duly qualified as administrator of the estate of said Finice Caruthers, deceased, and as such took possession of said premises, and leased them to one A. L. Mushell. That A. J. Knott and R. J. Ladd, having each obtained patents from the United States, under the pre-emption law, for portions of the tract of land embraced in the donation entry of Elizabeth Thomas, commenced actions against said A. L. Mushell, the tenant, to recover possession of the premises described in their patents, and while said actions were pending said C. S. Silver commenced a suit against said Ladd and Knott to restrain them from prosecuting their said actions, and to cancel and set aside the patents issued to them by the United States. A decree was rendered in said suit dismissing plaintiff's complaint for the reason that said Elizabeth Thomas was not a person entitled to take lands under any provision of the donation act (Act Cong. Sept. 27, 1850, 9 Stat. 496). It was stipulated between the parties hereto that a decree in the case of Silver v. Ladd, supra, had been entered in the records of the supreme court of the United States (7 Wall. 219) substantially in accordance with the opinion rendered in said suit therein, and that said stipulation might be used in lieu of and offered in evidence as a certified copy of such decree, but that said stipulation was not to be construed as an admission that any mandate had ever been issued upon said decree from the supreme court of the United States to the supreme court of this state. nor by this court to the circuit court of Multnomah county, nor an admission of the regularity of any appeal or of any fact other than that there had been an entry of such decree in the said court. It appears from said stipulation that said decree on appeal to this court was affirmed, and that a writ of error was taken to the supreme court of the United States which reversed the decree of this court (Silver v. Ladd, supra). but, no mandate having been filed or entered in the records of the circuit court, there was no competent evidence before it to show that the said decree was in fact reversed It will thus appear from the evidence intro duced at the trial that the plaintiff estat lished a complete legal title to the premises in controversy. The defendant sought to impeach the United States patent to Knott by offering in evidence a certified copy of a letter from the assistant commissioner of the general land office, dated April 5 1887,more than 20 years after the patent was issued,-directed to the register and receiver of the land office at Oregon City, Or., advising them that the pre-emption cash entry of Andrew J. Knott had been that day canceled in pursuance of the decision of the supreme court of the United States in the case of Silver v. Ladd, 7 Wall. 219, and directing them to note the fact in their records, with a reference to his letter and said decision. The court sustained an objection to the introduction of this letter, and, as the defendant contends, erroneously. When a patent issued under the seal of the United States, and signed by the president, is delivered to and accepted by the patentee, the title of the government passes with the delivery (Moore v. Robbins, 96 U. S. 538; Steel v. Refining Co., 106 U. S. 447, 1 Sup. Ct. 389); but if the legal title has passed from the United States to one party, when in equity and good conscience, and by the laws which congress has made on the subject, it ought to go to another, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title (Minnesota v. Bachelder, 1 Wall. 109; Stark v. Starrs, 6 Wall. 402; Silver v. Ladd, supra). "The

holder of a legal title in bad faith," says Mr. Chief Justice Waite in Widdicombe v. Childers, 124 U. S. 405, 8 Sup. Ct. 517, "must always yield to a superior equity. As against the United States, his title may be good, but not against one who had acquired a prior right from the United States, in force when his purchase was made under which his patent issued. The patent vested him with the legal title, but it did not determine the equitable relations between him and third persons." In Silver v. Ladd, supra, Mr. Justice Miller said: "It may well be doubted whether the patent can be set aside without the United States being a party to the suit." If a court cannot set aside a patent without a suit for that purpose in which the United States and its patentee are parties, it needs no arguments or authorities to show that no officer of the land department can by a mere edict annul a patent of the United States after its delivery to the patentee, and hence there was no error in rejecting the evidence offered. The patent having been delivered to Knott, the legal title to the premises therein described, including the tract in controversy, passed from the United States; and it is immaterial to the defendant, who does not claim as an heir of Elizabeth Thomas, whether it vested in Knott for his own benefit or as trustee for the heirs of Elizabeth Thomas. The supreme court of the United States having held that the donation certificate properly issued to Elizabeth Thomas, and that the patentees held the legal title in trust for her heirs, the government cannot now cancel the patent, and restore the land to the public domain, or render it subject to a homestead settlement; and hence this defense must of necessity fail.

The second defense is alleged as follows: "That the lot of land so occupied and held in actual possession by defendant as hereinafter described is portion of a public road, dedicated as such by the original settler, Elizabeth Thomas, described and used as such by the public in general for a period of more than 10 years, and up to the time of the occupancy by defendant for the purposes hereinbefore set forth." Section 319 of Hill's Code provides that "the defendant shall not be allowed to give in evidence any estate in himself or another in the property or any license or right to the possession thereof unless the same be pleaded in his answer." It may well be doubted whether the supervisory control over roads given by statute to the county court (Hill's Code, § 4061) includes the authority to erect buildings thereon, or to convert them to any other use than the accommodation of the public travel. But, even if we should assume that the county court had authority to lease any part of the public roads, or to license a person to occupy any portion thereof for any purpose, the defendant has not pleaded any estate in himself in the property, or any license or right to its possession derived from the county court or other public authority (section 319, Hill's Code), and hence this defense must also fail.

The plaintiff also introduced in evidence, over the defendant's objection, certain deeds and other muniments of title which purported to convey to its predecessors and grantors the equitable title of the heirs at law of Elizabeth Thomas to said premises. These deeds created a colorable title, and under them the plaintiff and its predecessor in interest, the South Portland Real-Estate Association, entered into the possession of the whole of said property as described by the deeds (Ang. Lim. 400), which possession has been retained by the plaintiff for more than 10 years prior to defendant's entry. The plaintiff's right of action is not founded upon an adverse, but upon a prior, possession. If the defendant had claimed a right of entry as an heir of Elizabeth Thomas, the question of plaintiff's adverse possession might have become an important factor to bar the defendant's right. A prior possession of land for any length of time is prima facie evidence of title, and will authorize a recovery in an action therefor against a mere volunteer or trespasser. Riverside Co. v. Townshend, 120 III. 20, 9 N. E. 65; Mickey v. Stratton, 5 Sawy. 478, Fed. Cas. No. 9,530; Hutchinson v. Perley, 4 Cal. 33; Ang. Lim. 361. "The maxim," says Mr. Justice Curtis in Christy v. Scott, 14 How. 292, "that the plaintiff must recover on the strength of his own title, and not on the weakness of the defendant's, is applicable to all actions for the recovery of property. But, if the plaintiff had actual prior possession of the land, this is strong enough to enable him to recover it from a mere trespasser, who entered without any title." This rule concedes that he who secures possession of real property thereby obtains a prior right against all persons except the owner. If it were otherwise, possession, in the absence of title, would be maintained only by the strong against the weak, and an unlawful resort to arms might become the means of resisting an intrusion upon a prior right. But prior possession for less than the statutory period of limitation does not authorize a recovery against a defendant who is lawfully in possession. Jackson v. Rightmyre, 16 Johns. 314. If the plaintiff had offered no other evidence of title to the premises than these deeds and proof of prior possession, it would have been sufficient to maintain this action against the defendant, who claims no legal title thereto, and is a mere trespasser thereon.

It is contended that the court erred in directing the jury to find a verdict for the plaintiff. There was no conflict in the evidence, nor any dispute as to the facts, nor as to the inferences which might reasonably be drawn therefrom; and, as the parties had agreed upon the amount of damages to which plaintiff was entitled, there was nothing to

submit to the jury, and the question was one of law, to be decided by the court. Coffin v. Hutchinson, 22 Or. 554, 30 Pac. 424. Other objections are urged, but, as the bill of exceptions does not purport to contain all the evidence, it must be presumed there was sufficient to support the verdict, and hence there was no error in directing the jury to return a verdict for the plaintiff. The judgment will therefore be affirmed, and it is so ordered.

PHILOMATH COLLEGE v. WYATT et al.

(Supreme Court of Oregon. Oct. 8, 1894.)

RELIGIOUS SOCIETIES - CHANGE OF CONSTITUTION -REVIEW BY CIVIL COURTS-VALIDITY.

1. The title to the property of a divided religious sect is in that part following the laws, usages, customs, and principles which were accepted before the division.

2. The action of the highest ecclesiastical body of a religious sect, in adopting the report of a committee appointed to determine the validity of a constitutional amendment and to submit it to the vote of its members, the amend-ment being adopted by the adoption of the report, is legislative, and not an adjudication binding on civil courts. 31 Pac. 206, affirmed. 3. Where the legislative body of a religious

sect, in adopting amended articles of belief, stated that they were in substance the same as the old, and in the debate before their adoption they were not attacked as being different therefrom, and bishops testified that there was no material change, and the only change appeared to be a gathering under the head of articles of beliefs requirements of the book of discipline,

there is not such a change of belief as to destroy church identity.

4. The old constitution of a religious sect provided that the highest legislative body should be compared of claims and the beautiful to the contract of be composed of elders only; the new, of lay members and elders. The old forbade all conmembers and elders. nection with secret societies. The new denounced them, and empowered the legislative body to make rules of discipline in the matter. The old forbade any change in the constitution, unless by required to the third of the second to the second unless by request of two-thirds of the members. The new allowed the legislative body to propose changes. *Held* that, though the change be invalid, there was not such a revolutionary change in the constitution as to destroy church identity, and therefore the title to the church property remains in those following the adopted constitution, and not in the few adherents to the old.

5. The general conference of a religious sect, authorized to amend its constitution on request of two-thirds of the members, may provide for the drawing of amendments, and their submission to the vote of the members, and a

summission to the vote of the members, and a request by the members is not a condition precedent thereto. 31 Pac. 206, reversed.

6. Notice of the time of such election as "during the month of Nov., 1888." is sufficient.

7. Two-thirds of the votes of the members voting in favor of the amendment is sufficient to authorize it.

to authorize it.

Moore, J., dissenting.

On rehearing. Affirmed.

For statement and original opinion, see 31 Pac. 206.

L. Flinn and Williams & Wood, for appellants. Caples, Hurley & Allen, John Burnett, W. S. McFadden, R. S. Strahan, and J. W. Whalley, for respondent.

WOLVERTON, J. It is unfortunate that it should become necessary in any case to call into requisition the courts of civil jurisdiction to determine and settle controversies arising within the pale of the church, and it is peculiarly so in the present instance, wherein the judicial mind has not been able, after years of litigation, to uniformly and satisfactorily solve the questions involved, or apply to facts touching the controversy such a clear and indubitable rule of law as will result in conviction to those in interest, fix the exact status of the contending elements in the church, and forever set at rest the title to the immense amount of property involved. The constitution of the United States has guarantied to the people thereof both civil and religious liberty. This guaranty extends as well to the encroachments of the state or civil government upon the rights, privileges, and immunities of the church, as of the church upon those of the state. It has brought about an entire and distinct separation of church and state, and is in consonance with a free and enlightened statehood. But, as was said in Watson v. Jones, 13 Wall. 713, by Miller, J.: "Much as such dissensions among the members of a religious society should be regretted, a regret which is increased when, passing from the control of the judicial and legislative bodies of the entire organization to which the society belongs, an appeal is made to the secular authority,—the courts, when so called on, must perform their functions as in other cases."

The Church of the United Brethren in Christ is a voluntary, unincorporated, religious association, having a written confession of faith, constitution, and book of dis-The government of the church is exercised through a series of judicatories, known as the official board, quarterly, annual, and general conferences, which latter meets quadrennially, and is the highest legislative and judicial body of the church. The plaintiff is a corporation duly incorporated under the general laws of the state, and its object "was and is to acquire and hold property in trust for said church," to build and maintain an institution for educational purposes, to be carried on under the direction and control of trustees to be appointed from time to time by the Oregon annual conference, which, like all other annual conferences of the church, is subject to the general conference. So that the trustees appointed by the annual conference are but agents through whom the property in question is held for the use and benefit of the church. At the general conference held at York, Pa., in May, 1889, a revised confession of faith and constitution was adopted. Fifteen members thereof, feeling aggrieved at the manner in which said revised confession of faith and constitution was adopted, withdrew, and met at another place in the same city of York, and



there organized another conference; rejected, as not binding upon them, the revised confession of faith and constitution; and, claiming to act under the old confession of faith and constitution, transacted such business as was brought before them. Since that date there have been two general conferences, the defendant trustees being appointed under the authority of the conference claiming to act under the old confession of faith and constitution, and the plaintiff being represented by trustees appointed under the authority of the general conference maintaining the revision. So that the question to be decided is, which of these two general conferences is the real conference of the Church of the United Brethren of Christ?

1. The real question, therefore, involved in this case, is one of identity. Whatever other questions arise during the course of its examination are merely incidental and secondary. Did the adoption of the revised confession of faith and constitution by the conference at York, waiving the question for the present whether adopted in strict accord with the then recognized constitution or not, change or destroy the identity of the church? If it did, the defendant trustees are the rightful representatives of the church and of the plaintiff corporation, as they are commissioned by the conference acting under the recognized confession of faith and constitution thereof. If it did not, then the action of those who withdrew from the regularly called and constituted conference at York, against the wishes of the majority, in organizing another general conference distinct and apart from the one so regularly called and constituted, is without authority and void. In the very nature of the form of government of the society, it can have but one general conference. "The title to church property of a divided congregation is in that part of it which is acting in harmony with its own law; and the ecclesiastical laws, usages, customs, and principles which were accepted among them before the dispute began are the standards in determining which party is right," 1 Wat. Corp. (8th Ed.) § 19. Or, as was said in McGinnis v. Watson, 41 Pa. St. 20: "It seems very plain that we must judge these people and their acts relative to this dispute by the ecclesiastical laws, usages, customs, and principles which were accepted among themselves before the dispute began, and ascertain which party is right, tried by that standard." This case is cited with approval in Presbyterlan Church v. Wilson, 14 Bush, 278, and the language of the syllabus thereof adopted by the court. See, also, Nibl. Mut. Ben. Soc. § 158. "Courts of law will inquire which party or which division adheres to the form of church government.

* * This rule * * necessitates an inquiry into the constitution and discipline of the church * * * to enable the court to discover which of the contending par-ties adheres to the order." Lectures on Relation of Civil Law to Church Polity by Justice Strong (45 and 59), cited in brief of William Lawrence. In Presbyterian Church v. Wilson, supra, the court, speaking through Cofer, J., says: "It thus appears that a Presbyterian congregation or particular church is a body of professing Christians and their children, governed by congregational, presbyterial, and synodical assemblies; and consequently there can be no such thing as a Presbyterian congregation or church not having a church session, and not being in connection with and governed by a presbytery and synod. Connection with and subjection to the recognized presbyterial system of government is as essential to constitute a Presbyterian church or congregation as belief in the Westminster confession of faith. Faith and government are alike and equally necessary to constitute a Presbyterian church, and a church having no other than a congregational government, although adopting the Presbyterian creed, is no more a Presbyterian church than a congregation governed by the presbyterial system, and adopting the thirty-nine articles of faith of the Episcopal Church." Thus it will be seen that church identity, when disputes arise, depends, not alone upon its peculiar creed and dogmas, but also upon the constitution and form of government, discipline, usages, customs, and principles maintained by it prior to the dispute or division. The scope, therefore, of investigation, for the purpose of discovering or fixing the identity of the genuine conference, comprehends all these necessary elements. Measured by this standard, the identity of the Church of the United Brethren in Christ, and its general conference, in the present case, must be ascertained and determined by reference to its confession of faith or fundamental doctrines, constitutional or fundamental law, book of discipline, and its usages and customs prior to the division of the church at York, Pa.

2. I shall first consider whether there has been a change in the confession of faith or fundamental doctrine of the church. I speak of a change, I mean one that is material and vital to the established tenets and doctrines of the church, as it is not every trivial transmutation of phraseology, or every addition to the so-called confession of faith. eo nomine, where taken or transposed from the discipline to that particular instrument, that will destroy church identity. I cannot see how the dogmas of the church are changed or destroyed by transferring doctrine previously contained in the discipline to the confession of faith, or vice versa. The fundamental belief remains the same. For instance, if justification and sanctification are doctrines to which all members of the church must subscribe before they can become such, how can it become important whether they are contained in the confession of faith, eo nomine, or in the discipline. There must be a radical change of faith or doctrine. Trustees, etc., v. St. Michael's Evangelical Church, 48 Pa. St. 21; Fadness v. Braunborg, 73 Wis. 292, 293, 41 N. W. 84.

I shall now advert to some of the alleged changes which it is claimed have been made in the confession of faith. It is a solemn matter to invade the domain of religious beliefs and dogmas, to explore doctrine, and decide intangible, metaphysical questions pertaining to the Godhead; and courts have a delicacy in entering upon this field of investigation, and will not do so unless it is necessary for the purpose of determining questions of civil or property rights. If these matters have been determined by the proper church judicatories the civil courts will accept such decisions as final, and will not look into or disturb them. It is said that there has been added to the confession of faith articles declaring a belief in "depravity, justification, regeneration and adoption, sanctification, and endless punishment." If it be admitted that such is the case, it does not follow that these are new doctrines or dogmas adopted and sanctioned by the general conference for the first time, and I think no such claim has ever been made by that portion of the church membership known as "Radicals." Turning to the book of discipline of 1837 (section 7), it will be seen that every person desiring license to preach is required to state his "knowledge of faith, of repentance, of justification, sanctification and redemption," and every book of discipline issued from that date to this contains the same requirement. As touching the doctrine of depravity, a resolution was adopted in 1853, by a vote of 23 to 19, defining the same. The book of discipline (1861) requires a person desiring to be received as a preacher to answer in the affirmative the following question: "Do you believe that man, abstract of the grace of our Lord Jesus Christ is fallen from original righteousness, and is not only entirely destitute of holiness, but is inclined to evil, and only evil, and that continually, and that except man be born again he cannot see the kingdom of God?" This requirement, with slight change in phraseology, is continued in every book of discipline issued since that date. The book of discipline of 1877 requires the following question to be propounded to an elder preparatory to his ordination: "Do you believe in future everlasting punishment?" This is continued in the later publications of the discipline. The course of reading and study prescribed by the discipline for many years last past for licentiate preachers, and upon which they are required to be examined touching "Bible doctrine," comprises "human deprayity, the atonement, redemption, repentance, justification by faith, regeneration, adoption," etc. So that in the usages and customs of the church, and by the discipline, the doctrines promulgated touching all these articles of faith have been repeatedly and continuously recognized and sanctioned by the church.

This society has for many years past been committed to each and all these articles of faith or church dogmas which it is now claimed are destructive of the church by reason of having been added to the articles of faith, eo nomine. The rule is quite uniform that whenever questions of discipline or of faith, or ecclesiastical rule, custom, or law, have been decided by the highest church judicatories, such decisions are accepted by the legal tribunals as final. Watson v. Jones, 13 Wall. 727; German Reformed Church v. Com., 3 Pa. St. 291; McGinnis v. Watson, 41 Pa. St. 21; State v. Farris, 45 Mo. 184; Robertson v. Bullions, 9 Barb. 134; Harmon v. Dreher, 1 Speer, Eq. 87. But it is claimed that the action of the general conference in the revision of the church creed, and in the adoption of all resolutions touching the legality of such revision, was legislative and not judicial. With this view I concur. The general conference of the United Brethren in Christ, as was said of the general assembly of the Presbyterian Church in Com. v. Green, 4 Whart. 561, "is a homogenous body, uniting in itself, without separation of parts, the legislative, executive, and judicial functions of the government; and its acts are referable to the one or the other of them, according to the capacity in which it sat when they were performed." The nature of the business in hand must determine wnether it is referable to the one branch or the other. Mr. Justice Moore, in his very able opinion heretofore rendered in this case, says: "The business of the legislature is to make general laws for the public good; that of judicial tribunals, to make specific settlements of private disputes. One establishes laws for future action, and is prospective; the other applies established laws to past actions, and is retrospective in its operation. The law is made by the one and applied by the other. Applying this distinction to the acts of the conference, it would appear that it was intended for the future public good of the society. It was a rule of action for future conduct. It was not applying the law to past actions. It was not a conclusion and judgment for past offenses. It was not a punishment for a violation of any rule of faith or discipline. It was not a conclusion that any ecclesiastical law, custom, or usage of the church had been disobeyed. Nor was it retrospective in its operation." 31 Pac. 219. And Judge Cooley says: "That which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be, for the regulation of future cases falling under its provisions. The legislative power extends only to the making of laws. To construe and apply the law is the peculiar province of judicial power. It is the province of judges to determine what is the law upon existing cases. In fine, the law is applied by the one and made by the other. To do the first,

therefore,—to compare the claims of the parties with the law of the land before established,-is in its nature a judicial act." Cooley, Const. Lim. 110, 111. The claim is that the general conference of 1889, in adopting the report of the special committee of seven, is judicial, and therefore binding upon the courts. The proceedings of the general conference of 1885, and of the commission appointed by it, did not effectuate the amendment. It was effected through the adoption by the general conference of 1889 of the report of the special committee of seven. The adoption of this report adopted the amendment. The proceeding is not perhaps in strict accord with recognized parliamentary usages, but the legal effect was as above stated, considering the method by which the conference transacted its business. It is in effect the same as if a legislative assembly should refer a bill to the judiciary or other proper committee, or a special committee, to determine the constitutionality thereof, and such committee should report the bill back, declaring it constitutional, and in pursuance thereof the bill should pass. The appointment of the committee of seven, its report, and the adoption thereof by the conference of 1889, was the method pursued for the accomplishment of the necessary legislation to effect the adoption of the revised confession of faith and constitution. It was legislation solely, and could not, in the very nature of the business transacted, be anything else. No one will contend that one and the same act can be both judicial and legislative, and hence the action of the conference upon the report of the committee of seven was not judicial.

As to whether there has been any material change in the articles of faith, the action of the general conference, sitting as a legislative body, ought to determine. The respect which one co-ordinate branch of the government maintains towards another ought to apply as well where a court of civil jurisdiction is considering the legislative acts of an ecclesiastical body; and when such body, acting in its legislative capacity, has placed a construction upon its acts, there is no good reason why the civil courts should not respect and even adopt such construction, unless the same is shown to be clearly and palpably contrary to some constitutional prohibition. "Every presumption is in favor of the validity of legislative acts, and they are to be respected, unless there is a substantial departure from the organic law." People v. Briggs, 50 N. Y. 558. Judge Cooley says: "The constitutionality of a law, then, is to be presumed because the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a just desire to keep within the restrictions laid by the constitution upon their action, have adjudged that it is so." Cooley, Const. Lim. (5th Ed.) 219. The powers of the commission were, by the act of the conference of 1885, which appointed it, limited

and defined as follows: First, that the commission shall preserve unchanged in substance the present confession of faith, so far as it is clear; second, that it shall retain the present itinerant plan; and, third, that it shall keep sacred the general usages and distinctive principles of the church on all great moral reforms, as sustained by the Word of God, in so far as the province of this work may touch them. As touching the work of the commission, the majority report of the committee of seven says: "We have also compared the instructions and limitations by the former general conference with their work as finally adopted by said commission, and find that said instructions and limitations were obeyed and carried out with commendable accuracy." This report was adopted by the conference. Here then is legislative action declaring the fact to be that the confession of faith, so far as it was clear, has been preserved unchanged in substance. This legislative action of the general conference, composed of the very able divines of the church, is evidence of the highest character touching these questions of faith and is entitled to great weight. And we are not without other contemporaneous evidence bearing upon the question of change. In all the discussion which took place in the conference of 1889 the "Radicals" do not appear to have attacked the confession of faith, as reported from the commission. One member, high in the counsels of the conference, towards the close of the debate, said: "Is it not marvelous that not a brother on the other side of the house, from Brother Barnaby to Bishop Wright, has said a word against the work of the commission itself? They have not said anything against the confession of faith, as it has been formulated and presented to us. They do not say it is any different from the old one, or that there is any heresy in it. * * * It corresponds with the old. It expresses it better, and in a more beautiful and orderly form, than the old one did. It also brings in some doctrines that were scattered through the discipline in various forms, and they are put in new arrangement." Aside from all this, leading bishops of the church have testified that in their judgment there is no substantial difference between the two. So that considering the alleged change in the confession of faith, and the materiality thereof, as a question of fact, and the evidence adduced pertinent to that issue, there is but little doubt that the great weight of testimony is against the contention of the defendants to this suit, and I therefore conclude that the revision of the confession of faith has not wrought such a change in substance in the fundamental doctrines and dogmas of the church as to subvert and destroy church identity.

3. I will now consider whether the constitution of the church has been so changed as to destroy church identity. It is said that religious organizations stand in the same attitude as other voluntary associations for benevolent or charitable purposes, and that "all who unite themselves to such a body do so with an implied consent to its government, and are bound to submit to it." Watson v. Jones, 13 Wall. 729. Or, as said by Cofer, J., in Presbyterian Church v. Wilson, supra, "religious societies are regarded by the civil authority as other voluntary associations, the individual members and separate bodies of which will be held to be bound by the laws, usages, customs, and principles which are accepted among them, upon the assumption that in becoming parts of such organisms they assented to be bound by those laws, usages, and customs, as so many stipulations of a contract between them." So the constitution of the United Brethren in Christ binding upon that society prior to the dispute may be regarded as a contract between the church and its members, and between the individual members thereof. An attempt at this late day to trace the history of the adoption of the constitution of 1841, or to discuss the process by which it was formulated and ratified by the members of the church, would be a useless task. It is sufficient to know that it has been recognized by the church and its members, and treated by all concerned as valid and binding, for a period of about 50 years. Whether legally adopted or not, it has been acquiesced in for such a great length of time that I am not now disposed to declare the instrument to be any other than that which both parties to this suit have always regarded and treated as genuine antecedent to the incidents which gave rise to this litigation. The constitution of 1841 is the compact by which this church and its members were bound prior to the dispute. It is a brief document, and omits all mention of many of the fundamental principles upon which the church government is founded. For the purpose of ascertaining these omitted principles, it is necessary to look to the discipline, usages, and customs of the church. For instance, an annual or quarterly conference is not defined, the number of representatives to the general conference is not fixed, nor does it undertake to regulate any basis upon which such representation shall be chosen. It does not constitute or create a single officer of all these church bodies, nor does it define their duties. except that bishops are "to be considered members and presiding officers." The preamble sets forth, among other things, that the purpose of adopting the constitution was "to define the powers and the business of quarterly, annual, and general conferences, as recognized by this church;" but a reference to its provisions shows that it failed to do either, except so far as relates to the powers and business of the general conference. By section 1, art. 1, "all ecclesiastical power herein granted to make or repeal any rule of discipline is vested in a general conference." Upon looking to the constitution alone for the grant of power, if effect is given to the words "herein granted," none will be found "to make or repeal any rule of discipline," except it can be extracted from the first four sections of article 2, giving power to the general conference "to define the boundaries of the annual conferences, to elect bishops, to try by impeachment the annual conferences, and to hear appeals." But if we take a broader view of this constitution, and regard it, as state constitutions are regarded, as a limitation, and not a special grant of power, the words "herein granted" become inoperative, and it becomes a general grant of power "to make or repeal any rules of discipline," being in effect authority to exercise "all the usually recognized powers of legislation not actually prohibited or expressly excepted." Railroad Co. v. Orton, 6 Sawy. 185, 32 Fed. 457. is the light in which the general conferences have always considered this constitution, if we are to judge by the class of legislation which has been adopted by it from time to time. In fact the general conference has been accustomed to go much further, and has constantly, and for years past, exceeded even "the usually recognized powers of legisla-Whatever there is of the form of church government has been established by the general conference, through the discipline, and the discipline at this time contains more of the principles of church government which are regarded as fundamental than elther the old or the revised constitution. Ever since the revolution of 1688 the British parliament has been conceded the power to enact fundamental as it does statute laws, by bill passed through the regular stages of legislation, and approved by the sovereign. James. Const. Con. 547. And such have been the usages and customs of the general conference by a long course of legislation. So that we must not look to the constitution alone for the fundamental principles or form of church government, but must look also to the discip-

The constitution of 1841 contains, for the most part, express limitations of power upon the general conference. Of such are the following: Article 2, § 4: "No rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands, nor destroy the itinerant plan." Section 7: "There shall be no connection with secret combinations, nor shall involuntary servitude be tolerated in any way." And article 4: "There shall be no alteration of the foregoing constitution, unless by request of twothirds of the whole society." No one will contend that this constitution can be legally changed except by the method therein provided, nor will any one seriously contend that the general conference had the power to change or do away with the confession of faith without the constitution being first regularly and legally modified so as to delegate such power to that body, or rather to remove the limitation upon its powers, but it does not follow that because the general conference attempted to legislate contrary to these ex-

press limitations the constitution or the form . or fundamental principles of church government are thereby abandoned or set at naught. The legislation may be void, but why should it necessarily work an abandonment of the constitution or the creed of the church? There are only three changes of importance attempted or made by the revised constitution: First, the provision for lay delegation in the general conference; second, the amendment with regard to secret combinations; and, third, the method provided for the amendment of the constitution. None of these affect the form of government or church polity. The official board, quarterly, annual, and general conferences, all remain and have their usual places, possessing their accustomed powers in the plan of church organization and government. The officers of all these bodies, and their rights and duties, remain the same. The clauses touching the confession of faith, right of appeal, human slavery, church property, itinerant plan, the rights of local preachers to their votes in the annual conferences, are all in effect unchanged. It is true the three exceptions above enumerated have revised the constitution somewhat, but the form and general plan of church government is not destroyed. The church polity remains the same. The agreement which the constitution implies has not been abrogated, and the most that can be said is that the general conference has violated the terms of the compact, for which the courts will afford an appropriate and ample remedy. Suppose the legislative assembly of Oregon was to pass an act extending to women the right of suffrage. This would not be an abrogation of the constitution, which inhibits women from voting, but it would be a violation of that instrument, for which the courts would afford an appropriate remedy. The legislature of the state of Mississippi, in the year 1854, passed an act proposing to amend the constitution by abolishing the superior court of chancery, and establishing "chancery courts with full jurisdiction in matters of equity to be held in each judicial district by the circuit judge thereof, at such 'times and places as may be directed by law." This proposed amendment was ratified by the people in 1855, and in 1856 was inserted by the legislature in the constitution, and was afterwards held constitutional by a divided court. Green v. Weller, 32 Miss. 650. No one contended that the amendment was revolutionary, although it was thought by many to have been unconstitutionally adopted. If laymen have no right to sit in the general conference, courts will, in a proper case, prevent them from sitting, and so in regard to the other alleged amendments to the constitution. Where there is a wrong there is a remedy. I concede the proposition laid down by Taft, J., in Brundage v. Deardorf. 55 Fed. 846, that "an open, flagrant, avowed violation of the original compact" may be "necessarily a withdrawal from the

lawful organization of the church;" but the facts, as presented here, do not disclose that the general conference has been guilty of any such acts. No fraud is even alleged by the defendants, as was the case by the complainants in Brundage v. Deardorf, supra. Both the conferences of 1885 and 1889 acted in entire good faith, and in the belief that their proceedings were constitutional. Grant, J., in his dissenting opinion in Bear v. Heas-ley (Mich.) 57 N. W. 276, states very clearly the proposition under consideration thus: "Grant that the action of the conference was illegal, in declaring the amendments adopted. It is indeed a startling proposition that by this act the conference destroyed its identity, ceased to represent the church, seceded from it, and thereby become a new and different church. The proposition finds no principle in law, equity, or good sense upon which to stand. The fifteen who left the regularly constituted conference became the seceders, and not those who remained in it. If the defendants are right in their contention, it would follow that if the conference had been a unit in declaring the amended constitution adopted, in which event its action would have been no more binding than now, the members of the local church might have seized the church property, on the ground that they were the sole representatives of the true church, and that all the others were heretics. The minority in this case have mistaken their remedy. They should have pursued a legal and orderly course, which was clearly open to them. should have protested, and, failing in this, have applied to the proper courts to determine the validity of the proceedings to adopt the amended constitution; and if such course found them void they would hold the old constitution in force, and compel the officers of the church to recognize and act under it." Shaw, C. J., in Earle v. Wood, 8 Cush. 458, says: "What we mean to say is this: that if, after solid and weighty consideration, humbly and conscientiously awaiting the guide of best wisdom, the yearly meeting should fully unite, in the proper as well as the Quaker sense of that term, in adopting some modification of their creed or of their speculative opinions, adhering to their great principles of love and fraternal duty, it would, upon their professed principles, seem too much to say that they would thereby cease to be Quakers, and cease to be the Society of Friends. * * * All disaffected members. having full liberty of conscience, might undoubtedly dissent from such opinions, and adopt different tenets. Perhaps they might by so doing become better theologians, better Christians, and better men. But they would cease to be Friends in unity with such yearly meeting, and with the meetings and individuals subordinate to it. Such dissenting individuals might form themselves into yearly, quarterly, and monthly meetings; but this would be a new organization, and not the

identical body to which they had been formerly attached."

There is a class of cases holding that where a member of an unincorporated, voluntary association violates the rules of such association, he loses his rights and privileges as such member, and even forfeits his right of membership, upon the ground that when he becomes a member he is presumed to know the rules thereof, and that he agrees and consents to be governed thereby, and that a violation of such rules is a breach of his implied contract, and consequently a forfeiture of his rights and privileges as a member of such association. Of such is White v. Brownell, 2 Daly, 359; Hyde v. Woods, 2 Sawy. 655, Fed. Cas. No. 6,975, 94 U. S. 523; Ebbinghousen v. Worth Club, 4 Abb. N. C. 300, 301; Leech v. Harris, 2 Brewst. 571; Innes v. Wylie, 1 Car. & K. 262; Venable v. Baptist Church, 25 Kan. 177; Protchett v. Schaefer, 11 Phila. 166. But none of these authorities go to the extent of holding that where the legislative branch of the highest judicatory of the church, at a general conference duly elected and lawfully convened, passes an act or ordinance contrary to or not in strict harmony with the constitution, or otherwise does an illegal act, it is necessarily an act of secession, and in subversion of the whole church government, without regard to whether the act itself constitutes a substantial or radical change in the form of church government or church polity which formerly obtained. The 15 who left the regularly constituted conference composed of 130 members, and organized a separate and distinct organization, although holding to the tenets and doctrines of the United Brethren in Christ, and adopting its form of church government and its discipline, became the seceders. Methodist Church v. Wood, 5 Ohio, 288; Ferraria v. Vasconcelles, 23 Ill. 456; Shannon v. Frost, 3 B. Mon. 253; Gibson v. Armstrong, 7 B. Mon. 481; Trustees, etc., v. St. Michael's Evangelical Church, 48 Pa. St. 20. I take it, therefore, that there has not been such a radical or substantial change in the constitution as to be subversive of church government and church polity, as it existed prior to the dispute, and that the church identity remains the same, and consequently the Liberals, in contradistinction to the Radicals, are entitled to the property involved herein.

4. But, if it is at all a doubtful proposition as to whether the identity of the church has been destroyed, there is another question, upon the proper solution of which the decision of this case may rest. Has the constitution been changed or revised in the manner provided therein? The old constitution provides (article 4): "There shall be no alteration of the foregoing constitution, unless by request of two-thirds of the whole society." "Though it is not expressly stated, the only meaning that can be given to the constitution is that the amendment of the proposition of individual expression might be ascertained. This proceeding, not being inhibited by the constitution, and being the legislative will of the conference, carried with it the impress of law. Nor did the conference delegate to the commission legislative powers. Schweiker v. Husser (III. Sup.) 34 N. E. 1022. The commission organized by purpose, and intrusted with legitimate powers, clearly and explicitly limited and defined. Taft, J., in Brundage v. Deardorf, suppression might be ascertained. This proceeding, not being inhibited by the constitution, and being the legislative will of the conference, carried with it the impress of law. Nor did the conference, carried with it the impress of law. Nor did the conference, carried with it the impress of law. Nor did the conference, carried with it the impress of law. Nor did the conference, carried with it the impress of law. Nor did the conference delegate to the commission legislative will of the conference, carried with it might be powers. Schweiker v. Husser (III. Sup.) 34 N. E. 1022. The commission organized by purpose, and intrusted with legislative will of the conference, carried with it might be ascertained. This proceeding, not being the legislative will of the conference, carried with it might be ascertained.

constitution is to be made by the general conference. And this power is limited by requiring the request or approval of twothirds of the entire society to give the amendment validity." Brundage v. Deardorf, 55 Fed. 848. Much discussion has centered about the word "request,"-the Radicals claiming that it is a "condition precedent to the power to act;" that it is active, voluntary, and must be the moving cause of the proposed amendment; the Liberals contending that it simply means a vote, an expression of assent or a passive concurrence, without regard to time, as relates to the adoption of an amendment, so that it proceeds or is contemporaneous therewith. I do not think the clause of the constitution referred to should receive a strict construction, nor do I think the word "request" should bear a technical meaning. It was undoubtedly the intention of the framers of the constitution that, before the general conference could make any change in that instrument, it must be preceded by an expressed desire of two-thirds of the body of the church, "the whole society," favoring the change. It is highly improbable that at any time "two-thirds of the whole society," or any considerable number of the members thereof, would spontaneously, and with one accord, request, or signify their desire to the general conference, that a change should be made in the constitution. Some organized effort among such a numerous membership would be necessary to obtain unison of action and contemporaneous results. Hence it would not be contrary to the spirit of the constitution for any member or minister or any body of the church to devise any method that should seem most expedient, and effect such organization as would appear most appropriate, for obtaining an expression of the membership, and ascertaining the aggregate result with reference to such change. The general conference being charged with the duty of looking to the general welfare of the church, it would seem quite natural and appropriate that it should take a matter of such importance in hand, and devise ways and means of obtaining an expression of the membership. Now this is just what the general conference of 1885 did. Its action was taken for the purpose of obtaining an expression of the members touching a revision of the constitution and creed. It provided for devising a method by which the aggregate of individual expression might be ascertained. This proceeding, not being inhibited by the constitution, and being the legislative will of the conference, carried with it the impress of law. Nor did the conference delegate to the commission legislative powers. Schweiker v. Husser (Ill. Sup.) 34 N. E. 1022. The commission organized by it was a lawful body, created for a lawful purpose, and intrusted with legitimate powers, clearly and explicitly limited and defined. Taft, J., in Brundage v. Deardorf, su-

importance to the word 'request,' as indicating that it is a condition precedent to the action of the general conference. It would seem that all that was intended was that no amendment of the constitution should go into effect until two-thirds of the whole society should agree thereto. The constitution is inartificially drawn, and the expression 'request,' should not have a narrow meaning. Nor do I think there is anything in the article or in the constitution which prevents the general conference from lawfully taking steps looking to the amendment of the constitution in accordance with its terms. It would seem to be a legitimate exercise of the supreme legislative power of the general conference to enact an ordinance that upon a certain day the expression of the society should be taken by vote upon the question whether the constitution should be amended in a certain way. While the constitution was adopted at a time when the church was smaller than it is now, the hope of the founders, doubtless, was that it would extend the country over. It is not to be presumed that they inserted in the constitution a provision which, while it professed to give the power of amendment, imposed such limitations as to make it practicably impossible. Therefore I am of the opinion that the general conference of 1885 had the right to appoint a commission to prepare a revised and amended constitution, and fix a time at which the vote of the church should be taken to signify the desire of the church that the amended constitution should be adopted. It may be conceded, though it is not now decided, that it was also within the legitimate powers of the general conference to provide that, if two-thirds of those voting at the time upon the amendment should be in favor of the new constitution, it should be held to be two-thirds of the entire society, on the ground that, if notice was given to the entire society of such a rule, then a failure to vote would be an acquiescence in the vote of those who did vote. But, to make such provision lawful, full and ample notice of this requirement, and of the day of the election, should be given to each member of the church."

The general conference, acting in its legislative capacity, could lawfully declare that two-thirds of all the votes cast should be deemed two-thirds of the whole society, as a basis of ascertaining the wishes of the society with reference to a change or revision of the constitution and confession of faith. County Seat of Linn Co., 15 Kan. 500; State v. Sutterfield, 54 Mo. 395; Vance v. Austell, 45 Ark. 407. In the case of County Seat of Linn County, supra, it appears that the constitution of Kansas provides (article 9, § 1), "No county seat shall be changed without the consent of a majority of the electors of the county," and the legislature enacted that "the place receiving a majority of the votes cast shall become the county seat." Brewer, J., delivering the opinion of the court, says: "It seems to us, therefore, that where the legislature has provided an election as the means of ascertaining the wishes of the elector of the county in reference to a change of the county seat, and has made no provision for a registration, and has designated no other list or roll as the evidence of the number of electors, it may, under the constitutional provision quoted, declare that the place receiving a majority of the votes cast shall be the county seat." The constitution of Missouri provides that "the general assembly shall have no power to remove the county seat of any county unless two-thirds of the qualified voters of the county, at a general election, shall vote in favor of such removal." Const. art. 9, § 2. By an act of the general assembly it was provided: "If it shall appear by such election that two-thirds of the legally registered voters of said county are in favor of the removal of the county seat of such county, then the county court shall appoint five commissioners," etc. Wag. St. p. 405, § 22. In construing these provisions the court held, in State v. Sutterfield, supra, that it must look to the "legally registered voters" to ascertain whether two-thirds had voted for the change. And in Vance v. Austell it was held that "the constitutional provision that 'no county seat shall be established or changed without the consent of the qualified voters of the county' means a majority of the qualified voters voting at the election, and fixes this as the minimum vote necessary to effect a removal, but does not prohibit the legislature from prescribing a larger vote, and that section 1165, Mansf. Dig., which fixes the number assessed for poll tax on the last assessment as the criterion of the number of votes in the county, is not in conflict with the constitution." These cases rest upon the principle that the legislature may adopt as conclusive evidence of the fact any mode of ascertaining the popular will which, according to the ordinary rules of human experience, is best calculated to serve the purpose, so that it does not override or set at naught the restrictions of the constitution. There are, however, cases decided by the supreme court of Tennessee, and one by the supreme court of Mississippi, holding the contrary doctrine, but in the latest case touching the question from the former state (Braden v. Stumph, 16 Lea, 593) the court seems to be in doubt of its own position. Cooper, J., who announced the opinion of the court, says: "I am myself unable to see any distinction between the meaning of the words 'consent,' 'concurrence,' and 'assent,' as used in the clause of the constitution cited, and am inclined to think that the rule adopted in Louisville & N. R. Co. v. County Ct., 1 Sneed, 692, for the construction and application of analogous words in a statute, might well have been followed in construing and dipplying the language of the constitution." The case from Mississippi (Hawkins v. Supervisors, 50 Miss. 735) has been reviewed by the United States supreme court (Carroll Co. v. Smith, 111 U. S. 556, 4 Sup. Ct. 539), which latter court refused to follow the doctrine therein announced.

The date of taking the vote upon the revision of the constitution and confession of faith was fixed as definitely as was the date fixed by custom of the society to vote upon the election of delegates to the general conference, "during the month of November, 1888;" and fair and ample notice of the time and manner of taking such vote was duly provided for, and given to the members of the society. The board of bishops was directed to prepare a letter addressed to the church on the work of the commission, to be published through the Religious Telescope, the official organ of the church, and otherwise, which was done in January, 1886; and the bishops' address, accompanied by the commission act, plan of submission, and proposed confession of faith and constitution, were distributed throughout the church immediately thereafter. Here, then, is an election legally called through and in pursuance of the legislative act of the general conference of 1885. Applying, then, the basis fixed by the general conference for determining the vote of the society, two-thirds of those who voted must be taken to be twothirds of the whole society, upon the ground. that "all qualified voters who absent themselves from an election duly called are presumed to assent to the expressed will of the majority [in this case, two-thirds] of those voting, unless the law providing for the election otherwise declares." County of Cass v. Johnston, 95 U.S. 369; People v. Warfield, 20 Ill. 159; Taylor v. Taylor, 10 Minn. 107 (Gil. 81); Carroll Co. v. Smith, 111 U. S. 556, 4 Sup. Ct. 539; St. Joseph Tp. v. Rogers, 16 Wall. 644; People v. Garner, 47 Ill. 246; People v. Wiant, 48 Ill. 263; County Seat of Linn Co., supra. The vote cast in favor of the revised constitution being largely in excess of two-thirds of the whole vote cast, the same was therefore legally adopted when it received the sanction of the general conference of 1889. And it may be added, in this connection, that the section of the constitution placing a limitation upon the power of the general conference "to change or do away with the confession of faith as it now stands" may itself be legally changed by the society under the general provision for amendments. And, even without amending such section, changes in the confession of faith might be made, in the interest of clearness and completeness of declaration of belief in the doctrines actually held by the church, which may be found less fully stated in the confession of faith of 1841. Schlichter v. Keiter (Pa. Sup.) 27 Atl. 45. These conclusions affirm the decision of the court below.

MOORE, J. (dissenting). I am unable to agree with the conclusion reached by my Brother WOLVERTON in this case. I do not think any satisfactory reason has been presented for changing the former opinion, to which I still adhere. BEAN, C. J., having participated in the trial of the cause below, took no part in the hearing on appeal; and, Mr. Justice WOLVERTON and myself being unable to agree, it follows that the decree must be affirmed.

OREGON RY. & NAV. CO. v. SWINBURNE et al.

(Supreme Court of Oregon. Oct. 16, 1894.)

APPEAL—SERVICE OF NOTICE—BONDS—CONDITIONS—EVIDENCE.

Service of notice of appeal on an agent of the corporation, on whom a summons could have been legally served, is sufficient.
 Under a bond binding defendants to re-

2. Under a bond binding defendants to repay such reasonable sums as plaintiff should be required to pay for the various parts of a right of way, depot grounds, and terminal facilities, plaintiff must prove the reasonableness of the several items.

3. A written memorandum signed by a portion of defendants approving the location of depot grounds at a certain place, at a cost not to exceed a certain amount, was competent as tending to show that the amount paid was a reasonable expenditure.

4. There being no provision in the bond as to width of the right of way to be secured, platiff was not limited to 60 feet, but might secure such width as it was accustomed to purchase in the ordinary course of its business in locating railroads.

Appeal from circuit court, Morrow county; W. L. Bradshaw, Judge.

Action by the Oregon Railway & Navigation Company against E. R. Swinburne and others on a bond. Judgment for plaintiff. Defendants appeal. Reversed.

A. S. Bennett, for appellants. J. M. Long. for respondent.

BEAN, C. J. This is an action to recover a sum of money alleged to be due the plaintiff from the defendants on a certain indemnifying bond, which is set out and the facts of the case sufficiently stated in the report of the former appeal. 22 Or. 574, 30 Pac. 322. A retrial, as directed, resulted in a judgment in favor of plaintiff for \$1,975, from which the defendants prosecute this appeal. The motion to dismiss the appeal for want of service of the notice thereof should. we think, be overruled. The service was duly made upon an agent of the plaintiff corporation, upon whom a summons could have been legally served, and was therefore sufficient.

Passing to the merits, it appears that the amount claimed by plaintiff to have been expended by it in securing the right of way referred to in the bond is made up of sundry sums of money claimed to have been paid for rights of way over the lands of different parties along the route of its road, and for attorneys' fees, livery bills, and expenses

of right of way agents, amounting, in the aggregate, to the sum of \$24.033, of which \$17,104 is admitted to have been repaid to it. The answer puts in issue the reasonableness and necessity of each and all of these items, and avers that the aggregate reasonable amount paid or expended by plaintiff in securing said right of way did not exceed \$15,-000. To maintain the issues on its part, the plaintiff produced, and put in evidence, an itemized statement of the amounts paid by it for rights of way and other expenditures connected therewith, and submitted evidence tending to show the general character of the country through which the road passes, how and where the right of way was located, and that certain sums paid therefor were reasonable; but the reasonableness of sundry items in the account, amounting to more than \$7,-000, was not shown, nor was there any evidence tending to show it, unless it could be inferred from the fact that the same was paid for right of way purposes, and from evidence tending to show the similarity in the situation of the ground over which the railway was constructed in cases where specific evidence of the reasonableness was given and that in regard to which no further proof than the fact of payment was offered. Upon this state of the evidence, all the defendants except J. L. Morrow, who, it seems, had approved the accounts as rendered by the plaintiff, moved the court to direct the jury to return a verdict in their favor, for the reason that the several expenditures made by plaintiff, and which the evidence tended to show were reasonable, did not exceed in the aggregate the amount admitted to have been repaid. The refusal to so rule is assigned as error. On the former appeal it was held that, under the terms of the bond, defendants are liable only for such sums as plaintiff was required to expend for the purposes specified, and which may be found reasonable in each particular instance. From this construction of the bond it necessarily follows that, to entitle plaintiff to recover in this action, it must not only show the amount paid out by it in securing the right of way, depot grounds, and terminal facilities, but that the several items going to make up its claim against the defendants are reasonable, and that the aggregate thereof amounts to more than has been repaid to it. This, the record shows, it did not do, nor attempt to do, and hence we think the court should have instructed the jury as requested by the de-

Although certain of the expenditures made by the plaintiff may have been reasonable in amount, we do not think it can be inferred therefrom that all or any of the others were likewise reasonable, nor was a description of the general character of the country through which the road passes, or the location of the line, alone sufficient evidence to enable the jury to determine intelligently or at all whether the several amounts paid for rights of way were reasonable or unreasonable. The burden of proof was upon the plaintiff. and it should have given some evidence tending to show the reasonableness of the several amounts which it was required to expend, and for which it seeks to recover in this action. Not having done so, we have no alternative but to reverse the judgment, and order a new trial. This deficiency in plaintiff's evidence may be supplied at the next trial, and it may relieve another question from doubt to say that, in our opinion, the written memorandum signed by a portion of the defendants, in which they approved the location of the depot grounds in Heppner at a cost not exceeding \$5,400, was competent as evidence tending to show that the amount paid therefor by plaintiff was a reasonable expenditure. This writing did not tend to vary the terms of the bond sued upon, nor substitute another agreement therefor. It did not attempt to fix any liability, or to charge any one with any particular sum, but, in connection with other evidence in the case. simply tended to show the good faith of the plaintiff, and that it paid no more than what was deemed the reasonable value for the land purchased.

Some question was made on the trial as to whether, under the agreement or bond, plaintiff could purchase a right of way more than 60 feet wide, and recover from the defendants the amount paid therefor, even if reasonable. Without attempting to state or comment upon the particular manner in which this question was raised, it is sufficient to say that, in our judgment, the plaintiff was authorized to secure a right of way over land of such width as it was accustomed to purchase in the usual and ordinary course of its business in locating and constructing railroads, and, for such reasonable sum as it was required to expend therefor, the defendants are liable. It will be observed that the bond contains no limitations or provisions as to the width of the right of way to be secured by the company, and, in the absence of such limitations, it seems to us, in view of the circumstances, that the parties must have contemplated that the railroad company should exercise its judgment, and purchase such a right of way in width as it was accustomed to purchase in the ordinary course of its business.

The other questions suggested in the brief, we think, are sufficiently covered by this and the opinion on the former appeal, and need not be further referred to at this time. Judgment reversed, and new trial ordered.

PEOPLE v. LANG. (No. 21,119.)

(Supreme Court of California. Oct. 4, 1894.) CRIMINAL TRIAL-INSTRUCTIONS - ASSUMING FAL-SITY OF DEFENDANT'S TESTIMONY.

1. On a trial for burglary, where defendant testified that he spent the day on which the

crime was committed at the house of a certain person, and that he fixed the date from the fact that he and such person were thrown out of a buggy, and the person referred to testified that the buggy accident did not occur on the day of the burglary, but that on the day of the burglary the defendant was at his house "off and on but being bugy he could not say how ourgiary the defendant was at his house "off and on, but, being busy, he could not say how long or when," and the defendant afterwards admitted that he was mistaken as to the day of the buggy accident, it was error for the court in its charge to assume that the defendant was not at the house of such person the whole of the day of the burglary.

2. In a criminal trial, in commenting on the evidence of the defendant, it is error for the

the evidence of the defendant, it is error for the court to charge that: "In looking at his testimony, you must remember it is the testimony of an accused man. Of course, he has a powerful motive to swear himself out of this charge. ful motive to swear himself out of this charge. We all understand that. And while you are not to disbelieve him merely because he is in that situation, still you will not shut your eyes to the fact that he has that motive, and you will govern yourselves accordingly: that is to say, you will look at his testimony by the light of that fact. You may believe it after all.

* * The law invites your attention to the motives of the witnesses."

Department 1. Appeal from superior court, San Francisco county: William T. Wallace, Judge.

Robert Lang was convicted of burglary, and appeals. Reversed.

John T. Cary, for appellant. Atty. Gen. Hart, for the People.

VAN FLEET, J. Defendant was convicted of burglary in the second degree, and sentenced to the state prison for a term of five years. He appeals from the judgment and an order denying his motion for a new trial.

Several points are made for a reversal of the judgment, mostly based upon objections to the charge of the court.

1. The evidence of the prosecution tended to show that the burglary with which defendant was charged was committed by entering a dwelling house at 419 Baker street, in the city of San Francisco, on the 11th day of June, 1893, between the hours of The defendant's main 11 a. m. and 5 p. m. defense was an alibi. He testified that he did not commit the burglary; that he did not enter the house; was never near it in his life. He said: "I remember Sunday, the 11th of June last. I was at Mr. Carr's place. keeps a saloon at the end of the Sutter street road, right at the corner. I went there between 8 and 9 o'clock Sunday morning, June 11th, and remained there until Monday about 12 o'clock. About 9 o'clock Sunday evening Mr. Carr asked me to come down town with him. He had a trotting horse. We went down town, and they were building a line at the time at Fifth and Mission, and the rails at this time were about this high [showing] above the pavement, and in going over it the buggy broke down. We had to leave the buggy, and go to a livery stable and hire another buggy, and put the horse in it, to go home with. That was on Sunday, June 11th, and that is the reason I remember the day." Mr. Carr, called as a witness on behalf of

defendant, testified in substance as follows: "I live at the corner of Sutter and Central avenue. I am acquainted with the defendant. He was at my house the day the buggy broke down. The stable man says it was the 13th of June (Tuesday), this year. I have no means of knowing or telling the day of the week except by what the stable man says. I am sure it was not on Sunday. It was a week day. The day the buggy broke down he was out there, and wanted me to go on a bond for a friend of his. It was about two o'clock in the afternoon that we went down town in the buggy. The buggy broke down at Fourth street. It was not on Sunday the buggy broke down. He was out there two or three days before that. He was out there the Sunday before that. He was out there for two or three days before the day the buggy broke down. He was there Sunday, the 11th of June. I think he was there Saturday, Sunday, and Monday. I can't say how long he stayed, it is so long ago. Maybe an hour or two. He was there off and on. I was busy. Sunday is a busy day out there." Afterwards the defendant admitted that he was mistaken as to the day the buggy broke down. This was all the testimony introduced on the question of alibi. In this state of the evidence the court, in its charge to the jury, said: "Now, as to the matter of testimony, as I remarked to you before, the value of the testimony is entirely with you. You are the judges of that, but I will remind you that a witness false in one part of his testimony is to be distrusted in others; that is to say, a witness willfully false. Now, defendant took the stand, and he undertook to state that on the particular Sunday involved he was with a particular person the whole of the day. It turns out, it seems, that that was not so. Now, do you believe that he was willfully false in making that statement? It is said upon his part (and that is a matter to be considered) that as a matter of fact he was with this witness Carr, but he was simply mistaken as to the particular day; that he was honest in his statement. Of course, if you think he was, it would not come under this rule that I have read to you." It is urged, and we think justly so, that by this language the learned judge of the court below violated section 19 of article 6 of the constitution of the state, which provides "that judges shall not charge juries with respect to matters of fact." The court virtually tells the jury that the statement of the defendant that he was at the witness Carr's house during the whole of the time he testified he was, on Sunday, June 11th, was not true, but was false, and simply leaves it with the jury to say whether that statement was willfully false or only inadvertently so. The evidence upon the point is not necessarily open to such interpretation. It is true that it may be susceptible of such an inference, but that inference was for the jury, untrammeled by the views of the court upon

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the subject. The defendant had stated that he was at Carr's during certain hours on that Sunday: that he remembered the day because of the accident to the buggy. Afterwards it turned out that the accident to the buggy occurred on a subsequent occasion. but it does not necessarily follow that because he was mistaken, or even intentionally misstated the incident about the buggy, his testimony was incorrect or false about being at the place indicated. In fact he is corroborated in part in the latter statement by Carr. who testified: "He was out there the Sunday before that. He was out there for two or three days before the day the buggy broke down. He was there Sunday, the 11th of June. I think he was there Saturday, Sunday, and Monday." It will thus be seen that the jury may well have seen fit, if left uninfluenced by the judgment of the court, to believe the defendant as to the time he was at Carr's house on the Sunday in question, notwithstanding the disparaging effect of the mistake as to the date of the buggy incident. What effect should be given to the latter when viewed in the light of all the evidence upon the fact in dispute was a question wholly committed to the jury, and the action of the court was, in effect, to withdraw it from their consideration. This was a plain invasion of the province of the jury and to the prejudice of defendant's constitutional right, for which the judgment must be reversed. People v. Murray, 86 Cal. 31, 24 Pac. 802; People v. Gordon, 88 Cal. 422, 26 Pac. 502.

2. In view of the fact that the case must go back for a retrial, we will notice one other point. Upon the question of the credibility of witnesses the court, in speaking of the evidence of the defendant, said: "In looking at his testimony, you must remember it is the testimony of an accused man. Of course, he has a powerful motive to swear himself out of this charge. We all understand that. And while you are not to disbelieve him merely because he is in that situation, still you will not shut your eyes to the fact that he has that motive, and you will govern yourselves accordingly; that is to say, you will look at his testimony by the light of that fact. You may believe it after all. That is for you, as I said before, and so it is with any other witness. The law invites your attention to the motives of the witnesses." It is contended that by this language the court clearly indicated to the jury that it was of opinion the defendant should not be believed; that the effect of this part of the charge on the ordinary mind would be "that the defendant might possibly be believed, but it was not at all probable that he would tell the truth under the circumstances." We are inclined to think this criticism not without merit, and that the learned judge transcended the proper limitation of the rule which has been established by this court. We cannot do better in this regard than to repeat what is said by Mr. Justice McFarland in

People v. Murray, supra: "We think that the court went too far in cautioning the jury against believing the defendant and the two other persons charged with the crime, although we would not be prepared to say that the judgment should be reversed for that reason. In People v. Cronin, 84 Cal. 191, it was held not to be error for a court, speaking of the credibility of a defendant, who was a witness for himself, to tell the jury that: 'You should consider his relation and situation under which he gives his testimony, the consequences to him from the result of this trial, and all the inducements and temptations which would ordinarily influence a person in his situation.' That instruction has been approved in subsequent cases, and it is now too late to question its correctness; but, if courts and prosecuting attorneys think it their duty to have an instruction on that subject in every case, they should be careful not to go further in that direction than courts have already done."

There are several other points strongly urged by appellant, but, in view of the fact that they involve questions which will not necessarily arise upon another trial, we do not deem it necessary to consider them at this time. Judgment and order reversed, and cause remanded for a new trial.

We concur: GAROUTTE, J.; HARRISON, J.

4 Cal. Unrep. 821

SMITH v. FRATT et al. (No. 18,274.) (Supreme Court of California. Sept. 29, 1894.) PREFERENCE BY INSOLVENT—SUIT TO SET ASIDE.

In an action by an assignee in insolvency to recover the value of property transferred by an insolvent debtor to defendants, findings that defendants neither knew nor believed, nor had reasonable cause to believe, that the debtor was insolvent, or made the deed in contemplation of insolvency, are sufficient to support a judgment for defendants.

Department 1. Appeal from superior court, Sacramento county; W. C. Van Fleet, Judge. Action by S. B. Smith, assignee, against F. W. Fratt and George F. Parker, to recover the value of property conveyed to the defendants before the assignment. Judgment for defendants, and plaintiff appeals. Affirmed.

D. E. Alexander, Albert M. Johnson, and Johnson, Johnson & Johnson, for appellant. Denson & Oatman, George A. Blanchard, L. S. Taylor, and S. Solon Hall, for respondents.

PER CURIAM. In January, 1887, James S. Meredith was adjudged to be an insolvent debtor, on petition of his creditors; and thereafter S. B. Smith, the plaintiff herein, was duly elected and appointed assignee of his estate. Smith qualified as such assignee, and the clerk of the court, by an instrument in writing, assigned and conveyed to him all the estate, real and personal, of the debtor.

Afterwards Smith, as such assignee, commenced this action to recover from the defendants the value of a stock of drugs and medicines alleged to have been sold and transferred to them by Meredith on December 9, 1886. The action was based upon the theory that, at the time of the transfer, Meredith was insolvent, and that it was made with a view on his part to give a preference to the defendants, who were then his creditors, and to prevent the property from coming to his assignee in insolvency, and being distributed ratably among his creditors, and that defendants, when they accepted the transfer, had reasonable cause to believe that he was insolvent, and that the transfer was made with a view to prevent his property from coming to his assignee in insolvency, and being distributed ratably among his creditors. The court found: That, at the time of the transfer, Meredith was indebted to Fratt, but not to Parker. That Meredith did not sell or deliver to Fratt the property described in the complaint, or any part thereof. That the transfer was made to Parker upon certain terms and conditions stated, and Meredith was at that time insolvent, and it was his desire to pay his debt due to Fratt in preference to other creditors, because it had been created in the purchase of this same stock of goods: "but neither Parker nor Fratt knew or believed that said Meredith was insolvent, nor did they or either of them believe, nor had either of them reasonable cause to believe, that Meredith entered into this agreement in contemplation of insolvency, or with the view of making Fratt a preferred creditor." "The defendant Parker did not purchase nor receive the transfer of said goods with the intention of giving or securing to Fratt any preference over other creditors of said Meredith, nor with intent to prevent said property from coming into the hands of the assignee of said Meredith, nor with intent to prevent the same from being distributed ratably among his creditors." Judgment was accordingly entered that the plaintiff take nothing by his action, from which, and from an order denying his motion for a new trial. the plaintiff appeals.

Three points are made for a reversal: (1) The insufficiency of the evidence to support the findings; (2) error of law in excluding certain testimony; (3) the insufficiency of the findings to support the judgment.

The first point relied upon cannot be sustained. The record shows that there was evidence sufficient to justify and support each of the findings assailed. Under the well-settled rules of this court, therefore, the judgment cannot be disturbed on this ground.

Only one error of law is complained of. When Meredith was being examined as a witness, he was asked by counsel for plaintiff, "Whom did you intend to benefit in making that transfer?" The question was ob-

jected to, and excluded by the court on the ground that it called for an opinion of the witness and was incompetent. Now, conceding that the ruling was erroneous, still we fall to see how the plaintiff was or could have been in any way prejudiced by it. The evident purpose of the question was to prove by the witness that he intended to benefit Fratt by the transfer, and in effect the court found that this was his intention. If, therefore, the question had been answered, the plaintiff's case would not have been strengthened.

The third point does not require any extended notice. The action was brought to recover the value of property alleged to have been transferred in violation of the provisions of section 55 of the insolvent act. That section provides that a transfer is void. and an assignee may recover the value of the property, when the person receiving such transfer, or to be benefited thereby, has reasonable cause to believe that the person making it is insolvent, and that such transfer is made with a view to prevent his property from coming to his assignee in insolvency. or to prevent the same from being distributed ratably among his creditors. The findings here clearly negative the fact that either Fratt or Parker believed, or had reasonable cause to believe, that Meredith was insolvent when he made the transfer, or that it was made with a view to prevent the property from coming to his assignee, or being distributed ratably among his creditors. This being so, the findings were sufficient to show that the plaintiff had no cause of action, and to support the judgment. It follows that the judgment and order appealed from must be affirmed, and it is so ordered.

8ANTA CRUZ FAIR-BUILDING ASS'N v. GRANT. (No. 15,488.)

(Supreme Court of California. Oct. 2, 1894.)
PRELIMINARY INJUNCTION—DISCRETION OF COURT.

The court's action in refusing a preliminary injunction will not be reviewed unless it shall clearly appear that there was an abuse of its discretion.

Department 1. Appeal from superior court, Santa Cruz county; F. J. McCann. Judge.

Action by the Santa Cruz Fair-Building Association against John Grant, superintendent of streets, for a preliminary injunction restraining him from selling plaintiff's property to satisfy an assessment. From a denial of its motion, plaintiff appeals. Affirmed.

Chas. B. Younger, for appellant. Z. N. Goldsby, for respondent.

HARRISON, J. Under proceedings for the extension of Front street in the city of Santa Cruz, by virtue of the provisions of the act of March 6, 1889 (St. 1889, p. 70), the

assessment had been confirmed by the city council, and placed in the hands of the superintendent of streets, and the defendant, who was such superintendent, was proceeding to collect it under the provisions of the act. The plaintiff, claiming to be the owner in fee of certain lands that had been assessed for the proposed improvement, commenced this action to obtain a judgment that the assessment was made without authority or jurisdiction on the part of the city, and that no lien upon its land was created thereby, and also that the defendant be enjoined from selling said lands to satisfy said assessment. In the complaint the plaintiff alleged. as the basis of its cause of action, that the city council had never passed any resolution describing the land deemed necessary to be taken for the extension of Front street, or specifying the exterior boundaries of the district to be affected by said improvement, and, after alleging the various steps taken under the above statute, further alleged that the defendant had advertised its lands described in the complaint for sale at public auction, and was threatening to sell the same for the purpose of satisfying said assessment. Prior to the issuance of the summons, the plaintiff moved the court upon the complaint that a preliminary injunction be granted at the time of the issuance of the summons, restraining the defendant, during the pendency of the action, from selling the land as described in the complaint. The court denied the application, and from this order the plaintiff has appealed.

The granting of a preliminary injunction is not a matter of right, but the application is addressed to the sound discretion of the court, which is to be exercised according to the circumstances of the particular case (High, Inj. § 11); and its action upon such application will not be reviewed in the appellate court unless it shall clearly appear that there was an abuse of its discretion. Upon such application a court will consider whether a greater injury will result to the defendant from granting the injunction than to the plaintiff from refusing it; and if the court is satisfied, from the nature of the action and the threatened injury, that the rights of the plaintiff will be fully conserved by granting an injunction after a hearing upon the merits, while, in case the plaintiff should fail to sustain his complaint, the injury sustained by the defendant from the preliminary injunction could not be compensated, a wise discretion would dictate its refusal. Olmstead v. Koester, 14 Kan. 467. And in granting an injunction the court is bound to consider the amount of injury which may be thereby inflicted on strangers to the suit and third parties. 1 Joyce, Inj. 497. Chancellor Walworth said, in Dyeing Establishment v. Fitch, 1 Paige, 98: "There are many cases in which the complainant may be entitled to a perpetual injunction on the hearing, where it would be manifestly improper to grant an injunction in limine. The final injunction is in many cases matter of strict right, and granted as a necessary consequence of the decree made in the case. On the contrary, the preliminary injunction before answer is a matter resting altogether in the discretion of the court, and ought not to be granted unless the injury is pressing, and the delay dangerous." See, also, Mayor, etc., v. Curtiss, Clarke, Ch. 340. "An injunction in limine is not a matter of strict right. It may sometimes be properly refused upon the same facts which would entitle the party of right to an injunction on final hearing." Akin v. Davis, 14 Kan, 143. A party seeking to enjoin a public officer from the performance of an official duty should show by distinct averments that the threatened acts of the officer will interfere with his rights to such an extent as to cause him some irreparable injury. In the present case, if the city council had no jurisdiction to authorize the extension of Front street, the assessment would create no lien upon the lands of the plaintiff, and a purchaser at the sale would acquire no title. These facts would be determined by the final decree in the action, and the rights of the plaintiff could be thereby fully protected. On the other hand, if the plaintiff should fail to sustain the allegations of the complaint, the delay in the improvement that would be caused by a preliminary injunction might work damage to the public, and injuriously affect others than the defendant. Moreover. although it is alleged in the complaint that the defendant has advertised the lands of the plaintiff for sale at public auction, it does not appear at what time the sale was to be made; and one of the grounds upon which the court denied the application was that it had "on the previous day tried and determined a case under the same assessment and involving the same points." The court may have concluded that the present action could be tried and determined before the day of sale; and it may also have been so well informed of the nature of the defense to the action as to justify it in denying the application for a preliminary injunction. Stoddart v. Vanlaningham, 14 Kan. 18. As the appellant has failed to show that the court in any respect abused its discretion, the order is affirmed.

We concur: VAN FLEET, J.; GAR-OUTTE, J.

104 Cal. 331 COULTERVILLE & Y. TURNPIKE CO. v. STATE. (No. 18,277.)

(Supreme Court of California. Oct. 2, 1894.)
ACTION AGAINST STATE—ESTOPPEL OF STATE.

Where a turnpike corporation sued the state for an infringement upon an alleged exclusive grant, occasioned by a competitive legislative grant, the fact that the act of legislature conferring authority so to sue contained a re-

cital in the introduction thereto that such exclusive privilege had been granted to the plaintiff will not preclude the state from availing itself of the defease of a denial of such grant, or of its validity, when it is clear from the language of the act that the legislature never so intended.

In bank. Appeal from superior court, Sacramento county; J. E. Prewitt, Judge.

Action under legislative authority by the Coulterville & Yosemite Turnpike Company against the state of California to recover for alleged infringement on their grant. From judgment for defendant, plaintiff appeals. Affirmed.

Mastick, Belcher & Mastick and James A. Waymire, for appellant. Atty. Gen. Hart, for the State.

FITZGERALD, J. This action brought under the authority conferred by an act of the legislature approved March 31, 1891, and is entitled "An act to enable the Coulterville and Yosemite Turnpike Company, a corporation, to sue the state of California for the loss and damage suffered and sustained by said corporation by the construction of a road by the Yosemite Turnpike Road Company, under and by virtue of an act of the legislature of the state of California, entitled 'An act granting the right-ofway to the Yosemite Turnpike Road Company over the Yosemite grant,' approved February 17, 1874, and for the relief of said Coulterville and Yosemite Turnpike Company." The facts stated in the complaint as constituting plaintiff's cause of action are the same as those recited in the preamble of the act referred to, and are alleged as follows: "(1) That the commissioners to manage the Yosemite Valley and Mariposa Big Tree Grove, by their resolution adopted the 16th day of July, 1872, together with the written agreement dated the 13th day of August, 1872, agreed with plaintiff that plaintiff should have the exclusive right to construct and maintain a wagon road on the northerly or Coulterville side of the Merced river from a point on or near Crane Flat. past the line of survey of that reservation from the public lands of the United States known as the 'Yosemite Grant,' to and upon the level of the Yosemite valley, and should have the exclusive right to maintain a road on said side of the Merced river, and collect tolls thereon, for a term of ten years from the completion thereof; whereupon plaintiff, in consideration of said agreement, and in pursuance of said resolution and agreement, proceeded to construct said road, and the same was completed on the 18th day of June, 1874, and said commissioners, on the 3d day of July, 1874, accepted the same as so completed. (2) That in the year 1874 the legislature of the state of California passed an act entitled 'An act granting the right of way to the Yosemite Turnpike Road Company to construct a toll road over the Yo-

semite grant,' approved February 17, 1874; and under and by virtue of said act said Yosemite Turnpike Road Company constructed and completed a road on the northerly side of the Merced river, from a point near Gentry's Station to a point on the level of the Yosemite valley near El Capitan, which said road was completed in the month of July, 1874; and thereupon the said Yosemite Turnpike Road Company opened the said last-mentioned road for travel, and the same was continuously traveled by the public thereafter. (3) That the said last-mentioned road was on the northerly or Coulterville side of the Merced river, and conflicted with the exclusive privilege so granted to plaintiff; and, by reason of the construction and completion of the same, the said wagon road so completed by plaintiff became and was little used, and plaintiff suffered thereby, and by reason of the premises, great loss and damage, to wit, the sum of one hundred and twenty-five thousand dollars (\$125,000)." complaint was demurred to generally, upon the ground that it did not state facts sufficient to constitute a cause of action, and specially upon other grounds, but which, in the view that we have taken of the case, are not necessary to be considered. The demurrer was overruled by the court, and thereupon the defendant answered, setting up the following defenses: (1) A denial that the alleged exclusive privilege was ever granted to plaintiff; a denial that the road built by the Yosemite Turnpike Road Company conflicted with any exclusive privilege granted to plaintiff; and a denial of any damage. (2) That the Yosemite commissioners had no power to make the alleged agreement. (3) That the court had no jurisdiction of the person of the defendant, nor of the subject-matter of the action. (4) The statute of limitations. (5) That the said act under which this action was brought is unconstitutional. The case was tried by the court, without a jury, and judgment given for the defendant. Plaintiff appeals from the judgment and the order denying its motion for a new trial.

The questions raised by the record on this appeal, and upon which the conclusion we have reached is based, are: First. Whether the alleged exclusive privilege was ever granted to plaintiff by the agreement entered into between it and the said commissioners. Second. If it was not, is the defendant estopped from showing that fact by the recital to the contrary in the preamble to the act referred to? The first proposition is disposed of adversely to plaintiff by the finding of the court that the said commissioners did not agree with the plaintiff that it should have the exclusive right to construct or maintain a wagon road on the northerly side of the Merced river. This finding is fully justified by the evidence, and will not be disturbed, unless the defendant is concluded by the recital set forth in the preamble to the act stated in the second proposition. The sole object and



purpose of that act was to empower the plaintiff to bring this action against the state; and, while it is true there is a recital in the introduction thereto that such exclusive privilege was granted to the plaintiff, yet it is perfectly clear from the reading of the act that the legislature never intended by this recital to preclude the state from availing itself of whatever defense it may have had against plaintiff's claim prior to the passage of the act. This is manifest from the language of the act itself, which provides that it shall be the duty of the attorney general "to defend said action and to interpose thereto such defenses, legal or equitable, as may exist, and which a private person under like circumstances might interpose." It is further provided that "if in said action a judgment shall be entered in favor of the plaintiff therein it shall be the duty of the attorney general to take an appeal therefrom to the supreme court of the state." If the act was susceptible of any other construction than the one we have given it, then the only question that could be determined on the trial of the case would be the amount of damages which plaintiff should recover. In disposing of the case upon these grounds, we do not wish to be understood as conceding that the commissioners had any authority whatever to grant the alleged or any other exclusive privilege. The remaining questions discussed by counsel orally and in their briefs are not necessary to be considered. Let the judgment and order be affirmed.

We concur: DE HAVEN, J.; HARRISON, J.; McFARLAND, J.

4 Cal. Unrep. 850

EGGER v. RHODES. (No. 19,286.)
(Supreme Court of California. Oct. 3, 1894.)
EXPERT EVIDENCE.

One who has been a civil and hydraulic engineer for several years is qualified to testify as an expert in matters touching civil and hydraulic engineering.

Department 2. Appeal from superior court, San Bernardino county; John S. Campbell,

Action by F. W. Egger against C. H. Rhodes to rescind a contract for the sale of land. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. W. Allen, for appellant. H. C. Rolfe, for respondent.

PER CURIAM. This is an action to rescind a contract for the sale of land. Plaintiff had judgment, and defendant appeals.

- 1. The demurrer to the complaint was general, and was properly overruled. The facts stated were fully sufficient to constitute a cause of action.
- 2. It was shown that the witness F. C. Finkle was and had been a civil and hydrau-

lic engineer for several years. This was a sufficient foundation to qualify the witness to testify as an expert in regard to the matters to which his attention was called. The objection that no opportunity was given defendant to question the witness as to his preparation for doing the work of a civil engineer, or as to any work done by him while claiming to be such, is not sustained by the record. So far as appears, no such questions, or any others, were asked or attempted to be asked by defendant for the purpose of testing the competency or skill of the witness.

3. It is earnestly insisted that the evidence was insufficient to justify the findings and decision of the court, but this point cannot be sustained. The findings cover all the issues, and are quite full and specific. To state the evidence in support of them would require a lengthy opinion, and no good would be accomplished by it. It is sufficient, in our opinion, to say that there was evidence sufficient to justify each of the findings assailed, and that the judgment cannot be reversed on this ground. We think the judgment and order appealed from should be affirmed, and it is so ordered.

104 Cal. 310

BLOOM v. HAZZARD. (No. 19,424.) (Supreme Court of California. Oct. 2, 1894.) CONTRACT—ACCEPTANCE—VALIDITY.

1. Where an offer is in writing, signed and delivered by the party making it, and is accepted, and acted upon by both parties, it is sufficiently executed to make it a binding obligation upon both, and will not be construed as a unilateral agreement.

2. An agreement by a constable to make a levy on execution issued, and to take less than his legal fees therefor, making, in his return, full charges, where the value of the property levied upon is presumably less than the Judgment and fees, is not void as against public policy.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county; W. L. Pierce, Judge.

Action by Lillian W. Bloom, as assignee of Charles M. Stetson, a constable, against George W. Hazzard, to recover certain fees. From judgment for defendant, plaintiff appeals. Affirmed.

H. S. Utley, for appellant. Carl Schutze, for respondent.

BELCHER, C. The plaintiff, as assignee of one Charles M. Stetson, brought this action to recover the sum of \$844.90, balance alleged to be due and unpaid for services rendered by Stetson as constable in the levying upon and sale of certain real property under an execution issued upon a justice's court judgment in favor of the defendant. Before any services were rendered, Stetson executed and delivered to defendant an agreement in writing, reading as follows: "San Diego, Cal., Sept. 21, 1891. I, Charles M. Stetson, constable of San Diego township,

California, agree that I will levy on the land herein described under the attached execution at the rate of \$5 per day that I am actually employed at it; charging, however, in my return, the full charges and fees allowed by law. George W. Hazzard is, however, not to pay more for my work than said five dollars per day, and ten dollars for making the return. [Signed] Charles M. Stetson, Constable S. D. Township. Alfred E. Cowles, Deputy Constable." Stetson, by his deputy, made the levy and sale, and was engaged in the work 101/2 days. The defendant bid in the property for \$1,248.10, and the return shows that the constable's fees amounted to the sum of \$928.90. On October 29, 1891, defendant paid to Stetson or his deputy \$59.85, and of this sum \$52.50 was to pay for said 101/2 days' work at the agreed price of \$5 per day, and \$7.35 was to pay certain extra expenses. Afterwards, on November 2d, defendant paid Stetson \$10, and received from him a receipt reading as follows: "San Diego, Cal., November 2, 1891. Received of George W. Hazzard the sum of \$10 in full for fees in the case of George W. Hazzard vs. Santa Rosa Land and Improvement Company. Charles M. Stetson, Constable San Diego Township." The court found that " said Stetson received and accepted said several sums of money, aggregating in the whole the sum of \$69.85, in fuli of all demands which he had against the defendant on account of his said services, and that said payments were made by defendant to said Stetson before said Stetson had made the assignment of his pretended claim to plaintiff, and that the defendant is not, and was not at the commencement of this action, indebted to plaintiff in any sum whatever." Judgment was accordingly entered that the plaintiff take nothing by her action, from which, and from an order denying a new trial, she appeals.

It is claimed for appellant that the agreement of September 21st was not a contract, and that at most it could only be considered a unilateral offer on the part of the constable, which required an unconditional acceptance to make it binding, and that "the writing as a contract in itself is void (a) because it is not executed by respondent,—that is, it does not show his assent; (b) because there is no second party to the instrument; (c) there is no mutuality of obligation or rights." writing was more than a unilateral offer on the part of the constable. It was an agreement in writing signed and delivered by him to the defendant. It was accepted by defendant, and was acted upon by both parties. This was a sufficient execution to make the writing a binding obligation, and to meet all the objections above noted. Reedy v. Smith, 42 Cal. 245.

It is further claimed that the agreement was against public policy, and was therefore void. We fail to see any valid ground on which this claim can be sustained. The agreement was not intended to work any

fraud or wrong upon any party; and, so far as appears, it cannot be classed as malum in se or malum prohibitum. It may be that the property to be levied on and sold was not worth enough to pay the judgment and the constable's legal fees for making the levy and sale, and if so there was no violation of public policy in his agreeing to take less than his legal fees. The property was not redeemed from the sale, and presumably because it was not worth what it was bid in for. It is admitted that it was orally understood that if the property should be redeemed, and the purchaser receive back the money bid, then he was to pay the constable the full amount of his fees. This was fair and just, and by the arrangement the law was in no way violated. We find no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: SEARLS, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

104 Cal. 234

RECLAMATION DIST. NO. 542 v. TURN-ER. (No. 18,248.)

(Supreme Court of California. Oct. 8, 1894.) RECLAMATION DISTRICT-INCORPORATION-COLLAT-BRAL ATTACK.

1. A corporation organized to reclaim swamps and overflowed lands is of a quasi public character, and the proceedings leading up to its creation cannot be collaterally attacked.

2. Under Pol. Code, § 3454, providing that the trustees of a reclamation district shall have power to acquire, by purchase or condemnation, a right of way, and the right to take material for the construction of all works necessary to accomplish that object, including levees and embankments, the trustees of a reclamation district may acquire levees built by the owners of land for their own protection, where such levees are necessary to the reclamation of land

within their district.

3. Where two of the three members of a board of trustees of a reclamation district are owners of different levees required for the purposes of the board, but have no interest in common therein, they are both disqualified to act in proceedings to acquire a levee belonging to

Commissioners' decision. Department 1. Appeal from superior court, Butte county; John C. Gray, Judge.

Action by reclamation district No. 542 against R. M. Turner to recover an assessment. Judgment was rendered for defendant, and plaintiff appeals. Affirmed.

H. V. Reardan, for appellant. Freeman & Bates, for respondent.

HAYNES, C. The plaintiff claims to be a public corporation, organized March 11, 1892, under the provisions of the Political Code, for the purpose of reclaiming swamp and overflowed lands, and brought this action against the defendant to recover the amount

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of an assessment made upon his lands within the district for the purpose of constructing the works necessary to reclaim the lands therein, together with certain incidental expenses connected therewith. The cause was tried by the court without a jury, and findings were filed, from which the conclusion was drawn that the defendant was entitled to judgment for his costs, and judgment was entered accordingly. The appeal is from the judgment upon the judgment roll alone.

1. The answer attacked the validity of the organization of the district as a corporation, and alleged that it had no capacity to sue. This court has repeatedly held that corporations similar to the plaintiff in this case are of a quasi public character, and that the legality and regularity of the proceedings leading up to their final creation cannot be attacked collaterally. This is the course attempted to be pursued here, and a long line of authority is opposed to it. See Quint v. Hoffman (Cal.) 37 Pac. 514, 777, and cases there cited.

The second and sixth findings of fact are as follows: "(2) That on or about the 11th day of March, 1892, plaintiff employed B. L. McCoy as engineer, as alleged in its complaint, and for the purposes therein alleged, and he, thereafter, as in said complaint alleged, did survey, plan, locate, and report a system of reclamation and an estimate of the cost of the work necessary for the reclamation of the lands in the district and of the lands needed for right of way, and the amounts estimated and reported by him were as stated in said complaint; that in such report said engineer stated that there were already existing within the district a line of old levees, which were adopted by him as a part of the system of reclamation, and which, at the date of such report, belonged to private persons, and were by such engineer reported to be thirty-eight thousand eight hundred (38,800) feet in length; and he reported that such old levees, from actual measurement, were worth \$11,156.94, and that such sum ought to be paid therefor, of which sum he recommended that \$7,987.92 be paid to persons acting as trustees of plaintiff, and that such sum be paid to the persons and in the amounts stated in defendant's answer; that said old levees are upon lands within said district, and were constructed prior to the taking of any steps for the organization of plaintiff, and were at the date of said report, and still are, the property of the persons on whose lands they are situated; that the said plaintiff has no means wherewith to purchase the title or the right to use said old levees, except by the levy and collection of an assessment upon the lands within the district; that the sum of \$2,850, referred to in said complaint, was made up of the several items and amounts stated in subdivision 2 of defendant's answer; that at the time said re-

Hoyl, William James, and E. White were trustees of plaintiff, and the said James and White were the owners of old levees adopted as part of the system of reclamation, but said James and said White had no interests in common in said old levees; that said report of said engineer was adopted by the unanimous vote of all three of said trustees." "(6) That it was at no time understood or agreed by or between plaintiff herein, or the trustees hereof, and the landowners within said district, that no landowner should receive or be entitled to any thing or sum in excess of the amount which should be assessed against his lands for benefits thereto; nor was there at any time an agreement between said plaintiff, or its trustees, and E. White that said White should not receive any sum in excess of the amount assessed against him for benefits." 3454 of the Political Code provides: "The board of trustees shall have power to elect one of its members president thereof; to appoint engineers and others to survey, plan. locate and estimate the cost of the works necessary for the reclamation of the lands of the district; to thereafter, at any time in its discretion, modify or change such original plan or plans, or adopt new, supplemental or additional plan or plans when, in its judgment, the same shall have become necessary; to acquire by purchase, condemnation or otherwise the right-of-way, and the right to take material for the construction of all works necessary for the accomplishment of that object, including drains, canals, sluices, bulk-heads, water-gates, levees and embankments, and to construct, maintain and keep in repair all works requisite and necessary to that end; and to do all other acts and things necessary or required for the reclamation of the lands embraced in the district." Here were more than seven miles of embankment already in existence. Assuming that new embankments where none existed would complete the reclamation of the entire district, the old embankments would, nevertheless, be in fact used for the accomplishment of that work. The old embankments were private property, however, built, doubtless, for the sole benefit and protection of the lands of the owner. It would therefore seem unjust that they should be used as part of an entire system for the benefit of others, as well as the owners, without being taken into the account, or that the owners should be assessed for the construction of new embankments covering the same space. We do not think it could have been the intention of the legislature that the existence of embankments within the district should prevent the full reclamation of all the lands within it, or that any part of the system should not be under the control of the corporation, as must be the case if the old embankments remain private property. If the embankments did not exist, it is clear that port was made, and ever thereafter, J. M. | a right of way for their construction could

be acquired by purchase or condemnation; nor do we see that the existence of the embankments constitutes any obstacle to the procurement of the right of way over the same ground, the embankments simply adding to the value of the right of way; or, if that be doubtful, we think it may fall within the "all other acts and things requisite or necessary" to the reclamation of the lands within the district, the words "necessary or requisite" including that which is expedient. How this can be equitably adjusted between the different land holders within the district is a question that is not before us.

2. The second point made by respondent, -viz. that two of the three trustees, being interested in the existing levees or embankments, which, according to the estimate of the engineer, constituted, in round numbers, one-half the entire cost of reclamation (aside from incidental expenses), were incapacitated by reason of their interest,-we think, must be sustained. The estimated value of the whole of the old embankments is \$11,-156.94, and of that owned by James and White, two of the trustees, \$7,987.92. Appellant insists that, as James and White were not jointly interested in any part of the old levees, as to the value of the several interests of each, two of the trustees were disinterested and competent to act, and as to the report of the engineer, upon which the assessment was based, the board of supervisors acted, the latter board being wholly disinterested and independent, and that, therefore, the proceeding is unaffected by the personal interest of these trustees. It is not necessary to assume that the engineer was partial or prejudiced in favor of the trustees who employed him, nor that his estimate of the value of the embankments was unfair, nor that the trustees, if this assessment were collected, would pay more or less than the estimated value of these embankments. The rule involved is broader and deeper, and does not require the defendant to show that he would in fact be injured. The rule is that where the personal or individual interest of an officer or agent conflicts with that of his principal, whether such principal be an individual or the public or a corporation, he cannot, unless under special circumstances, bind his principal. Appellant is mistaken in supposing that the duties of the trustees are merely perfunctory. They employ the engineer, and such employment involves selection. He could not be selected and employed by the one disinterested trustee; and in this selection and employment the personal interests of these two trustees were involved, and were in conflict with the interests of the defendant and of all who were not the owners of em-Whether the embankments shall be ultimately acquired at a less cost than the value placed upon them by the engineer does not affect the assessment based upon his estimate, nor the judgment to be rendered against respondent if the proceedings should be held valid. It may be conceded that, if but one of the trustees was interested in the old embankment, the action of the others could be sustained in any purchase that might be made of them by the district; but it would be turning a very sharp corner for James to say to White, "You and Mr. Hoyl fix the value on my embankment, and buy it for the district, and he and I will buy yours," as each would be interested to increase the price of the other's property in order to increase the price of his own; and, if condemnation proceedings were resorted to, they would be defendants while prosecuting the proceedings on behalf of the district. If we are right in holding that the old embankments can be acquired by the district, and used as part of the reclamation works, we think it must follow that, since all in the district are not owners of embankments, at least a majority of the board of trustees must be composed of nonowners of such embankments.

Some other questions are made by respondent concerning the regularity of the assessment, but these do not now require notice. We would, however, in view of possible future proceedings, call attention to section 8466, Pol. Code. as amended in 1891 (St. 1891, p. 288), which seems to have been overlooked by counsel. Under this section the cause of action did not accrue until 20 days after the date of the order made by the trustees, whereas this suit was commenced in 15 days after the order was made; nor did the order require payment in installments, as provided by said amended section. The judgment appealed from should be affirmed.

We concur: SEARLS, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

104 Cal. 213

HUNT v. BRODERICK, Auditor. (No. 15,561.)

(Supreme Court of California. Oct. 2, 1894.)
CLAIM AGAINST COUNTY — MANDAMUS TO COMPEL
AUDIT—APPEAL TO SUPERVISORS.

1. Mandamus lies to compel the county auditor to audit a valid claim against the county which has been allowed by the board of supervisors as ting within their powers.

visors acting within their powers.

2. Consolidation Act, § 92, providing for an appeal to the board of supervisors from the rejection of a claim by the county auditor, does not apply to claims already passed on by the board, or which must be presented in the first instance for its sanction.

board, or which must be presented in the first instance for its sanction.

3. Act May 17, 1861, empowers the board of supervisors to allow a sum not exceeding \$5,000 in any one fiscal year as counsel fees. Act Feb. 25, 1878, provides that the board shall not pay out in any one month more than one-twelfth of any claim allowed by law for the fiscal year.

and further provides that if, at the beginning of a month, any money remains which might have been expended in past months, it may be carried forward and expended in any succeeding months. *Held*, that the board may properly allow at one time a counsel fee of \$2,000.

Department 2. Appeal from superior court, city and county of San Francisco; Charles W. Slack, Judge.

Mandamus, on the relation of John Hunt, executor of the will of George F. Sharp, deceased, against William Broderick, county auditor, to compel the auditing of a claim against the county. From a judgment granting the writ, defendant appeals. Affirmed.

H. T. Creswell, for appellant. E. G. Knapp, for respondent.

McFARLAND, J. This is an appeal by defendant from a judgment of the superior court in a mandamus proceeding, by which the defendant, as auditor, was required to audit, allow, etc., a certain claim and demand of plaintiff against the city and county of San Francisco which had been duly passed and allowed by the board of supervisors of said city and county. The appeal is upon the judgment roll and a bill of excep-We see no good reason for disturbing the judgment of the court below. is no doubt from the evidence that the demand of respondent's intestate, Sharp. was a just one. The defenses and the points made here for reversal are in their nature technical; that is, they are based upon alleged irregularities committed by said Sharp, deceased, in presenting his demand and in prosecuting the appeal, and upon certain statutory provisions claimed to be obstructions which shut out his right of recovery.

1. Appellant objects to the form of demand, because it does not so specify the items thereof as to sufficiently comply with section 84 of the consolidation act. The demand was for legal services rendered by Sharp as an attorney in a protracted litigation, which resulted in the recovery by the city of valuable real property, viz. city slip lot No. 43. In his original petition to the board. Sharp, in reciting the history of his services, mentioned certain disbursements which in the course of the litigation he had paid out of his own pocket; and, if these are to be considered part of the demand finally allowed by the board, they were, perhaps, not sufficiently itemized. But we think the court was justified by the evidence in finding "that the said demand was and is for counsel fees alone, and was so treated and regarded, and as such allowed and approved by both the judiciary committee and the finance committee of the said board of supervisors, and as such was ordered paid by said board of supervisors, and as such allowed and approved by the mayor of said city and county, the ex officio president of said board, as such demand for counsel fees;" and there was certainly a sufficient specification of the counsel fees.

2. Where the board of supervisors have not exceeded their powers in allowing a demand, and the latter is a valid and legal claim against the county, it is the duty of the auditor to audit it, and mandamus will lie to compel him to do so. Gaslight Co. v. Dunn, 62 Cal. 589; Wood v. Strother, 76 Cal. 545, 18 Pac. 766, and cases there cited; Sweeny v. Maynard, 52 Cal. 468; Railroad Co. v. Stockton, 51 Cal. 328; Babcock v. Goodrich, 47 Cal. 488; Enkle v. Edgar, 63 Cal. 188.

3. Appellant contends that respondent should have appealed from the refusal of the appellant to audit his claim to the board of supervisors, under section 92 of the consolidation act, and that his failure to do so bars his right to a writ of mandate; and this point is the one most discussed in the briefs of counsel. The point seems to have been necessarily decided by this court in several cases adversely to the contention of appellant; but it has not been expressly mentioned in any opinion of the court to which our attention has been called. In Weed v. Maynard, 52 Cal. 460, Enkle v. Edgar, 63 Cal. 188, Gaslight Co. v. Dunn, 62 Cal. 580, and Welch v. Strother, 74 Cal. 413, 16 Pac. 22, and other cases, writs of mandate to the auditor have been sustained, or granted here originally, where no appeal had been taken to the board of supervisors, although the matter was not alluded to in the opinions; and we have not examined the transcripts and briefs in those cases to see if the point was raised. But, apart from authority, we are satisfied that where a valid legal demand has been regularly considered, passed, and allowed by the board, and the auditor has refused to audit it, he may be compelled so to do by mandamus, although the claimant has taken no appeal to the board. In the first place, if the appeal mentioned in section 92 was intended to apply to a case where the board had already passed upon and allowed the demand, the appeal would not afford a plain, speedy, and adequate remedy. In fact, it would afford no remedy at all. would have no more power to enforce its order after a second approval than before. "To supersede the remedy by mandamus, a party must not only have a specific adequate remedy, but one competent to afford relief upon the very subject-matter of his application." Babcock v. Goodrich, 47 Cal. 508. The board could not compel the specific act to be done by which alone respondent can obtain his rights. But, furthermore, we do not think that said section 92 was intended to apply, or does apply, to a case where the demand has once been passed upon by the board, and which must, in the first instance, be presented to and determined by the board itself. There is no necessity of such a construction of the section as will present the anomaly of an appeal to a tribunal of the very thing which it has already deliberately and finally determined. There are many instances where various officers of the city

and county have power, in the first instance, and without any previous action of the board of supervisors, to allow or reject demands. The auditor, for instance, is given power to allow or reject many and various kinds of demands which need not to be first presented to the board (see sections 82-85); and it is with respect to these latter demands that said section 92 provides that "if any person feels aggrieved by the decision of the auditor, or any other proper officer or officers of said city and county, except the board of education, in the rejection of, or refusal to approve or allow any demand upon the treasury presented by such person, he may appeal, and have the same passed upon by the board of supervisors, whose decision thereon shall be final." Clearly, this refers to a demand "presented" in the first instance to "the auditor or other proper officer," and which has not already been "passed upon by the board of supervisors." This construction makes the system harmonious, and gives to every claimant the right, at some time to have his demand considered by the board of supervisors, who are the final, and, as was said in Babcock v. Goodrich, supra, "the real, auditing power." Falk v. Strother, 84 Cal. 544, 22 Pac. 676, and 24 Pac. 110, cited by appellant, is not in point. Moreover, in that case the demand in question was first approved by the board of election commissioners, and, after rejection by the auditor, went to the board of supervisors for the first time on appeal.

4. The point is also made, though not very strenuously insisted on, that respondent's demand was invalid under the act commonly known as the "One-Twelfth Act." 1 We confess that we hardly see how that act can under any view be successfully applied to a case like the one at bar. By the act of May 17, 1861, the board is given the power to allow, out of the general fund, not exceeding \$5,-000 in any one fiscal year for the employment of special counsel; and it seems to be argued that because \$2,000, the amount of the demand in the case at bar, is more than one-twelfth of \$5,000, therefore it could not be properly allowed. How, then, could counsel ever be employed where the services would be worth more than one-twelfth of \$5,000? If the board be held as restricted to \$5,000 a year in the aggregate for counsel fees, it could not expend more than that amount in any fiscal year; but no such question arises here. The one-twelfth act provides that if, at the beginning of a month, any money remains which might have been expended in past months, it may be carried

forward and expended in any succeeding months; and we may assume that the court properly found that the \$2,000 was not more than the one-twelfth of the fund under such act. The evidence presented in the bill of exceptions may be assumed to be only that necessary to illustrate the exceptions taken, which did not include the point as to said one-twelfth act.

There is no other point necessary to be noticed. The judgment is affirmed.

We concur: FITZGERALD, J.; DE HA-VEN, J.

104 Cal. 326

VISALIA GAS & ELECTRIC LIGHT CO. v. SIMS et al. (No. 18,268.)

(Supreme Court of California. Oct. 3, 1894.)

Contract—Consideration—Corporations—

Lease of Franchise.

1. Where one party to a contract acquired possession of the property of the other by means of it, and induced that other party to forego for a period its possession and use, there was a sufficient consideration for the contract.

2. Where a corporation secures a franchise,

2. Where a corporation secures a franchise, by municipal grant, to operate gas and electric works, and to supply the inhabitants with the product, it becomes its legal duty so to do; and a lease of its works and privileges is ultra vires, and void as against public policy.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; William W. Cross, Judge.

Action by Visalia Gas & Electric Light Company against J. F. Sims and W. B. Morris, sureties for its lessee, Lynch. Verdict for plaintiff. Defendants appealed. Reversed.

Wm. H. H. Hart (A. R. Cotton and Nowlin & Fassett, of counsel), for appellants. N. O. Bradley and Bradley & Farnsworth, for respondent.

TEMPLE, C. The complaint charges that plaintiff leased to one Lynch, June 24, 1887, certain premises, including the plant of the Electric Light & Gas Company, for the term of two years from June 1, 1887; that Lynch agreed to take possession, manage, control. and operate the same, and to pay said company every three months during the term all the receipts of said gas and electric light business, after paying all necessary charges and expenses incurred in carrying on said business, and further agreed that the amount so paid should be sufficient to enable it to pay an annual dividend to its stockholders of 5 per cent. upon its capital stock of \$28,000, and in case of deficiency he would pay to such company every three months such further sums as would enable it to pay such dividend; that defendants became sureties by signing an agreement indorsed on said agreement of lease, whereby they agreed, if said Lynch failed to pay plaintiff such sums. or any sums which might be due, they would pay the same; that Lynch took possession of

^{&#}x27;Act Feb. 25, 1878, provides "that it shall not be lawful for the board of supervisors to authorize, pay or render payable in any one month, any demands against said treasury which shall in the aggregate exceed one twelfth part of the amount allowed by laws existing at the time of such contract, authorization or payment, to be expended within the fiscal year of which said month is a part."

the demised property, and retained it until June 1, 1889, without paying plaintiff any sums of money as rents or receipts from said business; that on the 1st of June, 1888, there became due plaintiff on said agreement \$1,-400, and on the 1st of June, 1889, the sum of \$1,400; that no part of said sums has been paid. The answer contains several defenses. (1) It denies that Lynch held possession for two years, and avers that plaintiff ejected him August 1, 1888. (2) There was no consideration for Lynch's agreement. (8) No consideration for the agreement to pay sums additional to the receipts from the business. (4) Receipts did not exceed the expenses. There was therefore a failure of consideration. (5) The contract of defendants was without consideration. (6) Failure of consideration for sureties' agreement. (7) Want of consideration again pleaded. (8) Plaintiff was incorporated to furnish gas and electricity to the inhabitants of Visalia for illuminating purposes. The alleged lease was therefore ultra vires. (9) The contract is ultra vires, and against public policy. A defense by amendment sets up the incorporation of plaintiff for specific purposes of furnishing light to the inhabitants; an ordinance procured by it from the city, authorizing it to lay pipes in the streets, and to erect masts for electric lights; the acceptance of the franchise; the construction of the works; the duty of the corporation to furnish gas and electric lights in consideration of the privileges; and its undertaking that the works shall not constitute a nuisance,—and again charges that the lease to Lynch was against public policy and void. The findings and judgment are for plaintiff. Nevertheless, the court found that the receipts from the demised property were insufficient to pay running expenses; that plaintiff was incorporated for the purpose of manufacturing coal gas, and to sell such gas and electricity to the inhabitants of Visalia, and was by ordinance authorized to lay down and maintain gas pipes in the streets of said city, and through such pipes supply the inhabitants with gas, and to erect and maintain poles, masts, and wires to conduct electricity through said city; that prior to the making of said agreement it had accepted said franchise, and had laid its pipes in the streets of said city, and erected the poles, masts, and wires, and when the lease was made was in the possession of and using said plant and said franchises; that among other restrictions imposed by such ordinance was the requirement that the works should be so constructed and used as not to become a nuisance; that no authority was conferred by said ordinance upon plaintiff to lease or assign such franchise.

1. Defendants contend that the lease and their undertaking as sureties are void, because not supported by a valuable consideration. The lease is supposed to be unsupported by a valuable consideration, because it, in terms, binds the lessee to pay over to the lessor all moneys received, over and above running expenses. Therefore, it is said, there was no chance for a profit to the lessee. His agreement to take care of and manage the works, and to guaranty a certain profit, was gratuitous. The contract bound him to do it for nothing. We need not inquire what induced Lynch to enter into a contract so one-sided. He may have had a motive which is not apparent. As matter of law, however, the contract was supported by a sufficient consideration. This may as well consist in detriment to the lessor as in profit to him. By the contract he acquired possession of the property for two years, and induced plaintiff to forego for the same period its possession and use. Who can say that plaintiff could not and would not have realized a profit from the property, but for the lease?

2. The main defense, however, is that the lease is ultra vires, and against public poli-The real question presented is not that the lease is ultra vires as to the corporation, but that, plaintiff having availed itself of the franchise granted it by the city of Visalia, it became its legal duty to operate its gas and electric works, and to supply the inhabitants with gas and electricity, and it was therefore against public policy to lease those works and privileges to Lynch, and thus disable itself for the time from performing its duty. This proposition is clearly maintained in Thomas v. Railroad Co., 101 U.S. 71. That was the case of a lease of a railroad and franchise. The court said. speaking through Mr. Justice Miller: "Where a corporation like a railroad company has granted to it by charter a franchise intended in large measure to be exercised for the public good, the due performance of those functions being the consideration of the public grant, any contract which disables the corporation from performing those functions,which undertakes, without the consent of the state, to transfer to others the rights and powers conferred by the charter, and to relieve the grantees of the burden which it imposes,-is a violation of the contract with the state, and is void as against public poli-This doctrine is asserted with remarkable clearness in the opinion of this court, delivered by Mr. Justice Campbell, in Railroad Co. v. Winans, 17 How. 30. * * * "This conclusion [argument] implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use, and its powers of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation, to enable it to provide facilities for communication and intercourse required for the public convenience. Corporate management and control over these

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were prescribed, and corporate responsibility for their insufficiency provided as a remuneration to the community for their grant. The corporation cannot absolve itself from the performance of its obligations without the consent of the legislature." This case was cited and approved in Green Bay & M. R. Co. v. Union Steamboat Co., 107 U. S. 198, 2 Sup. Ct. 221, and in Oregon Ry. & Nav. Co. v. Oregonian Ry. Co., 130 U. S. 1, 9 Sup. Ct. 409. So, too, the customers are interested in having a responsible party to deal The city has provided such a party in its contract with the corporation, for such it has been held to be. People v. Chicago Gas-Trust Co., 130 Ill. 268, 22 N. E. 798; Gibbs v. Gas Co., 130 U. S. 411 9 Sup. Ct. 553. The same conclusion is reached upon the principle that they cannot delegate functions and powers given to "Delegatus non potest delegare." The subject is extensively discussed in Mor. Priv. Corp. §§ 656, 1114, 1116, 1129. In the last section he says that the principle applies to gas companies. The author's conclusions accord with the cases above cited. In fact, respondent has furnished no cases to the contrary.

It is said, however, that when a contract which was ultra vires has been performed by one party the other is then estopped to plead that the contract was ultra vires. Here, however, the contract was void because against public policy. In such cases, courts will not give relief to either party. Respondent contends that the rule is different as to corporations, and some cases seem to sustain the claim. It is impossible to see why there should be a difference in such cases because one party is a corporation. It is sometimes said, however, that a contract of a corporation is against public policy when it is simply ultra vires, because it is against public policy that a corporation should assume to exercise powers not granted. In such case it is simply an executed ultra vires contract. But it may also be an attempt to do that which is unlawful without reference to the corporate franchise, -a contract which would be unlawful in a natural person. In such case the contract of the corporation is subject to the same rule which obtains in the case of individuals. But it would make no difference here. The lessee, it is found, made nothing from the lease. The rule is the same that it would have been had the corporation been sued. Says Morawetz (section 715): "If money or property is given to a corporation under a contract which is void because the agent assuming to represent the corporation in the transaction had no authority to bind it, the corporation is liable to account for the money or other property received. * Thus, in Burges and Stock's Case, 2 Johns. & H. 441, the directors of a life assurance company had issued policies of marine insurance, and applied the premiums to the use

of the company. Upon winding up the company the holders of the policies were held not to be entitled to prove for losses, but were allowed the amount of the premiums paid. Vice Chancellor Page-Wood said: 'They had no consideration for the premiums they paid. The directors, it is true, had no power to issue marine policies, but they had power to receive money, and apply it for the benefit of the company. It is proved that they did so receive and apply these premiums, and the amount might have been recovered, even at law, as money had and received." So, he says, a corporation cannot be charged with a loan of money made by its directors without authority, but if any portion of the money has been applied to the proper uses of the company it may be held liable to that extent at least. It is said: "The liability of the company does not, in such case, arise from the contract entered into by the directors, but from the equitable right of the lender to recover his money, which has gone to swell the company's assets." I think this is the principle which underlies most of the cases upon this subject, although forced to admit that some are not consistent with it. This action is on the contract to recover an amount of money which the lessee guarantied the property would pay, but which it did not. It is not for any amount of benefit which he received from the contract. It is found that he received no benefit upon it. The fact that there was a consideration which would prevent the contract from being a nudum pactum for the want of it does not make a case of benefits to be paid for, where a contract is ultra vires: and the contract, being against public policy, should not be enforced. I recommend that the judgment be set aside. and judgment on the findings ordered for defendants.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is set aside, and judgment on the findings ordered for defendants.

104 Cal. 272

Ex parte ROACH. (No. 21,117.)
(Supreme Court of California. Sept. 29, 1894.)
Intoxicating Liquors—License from City—
County Supervisors.

A person carrying on the liquor business within a city, who has received a license from the city, and is acting in conformity with its ordinances, cannot be prosecuted for a failure to observe the provisions of an ordinance of the supervisors of the county in which the city is situated, requiring liquor stores to be closed at a certain hour.

In bank.

Application by William M. Roach for a writ of habeas corpus. Writ allowed.

Horace L. Smith, for petitioner. S. Solon Holl, for respondent.

HARRISON, J. The petitioner is held by the sheriff of Kings county under a warrant of arrest issued by a justice of the peace of Lucerne township, in that county, upon a complaint charging him with having on the 13th of April, 1894, sold at his saloon, in the city of Hanford, certain intoxicating liquor, in violation of an ordinance of the board of supervisors of Kings county. The ordinance which the petitioner is charged with violating is entitled "An ordinance for the purpose of regulation, relating to saloons and other places where intoxicating liquors are sold, given away, or in any manner disposed of," and makes it unlawful for any person to sell any intoxicating liquor at a saloon between the hours of 10 o'clock p. m. and 5 o'clock a. m. of the succeeding day. The city of Hanford is a municipal corporation of the sixth class, organized under the municipal government act of March 13, 1893, and had prior to the 13th of April, 1894, passed an ordinance providing for the issuance of licenses for the sale of intoxicating liquors. The petitioner had complied with the provisions of this ordinance, and had received from the city of Hanford a license to carry on the business of retailing liquor within that city, which was in force at the time of his arrest. It is contended on the part of the petitioner that he is illegally held, for the reason that the supervisors of Kings county are without any police authority within the city of Hanford; that the ordinance passed by that body under which he was arrested is limited in its operation to those portions of the county not included within the boundaries of any municipality therein.

A municipal corporation can exercise only such powers as have been expressly or by necessary implication conferred upon it by law. These powers are to be found in its charter, or in some provision of the statute or constitution of the state wherein it is organized. Any ordinance passed by it within the scope of the authority expressly conferred upon it has the same force within the corporate limits as a statute passed by the legislature itself has throughout the state. 1 Dill. Mun. Corp. § 308; Village of Carthage v. Frederick, 122 N. Y. 268, 25 N. E. 480. Each derives its authority from the same source, and is an exercise of legislative power which has been conferred by the people. In the one case the power is exercised directly by the legislature, and in the other it is the exercise of a delegated power which has been authorized by the constitution, but in both cases the source of the power is the same. Any inconsistency between the two is to be resolved in favor of the ordinance, upon the principle that of two statutes containing inconsistent provisions that which is later in date is a repeal by implication of the earlier one, and upon the further principle that a statute making particular provision for a designated object or district will be

deemed to contain the legislative will for that object or district, and will prevail over a general law applicable to the state at large. State v. Clarke, 54 Mo. 17; State v. Clarke, 25 N. J. Law, 54; St. Johnsbury v. Thompson, 59 Vt. 300, 9 Atl. 571; Daw v. Board, 12 C. B. (N. S.) 161; Suth. St. Const. § 140. The adoption of the ordinance, being the exercise of a delegated legislative power, is to be construed with the same effect as if it had been adopted by the legislative power itself. Upon this principle, ordinances passed by a municipality whose territory is included within a county will supersede any ordinance of the county upon the same subject. Each being the exercise of a legislative power derived from the same source, is to be construed as though each had been the exercise of that power by the legislature itself.

Section 6 of article 11 of the constitution provides: "Corporations for municipal purposes shall not be created by special laws; but the legislature by general laws shall provide for the incorporation, organization and classification in proportion to population of cities and towns, which laws may be altered, amended or repealed." Under this authority the legislature, in 1883 (St. 1883, p. 93), adopted a municipal government act for the incorporation and organization of cities. Section 1 of this act provides: "Any portion of a county containing not less than five hundred inhabitants, and not incorporated as a municipal corporation, may become incorporated under the provisions of this act, and when so incorporated shall have the powers conferred, or that may be hereafter conferred by law, upon municipal corporations of the class to which the same may belong." By virtue of this act the city of Hanford has been carved out of the territory of Kings county, and organized into a city with the powers conferred by the act. Section 11 of article 11 of the constitution provides: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." The power to make these regulations is by this section conferred upon the city as well as upon the county, and must be held to be equally authoritative in each. It is a portion of the lawmaking power which the people through their constitution have conferred upon these respective bodies, and its exercise is entitled to the same consideration and to receive the same obedience as that portion of the same power which by the same instrument has been conferred upon the legislature. The regulations made under this authority are none the less a part of the law because the authority to make them is conferred immediately by the constitution than if it had been conferred immediately through an act of the legislature. The only limitation upon the exercise of the power is that the regulations to be made under it shall not be "in conflict with general laws." As this limita-

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tion applies equally to regulations of the county and the city, it cannot be held by the terms of the limitation that the regulation of either of these bodies is a general law for the other; and it is held that an ordinance passed by a county is not a "general law." within the meaning of this section of the constitution. Ex parte Campbell, 74 Cal. 25, 15 Pac. 318. The constitution recognizes the division of the state into counties, and has authorized the legislature to establish for them a uniform system of government; but it has also authorized the creation of other municipalities within the boundaries of the several counties, and has given to such municipalities the same power of legislation upon these enumerated subjects as is conferred upon the counties themselves; and the power thus conferred by the constitution is to be construed, if possible, in such a way as to give full effect to its exercise by each of the designated bodies. It is no more necessary that there be a conflict between the power thus to be exercised by the county and the city than if the authority of each had been derived through an act of the legislature. It is not to be supposed that it was the intention of the people, through their constitution, to authorize a county to exercise the same power within the territory of the city as the city itself could exercise, or to confer upon the county the right to interfere with or impair the effect of similar legislation by the city itself. Mr. Dillon says (section 184): "There cannot be at the same time within the same territory two distinct municipal corporations exercising the same powers, jurisdictions, and privileges." Full effect can be given to the section by holding that each has been given the exclusive right of legislation within its own particular boundaries. By the organization of a city within the boundaries of a county, the territory thus organized is withdrawn from the legislative control of the county upon the designated subjects, and is placed under the legislative control of its own council; and the principle of local government which pervades the entire instrument is convincing of the intention to withdraw the city from the control of the county, and to deprive the county of any power to annul or supersede the regulations of the city upon the subjects which have been confined to its control. In Ex parte Wolters, 65 Cal. 269, there was nothing in the record to indicate whether the ordinance then under consideration was for the purpose of revenue or regulation, or for both. In their brief, counsel for the petitioner expressly stated that the purpose of the writ was to test the question of the power of the board of supervisors to exact from persons transacting business in the county a license tax for revenue purposes. The right of the county of Butte to exercise within any city in the county the police power conferred by section 11 of article 11 of the constitution was not presented or considered by the court, and counsel expressly disclaimed any intention to argue that question. It did not even appear that the sale of the liquor for which the defendant was under arrest was made within the limits of any city. In Ex parte Campbell, 74 Cal. 25, 15 Pac. 318, where an ordinance of the city of Pasadena prohibiting the sale of wines or liquors in saloons and barrooms was under consideration, it was held that any regulations of the county of Los Angeles could not have the power to divest the authorities of the city of the right to legislate upon the same subject, and enforce such regulations within the city limits. In re Lawrence, 69 Cal. 608, 11 Pac. 217, presented the single question whether the county as well as the city had the right to collect a license tax for the business of selling liquor, and did not involve any question of the exercise of a police power. We are clearly of the opinion that the ordinance of the board of supervisors of Kings county is inoperative within the city of Hanford, and that the petitioner is illegally restrained of his liberty, and must be discharged; and it is so ordered.

We concur: BEATTY, C. J.; DE HAVEN, J.; FITZGERALD, J.; VAN FLEET, J.

Ex parte SCHERRER. (No. 21,160.) (Supreme Court of California. Sept. 29, 1894.)

In bank.
Application by George Scherrer for a writ of habeas corpus. Writ allowed.

William A. Bowden, for petitioner.

PER CURIAM. Upon the authority of Exparte Roach (No. 21,117) 37 Pac. 1044, this day decided, the petitioner is discharged.

104 Cal. 390

JOHNSTON v. BOARD OF SUP'RS OF GLENN COUNTY. (No. 13,295.)

(Supreme Court of California. Oct. 5, 1894.)
HIGHWAYS-REPORT OF VIEWERS.

Pol. Code. § 2088, provides that, after hearing the report of viewers in the laying out of a highway, the supervisors must declare the report to be approved or rejected in whole or in part. Held, that where, under a bill of review directed to a board of supervisors, it appears that a viewers' report is regular on its face, and the only question raised is whether the report was true, the action of the supervisors in approving the report will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Glenn county; Seth Millington, Judge.

Application by Mary S. Johnston for a bill of review commanding the board of supervisors of Glenn county to return proceedings laying out a road. The writ was dismissed, and the petitioner appeals. Affirmed.

Charles L. Donohoe, for appellant. Geo. D. Dudley and F. C. Lusk, for respondent.

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VAN CLIEF, C. On the petition of plaintiff the superior court of Glenn county issued a writ of review to the defendant board, commanding it to certify and return to that court all its proceedings in laying out and establishing a public road upon plaintiff's land. It is not disputed that the defendant obeyed the writ by returning certifled copies of all matters of record, and all matters required to be recorded, relating to the laying out and establishing of said road. showing among other things that the board duly appointed three persons, Stockwell, Knock, and Armstrong, as viewers of the proposed road, a majority of whom-Armstrong and Knock-reported to the board that they had viewed and surveyed the proposed road, and that they recommended that it be established and opened. The board approved the report of the viewers. and ordered the road "to be opened as a public road according to law," and declared the amount of damages awarded to each nonconsenting landowner, and that the amount awarded to plaintiff for damages was \$1,010. The court below found that in the matter of laying out the road the defendant had not, in any respect, exceeded its lawful jurisdiction, and thereupon dismissed the writ.

For the alleged purpose of showing that the report of the viewers was null and void, the plaintiff, on the trial, offered as evidence the ex parte affidavit of W. H. Sale, clerk of the board, to the effect that, on the hearing of the report of the viewers by the board, he heard Armstrong, one of the signers of that report, testify under oath that he (Armstrong) did not "survey or lay out, or help to view or survey or lay out, said road, as contained in the report of the viewers upon which said board of supervisors was acting." This affidavit was objected to by defendant on several grounds. The court sustained the objection, and plaintiff excepted. Whether or not the court erred in excluding Sale's affidavit is the only question properly presented for decision on this appeal. The bill of exceptions shows, however, that, after Sale's affidavit was ruled out, plaintiff "offered to prove" by additional affidavits and by parol testimony that Armstrong did not view the road, and that the official written report of the viewers was false in that respect; but it does not appear that any witness or additional affidavit was produced or offered for this purpose, nor that there was any ruling by the court, or exception by plaintiff, relating to this offer. The bill of exception shows that a day was fixed for hearing the report of the viewers, and notice thereof given, in full compliance with section 2688 of the Political Code, which section, in addition to requiring a day for the hearing to be fixed, and notice thereof to be given, further provides: "The board must, on the day fixed for the hearing, or to which it may be postponed or continued, hear the evidence offered by parties interested for or against the proposed alterations or new road, and must ascertain and by order declare the amount of damage awarded to each non-consenting land-owner over whose land they shall order the road to be opened, whether known or unknown, and declare the report of the viewers to be approved or rejected, in whole or in part." I think it clearly appears that by virtue of this provision of the Code the board acquired jurisdiction to hear and determine all questions relating to the report of the viewers, and to approve or reject that report either wholly or in part. That report was regular and valid upon its face, and the only question raised in regard to it was whether or not it was true,-a question of fact to be resolved according to the weight of evidence. If, as contended, the conclusion or finding of the board upon this issue was contrary to the evidence, it was merely an error committed in the exercise of unquestionable jurisdiction, and is therefore beyond the reach of a writ of review. Central P. R. Co. v. Placer Co., 34 Cal 861, 46 Cal. 670; Buckley v. Superior Court, 96 Cal. 119, 31 Pac. 8; Farmers' & Mechanics' Bank v. Board of Equalization, 97 Cal. 327. 32 Pac. 312. But, even if such an error could have been corrected upon a writ of review, all the evidence applicable to the issue must have been brought before the court of review, in some officially authenticated form, as part of the record of the board. In this case it does not appear that any part of the testimony of the 10 witnesses that appear to have testified before the board was reduced to writing; and though the clerk of the board, W. H. Sale, whose affidavit was rejected, certified that his official return to the writ of review was "a full, true, and correct copy of the original proceedings of the board of supervisors of Glenn county, * * * as the same remain of record and on file in my office," yet no part of the testimony of witnesses is contained in that return; and the court was not asked to order any amended or additional return, but only to make Sale's unofficial affidavit as to what one of the 10 witnesses testified a part of the record which he had officially certified to be full, true, and correct. I think the judgment should be affirmed.

We concur: HAYNES, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

HARRISON, J. I concur in the judgment. Upon the face of the return to the writ the proceedings of the board of supervisors were regular, and nothing to the contrary is suggested by the appellant. The only point urged by her as error is the refusal

of the court to allow the return to be amended by an ex parte affidavit that there was testimony before the board of supervisors to the effect that one of the signers of the report did not view or lay out the The affidavit did not purport to road. state that the viewer did not act, but that some persons had stated that he did not act. It needs no argument to show that a return cannot be amended in this manner. Whether the board of supervisors acquired jurisdiction of the proceedings is a question which is not presented by the record before us, and upon which no opinion should be expressed. I am not prepared to hold that the mere fact of giving the notice required by the statute vests the board of supervisors with such jurisdiction over the proceedings as to preclude the right to show that the purported report, upon which their right to give such notice rests, was false. This is entirely different from attempting to show that after the jurisdiction had been acquired they decided erroneously upon the evidence before them (Central P. R. Co. v. Placer Co., 34 Cal. 361), or that evidence was improperly received by them (Id., 46 Cal. 670).

(104 Cal. 802)

CHAPMAN et al. v. HUGHES. (No. 18,246.) (Supreme Court of California. Oct. 2, 1894.) PARTHERSHIP—WHAT CONSTITUTES - DISSOLUTION -FIRM PROPERTY.

1. Where persons entering into a joint business enterprise contract to do all that in law is

necessary to constitute a partnership, they are a partnership inter se, though they did not expressly intend to create such relationship.

2. Under Civ. Code, §§ 2401-2403, providing that property contributed by the partners shall be partnership property, the fact that they agree to retain the "title" in themselves separately is impressed.

arately is immaterial.

3. Where three persons enter into a partnership for the sale of land, the assignment by two of the partners of their interest in the partnership property to the third, and the enter-ing into of another agreement for the division of the proceeds, is a dissolution of the partner-

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Action by W. S. Chapman and another against Thomas E. Hughes. There was a judgment for defendant, and plaintiffs appeal.

Maxwell, Dorsey & Soto, for appellants. L. L. Cory, for respondent.

VAN FLEET, J. This is an action for an accounting with reference to certain real-estate transactions in which plaintiffs claim to be interested with defendant as partners, and in which it is alleged large profits were made. and appropriated by defendant, who refused to account. Findings were in favor of defendant upon all the issues, upon which judgment was entered in his favor, and plaintiffs appeal upon a bill of exceptions. The pleadings and findings are voluminous, but, from the view

we take of the questions involved, no extended statement of the facts is required.

1. On the question whether the 5,120-acre tract was bought by Hughes for himself, or for joint account of himself and the plaintiffs as copartners, and held in trust for the partnership, the court finds "that the defendant and plaintiffs were not at any time the owners or seised in fee of any of the pieces, parcels, or tracts of land described in paragraph 3 of the amended complaint, or any portion thereof, as copartners; that no portion of any of said land stood at any time in the name of Thomas E. Hughes for the use and benefit of the plaintiffs, and no portion of said property at any time stood in the name of the defendant, Thomas E. Hughes, in trust or otherwise for the parties to this action as copartners, or in any other way,-the fact being that Thomas E. Hughes was the owner and entitled to the sole and absolute possession of the whole thereof in fee simple." A careful examination satisfies us that the evidence upon this question, while possibly preponderating to some extent in favor of plaintiffs, is substantially conflicting, and the finding cannot, therefore, be disturbed. This finding being sustained, the entire claim of plaintiffs based upon the contention that there existed between the parties a partnership in this particular tract, independently of the syndicate agreement, must fall to the ground.

2. The syndicate agreement did, in our judgment, constitute a partnership, within the definition of section 2,395 of the Civil Code. It created an association of three persons for the purpose of carrying on together the business of selling the lands, and dividing the profits of that business between them. It contemplated united action in advertising and otherwise in promoting sales, and a joint expense to be incurred thereby, and further expressly provided for the payment to the syndicate of commissions on sales of other lands than those put into the syndicate. This was sufficient to constitute the relation that of partnership. Whether the parties knew that they were partners or not, they certainly intended and contracted to do all that in law is necessary to create a partnership. The relation of partnership may be established although the parties may not expressly intend to create such relationship. Pars. Partn. p. 86; Duryea v. Whitcomb, 31 Vt. 395. The respective parcels of land embraced in the syndicate were contributed by the respective partners, and thereby became partnership property. Civ. Code, \$\$ 2401-2403. This was not affected by the agreement that each partner should retain his title; they held the legal title in trust for the partnership use.

But the court finds that the relationship of the parties under the syndicate agreement was in effect dissolved, and their rights thereunder determined, by the subsequent agreement entered into between the defendant and each of the plaintiffs, separately, in 1883; and this, we think, was their substantial effect.

The mere assignment by one partner to another partner of his interest in the partnership property does not, it is true, dissolve the partnership (Civ. Code, § 2450); and the two agreements of 1888, so far as they operated merely to convey the land, did not, therefore, dissolve the partnership. But as these two agreements operated to vest in defendant the whole beneficial ownership of the land contributed by the plaintiffs to said partnership. and provided for the distribution of the proceeds in a manner different from, and inconsistent with, that provided by the syndicate agreement, the defendant became thereby the owner of the whole capital originally contributed by the plaintiffs, and those agreements must, therefore, be deemed a dissolution of the partnership so far as the plaintiffs are concerned. Plaintiffs are therefore not entitled to any profits made after that time, so far as the syndicate agreement is concerned, and, as the court finds that no profits were made prior to that time, they must be remitted to their rights under their separate agreements, under which it was found all the sales were made. Those rights are not involved in this action, and cannot, therefore, be determined herein. The judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

104 Cal. 298

BARNETT v. BARNETT et al. (No. 18,303.) (Supreme Court of California. Oct. 2, 1894.) Construction of Deed—Life Estate—Heirs of the Body—Habendum Clause—Effect.

1. Under Civ. Code, § 779, providing that. "when a remainder is limited to the heirs or heir of the body of a person to whom a life estate in the same property is given, the persons who on the termination of the life estate are the successors or heirs of the body of the owner for life are entitled to it by virtue of the remainder so limited, and not as mere successors of the owner for life," a deed, in printed form, purporting to "give, grant, alien, and confirm to the party of the second part, and to his heirs (and assigns, forever)" certain lands, to have and to hold "unto the party of the second part (his heirs and assigns, forever) for and during his natural life, and to the issue and heirs of the body of the said party of the second part," in which the words in parentheses were erased, and all following the last parenthesis was added in writing, conveys a life estate only to the grantee.

2. Where from the whole deed it appears that the grantor intended by the habendum clause to restrain, limit, or enlarge the estate named in the granting clause, the habendum

named in the granting clause.

3. The use of the word "heirs" in a granting clause is not repugnant to a habendum clause creating a life estate, since by Civ. Code, § 1072, the same estate would pass whether the word was inserted or omitted.

word was inserted or omitted.

4. Civ. Code, § 763, providing that "every estate which at common law would be adjudged to be a fee tail is a fee simple," does not apply to an instrument conveying only a life estate, though at common law it would convey a fee tail.

Department 1. Appeal from superior court, Fresno county; M. K. Harris, Judge. Cal.Rep. 35-37 P.—66

Action by F. Joseph Barnett against Lena Barnett and others to establish a fee-simple estate under a certain conveyance, and to restrain defendants from claiming any interest therein. Judgment for defendants, and plaintiff appeals. Affirmed.

Stanton & Carter and E. D. Edwards, for appellant. J. W. Knox and S. S. Wright, for respondents.

HARRISON, J. March 14, 1890, B. B. Barnett executed to the plaintiff herein a deed of conveyance of certain lands in Fresno county, by which he purported to "give, grant, alien, and confirm unto the said party of the second part, and to his beirs (and assigns, forever), all those certain lots, pieces, or parcels of land, * * * to have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part (heirs and assigns, forever), for and during his natural life, and to the issue and heirs of the body of the said party of the second part." The instrument was upon a printed form, and the above words in parentheses were erased therefrom, and the words in italics were inserted in writing. The defendant Lena Barnett is the daughter and sole issue of the plaintiff, and the other defendants are his brothers and sisters. The plaintiff claims that, by the aforesaid instrument, the lands therein described were conveyed to him in fee; and as the defendants claim that he took thereby only a life estate, and that at his death the heirs of his body will take the fee, he brought this action to procure a judgment in accordance with his said claim, and to restrain the defendants from making any claim thereto. A demurrer to the complaint was sustained by the court below, upon the ground that it failed to state a cause of action, and from the judgment entered thereon the plaintiff has appealed.

At the common law, by what is commonly called the "Rule in Shelley's Case," the above instrument would undoubtedly be construed as giving to the plaintiff the fee in the lands, and, if it had been executed prior to the adoption of the Civil Code, would have received the same construction in this state. Norris v. Hensley, 27 Cal. 439; Estate of Utz, 43 Cal. 200. Section 779 of the Civil Code, however, provides: "When a remainder is limited to the heirs or heirs of the body of a person to whom a life estate in the same property is given, the persons who on the termination of the life estate are the successors or heirs of the body of the owner for life are entitled to it by virtue of the remainder so limited to them, and not as mere successors of the owner for life." The effect of this section is to abrogate the rule in Shelley's Case, and, with other sections in the Civil Code, to furnish the rules by which to determine the estate or interest in the lands which the plaintiff took by virtue of the

grant Civ. Code, § 4. Section 1105 declares that "a fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended;" and, if it does appear from the grant that a lesser estate was intended, no such presumption exists. A grant is to be interpreted in the same manner as any other contract (section 1066), so as to give effect to the intention of the parties, if that intention can be ascertained (section 1636); and, for the purpose of ascertaining that intention, "the whole of the contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other" (section 1641). The intention, it is sometimes said, is to be gathered from the four corners of the instrument, and, in case of a grant, the habendum, as well as any other portion of the instrument, is to be considered. The ordinary use of the habendum is to define or limit the quantity of interest. or the estate which the grantee is to have in the property granted, and, although usually made a separate portion of the instrument, is not necessarily so, but may be wholly omitted, and the interest or estate granted may be defined or limited in the premises or granting part of the conveyance. Montgomery v. Sturdivant, 41 Cal. 290. The rule that, if the habendum is repugnant to the premises, it is to be disregarded, is only another form of the rule that, "if several parts of a grant are absolutely irreconcilable, the former part prevails." Civ. Code, § 1070. The intention of the parties to the grant is to be gathered from the instrument itself, and determined by a proper construction of the language used therein; but, for the purpose of ascertaining this intention, the entire instrument, the habendum as well as the premises, are to be considered; and, if it appear from such consideration that the grantor intended by the habendum clause to restrict or limit or enlarge the estate named in the granting clause, the habendum will prevail over the granting clause. Faivre v. Daley, 93 Cal. 670, 29 Pac. 256; Pelissier v. Corker (Cal.) 37 Pac. 465. "It is in such case to be considered as an addendum or proviso to the conveyancing clause, which, by a well-settled rule of construction, must control the conveyancing clause or premises, even to the extent of destroying the effect of the same." Bodine v. Arthur, 91 Ky. 53, 14 S. W. 904.

Taking into consideration the whole of the instrument under discussion, it is clear that it was the intention of the grantor that the habendum should operate as a proviso or limitation to the granting clause, and control it to the extent of limiting the estate conveyed to the plaintiff to a life estate, with a remainder to the issue and heirs of his body. The use of the word "heirs" in the granting clause creates no repugnance between that clause and the habendum, since the same estate would pass to the plaintiff whether

this word were inserted or omitted (Civ. Code, § 1072); and the subsequent limitation in the habendum shows that the grantor did not intend by its use to create an estate in fee in the plaintiff. Henderson v. Mack, 82 Ky. 379. No present estate would pass to the "heirs" (Hall v. Leonard, 1 Pick. 27); and at common law the use of this word would have had the effect merely to create a fee, instead of a life estate. By section 779, Civ. Code, the term "heirs" is changed from a word of limitation to one of purchase, and becomes a specific designation of a class which will have the right to the property upon the termination of the life estate. Upon that event they take the property, not by descent or as successors of the plaintiff, but by virtue of the remainder which was created for them at the execution of the deed to him. This remainder, although not capable of immediate enjoyment (Id. § 690), and therefore denominated a "future interest," is, nevertheless, an estate in the property capable of being transferred in the same manner as a present interest (Id. § 699).

Counsel for appellant states in his brief that the only question on this appeal is "whether the deed in question conveyed an estate in fee simple to plaintiff, or a life estate to plaintiff, with remainder in fee to the issue and heirs of his body;" and we therefore limit our decision to this proposition, and hold that by the instrument in question a life-estate only was conveyed to the plaintiff. Section 763 of the Civil Code has no application. This section provides that "every estate which would be at common law adjudged to be a fee tail is a fee simple." It does not provide that every instrument which at common law would be construed to create an estate tail shall be construed to create a fee simple, but that the "estate" which would be adjudged a fee tail is a fee simple. The rule of construction is defined in section 4 of the Civil Code; and we have seen that, upon a proper construction of the instrument in question, only a life estate was conveyed to the plaintiff. Being a life estate only, it is not an estate of inheritance, and hence cannot be an estate tail. As was said in Bodine v. Arthur, 91 Ky. 56, 14 S. W. 904, with reference to a similar statute: "To construe the statute as raising this life estate to the dignity of a fee-simple estate would be absurd, and would wholly defeat the object of the grantor." The judgment is affirmed.

We concur: GAROUTTE, J.; VAN FLEET, J.

104 Cal. 340

PORPHYRY PAVING CO. v. ANCKER. (No. 19,423.)

(Supreme Court of California. Oct. 3, 1894.) STREET IMPROVEMENTS—POSTING OF NOTICE.

Act March 18, 1885, as amended March 31, 1891, referring to work upon streets, provides that a resolution of intention by the city

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council shall be posted and published for a period of two days, and that "thereupon" the street superintendent shall post a more particular notice along the line of the contemplated improvement. *Held*, that "thereupon" is not used in the sense of "immediately thereafter," and it is sufficient if the latter notice be posted within a reasonable time.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county; George E. Otis, Judge.

Action by the Porphyry Paving Company against L. Ancker to enforce a street assessment. From a judgment for plaintiff, defendant appeals. Affirmed.

Charles R. Gray, for appellant. C. T. H. Palmer and F. W. Gregg, for respondent.

VANCLIEF, C. Action to enforce a street assessment against defendant's land situate in the city of San Bernardino. The judgment of the lower court was in favor of the plaintiff, and the defendant has appealed therefrom, and from an order denying a new trial.

1. Appellant contends that the court erred in overruling his demurrer to the complaint on the grounds that it does not state a cause of action, and that it is ambiguous and contradictory. The complaint appears to be neither ambiguous nor contradictory, and I think it states a cause of action. But it is contended by counsel for appellant that it is deficient in several respects, only one of which, however, is sufficiently plausible to merit special consideration. The third section of the act of March 18, 1885, "To provide for work upon streets, lanes, alleys," etc., as amended March 31, 1891 (St. 1891, p. 196), provides: "Before ordering any work to be done * * * the city council shall pass a resolution of intention so to do, and describing the work, which shall be posted conspicuously for two days on or near the chamber door of said council, and published by two insertions in one or more daily, semiweekly or weekly newspapers published and circulated in said city, and designated by said council for that purpose. The street superintendent shall thereupon cause to be conspicuously posted along the line of said contemplated work or improvement * * notices of the passage of said resolution. * * * He shall also cause a notice, similar in substance, to be published for six days," in designated newspapers. It is properly alleged in the complaint that the resolution of intention was posted and published for two days in the manner required, "said posting being continuous from January 6, 1892, to January 16, 1892, * * * said publication being on the sixth, seventh, and eighth days of January, 1892; * * * and that upon the 26th day of March, 1892, the street superintendent of said city caused to be posted, along the line of said contemplated work," the notice required to be posted by him, and caused a similar notice to be published in a newspaper, etc. The point made by appellant is

that it should have been alleged that the street superintendent posted and published the notice required to be posted by him immediately after the expiration of the twodays publication of the notice posted on the chamber door of the council, whereas it is alleged that the notices required to be posted and published by him were posted and published March 26, 1892,-more than two months after the two-days publication. It is contended that the word "thereupon," in the sentence, "The street superintendent shall thereupon cause to be conspicuously posted," etc., means "immediately;" that is, immediately after the two-days publication. The Century Dictionary defines the word as follows: "(1) Upon that. (2) In consequence of that; by reason of that. (3) Immediately after that; without delay; in sequence, but not necessarily in consequence." Webster's definitions are: "(1) Upon that or this. On account of that; in consequence of that. (3) Immediately; at once; without delay." No doubt the word is much oftener used in the sense of the first and second of these definitions than in that of the third, as indicated by the order in which they are given; but which of these senses was intended by its use in any particular case is to be determined almost entirely by reference to its context. It is sometimes used to express the succession of events in the order of time, regardless of the length of the period intervening; and it has been held to refer to the consideration upon which a promise was made. In Bean v. Ayers, 67 Me. 487, the question was whether the declaration alleged a consideration for a promise. The allegation was that plaintiff delivered certain spruce and hemlock logs to defendants at their request, and that "thereupon" the defendants delivered their agreement to the plaintiff, etc. The defendants contended that the word "thereupon" was used merely to mark the succession of facts in the order of time; but the court said: "The word 'thereupon' undoubtedly has different meanings. We think, however, it may fairly be considered as referring to the reason of the promise of the defendants."

The third section of the street law under consideration requires a resolution of intention and notice thereof to be posted and published for a period of two days as necessary conditions precedent to the publication and posting of a more particular notice by the superintendent of streets for a period of six days, since the latter publication would be of no avail without prior publication of the former. As used in that section, under these circumstances, the word "thereupon" refers to the conditions precedent, and means that the publication by the street superintendent is to be made upon those precedent conditions, and necessarily implies that the publication by the superintendent of streets must follow the resolution of intention and the publication thereof, in order of time.

there is nothing in the context or in the subject-matter indicating that the six-days publication by the superintendent must immediately follow the two-days publication. That it should follow within a reasonable time is the most that should be claimed. It will hardly be contended that a delay of five, or even ten, days would vitiate all prior proceedings, and necessitate a commencement thereof de novo. What would be an unreasonable delay in one case might be reasonable in another, under different circumstan-To sustain a general demurrer to the complaint on the ground of such delay (if it could be done in any case), the unreasonableness of the delay must conclusively appear on the face of the complaint; for, if the delay is mere matter of defense, the reasonableness of which is to be determined by evidence at the trial, it is not a ground of demurrer at all. Does it conclusively appear from the complaint alone that two and a half months' delay of the publication of notices by the superintendent was unreasonable? I think not. The two-days publication of the notice of intention to do the work expired early in January, which is ordinarily followed by two or three of the most inclement months of the year. Who can say, from aught that appears in the complaint, that it was not reasonable, or not even advisable, to postpone the commencement of grading the street until April. See Hart v. Plum, 14 Cal. 155.

2. On the appeal from the order denying a new trial, appellant contends that the evidence does not justify the findings by the court. I have carefully examined all the points under this head presented by appellant's counsel, with the result that, in my opinion, the evidence clearly justifies the findings excepted to. I therefore think the order and judgment should be affirmed.

We concur: BELCHER, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

HOUGHTON & UPP MERCANTILE CO. v. DYMONT et al.

(Supreme Court of Oklahoma. Sept. 8, 1894.)

JUDGMENT—DEFAULT—APPEARANCE.

After a general appearance to an action by duly-authorized counsel for a party, a judgment will not be set aside for want of summons.

(Syllabus by the Court.)

Error to district court, Canadian county; before Justice John H. Burford.

Complaint filed July 17, 1891, by the Houghton & Upp Mercantile Company against Dymont & Lane and Ridge Whitlock. Judgment for plaintiff. Ridge Whitlock moves

the court to set aside judgment against him. Motion overruled. Whitlock brings error. Affirmed.

U. H. Carswell, for plaintiff in error. Blake, Denton & Blake, for defendant in error.

SCOTT, J. This is an attachment proceeding filed in the district court of Canadian county on the 17th day of July, 1891, by the Houghton & Upp Mercantile Company against Dymont & Lane and Ridge Whitlock. The complaint alleges that the firm of Dymont & Lane is composed of Walter Dymont, Thomas Lane, and Ridge Whitlock; that said firm is indebted to them in the sum of \$254.50, as evidenced by check, a true copy of which is attached to said complaint and made an exhibit thereto; that the proceeds of said check were used for the benefit of the firm of Dymont & Lane, the said defendant Dymont participating in the use and benefit thereof equally with said Thomas Lane; that no part of said check has been paid; that the said the Houghton & Upp Mercantile Company is the lawful owner and holder of said check, etc. Judgment for the sum is prayed for against said Dymont & Lane and Ridge Whitlock. This is the check Dec. 15th, 1890. (Exhibit A): **"\$25**0.00. Red River National Bank of Gainesville. Texas: Please pay to the order of Thomas Lane two hundred and fifty dollars. Ella West." Protest for nonpayment, signed, "James H. Whitfield, Notary Public, Gainesville, Cook County, Texas, Jan. 7th, 1891." Indorsed on back as follows: "Pay Midland National Bank, Kansas City, Mo., or order, for collection, for account of the Strong & Ross Banking Co., Arkansas City, Kansas. Howard Ross, Cashier." "Thomas Lane. Ridge Whitlock." "Pay to Strong & Ross Banking Co., or order. Houghton & Upp."

The affidavit for attachment states that the claim sued upon is for money due upon a check accepted and cashed by the Houghton & Upp Mercantile Company; that the claim is just; that said Walter Dymont and Thomas Lane are nonresidents of Oklahoma Territory, and are about to remove their property subject to execution out of the territory, not keaving therein enough to satisfy the claim of the said the Houghton & Upp Mercantile Company, or the claim of their other creditors. Bond was filed and approved by the clerk of the court on the same date, and a writ of attachment issued, commanding the sheriff of Canadian county to attach the goods, chattels, etc., of Dymont & Lane and Ridge Whitlock. The writ was executed on the 7th day of August, 1891, by levying upon 300 head of cattle in the possession of James Jones, the property of Dymont & Lane, as shown by the sheriff's return. The record does not disclose that summons was ever issued, but summons by publication is sought upon attidavit filed by W. S. Upp, alleging simply Walter Dymont and Thomas Lane to

be nonresidents of Oklahoma Territory, and their residence to be unknown to him. No reference is made to Ridge Whitlock in the affidavit. No proof of publication is shown in the record, and no evidence of service on the plaintiff in error is disclosed, or no record of the general appearance or waiver of sum-Judgment in personam was rendered against Walter Dymont, Thomas Lane, and Ridge Whitlock by default, on the 10th day of December, 1892, for the sum of \$288.82 and costs; the attachment having been dissolved on the 2d day of January, 1892, previously. On May 1, 1893, Ridge Whitlock filed a motion, supported by affidavit, praying that the judgment rendered against him be set aside. The parties appeared and a trial of the facts alleged in the motion and affidavit was had on the 4th day of May, 1893. The motion was overruled, and time given to make and file a bill of exceptions. A bill of exceptions was signed and approved on the 31st day of May, 1893, and filed in this court on the 2d day of May, 1894, and is before us solely on the one proposition as to whether the court erred in overruling the motion of the plaintiff in error to be relieved of the judgment rendered against him as the record in the case discloses.

We are satisfied that the court below committed no error in overruling the motion of plaintiff in error to set aside the judgment. We think that Whitlock's appearance as one of the "defendants" in the motion to discharge the attachment was an appearance to the merits of the action, sufficient to give the court jurisdiction. Whitlock, in his affidavit, attached to his motion to set aside the judgment, did not say that the attorneys who represented him in the motion to dissolve the attachment were not authorized to do so, and it must stand presumed that the attorneys who filed that motion were duly employed by him to file the motion, and his appearance was entered, and the court acquired jurisdiction. Notwithstanding that there was no summons ever issued to Whitlock, and that his name was not mentioned in the service by publication with the other defendants, yet he was one of the defendants in the action, and his appearance in the motion to discharge the attachment was a sufficient appearance for the court to acquire jurisdiction over him, and the rendition of judgment against him was not error. The court, in overruling the motion to set aside the judgment, committed no error. The judgment of the lower court is affirmed. It is so ordered. All the justices concurring.

BURCHETT v. PURDY.

(Supreme Court of Oklahoma. Sept. 8, 1894.) Replevin-Pleading-Variance-Demand-DAMAGES.

1. The record shows that this action was , brought against B. W. Burchett in his individual capacity, and not as sheriff of Kingfisher county. The evidence disclosed the same state of facts. Held not a fatal variance between the pleadings and the proof.

2. The plaintiff cannot always certainly tell

by what right one interfering with his possession claims to act, and the only safe way is to make the person interfering with his right of possession defendant, and let him plead his agency or official character as a defense, if he

is not acting for himself.

3. When an officer levies an execution upon the property of one not named in the writ, a demand is not necessary by the owner before bringing replevin; or where an officer levies upon one person's property to pay the debt of another, or when the original taking was wrongful, and the officer was not in the proper discherge of his duty or if the saigure on execucharge of his duty, or if the seizure on execu-tion was illegal in any manner, or the property is found by the officer in the custody of a stranger to the writ, either actual or constructive, which is the same in law, no demand by the true owner is necessary.

4. The award of damages in the sum of \$50

in this case is not excessive.

(Syllabus by the Court.)

Error from probate court, Kingfisher coun-

Action in replevin by M. S. Purdy against B. W. Burchett. Judgment for Purdy for return of property, and damages in the sum of \$50. The facts are stated in the opinion. Defendant brings error. Affirmed.

Boynton & Smith, for plaintiff in error. Noffsinger & Nagle and Kane & Jones, for defendant in error.

SCOTT, J. Complaint in this case was filed on the 15th day of April, 1893, by M. S. Purdy against B. W. Burchett, in the probate court of Kingfisher county, alleging that he was the owner of, and entitled to the immediate possession of, certain articles of personal property, viz. a saloon outfit, set forth in an itemized statement thereto attached, and made a part of the complaint, as Exhibit A, of the aggregate value of \$251.58, and that the defendant had possession thereof without right, and unlawfully detained the same from the plaintiff, to his damage in the sum of \$500. Plaintiff prayed judgment for the possession of the said property, and \$500 damages for such unlawful taking and detention, and for all other proper relief. The usual replevin affidavit was subscribed and sworn to, and properly filed in the case. A writ thereupon issued, and the property was turned over to the plaintiff. The answer was a general denial. Upon the issues thus formed, a jury being waived, judgment was rendered for the plaintiff for the return of the property, and damages in the sum of \$50. The defendant then filed a motion for a new trial, setting forth-First, that the judgment of the court was contrary to law, and not supported by sufficient evidence: second, that there was a material variance between the evidence and the allegations of the complaint, as denied by the answer, specifying that the evidence wholly failed to show that the said Burchett, in his individual capacity, took from the plaintiff, or detained, the property in controversy, or any part thereof, but that said property was taken and held by said Burchett as sheriff of Kingfisher county, territory of Oklahoma, under and by virtue of an execution in an action in attachment entitled Samuel Westheimer & Co. v. R. T. Lee et al.; and, third, that the damages were excessive, and the award thereof unlawful and contrary to the law and the evidence. court overruled the motion, and rendered judgment thereon, as hereinbefore stated. bill of exceptions was thereupon presented, allowed, signed, and filed; and the case comes to this court on appeal, under section 1566, p. 563, of the Statutes of 1893, by Chandler v. Colcord, 1 petition in error. Okl. 260, 32 Pac. 330.

The plaintiff in error assigns five grounds of error, but groups the first, second, third, fourth, and fifth assignments, and treats them as one, only relying principally upon two grounds in his brief.

In the first ground of error the plaintiff in error argues the question as to whether an action in replevin is maintainable against a person in his private and individual capacity, to recover personal property, levied upon under process of the court while acting in his official capacity, as sheriff. This being conceded, does it constitute a fatal variance between the pleadings and the proof? The second question presented is, was a demand necessary before the commencement of this action, under the law and the facts of the case? We think both these questions should be answered in the negative, and the authorities are practically uniform on both propositions, and fully support the negative response of the court to them.

We will dispose of the questions in their order. On the first, evidence shows that prior to instituting this action the defendant below, B. W. Burchett, entered the place of business of plaintiff below, M. S. Purdy, and took therefrom, without authority of law, the goods and chattels in controversy in this ac-The evidence all shows that the goods tion. seized were the individual property of Purdy, but they were taken by plaintiff in error, over the protest of defendant in error, as the property of one R. T. Lee, under an execution issued against the property of the said Lee, and in which Purdy was in no wise inter-The record shows that this action was brought against B. W. Burchett in his individual capacity, and not as sheriff of Kingfisher county; and the evidence discloses, as above stated, that the levy was made under and by virtue of the execution against Lee. This is claimed by plaintiff in error as a fatal variance, and assigned as his first ground for reversal of the court below. We cannot assent to this doctrine. When a person wrongfully detains property, it is immaterial in what capacity he assumes to hold it. The person from whom property is wrongfully taken is not required, in law, to know, and cannot always ascertain, by what authority the person wrongfully taking it assumes to have acted. The important point is the wrongful taking or detention, and by whom detained, and not the capacity in which the person detaining the property is acting. It is clearly proper to bring an action in replevin against a defendant in his individual capacity, even when he intends to act in another capacity. If the defendant is acting as agent, sheriff, or otherwise, it is a matter in defense, to be pleaded and proved as any other fact. The plaintiff cannot always tell certainly by what right one interfering with his possession claims to act; and the only safe way is to make the person interfering with his right of possession defendant, and let him plead his agency or official character as a defense, if he is not acting for himself. Cobbey, Repl. 228; Barghoff v. McDonald, 87 Ind. 549; Rose v. Cash. 58 Ind. 278.

The second assignment of error is that a demand was not made before commencement of the action. The decisions upon this question are neither uniform nor entirely reconcilable, but the general and better doctrine seems to be that a demand is only required when it is necessary to terminate the defendant's right of possession, or to confer that right upon the plaintiff, but when the plaintiff claims the ownership of the property, and the right of possession as incident to that ownership, and the defendant's right claimed is precisely the same, no demand is necessary. Cobbey, Repl. 240; Lamping v. Keena, 9 Colo. 390, 12 Pac. 434; Smith v. McLean, 24 Iowa, 322; Eldred v. Oconto Co., 33 Wis. 140; Shoemaker v. Simpson, 16 Kan. 43; Pyle v. Warren, 2 Neb. 241; Homan v. Laboo, 1 Neb. 205. It may be true that where an officer is proceeding according to law, under a valid writ of attachment, a demand must be made of him for the property seized under the writ before one claiming to be the owner can maintain replevin. Hines v. Chambers, 29 Minn. 7, 11 N. W. 129. But, where an officer levies an execution upon the property of one not named in the writ, a demand is not necessary by the owner, before bringing replevin, or, where an officer levies upon one person's property to pay the debt of another, no demand is necessary by the true owner. When the original taking was wrongful, and the officer was not in the proper discharge of his duty, or if the seizure on execution is illegal in any manner, no demand is neces-The same is true if the property is found by the officer in the custody of a stranger to the writ, either actual or constructive, which is the same in law. Cobbey, Repl. pp. 264, 265; Stone v. O'Brien, 7 Colo. 458, 4 Pac. 792; Leonard v. Maginnis, 34 Minn. 506, 26 N. W. 733; Sharon v. Nunan, 63 Cal. 235; Boulware v. Craddock, 30 Cal. 190; Wellman v. English, 38 Cal. 583; Hexter v. Schneider, 14 Or. 184, 12 Pac. 668;

King v. Orser, 4 Duer, 431; Ledley v. Hays, 1 Cal. 160. The sheriff had no writ or authority to seize the property of Purdy, and the legal process under and by virtue of which he was acting was inconsistent with his rights. It was not incumbent upon defendant in error, in law, to know whom the sheriff might have process of execution against, nor was he bound to know that the sheriff was pretending to act under legal authority or in his official capacity. The property was his individual property, and, unless it be taken by legal process or proceedings against him, the taking and detention are wrongful. Whenever possession of property is illegal and inconsistent with the owner's right of possession, the law will not recognize such possession, and no demand is necessary. Dickson v. Randal, 19 Kan. 212. In the case of Shoemaker v. Simpson, 16 Kan. 52, in a very able and exhaustive opinion by Valentine, J., after a review of much authority, this language is used: "A demand of the property before commencing an action of replevin is necessary only where the possession of the property by the defendant is rightful, or at least not wrongful, and where a demand is required to terminate such rightful possession, or to convert what was previously an innocent possession into a wrongful one. A demand never was necessary, in a replevin action, where the possession of the property by the defendant was already wrongful without a demand; and all that is necessary to make the possession of the property of another wrongful, in law, is that the possession be without authority of the owner, and inconsistent with his rights. We think it may be laid down as a rule that whenever one person obtains possession of the personal property of another without consent of the owner, and then, without any right which the law will recognize, asserts a claim to the property inconsistent with the owner's right of property and right of possession, the possession of such person will immediately become illegal and wrongful, and no demand for the property will be required to be made by the owner before he commences an action of replevin for the recovery of the same, although the possessor thereof may ever so honestly entertain the belief that his claim to the property is both legal and just." evidence in the case also shows that, at the time the sheriff seized the property in question, he was notified by defendant in error, Purdy, that he (Purdy) was the owner of the property so seized, and ordered him not to take it. This state of facts is identical with the facts in the case of Stone v. Bird, 16 Kan. 488 (opinion by Brewer, J.): "A writ against A. gives the officer no authority to take the property of B.; and if the officer takes the property of B., and is notified at the time that it is the property of B., the taking is unlawful, and the subsequent detention wrongful." We think the doctrine thus declared to be correct, and supported by all

the authority upon that question. Clearly, in this case, the taking was wrongful, as well as the subsequent detention; and, such being the fact, it was not a legal duty incumbent upon the defendant in error to demand his property before institution of the action.

Plaintiff in error seeks to raise another question, not properly saved in the record, and a discussion of it will be unnecessary. point sought to be submitted is that the defendant cannot rightfully maintain replevin for intoxicating liquors unless he show also that he is legally licensed to sell the same. Some Iowa cases are cited in support of this contention, but these cases are all based upon a special statute, and hence could not apply to the case at bar, even if the point were properly before us, for we have no such statute in this territory, controlling such cases.

There was ample testimony to sustain the award of damages. While it is possible that the testimony of the witnesses regarding the damages might have been stronger, and somewhat more consistent, yet the court below took the place of a jury when a jury was waived, and in this capacity passed upon the credibility of the witnesses. It seems that the court believed from the evidence that the damages resulting from the levy were \$50. Indeed, it is difficult for this court to believe that the damages could have been less. A wrongful seizure and detention by execution or attachment of property carries with it all the embarrassments known to the commercial world; and a business would be very nearly no business at all, not to have been damaged in the sum of \$50 by this levy. The award of damages we do not believe to have been excessive, under the evidence in the case. The judgment of the court below must be affirmed. It is so ordered. All the justices concu. ing.

JOHNSON, Sheriff, v. CAMERON, Territorial Auditor.

(Supreme Court of Oklahoma. Sept. 8, 1894.) AGREED CASE—CARE OF INSANE - AUDITING AC-COUNTS.

1. Under section 4419, St. 1893, parties to a question which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the contro-versy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The court shall thereupon hear and determine the case, and render judgment as if an action were pend-

2. Section 274, St. 1893, provides for an appropriation of \$15,000 for the commitment and care of the insane. The legislative assembly did not intend by such appropriation to modify the provisions of section 5935, St. 1893, for the auditing of all accounts against the territory of Oklahoma, or section 3012, Id., providing that the compensation and expenses of the sheriff. the compensation and expenses of the sheriff, incurred in the care of the insane, shall be paid

out of the territorial treasury, in the usual manner, when such appropriation is exhausted.

3. When such accounts are presented to the auditor as required by law, it is his duty to audit them, and issue a warrant upon the territorial treasurer, in the usual mauner; and, if there are no funds in the possession of such treasurer, it is his duty, under section 5955, St. 1893, to indorse thereon the date of its presentation, with his signature thereto.

(Syllabus by the Court.)

Application for mandamus by G. W. Johnson, as sheriff of "O" county, against Evan D. Cameron, auditor of Oklahoma territory. Granted.

R. E. Wood, for plaintiff. C. A. Galbraith, Atty. Gen., for defendant.

SCOTT, J. This is an original proceeding in mandamus, filed in this court on the 18th day of June, 1894, by G. W. Johnson, as sheriff of "O" county, territory of Oklahoma, against Evan D. Cameron, auditor of Oklahoma territory, upon an agreed statement of facts which reads as follows: "In pursuance and by virtue of section 4419, c. 66, of the Oklahoma Statutes, providing for submitting a question which might be the subject of a civil action to a court having jurisdiction thereof, the parties above named come now, and stipulate and agree that the facts in this controversy are as set forth in the petition and application for peremptory writ of mandate filed herein, except that, the reason for the defendant's not auditing said accounts not being stated in said application, it is agreed that the defendant refuses to audit said accounts for the reason that there was not, at the time they were presented, nor is not now, any money in the treasury with which to pay said warrants, and for the further reason that the appropriation made by the territorial legislature for transportation and care of the insane for the years 1893 and 1894 was, at the time said accounts were presented, entirely exhausted, and covered by warrants previously issued against said appropriation. The decision of the court is respectfully asked on the question of the right of the defendant, as auditor of the territory, to audit accounts that are proper claims against the territory, after the appropriation made for the purpose of paying said accounts has been exhausted." The petition for the writ of mandamus reads: now the said plaintiff, and respectfully represents and shows to the court that he is now, and was at all the times hereinafter mentioned, the duly qualified and acting sheriff of 'O' county, territory of Oklahoma; that the said defendant is now, and was at the times hereinafter specified, the duly qualified and acting auditor of Oklahoma territory; that it is the duty of said defendant, under the laws of said territory, to audit all claims and accounts against the territory, when properly presented and verified, and to issue a warrant on the territorial treasurer for the amount thereof; that on the 1st day of May, 1894, in executing a warrant duly and regularly issued, directed and delivered to plaintiff, as sheriff of 'O' county, the plaintiff conducted one Wm. E. Miller, duly adjudged insane, to the insane hospital at Jacksonville, Ill., as directed in said warrant, and delivered said Wm. E. Miller to the superintendent of said hospital, whose receipt for said patient was duly indorsed on said warrant; that in executing the warrant as aforesaid the plaintiff incurred expenses, in railroad fare, etc., amounting to \$130.85; that said expenses are a proper charge against said territory, and said territory of Oklahoma is liable to plaintiff for the same; that plaintiff made out an itemized statement of his account in due form, a copy of which is hereto attached, marked 'Exhibit A', and made a part hereof, and presented to the defendant as auditor, and requested that the same be audited, and a warrant issued to him on the treasurer for the same; that the defendant refused and still refuses to audit said account and to issue a warrant to plaintiff therefor; that on the 12th day of May, 1894, the plaintiff, in executing a warrant duly directed and delivered to him as sheriff of 'O' county, conducted Elizabeth Reynolds, an insane patient, to the hospital at Jacksonville, Ill., and delivered said patient to the superintendent of said hospital, as in said warrant directed, and in so doing incurred an expense, for railroad fare, board, etc., amounting to \$128.25 (an itemized statement of said account is hereto attached, marked 'Exhibit B', and made a part hereof); that said expense is a proper charge against the territory of Oklahoma; that the plaintiff presented said accounts to the defendant, as auditor, and requested that he audit said accounts, and issue a warrant to plaintiff on the territorial treasurer for the amount thereof; that the defendant refused and still refuses so to do; that the plaintiff paid out the greater amount of said money in cash, and expected said account to be properly audited and warrant issued therefor, so that the same could be converted into money, and that said accounts were not audited, and warrants issued thereof, is the source of much embarrassment to him in the proper conduct of his office; that he has no adequate remedy at law; and that, unless the writ issue as hereinafter prayed for, great and irreparable wrong will be done him. Wherefore, plaintiff prays that a peremptory writ of mandamus issue forthwith, directed to the defendant, commanding him to audit the said accounts, and issue and deliver to plaintiff warrants on the territorial treasurer for the respective amounts thereof. As in duty bound, he will ever pray." Attached to this petition are the vouchers, as required by law, marked respectively Exhibits A and B. The case is submitted in conformity to statutory provisions with reference to the submission of agreed cases, and under the agreed statement thus filed the case is presented for determination upon the question as to whether

the peremptory writ should issue, commanding the territorial auditor to forthwith audit the said accounts, and issue and deliver to plaintiff warrants on the territorial treasurer in the respective amounts as prayed for in his petition.

It appears that the governor of Oklahoma, under and by virtue of section 2990, St. 1893, entered into a contract with a hospital for the insane at Jacksonville, Ill., for the care of insane patients from this territory, and the sheriff, in the discharge of his duty, convered the patients to said hospital, and incurred the expense alleged; and, when he presented his account to the defendant to be audited, defendant refused to do so for the reason that the appropriation for the insane had been previously exhausted. An act providing for the care of insane patients was passed by the legislative assembly of the territory of Oklahoma, and took effect December 20, 1890. That act made express provision for the care of the insane, and provided compensation for the payment of the officer in whose custody they were placed from time to time until finally committed as required by law. The legislative assembly made provision for current expenses of the territory for the years 1893 and 1894, which act took effect March 10, 1893 (St. 1893, § 274). Section 274 provides for an appropriation of \$15,000 for the commitment and care of the insane for said years 1893 and 1894, or so much of said sum as may be found necessary. The territorial auditor audited the accounts presented to him, as required by law, until the sum of \$15,000 so appropriated had expired; and, said fund being exhausted at the time the plaintiff in this case presented his account, defendant refused to audit and issue a warrant on the territorial treasurer therefor. We are now called upon to determine whether the act of the legislative assembly appropriating the sum of \$15,000 for the purpose named operates as a limitation upon the auditor in auditing and issuing warrants upon the territorial treasurer after the expiration of said

Section 2990, St. 1893, reads: "The governor of the territory of Oklahoma be and he is hereby authorized to contract with any territory or state in the United States, or with the proper officials thereof, for the care of persons who become insane within this territory and who are citizens thereof. Such care to be had in the insane asylums of the territory or state with which such contract may be made." Section 2001, Id., reads: "Such contracts shall be in writing and when executed shall authorize persons entitled to treatment in any insane asylum to be carried to that asylum and there held with like force and effect as though such asylum was within this territory." Section 2002, Id., reads: "Until an asylum for the insane be erected in this territory, all patients shall be examined, held, and their sanity determined as in this act provided. When adjudged insane as. herein provided, the patient shall be carried to the hospital in accordance with the contract so made by the governor." Section 3001, Id., reads: "On the return of the physician's certificate the commissioners shall as soon as practicable conclude their investigations, and having done so they shall find whether the person alleged to be insane is insane; whether, if insane a fit subject for treatment and custody in the hospital; whether the legal settlement of such person is in their county, and if not in their county, where it is, if ascertained. If they find such person is not insane, they shall order his or her discharge if in custody. If they find such person insane, and a fit subject for treatment and custody in the hospital, they shall forthwith issue their warrant and a duplicate thereof, stating such finding with the settlement of the person, if found, and if not found, their information, if any, in regard thereto, authorizing the superintendent of the hospital to receive and keep such person as a patient therein. Such warrant and duplicate with the finding and certificate of the physician, shall be delivered to the sheriff of the county, who shall execute the same by conveying such person to the hospital, and delivering him or her, with such duplicate and physician's certificate and finding, to the superintendent thereof. The superintendent, over his official signature, shall acknowledge such delivery on the original warrant, which the sheriff shall return to the clerk of the commissioners with his costs and expenses endorsed thereon. If neither the sheriff nor his deputy is at hand, or if both are otherwise engaged, the commissioners may appoint some other suitable person to execute the warrant in his stead, who shall take and subscribe an oath or affirmation faithfully to discharge his duty, and shall be entitled to the same fees as the sheriff. The sheriff or any other person so appointed may take to his aid such assistance as he may need to execute such warrant; but no female person shall thus be taken to the hospi-. tal without the attendance of some other female, or some relative of such person. The superintendent in his acknowledgment of delivery must state whether there was any such person in attendance, and give the name or names if any. It is, however, hereby provided that if any relative or intimate friend of the patient, who is a suitable person, shall so request, he shall have the privilege of taking and executing such warrant, in preference to the sheriff or any other person, and without taking such oath or affirmation and for so doing he shall be entitled to his necessary expenses, but no fees." Section 3012, Id., reads: "The commissioners of insanity shall be allowed at the rate of two dollars per day each for all the time actually employed in the duties of their office. The judge of probate in addition to what he is entitled to as commissioner of insanity, shall

be allowed one-half as much more for making the required record entries in all cases of inquest, and of meetings of the board for any purpose, and for filing of any papers required to be filed. He shall also be allowed twenty-five cents for such notice or process given or issued under seal, as herein required. The examining physician shall be entitled to five dollars for each case examined and mileage at the rate of ten cents per mile each way. The sheriff shall be allowed for other service than conveying a patient to the hospital and returning therefrom the same fees for like services in other cases. Witnesses shall be entitled to the same fees as witnesses in the district court. The compensation and expenses provided for above shall be allowed and paid out of the county treasury in the usual manner, except those of sheriff, which shall be paid out of the territorial treasury in the usual manner." Section 5935, Id., reads: "All accounts or claims against the territory, which shall be by law directed to be paid out of the treasury thereof, shall be presented to the auditor, who shall examine and adjust the same, and for the sums which shall be found due from the territory shall issue warrants payable at the territorial treasury, which shall be numbered consecutively and each shall specify the date of its issue and the name of the person to whom payable of each warrant, and corresponding thereto, shall be entered upon a stub for each warrant separately, and those stubs shall be carefully preserved by the auditor in his office." Section 5937, Id., reads: "For the redemption of all warrants issued in conformity with the provisions of this chapter, the credit of the territory is hereby pledged." Section 5955, Id., reads: "When any warrant shall be presented to the treasurer for redemption, and there shall be no funds in the treasury appropriated for that purpose, the treasurer of the territory shall endorse thereon the date of its presentation, with his signature thereto, and thereafter such warrant shall draw interest at the rate of six per cent, per annum, and whenever there shall be funds in the treasury for the redemption of warrants so presented and endorsed, the treasurer shall give notice of the fact in some newspaper published at the seat of government, and at the expiration of thirty days after the date of such notice, the interest on such warrant shall cease."

It is conceded that plaintiff's accounts are just and proper charges against the territory; that the territory is pledged by section 5937, St. 1893, for their payment; that the \$15,000 appropriated by the legislative assembly for the commitment and care of the insane for 1893 and 1894 was, at the time said accounts were presented, exhausted, and fully covered by warrants outstanding, issued for such purpose against said fund for said period. Counsel for defendant argues that the legislative assembly, by said appropriation of \$15,000, intended to and did prescribe a

limitation upon the power of the territorial auditor to draw warrants against said fund. notwithstanding the apparently mandatory provision contained in section 5935, Id., as to his duty to audit just accounts against the territory when presented to him, and, further, while plaintiff's accounts are just and proper charges against the territory, and will necessarily be paid when the legislative assembly shall have appropriated money therefor at some future time, that not until such appropriation is made has the territorial auditor the authority to audit the accounts and issue warrants in payment of these ex-Counsel for defendant does not contend that there is any inhibition in either the organic act or the statutes of Oklahoma. and admits in express terms that unless the appropriation by the legislative assembly for the specific purpose mentioned in section 274 of the act making appropriation for the current expenses for the territory for the years 1893-94 is a limitation on the authority of the defendant to audit the accounts, and issue warrants against said fund in excess of the amount of said appropriation, the plaintiff is entitled to have his accounts audited as prayed for. The question is thus narrowed to the single proposition as to whether the legislature, by the appropriation of \$15,000 for the commitment and care of the insane for the years 1893-94, meant thereby to modify the provisions of section 5935, St. 1893, for the auditing of all accounts against the territory, and section 3012, Id., providing that the compensation and expenses of the sheriff, incurred in the care of the insane, shall be paid out of the territorial treasury in the usual manner. The court does not believe that the legislative assembly meant to do this. We think, in this case, when the accounts were presented to the auditor, he should have at once audited them. and issued a warrant upon the territorial treasurer for the payment of the same, in the usual manner; and if there are no funds in the possession of the territorial treasurer, out of which said warrants can be lawfully paid, it is his duty, under section 5955, Id., to indorse thereon the date of its presentation, with his signature thereto; and thereafter, the law provides, such warrants shall draw interest at the rate of 6 per cent. per annum, and whenever sufficient funds have accumulated in the treasury for the redemption of the warrants so presented and indorsed the treasurer shall give notice of the fact in some newspaper published at the seat of government, to that effect, and at the expiration of 30 days after the date of such notice the interest on such warrants These are very wise provisions shall cease. of law, and are made with the express intention that the wheels of the government shall not be stopped when the cash on hand is exhausted; and, as a guaranty of the faith and stability of the state or territory, the credit thereof is pledged for the redemption

of all outstanding warrants so issued, when the funds have expired. It is not the purpose of any government to impose unnecessary burdens upon its officers in the discharge of their obligations thereto, and a liberal construction even of the statutes referred to is unnecessary when we take into consideration the fact that the law has exacted, in instances of this kind, the private funds of the sheriff in the performance of his official duty.

It is the opinion of the court that the legislative assembly did not mean to limit the payment of expenses for the care and commitment of the insane for the years 1893-94 to the sum of \$15,000, but that such sum was appropriated as a sum, in the judgment of the legislature, sufficient to defray such expenses during the years named, and if insufficient the provision of law still existed for the payment of these expenses in the usual manner. It is really no concern of the auditor, in this case, whether the treasurer has in his hands funds or not. When funds are exhausted the treasurer's duty is plain, as heretofore shown. The authorities bearing upon this question support the view of the court, as expressed. See Publishing Co. v. Kenney (Mont.) 24 Pac. 96; Fisk v. Cuthbert, 2 Mont. 593; Henderson v. Board. (Ind. Sup.) 28 N. E. 127. Entertaining the views thus declared, the peremptory writ of mandamus will be awarded, commanding the territorial auditor to audit the accounts as presented by the plaintiff, and to issue warrants in the usual manner upon the treasurer of Oklahoma territory for the payment of the same. It is so ordered. All the justices concurring.

TERRITORY v. MILLIGAN.

(Supreme Court of Oklahoma. Sept. 7, 1894.)
WITNESS — COMPETENCY OF CHILD — REVIEW OF
DECISION — CHIMINAL LAW — VALIDITY OF VERDICT—RETURN ON SUNDAY.

1. Where the trial court, after an examination touching the competency of a witness under the age of 10 years, permits such witness to testify, the appellate court will not reverse the cause unless it affirmatively appears from the record of such examination that the court below erred.

low erred.
2. Section 8, art. 11, c. 68, Code Cr. Proc. authorizes the court to receive the verdict of

the jury upon the Sabbath day.

3. Where the trial court received the written verdict of a jury, and the same was thereafter read to them by the clerk, and the judge inquired of the ury if that was their verdict, and they answered in the affirmative, and afterwards the jury was polled by the judge, each juror answering that the verdict so read was his verdict, held, that the substantial requirements of section 12, art. 12, of the Laws of Oklahoma, were complied with.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice Henry W. Scott.

John Milligan was convicted of murder, and appeals. Affirmed.

Amos Green, D. C. Lewis, and Charles R. Redick, for appellant. J. H. Woods, Co. Atty., and J. M. Johnson, for the Territory.

DALE, C. J. This is an appeal from a judgment rendered in the district court of Oklahoma county at the February term, 1894. The defendant was convicted of the crime of murder, and was, by the judge of the lower court, in accordance with the verdict returned by the jury, sentenced to be hanged. An appeal was taken from the judgment of the lower court, and such judgment duly stayed pending the affirmance or reversal of the judgment by this court.

The errors complained of are not specifically pointed out, but, from a reading of the transcript and case made, we find that the defendant below has fairly before us three propositions which we may consider: First. Did the court below err in permitting the witness named Amelda Clark to testify on behalf of the territory? Second. Did the court err in receiving the verdict of the jury upon the Sabbath day? Third. It is alleged that the verdict of the jury was not recorded upon the minutes of the clerk, and thereafter read to them, before the jury was allowed to separate.

Upon the first proposition, it appears that Amelda Clark was called as a witness for the prosecution; that counsel for defendant applied to the court for an examination of said witness touching her competency as a witness, which request was granted, and after sending the jury out the witness was questioned by the court and counsel as to her age, knowledge of the facts, and the nature and obligations of an oath administered to her. It is insisted that such examination did not justify the court in permitting the witness to testify before the jury. The questions propounded to the witness, as well as the answers thereto, and the testimony she was permitted to give to the jury, appear in the record. A perusal of the record shows the witness to have been of ordinary intelligence upon most of the subjects about which she was interrogated. She was unable to give her age, and we will assume that she was under the age of 10 years. The second subdivision of section 4213 of the Statutes of Oklahoma, which section provides what persons shall be incompetent to testify upon the trial of a cause, reads as follows: "Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly.' Upon the objection of counsel for the defendant to receiving the testimony of the witness, the court examined the child, with a view to determining whether or not she had an understanding touching the facts about which she was called to testify, or whether the impressions she had received were just, and also to determine her ability to relate the facts truly. Our statute leaves

the question of determining the competency of such witness wholly in the discretion of the trial judge. He has the witness before him, and is better able to judge of the intelligence of a witness than can the appellate court in reading the answers of the witness to the questions as they appear in the record. Before an appellate court should reverse the lower court, it must clearly appear from the record that the judge, in admitting the testimony of the witness, did not act within the discretion granted by the statute. record fails to show such a condition in this case. On the contrary, an analysis of the questions and answers of the witness, both upon the examination touching her competency and her testimony as given before the jury, indicates that the witness should have been permitted to testify.

The second objection raised is easily disposed of, under our statute. Section 8, art. 11, c. 68, of the Statutes of Oklahoma, is as follows: "While the jury are absent the court may adjourn from time to time as to other business, but it is nevertheless deemed open for every purpose connected with the cause submitted to them, until a verdict is rendered or the jury discharged. A final adjournment of the court discharges the jury." In the case under consideration, it appears that the verdict was received by the judge on Sabbath morning. The section of the law above quoted keeps the court continuously in session until the jury have returned their verdict, or shall have been discharged, or until the final adjournment of the term. If the court is by law in session, it follows that the court can perform the acts for which it is in session. It is kept open to receive the verdict of the jury, and under the statute quoted, for the purpose of receiving the verdict of the jury, it is as much in session on the Sabbath as it can be on any other day of the week.

The third question raised relates to the manner of receiving, recording, and announcing the verdict. It appears that when the jury returned their verdict into court the same was in writing, signed by the foreman and was by the court handed to the clerk, who read the verdict to the jury, and that the court thereupon asked the jury if that was their verdict; that the foreman answered in the affirmative; the court then, on his own motion, polled the jury, asking each member of such jury whether or not the verdict, as read by the clerk, was his verdict; and that each juror answered affirmatively, after which the jury was discharged. Appellant contends that under section 12, art. 12 (general section 5254, Laws Okl.), the verdict was improperly received, and that no judgment against the defendant was legally had upon such verdict. The section referred to reads as follows: "When the verdict is given, and is such as the court may receive. the clerk must immediately record it in full upon the minutes, and must read it to the jury and inquire of them whether it is their verdict. If any juror disagree, the fact must be entered upon the minutes, and the jury again sent out: but if no disagreement is expressed, the verdict is complete and the jury must be discharged from the case." This section of our statute may be said to be declarative of the common-law rule for receiving verdicts in criminal prosecutions, and the reason for such rule is apparent. Under the common law the jury, through their foreman, would orally announce their verdict. The clerk would at once record the same, after which the clerk would, in open court, before the jury were discharged, read the verdict as he had recorded the same, and the judge would then inquire of the jury if the verdict so read was their verdict. If the jury answered in the affirmative, they were discharged. If any member of the jury expressed himself dissatisfied, the jury were sent out for further deliberation. This mode of practice was followed because the verdict delivered orally might not be recorded as intended by the body delivering the same, and after the jury were once discharged they could not again be convened to further consider of their verdict. And it was to prevent mistakes that the rule was adopted vich required the clerk to immediately make a record of the oral verdict, and read his recorded verdict to the jury, so that all questions as to the character of the verdict might be forever put at rest before the jury separated, and while they still had the matter under control. Our statute makes no specific provision as to whether the verdict in a criminal case shall be delivered orally or in writing. In the case under consideration the verdict was reduced to writing, and signed by the foreman, and so returned in open court, and by the clerk at once read to the jury; and, in the absence of proof, we are bound to find that the same was duly filed as part of the records of the case. But it is agreed that the verdict was not recorded before it was by the clerk read to the jury, and the jury discharged, and it is contended that the section of the law last quoted is mandatory. The reason for the common-law rule has ceased to exist. Under the manner of receiving the verdict in this case, the same certainty was had as to the character of the verdict returned as was had in receiving verdicts under the common-law rule. In this case the jury had reduced their verdict to writing, and, by their foreman, signed the same, and no mistake could occur as to their intention. It was as accurately determined—perhaps more so-as it would have been if the clerk had taken the same, transcribed it upon the minutes of his proceedings, and read the same to the jury. So, in effect, and for the purpose of protecting the substantial rights of the defendant, it will be seen that, when the clerk read the verdict of the jury from the instrument returned as their verdict, he read the recorded verdict of the jury; and whether

he transcribed it upon his minutes before or after he read it to the jury is immaterial, as the substantial act of recording the verdict was performed by the jury when they returned the written verdict, duly signed by their foreman. And this brings us to the proposition as to whether or not this tribunal will reverse the trial court for an error which is wholly immaterial, in so far as it affects the substantial rights of the appellant. General section 5330 of our statute relating to appeals reads as follows: "On appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." This section must be given proper effect in considering this matter. In so far as the statute invoked by appellant is concerned, it may be stated that the substantial requirements thereof have been complied with, and that the trial court gave to the defendant below every right intended to be guarantied to him by the laws of our territory, and that if we shall observe the requirements of section 5330, supra, we must regard the objection as technical and insufficient to reverse this case. The judgment of the court below is affirmed, and the case remanded for further proceedings under the sentence.

SCOTT, J., having tried the case below, not sitting. All the other justices concurring.

SWAN v. UNITED STATES.

(Supreme Court of Oklahoma. Sept. 7, 1894.) CRIMINAL LAW—APPEAL.

Where the defendant below was on the 7th day of November, 1892, duly sentenced, upon a conviction had prior thereto, and upon the same day filed his motion for a new trial, and the same is overruled, and an appeal prayed for and allowed on said day, and the transcript of the record and case made is not filed in the supreme court until the 4th day of December, 1893, no notice of appeal being filed prior to said date, keld, that under section 4, art. 16, e. 72, Code. Cr. Proc. the appeal will not lie. (Syllabus by the Court.)

Error from Kingfisher county court; before Justice John H. Burford.

Henry H. Swan was convicted of an attempt to commit manslaughter, and brings error. Dismissed.

Amos Green & Son and H. R. Thurston, for plaintiff in error. C. R. Brooks and Horace Speed, for the United States.

DALE, C. J. From an examination of the record in this case, it appears that in the court below the defendant, Henry H. Swan, was at the October term, 1892, of the court held in Kingfisher county, convicted of an attempt to commit the crime of manslaughter, and was on the 7th day of November sentenced, upon the verdict of the jury, to one year at hard labor, and to pay a fine

of \$50 and the costs of the prosecution. It further appears from said record that on the same day the defendant below prayed an appeal, which was duly granted, and time given; that on the 4th day of December. 1893, the defendant filed in this court his transcript of the record, and the writ of error was granted, returnable at the January term of the supreme court following. It nowhere appears in the record that any notice of the appeal was ever served upon the attorney for the adverse party, and the defendant in error calls the attention of this court to the fact that the appeal was not filed in time and asks this court to dismiss the same. It is well settled that appeals will lie in those cases only where the statute provides for the appeal, and that, in order for a person to avail himself of the right of appeal, he must substantially comply with all of the reasonable requirements of the statutes. The statutes of Oklahoma, in section 4, art. 16. c. 72, Code Cr. Proc., provide that appeals must be taken within one year after the judgment is rendered. In the case under consideration it appears that more than one year elapsed from the time the appeal was prayed for and allowed by the district judge before the same was properly taken. The statute requiring that appeals shall be filed within one year is a reasonable statute, and, where a party appealing fails to bring himself within the requirements of such statute, this court will not consider such appeal.

BURFORD, J., having tried the case below, not sitting. All the other justices concurring.

BRADFORD v. TERRITORY ex rel. WOODS, County Attorney.

(Supreme Court of Oklahoma. Sept. 7, 1894.)

QUO WARRANTO PROCEEDING — MISCONDUCT OF
COUNTY CLERK—ISSUE OF LIQUOR LICENSE.

1. Under St. 1890, art. 34, c. 70, information in the nature of quo warranto, in the name of the territory, on the relation of the county attorney, is the proper proceeding to remove a county clerk from office for maladministration in office.

2. It is a violation of law for a county clerk to issue a liquor license to an applicant until the full amount of the annual fee has been paid to the county treasurer, and a clerk who does such act is guilty of willful maladministration in office, and may be removed for such disregard of duty.

3. Our laws furnish three concurrent remedies for removal of public officers for the causes prescribed in chapter 61, St. 1890, viz. information in the nature of quo warranto, accusation by the grand jury, and complaint by the board of county commissioners, or some other person in his own name, and either remedy may be adopted

be adopted.

4. The acts done by a county officer, to warrant his removal from office, need not be such as would subject him to a criminal prosecution, but any acts done knowingly in violation of his statutory duties are sufficient to constitute such maladministration as will forfeit his right to said office.

5. A large discretion is vested in the trial

judge in determining the qualifications and competency of jurors, and unless an abuse of such discretion is shown an appellate court will not disturb his action.

G. It is not error to sustain a challenge to a juror who has formed an opinion based upon rumors or newspaper reports, when he answers that notwithstanding such previously formed opinion he will render a fair and impartial verdict. In such cases the court passes judicially upon his qualifications, and must be satisfied from his answer, his conduct, actions, and demeanor that the juror will be fair and impartial, and will not be influenced by any motives except a desire to do exact justice.

(Syllabus by the Court.)

Error from district court, Oklahoma county; before Justice Henry W. Scott.

Proceeding by the territory of Oklahoma, on the relation of J. H. Woods, against William Bradford, to remove him from office. A judgment ousting said Bradford from office was rendered, and he brings error. Affirmed.

Redick, Lewis & Snyder, for plaintiff in error. J. H. Woods, in pro. per. C. A. Galbraith, Atty. Gen., for the Territory.

BURFORD, J. This was a proceeding by information in the nature of quo warranto to remove the plaintiff in error from the office of county clerk of Oklahoma county for willful maladministration in office. The cause was before this court once before (1 Okl. 366, 34 Pac. 66), and the substance of the information is set out in the former opinion. The plaintiff in error was tried by jury a second time and convicted, and judgment rendered ousting him from said office.

The first error assigned is the action of the judge of the trial court in sustaining the challenge of the relator to certain jurors for The jurors testified on their voir dire that they had formed opinions as to the merits of the cause, based upon hearsay and newspaper reports, but that notwithstanding such opinion they could give the defendant a fair and impartial trial. The court excused the jurors named, and directed other jurors to be selected to take their places. It is contended that these jurors were not disqualified under section 5466, St. 1890. It is provided by said statutes that "no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury, founded upon rumor, statements in public journals or common notoriety, provided it appears to the court upon his declaration under oath or otherwise that he can or will, notwithstanding such opinion act impartially and fairly upon the matters to be submitted Under this section the court must be satisfied that the juror will act fairly and impartially, and in passing upon this question he must act judicially on the facts before him; and the conduct and appearance of the juror, his manner, and apparent candor or impartiality, are all to be considered by the court, together with his actions, in determining his fitness as a juror. It is the duty of the trial court, in the selection of jurors for the trial of a cause, civil or criminal, to see that jurors are obtained who will act fairly and impartially between the litigants: who will not be influenced or biased by previously formed opinions, or actuated by motives other than a desire to render exact justice to both parties. A very large discretion is vested in the court, in determining the competency and qualifications of jurors, and its action should never be disturbed by an appellate court unless an abuse of such discretion is clearly apparent. We find nothing in the record to indicate that the trial court abused the discretion vested in it, in impaneling the jury; and while it would not have been error, under the statutes cited, to have retained the jurors, as appears from their answers, the presumptions are in favor of the correctness of the act of the trial court, and no error is manifest in the record. In any event, the statute cited from the Code of Criminal Procedure cannot be held as controlling, yet the rule there stated is the proper one, now accepted by most all the courts of the highest resort in cases either civil or criminal.

The second assignment of error complains of the action of the trial court in refusing to permit the defendant, Bradford, to prove on the trial that he had paid to the treasurer of Oklahoma county, after the commencement of this action, the moneys received by him from the sale of liquor licenses. If there was any error in rejecting this testimony, it was cured by afterwards permitting the defendant to testify fully as to said payments. The third assignment of error presents the same question.

The only other objection insisted upon by counsel for Bradford is that the information was improperly brought, and that it does not state facts sufficient to entitle the relator to have the office of county clerk declared va-The statute in force at the time this action was commenced authorized an information to be filed by the county attorney on his relation. The usual practice is to bring it in the name of the sovereign power, on relation of the public prosecutor; and in this cause the case was brought in the name of the territory, on the relation of the county attorney. There was no error in this. Such proceeding is authorized whenever any public officer shall have done or suffered any act which, by the provisions of law, shall work a forfeiture of his office. Section 1, art. 34. c. 70, St. 1800, provides that when any public officer thus charged shall have been found guilty of having done or suffered any act which, by the provisions of the law, shall work a forfeiture of his office, * * * the court shall give judgment of ouster against the defendant, and exclude him from the of-Section 10, Id., states the cause for removal as follows: "All elective county officers may be charged, tried and removed from office for either of the causes following: (1)

Habitual or wilful neglect of duty. (2) Gross partiality. (3) Oppression. (4) Extortion. (6) Wilful maladministra-(5) Corruption. tion in office. (7) Habitual drunkenness. (8) For the failure to produce and account for all public funds and property in his hands at any settlement or inspection authorized by law." Chapter 61, § 8, St. 1890. The doing or being guilty of any of the acts above specified, by a public officer, works a forfeiture of his right to the office; and it only remains for the facts to be judicially determined, and a judgment of ouster rendered by the proper court. The statute provides three ways in which this action may be brought and prosecuted, viz.: By information in the nature of quo warranto, which should be in the name of the territory, on the relation of the county attorney or attorney general; by accusation by the grand jury; by complaint by the board of county commissioners, or by any person in his own name. The law makes it the duty of the county clerk, after certain conditions have been performed by the applicant, to issue a liquor license, on payment of a specified sum of money into the county treasury. The applicant is not entitled to a license until this payment is actually made to the county treasurer. The law fixes the terms upon which an applicant may procure a license to sell liquor, and there is no authority vested in any officer to change or modify the statute. The license may be for a less time than a year, but no less sum than the annual license fee can be accepted for either a long or short time. The county clerk in this case is charged with having issued liquor licenses to applicants without requiring the payment of any sum to the county treasurer, and it is alleged that he accepted a sum himself from the applicant, leas than the required fee, and this sum he failed to pay over to the treasurer. This was a clear violation of his duties as a public officer, and one that could not have been committed, except knowingly and willfully. Willful misconduct and violation of the statutory duties of office is maladministration in office, and is such a disregard of official duties as will, under the statutes, forfeit the right to the office and its emoluments; and under the law, as it existed at the time this proceeding was commenced, an information in the nature of quo warranto was the proper mode of having the office declared vacant. The authorities cited by counsel for plaintiff in error are not in point, as ours is purely a statutory proceeding, and is governed alone by the statute in a case of this character. The evidence fully sustains the verdict, and the judgment of the court was warranted by the law.

It is contended that Bradford might have been charged with the crime of embezzlement, if he was authorized to collect the funds for the county, and, if not, he could not be held liable to the county, and in any event the licenses were void, the licensees never having paid for same. If all these propositions are conceded, it can make no difference in this case. It is immaterial whether Bradford collected the money for the county, and embezzled the funds, accepted the money paid him as bribes from the parties who procured the licenses, accepted it as a loan, or took it in good faith, with the purpose to pay it into the county treasury. He is not being sued for the funds, or on his bond for malfeasance, nor is he being prosecuted for any criminal offense. The charge is that he forfeited his office by having done acts which, by the provisions of the law, worked a forfeiture of said office; and, having been found guilty, the court was required to render a judgment of ouster, and deprive him of said office.

We find no error in the record. The judgment is affirmed, at the costs of the plaintiff in error. All the justices concur, except SCOTT, J., not sitting.

BOARD OF EDUCATION OF CITY OF PERRY v. HARALSON, County Treasurer.

(Supreme Court of Oklahoma. Sept. 7, 1894.) STATUTE-REPEAL-FINES AND FORFEITURES-SCHOOL FUND.

1. Section 15, art. 3, c. 73, Laws 1893, repeals section 50, art. 59, c. 25, of the crimes act, relating to the disposition of fines, forfeitures, and pecuniary penalties.

2. All moneys collected from fines, forfeitures, and penalties under the provisions of the crimes act constitute a county school fund, and must, when collected by the county treasurer, be placed in such fund.

(Syllebra by the Count)

(Syllabus by the Court.)

Application by the board of education of the city of Perry for writ of mandamus against J. L. Haralson, treasurer of "P" Granted. county.

C. H. Wynn, for plaintiff. S. H. Harris, for defendant.

DALE, C. J. This is an original proceeding, brought by plaintiff against the defendant for the purpose of procuring from this court a peremptory writ of mandamus upon the county treasurer of "P" county, compelling that officer to credit to the school fund of "P" county certain moneys received by the treasurer from fines, penalties, and forfeitures in criminal cases. The plaintiff filed a motion in this court after notice to defendant, and the hearing was had upon the application of plaintiff. All objections as to the form and manner of presenting the application are waived, and the sole question before us is the proper disposition of the fund arising from fines, penalties, and forfeitures. An agreed statement of facts is filed, from which we find that there has been collected by the different courts of "P" county from fines, penalties, and forfeitures a sum in excess of \$600; that the defendant Digitized by GOOSI

holds the same in his possession, and refuses to credit the same to the school fund of "P" county; and the object, as stated, of this proceeding is to determine whether such fund should go to the school or the general county fund. The solution of this question will turn upon the construction to be given to section 5791, c. 73, Comp. Laws Okl. 1893, which is as follows: "The county commissioners shall, at the time the annual taxes for territorial and county purposes are levied, levy on the taxable property of the county a tax, not to exceed one (1) per cent., which shall be collected as other taxes; and the money so realized, together with the proceeds of all monies collected from fines, forfeitures, penalties, proceeds from the sale of estrays, and all monies paid by persons as equivalent for exemption from military duty and all monies collected from marriage licenses, shall constitute a county school fund, and be appropriated exclusively for the purpose of establishing and supporting public schools for not less than three nor more than nine months in each year, and defraying current expenses of the same of every description; and said county school fund shall be apportioned to each school district in said county in proportion to the number of children over the age of six years and under the age of twenty-one years, resident therein as shown by the last annual enumeration of the same. The county treasurer shall pay to each district treasurer in the county all school monies in the county treasury belonging to the district, upon the order of the director and clerk of the district; provided, that said order shall be accompanied by a certificate from the district clerk, stating that the treasurer of the district has executed and filed his bond as required by law." This section is a part of the general law relating to schools, passed by the legislature March 14, 1893, and contains a repealing clause as follows: "All acts and parts of acts inconsistent herewith be, and the same are hereby repealed, and this act shall take effect and be in force on and after its passage and approval." ter 73, § 5830. It is contended that this later act does not repeal the acts of the territorial legislature passed in 1890, which provide that the money received from fines, penalties, and forfeitures shall be paid into the county treasury, to be added to the county general fund. Section 2608, c. 25, St. 1890, known as the "Crimes and Punishment Act," reads as follows: "All fines, forfeitures and pecuniary penalties prescribed as a punishment by any of the provisions of this chapter, when collected, shall be paid into the treasury of the proper county, to be added to the county general fund." Counsel for defendant cite numerous sections of the statute to show that it was the intention of the legislature to provide separately in each act of our statute for a disposition of such funds as might accrue from fines, forfeitures, and penalties in the enforcement

of the several chapters of our laws wherein such fines may be collected, and argues from such premises that, while the school law was adopted at a later date than was the procedure criminal act, it was not the intention of the legislature, at the time the school law was adopted, to do more than provide for the disposition of such funds as might arise from the enforcement of such law. The argument is not convincing. The act of 1893 is not ambiguous. It plainly provides that "the proceeds of all monies collected from fines, forfeitures, penalties, proceeds from sale of estrays and all monies paid by persons as equivalent for exemption from military duty, and all monies collected from marriage licenses, shall constitute a county school fund." No language could be more certain in meaning, and if we construe the same in accordance with the accepted rules we can come to but one conclusion. This statute is comprehensive in its terms, and although the legislature might not have intended to give it a broad meaning, it is susceptible of no other. It in express terms repeals all laws inconsistent with it, and therefore repeals all laws passed at a prior We are of the opinion that a peremptory mandate should issue to the defendant. directing him to credit to the school fund of "P" county the fund which he holds arising from the sources designated as fines, penalties, and forfeitures. All the justices concurring.

ROBINSON et al. v. CUMMINS. (Supreme Court of Oklahoma. Sept. 7, 1894.) REFERENCE—DEPOSIT OF COSTS—STENOGRAPHER'S FEES.

1. Under the Statutes of 1890, the court has no authority to order the parties to a cause to deposit in court the amount of the referee's costs before the referee reports to the court who is the prevailing party; nor has it authority to require payment of referee's costs, or any part of them, by any other than such prevailing party.

2. Stenographer's costs, as such, are not not to the court of the party of the party

2. Stenographer's costs, as such, are not part of the costs provided for in a trial by referee under the statutes of Oklahoma. They are to be considered, if at all, as a part of such compensation as the court shall direct to be paid to the referee.

(Syllabus by the Court.)

Error from district court, Kingfisher county; before Justice John H. Burford.

This action was commenced in the district court of Kingfisher county by B. V. Cummins against Robinson and Gibson, a copartnership under the firm name of the Commercial Bank. The plaintiff below alleged that he had executed and delivered to the Commercial Bank his promissory note in the sum of \$500, and, to secure the payment of the same. Cummins executed and delivered to the bank a chattel mortgage on certain of his personal property, of the aggregate value of \$1,789.10; that, by private and public sale, the bank had disposed of the chattels for an

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amount unknown to plaintiff, but which amount he alleged was greatly in excess of the amount of his note, interest, and all reasonable costs and charges in connection with the sale and disposition of said property; and prayed that the defendant bank be required to render an accounting of such sales, and that he might recover judgment for the amount found due, and for the cancellation of the note and mortgage. The defendants answered, admitting the execution of the note and mortgage, but alleged that the chattels mentioned in the mortgage were claimed by the Peru Plow & Wheel Company, and that, at the request of Cummins, the mortgaged chattels were disposed of to satisfy the note; that the expense of keeping and selling the chattels, together with the amount due on the note, was \$756.35; that the proceeds arising from the sale of the chattels were \$699.65; and prayed judgment for the difference. In the second count, defendants asked affirmative relief in the sum of \$320. This was in the nature of a counterclaim for money laid out and expenses in defending the title and possession of the chattels mortgaged, which, under a verbal contract, Cummins had agreed to pay. Upon the hearing, the court appointed a referee to make findings of fact and conclusions of law, which were made, and, upon the exceptions to such conclusions, a second reference was made, and the time extended in which the referee was required to make his report to October 24, 1893. Upon the 24th of October, 1893, the court ordered that each of the parties deposit with the clerk the sum of \$89.35, as the costs of the referee and stenographer, by the next morning, by 9 o'clock, which order the court made prior to the time the referee made his findings of fact. This order was not complied with, and thereupon the court dismissed the action, and ordered each party to pay one-half the costs of the entire case. The case is brought here to reverse the order of the trial court in dismissing defendants' counterclaim, and also the order taxing one-half the costs of the action to the plaintiff in error. Reversed.

Thaddeus G. Cutlip. for plaintiff in error.

McATEE, J. (after stating the facts as above). It is assigned as error that the court required the plaintiff in error to deposit the amount of the referee's and stenographer's costs in said case before the referee's report was filed, and before his bill of costs was filed in said cause; and that, upon the failure of plaintiff in error to deposit in court the said referee's and stenographer's costs and fees as required by said order, the court dismissed the case: and that there was error in not requiring the referee to show who was the prevailing party, and in not then requiring said prevailing party to deposit the amount of said fees and costs; and that there was error in

the court assessing one-half of the whole costs to the plaintiff in error. It was upon October 24, 1893, ordered by the court that "each of the parties hereto deposit the amount of the referee's and stenographer's costs herein, to wit, the sum of \$89.35, by to-morrow morning, at nine o'clock," and upon the following morning, October 25, 1893, at 9 o'clock, both parties to the action being in default of the order theretofore made on October 24, 1893, requiring each of them to deposit with the clerk the referee's and stenographer's fees, the court ordered that the cause be dismissed, and that each party, plaintiff and defendant, pay half the costs of the suit, to which order plaintiff and defendants excepted.

This suit was brought under the Code of Civil Procedure adopted in 1890 and is governed by its provisions. It is provided in section 4, art. 21, upon "Trials by Referees" (page 845 of the Statutes of Oklahoma of 1890), that "the referee or referees shall each receive such compensation as the court shall direct, to be paid by the prevailing party before the report is filed and recorded, as costs in the action." Article 21 contained, at the time of the bringing of this suit, the only provision by which the court was authorized to appoint, and trial might be had by, the referee. It also contained the only provision by which the referee might be paid. That provision was that the referee's "compensation should be paid by the prevailing party before the report is filed." But how should it be known who was the prevailing party? The referee was the only person who had that knowledge. It was therefore his duty to make known who the prevailing party was before demanding his compensation. The parties to the cause had the same right to demand that he make known who the prevailing party was before he had any right to receive compensation as the referee himself had to require payment before filing his report. No power was given to the court in the statute to compel an advance or deposit of costs to be made by either party to the action until the referee had announced whom he found to be the prevailing party. The court could go no further than the authority expressly given to it by the statute, and no such authority can be found there. There is no right or remedy by which to recover costs except such as are provided by statute and in accordance therewith. Now, is there any provision in the statute for the payment of a stenographer? The provision is solely for compensation to the referee. If the referee had found it necessary, more economical, or indispensable to engage the services of a stenographer. as is presumable, it would be a matter in the discretion of the court to consider that fact, in ordering compensation to be made to the referee.

The order of the district court dismissing the case is reversed; and it is ordered that

the counterclaim of defendants in error be reinstated upon the docket of the district court, and the order dismissing the cause, and allowing the referee to file his bill of costs, be held for naught, and the referee be required to show who was the prevailing party; and, in case of his refusal so to do, that the district court be directed to try the cause ab initio.

BURFORD, J., not sitting; all of the other justices concurring.

(2 Okl. 152)

WELLMAN v. TERRITORY.
(Supreme Court of Oklahoma. Sept. 7, 1894.)
APPELLATE PROCEDURE—FILING BRIEF AND ABSTRACT.

Rules 21 and 25 of the supreme court, adopted pursuant to Code Civ. Proc. c. 66, \$4632, and requiring plaintiffs in error to file a brief and a printed abstract of the record, setting forth the points relied on for reversal, and requiring the pages thereof to be numbered, are mandatory, and, on failure to comply therewith, an appeal will be dismissed.

Appeal from probate court, Payne county. H. Wellman was convicted of distributing obscene literature, and appeals. Appeal dismissed.

Hutto & Stewart, for appellant. C. A. Galbraith, Atty. Gen., for the Territory.

McATEE, J. This case comes here from the probate court of Payne county. The plaintiff in error was charged by the county attorney of Payne county with unlawfully, willfully, and lewdly distributing a lascivious, obscene, and indecent writing to M. and divers other persons. Upon trial by jury, a verdict of guilty was returned, and judgment was rendered against him, and a fine of \$100 imposed by the court. The defendant below brings the case here, making 18 assignments of error. No printed abstract of the record or of the points relied upon for a reversal of the judgment is furnished. The pages of the transcript of the record are not numbered. No brief has been filed in the case by counsel for plaintiff in er-The Code of Civil Procedure (chapter 66, § 4632) authorizes "the judges of the supreme court to revise their general rules, and make such amendments thereto as may be required to carry into effect the provisions of this Code, and to make such further rules consistent therewith as they may deem proper. The rules so made shall apply to the supreme court, district court and probate courts." In pursuance of the power thereby conferred, this court has adopted the following rules:

"21. Appellants and plaintiffs in error in all cases in the supreme court shall prepare a printed abstract of the record in each case, in which they shall set forth the title of the case, with the date of the filing of all papers in the court below, and a brief statement of

the contents of each pleading, and shall set forth fully the points of the pleadings or evidence, and the points relied upon for the reversal of the judgment or decree. The clerk of the court below shall also number each case of the transcript of the record, and appellants and plaintiffs in error shall refer to the same in the margin of the abstract in such manner that orders, pleadings, and evidence referred to in the abstract may be easily found on the record. They shall file with the clerk of this court, for the use of the appellee or defendant in error and judges of this court, five copies of such abstracts on or before the first day of the term, unless, for good cause, the time for filing abstracts shall be extended."

"25. The brief of the counsel for appellant or plaintiff in error shall contain a statement of the errors relied upon and the authorities to be used in the argument, and five copies thereof shall be filed with the clerk of this court on or before the first day of the term, unless, for good cause shown, the time shall be extended. One of the copies may be withdrawn by the counsel for appellee or defendant in error, and the others shall be for the use of the justices of this court."

These rules are authorized and are mandatory. It would be hard to conceive a case in which the plaintiff in error could have more entirely failed to comply with them. The appeal is therefore dismissed.

(2 Okl. 369)

In re DOSSETT.

(Supreme Court of Oklahoma. Sept. 8, 1894.)
DISTRICT COURT — ADJOURNED SESSIONS — JUDG-MENT—ABSENCE OF JUDGE — CONFLICTING SES-SIONS.

1. The district courts of Oklahoma Territory have authority and power to hold adjourned sessions of court, after the commencement of the regular term, at a time or times not designated in the order of the supreme court fixing the times when terms of said court shall begin.

2. The proceedings of such adjourned ses-

2. The proceedings of such adjourned sessions are not coram non judice and void, notwithstanding the regular term in another county in the same district had intervened between the time of the adjournment and the convening

of the adjourned session.

3. After the court has once regularly convened on the day fixed by order of the supreme court, it can expire only by adjournment sine die or by operation of law, and, unless adjourned sine die, will not so expire by operation of law until the first day of the next regular term in the same or another county; and failure of the judge to attend on a distant day to which the said court is adjourned, after having been regularly convened on the date fixed, will not result in the loss or lapse of the term.

4. Notwithstanding the Payne county court was theoretically in session during the same period that the petitioner was tried for murder in Logan county, yet such session of court was not such as the law contemplates in the observance of the rule that two courts cannot be in session in the same district at the same time.

5. Under the law as it now exists in this territory, since the act of congress of December 21, 1893, quaere, can two courts, in the same district, be in session at the same time?

(Syllabus by the Court.)

Application by John Dossett for release on habeas corpus. Denied.

On the 1st day of January, 1894, John Dossett filed his petition for a writ of habeas corpus. He was tried on an indictment returned by the grand jury of Logan county into the district court for the crime of murder. His trial commenced on the 18th day of August, 1893, and continued from day to day until the 28th day of August, 1893, the court sitting with the powers of a United States district and circuit court. On the latter date a verdict of guilty was rendered against him, as charged in the indictment. Motions for a new trial and in arrest of judgment were filed, passed upon and overruled by the court, and on the 28th day of August, 1893, the court pronounced judgment of death upon him, fixing the date of his execution January 8, 1894. From the judgment of the court the defendant has appealed, and the appeal is now pending in this court. In the meantime, to wit, on the 1st day of January, 1894, he instituted this proceeding in habeas corpus, alleging: "(1) That he is illegally and unlawfully restrained of his liberty, and is confined in a certain jail, commonly known and designated as the 'United States Jail.' situated in the city of Guthrie, in the county of Logan, and the territory of Oklahoma. (2) That he is so held by one E. D. Nix, who is the lawfully appointed and qualified United States marshal for Oklahoma Territory, and that he is so held by the said Nix under and by virtue of a certain commitment and order of the district court of Logan county, Oklahoma Territory, as more fully appears hereinafter. (3) That heretofore, to wit, on the 18th day of August, 1893, this defendant was being held in custody in Logan county, Oklahoma Territory, charged with the crime of murder in the first degree, and was so held for the purpose of being prosecuted in the district court of Logan county, Oklahoma Territory, sitting as a United States court. That on said 18th day of August, 1893, this defendant was called to the bar of the district court of Logan county, aforenamed, and a trial upon said indictment was begun in said court, and that said trial was continued from day to day, and proceedings had therein, until the 28th day of August, 1893, at which time a verdict of guilty was rendered in said cause against this defendant. That afterwards a motion for new trial was filed in said cause, and the same was passed upon by said court and overruled; and a motion in arrest of judgment was thereupon filed, which motion was overruled by said court, and this defendant was by said court sentenced to be hanged on the 8th day of January, 1894. That this defendant is now being held by the power and process of said court, under and by virtue of the proceedings herein set forth. That heretofore, to wit, on the 28th day of January, 1892, the territory of Oklahoma was subdivided into three judicial

districts, as by the supreme court of the territory of Oklahoma ordered and directed. and that one of said judicial districts was known and designated as the 'First Judicial,' and that said first judicial district comprised the counties of Logan, Payne, and 'A' in said territory of Oklahoma. That on said 28th day of January, 1892, the said supreme court of the territory of Oklahoma met in session at the city of Guthrie, and, pursuant to the power and authority vested in said court by the organic act of the territory of Oklahoma. made and entered of record an order providing that the terms of the district court in the first judicial district should be as follows: That a term of said district court should commence in the city of Guthrie, in the county of Logan, on the first Monday of March and September of each year; and that a term of said district court should commence in the town of Stillwater, in the county of Payne, on the third Tuesday in April and first Tuesday in November of each year; and that a term of said district court should commence in the town of Chandler, in the county of 'A,' on the fourth Tuesday of May and last Tuesday of November of each year. That a copy of the record of the proceedings of the supreme court of the territory of Oklahoma had on said 28th day of January, 1892, in so far as the same relates to and affects the terms of court to be holden in the said first judicial district, is attached to this petition, marked 'Exhibit A,' and made a part hereof. That on the said 28th day of January, 1892, and at all of the times mentioned in this petition until the ending of the said trial of this petitioner, as herein set forth, the Hon. E. B. Green was judge of the first judicial district of the territory of Oklahoma aforenamed. That, in compliance with the provisions of said order so made by the supreme court of the territory of Oklahoma, the Hon. E. B. Green, judge of the first judicial district aforesaid, opened court in the town of Stillwater, in the county of Payne, in the month of April, on the third Tuesday thereof, as by law provided, and held court therein at divers and sundry times during the months of April, May, and August, and adjourned said court from time to time from the commencement thereof, in the month of April. until the 1st day of September, 1893. That during all of the time that the said trial was being held, in which this petitioner was convicted in the county of Logan, as herein set forth, the district court of the first judicial district was in actual session in the county of Payne in said first judicial district. This petitioner avers that, by reason of the premises, the Hon. E. B. Green had no right, power, or authority to hold a session of the district court in the county of Logan, as aforesaid, and that the said district court of the county of Logan was not. and could not be, in session for the purposes of the transaction of any business whatsoever, and that all of the acts done and performed by the said E. B. Green in the trial of said cause were without authority of law and contrary to law, and were and are absolutely void, and of no force or effect whatsoever. This petitioner says that his trial and conviction were and are absolutely void. and that his incarceration thereunder is illegal and unlawful." The petition is verified by George Gardner, one of the attorneys for the petitioner.

Exhibit A, referred to in the complaint, reads as follows:

"United States of America, Territory of Oklahoma—ss.: Be it remembered that on the 28th day of January, 1892, the supreme court of the territory of Oklahoma met in the city of Guthrie, pursuant to adjournment, and there were present Hon. E. B. Green, chief justice, presiding, and Hon. A. J. Seay, associate justice, John F. Stone, Esq., assistant United States attorney, William Grimes, marshal, by J. C. Robb, deputy, Charles H. Filson, clerk, and E. P. Babcock, crier. Proclamation of the opening of said court having been made by said crier, the following proceedings were had:

"In re Changing the Date Holding Terms of the District Court in the Various Districts of the Territory of Oklahoma. It is ordered by the court that a term of the district court shall be held in the first judicial district of said territory at the city of Guthrie, county of Logan, commencing on the first Monday of March and September of each year; and that a term of said district court shall be held at the town of Stillwater, in the county of Payne, commencing on the third Tuesday in April and first Tuesday in November of each year; and that a term of said district court shall be held at the town of Chandler, in county 'A', commencing on the fourth Tuesday in May and last Tuesday in November of

"By agreement of the parties, the issuance of the writ was waived, and all of the questions submitted upon the petition, and the agreed statement of the record and the facts. as follows:

"District Court, Payne County, Okla. Territory. Be it remembered that now, at this time, April 18, 1893, the district court of the first judicial district of the territory of Oklahoma sitting in and for said county of Payne was convened at the hour of ten o'clock a. m. for the regular April term, 1893, and was by order of court and proclamation of court crier duly made open for actual transaction of business. There was present Hon. E. B. Green, John F. Stone, assistant United States attorney, T. J. Hueston, deputy United States marshal in charge, and T. G. Risley, clerk.

"District Court, Payne County, Okla. Terr. Be it remembered that now, at this time, April 29th, 1893, the district court of the first judicial district of Oklahoma Territory sitting in and for Payne county was by order of

court duly adjourned until 10 o'clock a. m., May 2nd, 1893, after having had the foregoing proceedings.

"'District Court, Payne County, Oklahoma Territory. Be it remembered that now, at this time, May 2nd, 1803, the district court of the first judicial district of Oklahoma Territory sitting in and for Payne county. O. T., was by order of court duly adjourned until ten o'clock a. m., May 3rd, 1893.

"'District Court, Payne County, Oklahoma Territory. Be it remembered that now, at this time, May 3rd, 1893, the district court of the first judicial district of Oklahoma Territory sitting in and for Payne county, in said territory, was by order of court and proclamation of court crier duly convened at the hour of 10 o'clock a. m. There were present Hon. E. B. Green, judge, John F. Stone, assistant U. S. district attorney, T. J. Hueston, deputy United States marshal in charge, and Chas. W. McGraw, dep. district clerk.

"'District Court, Payne County, Oklahoma Territory. Be it remembered that now, at this time, May 5th, 1893, the district court of the first judicial district of Oklahoma Territory sitting in and for Payne county was by order of court and proclamation of court crier duly adjourned until Tuesday, August 1st, 1893, at 10 o'clock a. m.

"'District Court, Payne County, Oklahoma Territory. Be it remembered that now, at this time, Aug. 1st, 1893, it is ordered, considered, and adjudged that the district court of the first judicial district in and for said Payne county be, and it is hereby, adjourned until Tuesday, Aug. 15, at 10 o'clock a. m., A. D. 1893.

"'District Court, Payne County, Oklahoma Territory. And now on this 15th day of August, A. D. 1893, it is ordered by the judge of the said court that the district court of Payne county, Oklahoma Territory, stand adjourned until 10 o'clock a. m., Monday, August 21st, A. D. 1893.

"District Court, Payne County, Oklahoma Territory. Be it remembered that now, at this August 21st, 1893, it is ordered, considered, and adjudged that the district court in and for said county be, and it is hereby, adjourned until Wednesday, August 23, 1893.

"'District Court, Payne County, Oklahoma Territory. Be it remembered that now, at this time, Aug. 23rd, 1893, it is ordered, considered, and adjudged that the district court of the first judicial district of Oklahoma Territory in and for said Payne county be, and it is hereby, adjourned until 2 o'clock p. m., Tuesday, August 29th, A. D. 1893.

"'District Court, Payne County, Oklahoma Territory. Be it remembered that now, at this time, August 29th, 1893, the district court of the first judicial district sitting in and for Payne county in said territory, at Stillwater, was convened by order of court and proclaimed by court crier at the hour of 2 o'clock p. m. for the actual transaction of

business. There was present Hon. E. B. Green, judge, T. G. Risley, clerk, S. P. King, county attorney in and for said Payne county, and F. M. Burdick, sheriff, who opened court as court crier.

"'District Court, Payne County, Oklahoma Territory. Be it remembered that now, at this time, Sept. 1st, 1898, the district court of the first judicial district of Oklahoma Territory sitting in and for said Payne county was by order of court duly adjourned until Tuesday, November 7th, A. D. 1893, the same being the first day of the November term, 1893."

"Territory of Oklahoma, Payne Countyss.: I, W. L. Norman, deputy clerk for Payne county, of the first judicial district of Oklahoma Territory, do hereby certify that the above and foregoing is a true and correct transcript of the records and journal of the district court of the first judicial district of Payne county; and I further certify that the said district court adjourned from day to day, and was in session each day, after it convened, on April 18th, until April 29th; and I further certify that the said court adjourned from day to day, and was in session each day, from May 3rd until May 5th; and I further certify that the said court adjourned from day to day, and was in session on each day, from August 29th until Sep-Witness my hand this 10th day tember 1st. of January, 1894. [Signed] W. L. Norman, Deputy District Clerk for Payne County. [Seal.]"

"In the Supreme Court of Oklahoma Territory. In the Matter of the Illegal Imprisonment of John Dossett. It is hereby stipulated and agreed between the parties hereto that the transcript hereto may be read in evidence upon the hearing of the habeas corpus proceedings pending in the above court, wherein John Dossett is petitioner, without any objection thereto by either party; and it is further agreed that the district court of Payne county adjourned from day to day and was in session from April 18th until April 29th, inclusive, and that said court adjourned from day to day and was in session from May 3rd to May 5th, inclusive, and that said court adjourned from day to day and was in session from August 29th to September 1st, inclusive, as shown by the accompanying certificates. [Signed] A. H. Huston and George Gardner, Attorneys for Petitioner. John F. Stone, Asst. U. S. Attorney."

It was further stipulated by the parties as follows:

"In Supreme Court of Oklahoma. In re Imprisonment of John Dossett. It is hereby stipulated that the trial of the petitioner in Logan county took place between the 18th and the 28th days of Aug., 1893, commencing on the 18th, and ending on the 28th. [Signed] John F. Stone, Asst. U. S. Atty. George Gardner, Atty. for Petitioner."

The case was argued orally before the full

beach, and very able and exhaustive written briefs submitted by counsel for the petitioner and the government. Writ denied.

Beekman & Peckham, George Gardner, and A. H. Huston, for petitioner. C. R. Brooks, Horace Speed, and J. F. Stone, for the United States.

SCOTT, J. (after stating the facts). This proceeding presents three important questions, and upon the solution of each of them depend issues of great importance to the petitioner, the bench, the bar, and the public: First. Has the district court any authority and power to hold adjourned sessions of court after the commencement of a regular term, at a time or times not designated in the order of the supreme court fixing the time when the terms of court shall be held? Second. Are the proceedings of such adjourned term coram non judice and void, and especially if the regular term of court in another county in the same district had intervened between the time of the adjournment and the convening of the adjourned sessions? Third. Was the district court of Payne county actually in session at the time the petitioner was tried and convicted? Counsel for the petitioner present these questions to the court in their brief in a very scholarly manner, and should certainly be commended for the zeal and ability shown in its preparation.

Upon the first question there appears to be less diversity of opinion than upon the second. Indeed, in the abstract, and as applied to courts of general jurisdiction, the weight of authority gathered from the reported cases throughout the United States holds that this is one of the necessary powers, irrespective of any grant or concession of right by express statute, and without which inherent power of conduct of its affairs and business a court would become a mere machine, in which condition, should any fortuitous circumstance cause a suspension of its business and functions in the midst of a regular term, it would have no power within itself to adjourn over, and to again start its machinery into operation until its next regular session. Courts in all civilized countries are instituted for the dispatch of public business, and are not to be circumscribed by legal technicality, in this rapid commercial era, by the rusty usages of the past, but, adapting themselves to the progressive march of civilization, must conform their rules of procedure to meet the necessities of the age. Counsel for petitioner argue with considerable ingenuity against the power of the district court of this territory to hold any other than regular terms of court, and place particular stress upon certain words contained in that portion of the organic act of the territory which directs the action of the supreme court in fixing where and when terms of the district courts shall be held in

That portion of the the various districts. organic act referred to reads as follows: "Sec. 9. The supreme court shall define said judicial districts and shall fix the times and places at each county seat, in each district where the district court shall be held, and designate the judge who shall preside therein." St. 1890, p. 41. Now, there can be no doubt that it might have been competent, under this section, for the supreme court not only to designate the day upon which each term should commence, but also to designate the day on which each term should end, had that body seen proper to do so; but, in performing their duties under this head, that court, in its wisdom, saw fit only to fix the dates of the commencement of each term of the district court in the several counties, and remained silent as to the duration and the date of the termination of the session; hence, when we come to consider the question of the limits of time allotted to each term, and, in connection therewith, also when each term shall be regarded as at an end, we must necessarily find where the power abides to continue in session, adjourn over temporarily, or adjourn the term sine die. No contention will arise upon the proposition that a court of general jurisdiction, once in session upon the day fixed by law for its regular term to commence, may continue in session, should its business justify, until such time as another regular term of the same or another court in the same district shall arrive, when, if not adjourned over by the action of the court itself, by operation of law, one term would end, and the new term would begin; nor will there be any contention, the length of time a court shall last not being fixed, that the court may adjourn sine die at any time after convening. Thus far, at least, the court has full control of its own business and actions. A much more serious question arises when we come to a consideration of the point whether the district court can adjourn for a considerable number of days, and then, on the adjournment date, resume its functions, and, thus resumed, adjourned sessions became a part of the regular term.

It is strenuously contended by counsel for petitioner that in this territory, under the provisions of the organic act, and by the action of the supreme court in fixing the times and places when terms of court shall be held, adjourned sessions cannot be held by the district court, but that, when an adjournment of the regular term is taken, the term lapses, and the session cannot again be resumed without an order of the supreme court permitting it to be done. On reason and weight of authority we do not think the position of counsel is tenable. The language of the organic act, interpreted by the ordinary rules of construction, may well be held to mean that the supreme court shall fix the time when courts shall begin to be held, without any reference to the duration or continuity of their holding, that being left to the wisdom of the presiding judge, whose knowledge of the volume of business to be transacted in each court of his district would enable him to best judge of the necessity for longer or shorter sessions of each court. Furthermore, it is evident from the language of the organic act that congress did not mean to confer on the supreme court the sole power to determine the length of time each term should last, for, had congress so intended, it would have been easy to have made such a provision. No provision of this kind being contained in the act, and the supreme court, in fixing the terms of the several district courts, having placed no limitation on the length of the terms, it may fairly be inferred that the control of those matters was purposely left in the discretion of the various district judges, provided that the exercise of such authority is within the ordinary scope and range of their powers, apart from any express enactment or rule of procedure conferring upon them the right to do so. Upon this branch of the question we derive valuable assistance from the very able and masterly brief of counsel for the government, which is marked throughout by evidences of deep and careful research, extending over the entire field of American authorities, the recapitulation of which may well be said to set at rest all doubt as to the power of courts of general jurisdiction to control and direct their own sessions after once convening on the day fixed by law.

In the case of Bank v. Withers, 6 Wheat. 106, Chief Justice Marshall, in the opinion of the court, says: "The sole question in the cause is whether the adjournment from the 16th of May to the fourth Monday in June was a continuation of the April term or constituted a distinct term. There being nothing in any act of congress which prevents the courts of the district from exercising a power common to all courts,-that of adjourning to a distant day,-the adjournment on the 16th of May to the fourth Monday in June would be a continuance of the same term, unless a special act of congress especially enabling the courts of the district to hold adjourned sessions may be supposed to vary the law of the case. That act is in these words: 'And the said courts are hereby invested with the same power of holding adjourned sessions that is exercised by the courts of Maryland.' These words do not, in themselves, purport to vary the character of the session. They do not make the adjourned session a distinct session. were probably inserted from abundant caution, and are to be ascribed to an apprehension that courts did not possess the power to adjourn to a distant day until they should be enabled to do so by a legislative act. But this act, affirming a pre-existing power, ought not to be construed to vary the nature of that power, unless words are employed

which manifest such intention. In this act there are no such words, unless they are found in the reference to the courts of Maryland. But on inquiry we find that in Maryland an 'adjourned session' is considered as the same session with that at which the adjournment was made. Since, then, the term at which this conditional or office judgment was to become final was still continuing when it was set aside, and the defendant permitted to plead to the declaration, there was no error in the proceeding." In the case of Harris v. Gest, 4 Ohio St. 470, clting the case of Bank v. Withers, supra, with approval, the court says: "Courts are not limited in their power of adjournment to an adjournment from one day to the succeeding day. They have an inherent power to adjourn to a more distant day when not restrained by the constitution or the statute law. * * * When this power is exercised, the sitting after the adjournment is a prolongation of the regular term, and in contemplation of law there is but one term." The supreme court of Wyoming, in Re Mac-Donald (Wyo.) 33 Pac. 18, says: "The question involved here was presented to this court, and was discussed at length, in the case of Stirling v. Wagner (Wyo.) 31 Pac. 1032: and although the membership of this court has been changed since that decision was rendered, which may account for the presentation of the question anew, we adhere to the ruling in that case, and hold such an adjournment over an intervening term or portion of a term of the district court for another county in the same district valid. It was in accordance with the universal practice of the district court in this jurisdiction to so adjourn over a term or a portion of a term. It was deemed unnecessary and unwise to disturb this practice, which has received such sanction of these courts, as such an action on our part would result in disturbing and annulling too many judgments. Besides, there never was any statute in this jurisdiction prescribing the duration of any term of the district court, the length of its sessions, or when it should adjourn; and, in the absence of any positive law to the contrary, a district court, being a court of general and superior jurisdiction, has power to adjourn to a distant day, even over an intervening term or portion of a term held in another county or the same district during the interval of adjournment." also, Smurr v. State, 105 Ind. 125, 4 N. E. 445; Casily v. State, 32 Ind. 62; Samuels v. State, 3 Mo. 73; Lewin v. Dille, 17 Mo. 69; Railroad Co. v. Hand, 7 Kan. 380; State v. Knight, 19 Iowa, 96-99; Cook v. Smith, 54 Iowa, 640, 6 N. W. 259, and 7 N. W. 16; Dunn v. State, 2 Ark. 229; State v. Montgomery, 8 Kan. 358 (Brewer, J.); In re Millington, 24 Kan. 214 (Brewer, J.). thorough review and consideration of the authorities upon this question conclusively settles the question of the authority and inher-

ent right in all courts of general jurisdiction to adjourn their sessions over to a distant day, and over intervening regular terms in other counties, and then to resume business at the adjourned date, and that such resumed session is but part and parcel of one and the same term. We fully agree with this doctrine, and hold the principles fully applicable to the district courts in this territory.

We come now to the consideration of the really important question involved in this case, and that is whether the petitioner was tried at a term of court, and at a time, when another term of court in another county of the same district was in session, and the law as applicable thereto. There is no controversy upon the proposition that the Logan county district court was in session from the 18th to the 28th day of August, 1893, both days inclusive, and that the petitioner was tried between those dates, and that the Honorable E. B. Green, presiding judge, was present during all of said time, presiding over that court; and the only reasons urged by the petitioner why said session of Logan county district court was not a legal term or session are-First, because the court had no power to fix and hold an adjourned term; second, because the court had no authority or power to fix the time and hold an adjourned session in Logan county after the time had arrived for holding an intervening term in Payne county; third, because it is alleged that the adjourned term of the district court of Payne county was actually in session at the same time that the petitioner was being tried in Logan county.

The first two objections urged by the petitioner against the legality of his trial must be decided against him, on the grounds and upon the authority heretofore stated and cited in this opinion. Let us then carefully examine the third ground of objection, and see whether it is tenable. The transcript of the proceedings of the Payne county district court, as certified to by the clerk, is before us, and it is stipulated by counsel for the petitioner and for the government that it may be considered in evidence by us without objection. This transcript shows the convening of the court in regular session for the April term, 1893, on the 18th day of April, 1893, the Hon. E. B. Green, judge of the first judicial district, presiding, and further shows that on the 5th day of May, 1893, the Payne county district court was, by order of the court and proclamation of the court crier, duly adjourned until Tuesday, August 1, 1893, at 10 o'clock a. m. The record fails to show the presence of any officers of the court on said date, or that the court convened at all, nor does it show by whose order the further adjournment was taken to Tuesday, August 15, 1893. Under the authorities it will not do to say that the failure of a judge to attend and open court on a day to which it has been adjourned, after having

regularly convened on the day fixed by law, will result in the loss of the term, and that hence the failure of Judge Green to be present in Payne county on the 1st day of August, 1893, operated as a loss of the term in that county. This question must be determined from a different standpoint. The transcript further shows that on August 1, 1893, court was adjourned in the same indefinite manner to August 15th; on August 15th to August 21st; on August 21st to August 23d; on August 23d to August 29th; and that on August 29th the judge and all the officers were present. On September 1st, court was adjourned to November 7, 1893, which was the first day of the next regular term for Payne county. We are unable to say that, after a session of court is once regularly convened on the day fixed by law, it can expire in any manner, except by adjournment sine die or by operation of law. This is the rule, and is too well settled to admit of controversy. In what manner can a session of court expire by operation of law if not adjourned sine die? Will the failure of the judge to attend on a distant day to which said court is adjourned lose the term? We think not. The Payne county court was theoretically in session until the first day of the regular term following in that or another county, on the theory that a court is in session from the date of convening on the day fixed by law to the first day of the regular term following in the district, unless adjourned sine die. The transcript cuts no figure except to disclose that the term was not adjourned sine die, and, if not, its period of duration lasted until the first day of the regular term following.

This branch of the subject is ably discussed in Railroad Co. v. Hand, 7 Kan. 386 (Kingman, C. J.; Brewer, J., concurring; Valentine, J., not sitting). Some of the reasoning will be instructive here: "A question is raised in limine, of considerable importance. The facts necessary to understand it are these: The verdict in the case was returned, and judgment entered thereon, on Saturday, the 5th of December, and at the close of the day the court adjourned to Monday, the 7th; but neither on Monday, the 7th, nor on Tuesday, the 8th, was any court held, the district judge being absent. On the 8th of December the motion for a new trial was filed with the clerk. On the 9th, the judge having reached Lawrence, the court was opened, and the motion for a new trial was heard and overruled, and time given to make a case; and that case so made raises all the questions but one made in this court. It is insisted by defendant in error that all the proceedings had on Wednesday, the 9th, were coram non judice, and present no basis on which the court can act. The record shows that on Monday, the 7th, and on Tuesday, the 8th, the court was adjourned by the sheriff, the order reciting the absence of the judge, being detained by a severe storm. Section 719 of the Civil Code is referred to as sustaining

the correctness of the action of the sheriff. This section seems clearly to refer to the beginning of a term, and therefore is not applicable to this case. It was inserted for the sole purpose of saving the term if the judge was detained from the place for any cause. Thomas v. Fogarty, 19 Cal. 644; People v. Sanchez, 24 Cal. 17. By common law, a failure to open court on the first day of the term wrought a loss of the whole term. People v. Bradwell, 2 Cow. 445. The great inconvenience arising from this principle early led to its correction by legislation. Accordingly, the English parliament, in 3 Geo. IV. c. 10, made provision that the court might be opened at some day subsequent to the first day of the term, and that all records and proceedings should be made up as of the first day of the term (2 Bac. Abr. tit. 'Courts,' p. 714); and our examination has shown that similar laws have been passed in many of the states. This section of our Code having only reference to the beginning of the term, the act of the sheriff in adjourning the court was simply a nullity. Yet we do not think that the term was lost by the adjournment of the court on Saturday till Monday, and its not convening till Wednesday. The term of the court is fixed by law. Having once opened, it so continues till the term expires, or an adjournment sine die is made. The adjournment from day to day does not suspend its functions. After the court has adjourned for the day, it is a common practice for grand juries to continue their sessions, swear witnesses, pursue their investigations, and find bills; and petit juries frequently remain out all night in deliberation, and make up their verdicts, while the journal shows that the court has adjourned. Each of these juries is part of the court, performing important functions; and the court is always in session, in fact, so that it can protect the juries and enforce proper conduct on their part. 'For all general purposes, the court is considered as in session from the commencement till the close of its term.' Barrett v. State, 1 Wis. 175. In the case just cited, the court had adjourned till the next day, and some hours after the adjournment, and before the next day had begun, received a verdict in a criminal case, which was held good, on grounds that necessarily cover the case under consideration. At common law, the whole period of a term was looked upon as a single day, and everything done at the term was regarded as done of that day. We need not point out what innovations our statutes have made on this doctrine, but nowhere find it abrogated. The statute still makes judgment liens revert to the first day of the term at which the judgment was rendered. There is an evident purpose on the part of courts to so construe the law, if possible, as will uphold the sessions of courts actually doing business. See Womack v. Womack, 17 Tex. 1; Cook v. Skelton, 20 Ill. 107; Jones v. State, 11 Ind. 357. In this case we find there pres-

ent the judge, the clerk, and other ministerial officers at the time and place where it is by law authorized to be held, properly organized at the beginning of the term, and performing the functions of a court. This must be held to be a court legally constituted and fully authorized to transact business. 2 Bac. Abr. 616, tit. 'Courts.' This conclusion makes it necessary to examine the various questions raised in the record."

In State v. Montgomery, 8 Kan. 358 (Brewer, J.), the question is discussed as follows: "Upon that day, then, the regular term of court in Anderson county commenced. Upon that day, too, it is plain the term of the district court of Douglas county, by necessity, closed; for it is said that the court is considered in session from the commencement to the close of the term, and, if the term did not close in Douglas county at the time it commenced in Anderson, there would be 'two terms of the district court in session in the same district at the same time, doing business and trying cases, with but one district judge.' It does not appear from the record that there was practically any such difficulty as that suggested, or that the judge of the district court was attempting the physical impossibility of a personal presence in Garnett and Lawrence at the same time, or even that the judge pro tem. was engaged in holding court in Douglas on the same day that the regular judge was holding court in Anderson county,-a question, by the way, which may involve consideration very different from that presented by this record. So far as appears here (for we cannot presume difficulties and collisions when none are shown), the district court of Douglas county was adjourned by order of the judge from a day prior to the commencement of the regular term in Anderson county to a day subsequent to its close. Was such adjournment ultra vires, and did the term lapse notwithstanding such order? This is a naked question. The legislature has named the day for the opening of a term, but has not for the clos-That is confided to the discretion of the judge, and is determined by the amount of business and the necessity of suitors. section 10 of the amendment to the Code of Civil Procedure in 1870 (Laws 1870, p. 174), actions are 'triable at the first term of the court after the issues therein, by the times fixed for pleading, are or should have been made up ten days before the term.' It may often happen that the time is insufficient to dispose of all the triable actions in one county before the day fixed for the commencement of the term in another. Has the law given to a party the right to have his case tried at a given term, and at the same time denied the court the power to secure that right? Again, section 10 of the acts concerning district courts (Gen. St. p. 308) provides that the 'judges of the several district courts shall have the power to hold such special and adjourned terms, in any county in

their respective districts, as they may deem necessary.' For special terms, notice is required, but for an adjourned term a simple order adjourning the court to a given time is all that is necessary. A special term is a separate, independent term. An adjourned term is but a continuation-a part-of the regular term. Giving the district court power to hold an adjourned term gives it power, not to adjourn from day to day, but to adjourn over a length of time, over intervening obstacles to the holding of court. It seems to contemplate just such an exigency as the present, where the business in one county is incomplete, and yet the day fixed for the commencement of the term in another has arrived. The time of such adjournment is not restricted unless it is deemed to be by the commencement of the succeeding regular term in that county. Being but a continuation—a part—of the regular term, the unfinnished business may be completed, bills of exceptions signed, etc. Again, while it is true mere is a sense in which it may be said that the court is considered in session from the commencement to the close of the term, and this theoretical continuity involves the presence in the county of all the officers of the court, including the judge, yet there is a practical limit to the application of this doctrine, beyond which an attempt to carry it involves a manifest absurdity. Supposing that a judge holding court in some adjoining county during the present week should adjourn for a day, and come here to attend the State Fair, and that during that day an exigency should arise in his county which demanded the immediate exercise of the restraining power of an injunction, to whom shall the application therefor be made? By section 239 of the Civil Code the district judge, 'or in his absence from the county, the probate judge,' may grant an injunction. Now, by the strict theory of the continuity of the term, the district judge is present in the county, and therefore the probate judge has no jurisdiction. As a matter of actual fact, he is absent from the county, and therefore the probate judge has jurisdiction. Unquestionably, the latter view is correct, and illustrates a practicable limitation to the idea of the continuity of the term. We conclude, then, that the adjournment of the district court from the 9th to the 24th of March was not ultra vires, that the term did not lapse on the 13th of March, and that the bill of exceptions is a part of the record, and that the errors alleged in it are proper subjects for our consideration."

Under these authorities, and the law as we understand it, our determination is this: While the Payne county court was theoretically in session, as illustrated in State v. Montgomery, yet the actual fact is that Judge Green was at Guthrie, Logan county, during the period from August 18th to August 28th, inclusive, trying John Dossett for murder. The transcript shows this. He was not "at-

tempting the physical impossibility of being personally present at both places at the same time." The fact that an adjournment was taken, or attempted, in Payne county, from time to time, makes no difference. Had August 1st, or any of the previous dates upon which adjournments were attempted or taken, been the first day of a regular term, under the authority of the Terrill Case (Kan.) 34 Pac. 457, and McClaskey Case, Id. 459, the term on August 1st, or any of those prior thereto when the judge failed to attend, would have been lost, or, under the law as it is now (section 4626, St. 1893), on a failure to comply with the statutory requirements on the first and second days of the term, the same result would have followed; but where the term had regularly opened, and was legally in session, neither of these rules would apply. We think that the "theoretical session" of the Payne county court, illustrated in State v. Montgomery by the learned justice delivering the opinion, applies with peculiar force to this case, and is not such session of court as the law contemplates to interfere with the regular and lawful transaction of business in Logan county. The transcript shows nothing more than the adjournments, and for these the presence of the judge was not essential, after the court was once opened regularly according to law. We hold the Logan county term to have been legal, and that the alleged sessions of the Payne county court were not such as are contemplated in the observance of the rule that two courts cannot be in session in the same district at the same time. We are not ready to concede the question as to whether, under the law as it now exists in this territory since the act of congress of December 21, 1893, and some very respectable late authority, even this cannot transpire legally. Viewing the law as we do, the application and writ for the release of the petitioner will be denied. It is so ordered. All the justices concurring.

SPRAY V. TERRITORY.

(Supreme Court of Oklahoma. Sept. 7, 1894.) Criminal Law—Appeal.

1. When a criminal cause is brought here upon writ of error or appeal, in such a manner that the court cannot pass upon the substantial rights of the parties, the provisions of the statute relating thereto must be strictly complied with.

2. An agreement of attorneys, prescribing the time or manner of taking such appeal or bringing such writ of error here, cannot be substituted in lieu of the provisions of the statute. (Syllabus by the Court.)

Error to district court, Oklahoma county; before Justice J. R. Clark.

John Spray was convicted of a criminal offense, and brings error. Dismissed.

Amos Green & Son, for plaintiff in error. C. A. Galbraith, Atty. Gen., and J. H. Woods, for the Territory.

McATEE, J. The plaintiff in error was indicted by the grand jury of Oklahoma county for a rape committed upon Etta Fix. a female child 14 years of age. A transcript of the testimony of the prosecuting witness and of the plaintiff in error is filed in the case. From a careful examination of this testimony, it appears that a number of other witnesses were examined, and it is evident that no true estimate can be formed of the merits of the case without an examination of the other testimony also. It is not possible, therefore, to pass upon the substantial rights of the parties. To do this, it is imperative that a complete transcript of the evidence should have been furnished. This case was begun under the Code of Criminal Procedure in force when the indictment was found, December 8, 1891, as contained in the Statutes of Oklahoma (Ed. 1890), by which it is provided in article 16, p. 1015, that: Section 4: "The appeal must be taken within one year after the judgment is rendered and the transcript must be filed as hereinafter directed." And section 5: "An appeal is taken by the service of a notice upon the clerk of the court where a judgment was entered stating that the appellant appeals from the judgment. If taken by the defendant a similar notice must be served upon the prosecuting attorney." Section 7: "* * When the appeal is taken the appellant shall, within sixty days thereafter prepare and serve upon the opposite party, or his attorney an abstract of the record of the cause, setting forth so much thereof as he may deem necessary to clearly present the errors complained of, and shall accompany it by an assignment of error, and shall file in the office of the clerk of the supreme court seven printed or type-written copies thereof, and the clerk of the court shall then docket the cause. plaintiff and defendant, as it stood in the court below. * * * Abstracts, briefs and arguments shall be in such form and filed as the supreme court may by rule direct." Judgment was rendered December 19, 1892. The notices were not served as prescribed in sections 4 and 5.

The provisions cited in section 7 were not complied with. In lieu thereof, the following agreement was attempted to be substituted: "It is hereby stipulated and agreed that no writ of error need issue. Defendant in error hereby traverses the aforesaid assignment of error, and says no error intervened in the trial below, and waiving service of writ, and agrees that the court hear the case on the record and papers and evidence filed, and without the filing of briefs by either party, and pass upon the errors complained of; that the case be taken up and heard by consent on the 20th day of the present month, or as soon thereafter as the court can hear the same. July 17th, 1893." This agreement was signed by the attorneys for the plaintiff in error and by the county attorney on the last-named date, and alse

by the attorney general for the territory. Accompanying this agreement, the transcript on appeal, together with excerpts from the evidence, were filed in this court January 16, 1894. No attempt has been made to bring the case here in the manner prescribed by the statute. This court has, as authorized by section 7, given directions as to the form in which abstracts and briefs shall be presented to it. These directions have not been complied with. When a criminal cause is brought here upon writ of error or appeal in such a manner that the court cannot pass upon the substantial rights of the parties, the provisions of the statute relating thereto must be strictly complied with. An agreement of attorneys, prescribing the time or manner of taking such appeal or bringing such writ of error here, cannot be substituted in lieu of the provisions of the statute. The appeal is dismissed. All of the justices concur.

LIGHT v. CANADIAN COUNTY BANK.

(Supreme Court of Oklahoma. Sept. 7, 1894.)

ARREST IN CIVIL PROCESSINGS—FRAUD—REVIEW ON APPEAL — DUE PROCESS OF LAW—TRIAL BY JURY.

1. The proceedings for the arrest and bail of persons who are charged upon affidavit with having removed or begun to remove any of their property out of the jurisdiction of the court with the intent to defraud their creditors, or that they have begun to convert their property, or a part thereof, into money, for the purpose of placing it beyond the reach of their creditors, or that they have property which they fraudulently conceal, as provided in the statutes of Oklahoma (chapter 66, art. 9, § 4026), and upon the terms and conditions of said chapter, and upon the arrest of the person so charged, that he or they may be committed to the jail of the county until discharged by law, and may be so held under arrest until it be found by the court upon hearing that the statutory grounds stated in the affidavit were untrue, or that the money, property, or assets so referred to have been applied to the payment of the debt sought to be recovered in the action, are not violative of articles 5 and 7 of amendments to the constitution of the Unital

ed States.

2. In proceedings before the probate judge under the Statutes of Oklahoma (chapter 66, art. 9, "Arrest and Bail") the judgment debtor has not a right to a trial by jury upon the hearing of a motion to discharge the order of arrest on the ground that the allegations in the affidavit on which the order of arrest was granted are

3. In proceedings in arrest and bail the affidavit may be amended, at the discretion of the court, when it contains the names of the parties, specifies the amount of indebtedness, and avers a statutory ground for issuing the order of arrest, no matter how defectively the points

may be stated.

4. "Due process of law" is the manner of proceeding which has always been recognized as constitutional in England and in this country in the particular class of cases to which the one in question belongs, the person subjected to it being afforded every reasonable opportunity to defend himself of which the nature of the case will admit.

5. Article 7 of amendments to the constitution of the United States preserves the right of

trial by jury in such classes of cases in which it existed at the time of the adoption of the constitution, in so far as the legal proceedings applied at that time to the ascertainment of the amount for which judgment was to be entered; but the methods to be adopted for enforcing payment of the amount found to be due from the judgment debtor are within the legislative power of the various states.

6. This court will not reverse a finding of

6. This court will not reverse a finding of facts made by the probate court upon motion to discharge the order of arrest because of the insufficiency of the evidence upon which said finding is based, provided the evidence reasonably

tends to support its finding.

(Syllabus by the Court.)

Error from probate court, Canadian county.

Action by the Canadian County Bank against Albert E. Light. An order for the arrest of defendant was issued. A motion to discharge the order was denied, and the court found that plaintiff was entitled to execution against the person of defendant, and the latter brings error. Affirmed.

Plaintiff in error, on May 22, 1893, executed and delivered to defendant in error his promissory note for \$355.75, due in 15 days from date, but upon the payment of interest in advance extensions were made up to February 7,1894. It appeared in evidence that plaintiff in error made a loan of \$355.75 from the Canadian County Bank on March 22, 1893, and agreed to pay for the use thereof at the rate of 2 per cent. per month until paid, and mortgaged a quarter section of land, upon which he held the final certificate, to the bank, to secure the payment of the loan; and thereafter, on August 25, 1893, he was notified that final proof on the land was suspended because the notice to make proof was signed by the receiver instead of the register, as required by law. Thereupon he agreed with one Weedman to convert his cash entry into a homestead, and to immediately thereafter relinquish to Weedman in consideration of \$1,600. This scheme was planned, and the money thereafter paid in cash to plaintiff in error by Weedman. Plaintiff in error gave no notice to the bank that the mortgage given to it as security was then worthless, and that he had arranged with Weedman to make it so, but, pending the execution of the agreement to convert the land and defraud the bank of its lien, he renewed his note in the bank, still concealing from it this fact. In the action upon the note he pleaded the statute of usury against his contract with the bank, and claims to have paid out the whole amount received from Weedman upon a debt due his brother, and in excursions to Colorado and other states. On February 21, 1894, defendant in error brought its action on said note in the probate court of Canadian county to recover the amount thereof, and claiming interest from and after February 7, 1894. On the same day that summons was issued the plaintiff below filed its affidavit for an order of arrest of Light under the provisions of article 9, Code Civ. Proc., alleging the following grounds, viz.; Digitized by GOOSIC

(1) Light had converted his property into money for the purpose of placing it beyond the reach of his creditors, and (2) that he has property which he fraudulently conceals. The defendant, Light, was arrested on the day the order was issued. On February 22d defendant below filed a motion to discharge the order of arrest on the ground that the averments in the affidavit upon which the order was issued were insufficient in law, and pending the hearing of the motion to discharge the order of arrest Light filed a second motion to discharge the order of arrest on the further and additional ground that the facts set forth in the affidavit were untrue. On February 27th the cause was heard before the probate court upon the motion to discharge, and over the objection of Light the court permitted the bank to amend its affidavit, which was accordingly done, and, on leave being granted, Light's motion to discharge was extended to cover the amended affidavit. Upon the hearing of the motion to discharge the order of arrest the court denied the motion, and found that the plaintiff was entitled to execution against the person of Light, and ordered that he be placed in jail until the judgment should be paid, or that defendant be discharged according to law. The defendant below brings the case here for review, alleging error as follows: (1) The court erred in permitting the plaintiff below to amend its affidavit for arrest in substance by alleging additional grounds to those set forth in the original affidavit. (2) The court erred in denying the motion of the defendant below to discharge said order of arrest on the ground of the insufficiency of the affidavit for arrest. (3) The court erred in rendering judgment that execution be issued to the sheriff to arrest the defendant and imprison him until said debt and costs should be fully paid, or defendant discharged according to law.

Forrest & Gunn, for plaintiff in error. Gillette & Brown, for defendant in error.

McATEE, J. (after stating the facts). The first contention of plaintiff in error is that the court erred in permitting plaintiff below to amend his affidavit for arrest in substance by alleging therein additional grounds for arrest to those set forth in the original affidavit, against the objection of the defendant This is incorrect. The only allegation not made in the original affidavit which appears in the amended one is "that he has disposed of his property with intent to defraud his creditors." It had been stated in the original affidavlt "that said defendant, Albert E. Light, has converted his property into money for the purpose of placing it beyond the reach of his creditors." If one converts his property into money for the purpose of placing it beyond the reach of his creditors, that will be disposing of it with intent to defraud his creditors. The other amendments of the affidavit permitted by the court were enlargements of what had been stated in substance in the original affidavit. The whole amendment was such as the court was authorized to permit in order to make the proceedings in the case to conform to the provisions of the Code of Civil Procedure (St. Okl. 1893, § 4017, p. 784). In states where, by the civil procedure, amendments to the affidavit are authorized, it is held that "when the affidavit contains the names of the parties, and specifies the amount of the indebtedness, and avers a statutory ground for issuing the writ, however defectively any of these points may be stated, it may be amended." Drake, Attachm. § 113; Booth v. Rees, 26 Ill. 45; Moore v. Mauck, 79 Ill. 391; Wells, Fargo & Co. v. Danford, 28 Kan. 487; Robinson v. Burton, 5 Kan. 294. The rule thus declared is upon that provision of the Civil Code which provides that: "The court may * * in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding, or by inserting other allegations material to the case, or conform the pleading or proceeding to the facts proved, when such amendment does not change substantially the claim or defense; and when the proceeding fails to conform in any respect to the provisions of this Code, the court may permit the same to be made conformable thereto by amendment." The rule covers the amendment permitted by the probate court, and is applicable to proceedings in arrest and bail, as in attachment.

The second assignment of error is that the court refused to discharge the order of arrest because of the insufficiency of the affidavit for arrest, but the plaintiff in error does not state in his brief any respect in which the affidavit is insufficient, and, as it conforms to the requirements of the Code of Civil Procedure, it is sufficient. It is further assigned for error that in denying the motion of defendant (plaintiff in error) to discharge the order of arrest because the facts set forth in the affidavit for arrest were untrue, the court erred. The court below passed upon the facts, and they will not be reversed here inless the rulings is clearly against the weight of evidence.

It is further claimed by plaintiff in error under his fourth assignment of error that the provisions of the statute (chapter 66, art. 9, §§ 148-154, Code Civ. Proc.) are in contravention of the constitution and laws of the United States, and that the order of the probate judge to the sheriff of Canadian county to arrest the plaintiff in error, and hold him to bail in double the sum of \$355.75, as stated in the affidavit for arrest to be due, was in violation of article 5 of amendments to the constitution of the United States, providing that "no person shall be" deprived of life, liberty or property without due process of law;" that by the

arrest he was deprived of his liberty without due process of law; that the arrest and imprisonment of a citizen on an affidavit, to be kept under arrest or bail until discharged according to law, is not in any sense "due process of law," but that due process of law implies jurisdiction and trial; and further, that article 7 of amendments to the constitution of the United States provides that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This is a suit at common law. and the proceedings in arrest in this case are in violation of the constitution. Upon this contention it is to be said that "due process of law" is the law in its usual course of administration through courts of justice. 2 Story, Const. §§ 1941-1952; Murray's Lessee v. Improvement Co., 18 How. 272; Wynehamer v. People, 13 N. Y. 378. It means in each particular case such an exercise of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the preservation of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. Stuart v. Palmer, 74 N. Y. 191; Cooley, Const. Lim. 355. It is probably wiser to leave the meaning of "due process of law" to be evolved "by the gradual process of judicial inclusion and exclusion as the case presented for decision shall require, with the reasoning on which such decision may be founded." Mr. Justice Miller, of the United States supreme court, in Davidson v. Board, 17 Ala. Law J. 223. "The peculiar necessities which call for the action of an officer, and whether the power was exercised in the same manner prior to the adoption of the constitution without being regarded as a violation of the principles of Magna Charta, may be considered; and if it be found that like proceedings have always been recognized as constitutional in England and this country, and if the person subjected to them is accorded every reasonable opportunity to defend his individual rights which the nature of the case will admit,the case being one in which the end sought to be obtained is lawful,-the statute cannot be said to deprive a party of the benefits of due process of law." Judge Cooley, in Ex parte Ah Fook, 49 Cal. 406. It does not necessarily require a trial by jury except in regular common-law proceedings. Walker v. Sauvinet, 92 U.S. 90; Reagh v. Spann, 3 Stew. (Ala.) 108; In re Curry, 1 N. Y. Civ Proc. R. 319; Church v. Kelsey, 7 Sup. Ct. 897; Donahue v. County of Will, 100 Ill. 94; Hilton v. Merritt, 110 U.S. 97, 3 Sup. Ct. 548; People v. Haws, 37 Barb. 440; The J. W. French, 13 Fed. 924; Risser v. Hoyt, 53 Mich. 185, 18 N. W. 611. So of article 7 of amendments to the constitution. The constitutional guaranty in the various states. that the right to trial by jury shall be preserved and shall remain inviolate, refers to

the right as it existed at the time of the adoption of the constitution. That amendment provides that "in suits at common law, when the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," etc. That declaration provides that the right of trial by jury shall be preserved; that is, kept just as it was at the time of the adoption of article 7 of amendments. This provision does not extend, but preserves, the right of trial by jury. Cases to which it was not then applicable are still exempt from its application. The provision is also made in such terms as to justify the view that it was intended to apply solely to the ascertainment of the amount or value in controversy, and for which judgment should be entered up, and not to the method of enforcing the judgment of the court, and to the means within the power of the court to compel compliance with its orders. Such methods of procedure for enforcing compliance with the orders of the court are within the power of the legislatures of the various states, and the proceeding for arrest and bail herein referred to is among these means. "Due process of law" carries with it, therefore, the right of trial by jury, when trial by jury has been the usual course of administration in the particular class of cases through courts of justice to which the one in question belongs. What was, at the time of the adoption of the constitution of the United States, the usual course of administration through courts of justice, was grafted into that instrument under the name of "due process of law." That term carries with it the right of trial by jury in all cases in which trial by jury was a part of the usual course of administration through courts of justice at the time the constitution was adopted. It does not give the right of trial by jury in cases in which it did not exist at that time. It does not give it in the large fields of equitable and admiralty jurisdiction. It does not take away from the courts the power to punish contempts summarily without the intervention of a jury, as it existed at the time of the adoption of the constitution. At the time of the adoption of the constitution in proceedings in chancery, if the debtor was ordered to deliver goods or property, and refused to do so, he was adjudged guilty of contumacy, and was, in aid of and to enforce the order of the court, subject to arrest and imprisonment until he obeyed the order. The order was made, not as a punishment for guilt or crime, but as a means within the power of the court to compel obedience to its decrees. The order was made only when the debtor was found to have property, and the court found it within his power to obey the order. The proceedings in aid of execution and the proceedings of arrest and bail provided for in chapter 66, art. 9, Code Civ. Proc., "Arrest and Bail." are substitutes for the former power of the

court to enforce compliance with its decrees in such chancery proceedings, and nothing more, and take nothing away from the rights of the judgment debtor as those rights existed at the time of the adoption of the constitution, as is abundantly shown by the authorities hereinafter cited. The guaranties relied upon by the plaintiff in error are interpreted by the great preponderance of authority in the courts as leaving the rights of creditors and debtors unimpaired. the right to compel the production and delivery of property or money not exempt from execution, found in the ownership or control of the debtor at the time of execution levied, by arrest and imprisonment, existed at the time of the adoption of the constitution, so it exists now under the proceedings in this case. It is now, and was then, a method of coercion adopted against the debtor who willfully disobeys the order of the court. It is no greater and no less, but the same, "due process of law" guarantied by the constitution. When the property or money is delivered in obedience to the order of the court, or the court is satisfied that the plaintiff in error is incapable of obeying the order to deliver, it will be its duty to order his discharge.

But in refusing at the hearing to discharge the order of arrest, which has been declared upon as error, the court affirmed the statements of the affidavit of arrest, including the statement that the defendant has property which he fraudulently conceals. A finding of fact by the probate court will not be reversed, or its correctness called in question here, if the evidence appears to support its finding, and that court having found it sufficient. The legislature may designate the cases in which the court may punish summarily. The right of trial by jury is just that right as it existed at the time of the adoption of the constitution, and at that time it was not the right of the judgment debtor to have a trial by jury under proceedings in chancery to enforce obedience to the orders of the court, when the court found from the facts that obedience was possible; and it is not now his right, under the proceedings in this case, in which the plaintiff in error has been personally arrested in order to compel him to pay money which the court below found to be in his ownership and control, and which he has refused to do, to demand a trial by jury. If it had been his right, he has waived it by going to trial before the probate judge without demanding a jury. In re Oldham, 89 N. C. 23; State v. Mc-Claugherty (W. Va.) 10 S. E. 407; In re Burrows (Kan.) 7 Pac. 148; Kimball v. Connor, 3 Kan. 414; Kearney's Case, 13 Abb. Pr. 459; Ex parte Cohn, 55 Cal. 195; Ex parte Smith, 53 Cal. 204; State v. Burrows, 33 Kan. 10, 5 Pac. 449; Murp' v. People, 2 Cow. 815; State v. McClear, 11 Nev. 39. The appeal is dismissed and the judgment below affirmed. All the justices concur.

ROGERS et al. v. BONNETT et al. (Supreme Court of Oklahoma. Sept. 7, 1894.) Contribution between Wrongdoers—Jurisdiction of Probate Court—Findings.

1. The Board of Trade of Kingfisher, a corporation incorporated with \$150 as its capital stock, of which less than \$75 was paid up, contracted with A. to pay him \$700 upon the erection of a flouring mill, but failed to do so; and upon suit brought by A. against the corporation in the district court for Kingfisher countries. ty, and judgment having been obtained against the corporation for the sum contracted for as above, and execution issued, it was found to be without property and insolvent. A receiver was appointed, who brought suit in the district court against the plaintiffs and defendants, as court against the plaintiffs and defendants, as directors, to recover against them, in their individual and private capacity, upon the contract with A., and recovered a judgment against them for the sum of \$675, which was compromised and paid in different proportions by S., B., W., and R., defendants in error. S. and B. brought suit in the probate court against W. and R. and the other parties to the suit for contribution. *Held*, that the contract made by defendants and plaintiffs with A. was in violation of section 10, art. 3, c. 18, St. Okl. 1890, and was illegal, and known by plaintiffs and defendants to be so, or, if not known to be so defendants to be so, or, if not known to be so, by them, their ignorance of its illegality was inexcusable; that plaintiffs and defendants were joint wrongdoers, and contribution will not be enforced.

2. The probate court has the same jurisdic-

2. The probate court has the same jurisdiction as that of the district court, in suits at law or in equity, for the recovery of any sum of money not exceeding \$1,000, exclusive of costs, subject to the exceptions stated in section 1, art. 15, c. 18, St. Okl. 1893.

3. The refusal of the court below to state findings of fact in writing and conclusions of law upon them, when requested so to do by either party to a suit, before judgment, is reversible error.

versible error.

(Syllabus by the Court.)

Error from probate court, Kingfisher county.

Action by W. J. Bonnett and D. W. Solomon against F. S. Rogers and Z. J. Wallace. Judgment for plaintiffs. Defendants bring error. Reversed.

T. G. Cutlip, for plaintiffs in error. W. A. Taylor, for defendants in error.

McATEE, J. This action was begun in the probate court of Kingfisher county on the 17th day of May, 1893, to enforce contribution from alleged joint obligors upon a contract made by the Board of Trade, a corporation of the city of Kingfisher, with one C. D. Addison, by which said corporation bound itself to pay \$700 to Addison upon the erection and maintenance by him of a flouring mill in the city of Kingfisher. Addison erected and maintained the mill, and demanded of the corporation the stipulated sum of \$700, and received therefrom the sum of \$23, and no more. On October 13, 1891, Addison sued the corporation in the district court for the balance of the sum of \$700 remaining unpaid, obtained judgment thereon, and caused execution to be issued thereunder, upon which return was made of "No property found." Addison thereupon applied to the district court

for the appointment of a receiver for the corporation, alleging that the subscribed capital stock was but \$150; and that the amount of the paid-up capital was less than \$75; and that the amount agreed by the corporation to be paid to him (Addison) was greatly in excess of the capital stock, in violation of law; and that the directors were liable to him in their individual capacity for the amount of the indebtedness remaining due upon the contract made with him. The court appointed a receiver, and directed him to commence suit against the directors, among whom were the parties to this suit; and the receiver thereafter obtained against them therein a judgment for the sum of \$673, which was afterwards compromised and paid in various proportions by Solomon, Bonnett, Wallace, and Rogers. The defendants bring the case here, and charge error in this: That the court had no jurisdiction of the subject-matter of the action; that the court refused to make written findings of fact and conclusions of law; that the court refused to permit the appellants to file a motion for a new trial.

The contention of the appellants upon the first assignment of error is that this is a suit for contribution, and hence equitable in its character; that the probate court has no equity jurisdiction except that which was expressly conferred by law; that it has also a limited jurisdiction; and that, with certain exceptions, of which this is not one, the probate courts have no powers except in common-law cases upon a money demand in which the aid of equity is required to retain the status of the parties and of the subjectmatter pending litigation. It is also contended by plaintiffs in error that actions at law and in chancery are constitutional branches of judicial procedure, and that the act of congress creating the government of this territory, and conferring the judicial power upon the supreme court and the district courts of the territory, recognized and maintained a clear distinction between common-law and chancery actions. It is by the act extending the jurisdiction of probate courts in civil and criminal cases, passed by the legislature of Oklahoma, which took effect December 25, 1890, and in article 15, § 1, thereof, provided that "probate courts * * * shall in civil cases have concurrent jurisdiction with the district courts in all civil cases in any sum not exceeding one thousand dollars, exclusive of costs," etc.; and it was by act of congress of March 3, 1891, as contained in the supplement to the Revised Statutes of the United States (2d Ed., vol. 1, p. 929), enacted as follows: "Provided that in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by legislative enactments, which enactments are hereby ratified," etc. So that in all civil cases in which a sum of money is sought to be recovered not exceeding \$1,000, exclusive of costs, the probate court has the same or concurrent jurisdiction as the dis-

"Concurrent" is "having the trict court. same authority. * * * Such and such courts have concurrent jurisdiction; that is, each has the same jurisdiction." Bouv. Law Dict. p. 311. "Concurrent jurisdiction is that of several different tribunals, each authorized to deal with the same subject-matter." Rap. & L. Law Dict. The probate court has therefore the same authority, and is authorized to deal with such a case in the same manner and to the same degree and with the same jurisdiction, as that of the district courts; and "civil cases" is undoubtedly used in the statute as opposed to "criminal cases." And civil actions, therefore, included any action in which a litigant may be entitled to a civil remedy; that is, to a remedy which is legal in its character, or to a remedy which is equitable in its character. The recovery sought here is for a sum of money less than \$1,000. This case does not fall under one of the exceptions to the provision above cited, enlarging the jurisdiction of the probate court. The probate court has therefore jurisdiction to hear this case.

It is also contended by plaintiffs in error that actions at common law and in chancery are constitutional branches of judicial procedure; and that the acts of congress creating the government of this territory, and conferring judicial power upon the supreme court and the district courts, recognize and maintain a clear distinction between common-law and chancery actions; and that the code abolition of these actions will not prevail in federal courts. Upon this contention it is to be said that the only provision made upon the subject in the constitution of the United States is as follows: "The judicial power shall extend to all cases in law and equity arising under the constitution or laws of the United States, treaties made or which shall be made under their authority," etc. So that actions at law and in chancery are not constitutional branches of judicial procedure, since no provision is made concerning them in the constitution. The only provision relating to this matter contained in the organic act is that of section 9,-that "the supreme and district court shall possess chancery as well as common law jurisdiction;" and there is therefore no "clear distinction" preventing the operation of that portion of that provision of section 10 of article 2 of the Code of Civil Procedure which "abolishes the distinction between actions at law and suits in equity," which provides that "the forms of all such actions and suits heretofore existing are abolished, and in their places there shall be hereafter but one form of action, which shall be called a civil action." Neither is this a case which, as is contended, appeals to the federal powers of the court.

Error is again assigned in this: that the court refused to make written findings of fact and conclusions of law thereon, at plaintiff's request. It is provided by the

Code of Civil Procedure of 1890, in article 12. § 2, that if any one of the parties request it, with a view of excepting to the decision of the court upon the conclusions of law involved in the trial, "the court shall first state the facts in writing, the conclusions of law upon them, and judgment shall be rendered accordingly." The record shows that, when the case came on for trial, the court was requested in writing to separately state its findings of fact and conclusions of law, which the court falled to do. This is reversible error.

Error is again assigned in this: that the complaint does not state facts sufficient to constitute a cause of action, and that the demurrer of plaintiffs in error covered the objections to the petition and evidence that contribution cannot be enforced in this case, since the statute under which this action is brought, to wit, section 10, art. 3, c. 18, St. Okl. 1890, provides that "directors of corporations must not make or create debts beyond their subscribed capital stock. * * * For a violation of the provisions of this section, * * * they are in their individual and private capacity jointly and severally liable to the corporation and to the creditors thereof in the event of its dissolution, to the full amount of the debts contracted." It is here provided that, for a violation of its provisions, the directors shall be liable in their individual and private capacity, both jointly and severally, to the corporation and its creditors. The provision here made is for the benefit of the corporation itself and its creditors. No relief is afforded by it to the directors by which the liability is created as between themselves and against each other for contribution. If any such relief exists, it must be drawn from the principles of the common law. This suit is in no sense a suit upon contract. It is a suit brought, as the pleadings and evidence show, to enforce a liability created by statute. That makes this a case to enforce a penal liability or penalty. A liability created by the statute is in the nature of a punishment for a violation of its provisions, and is therefore a penalty for wrongdoing. 2 Bouv. Law Dict. p. 318. A penalty or penal sum is a sum of money payable as an equivalent or punishment for an injury. 2 Rap. & L. Law Dict. p. 945. A statute providing that officers of certain corporations shall be personally liable for the debts of the corporation in case they fail to file the annual certificates their condition imposes a penalty (Mitchell v. Hotchkiss, 48 Conn. 9; 3 Williams' Ex'rs, 3d Am. Ed., 1729; U. S. v. Daniel, 6 How. 11); and those upon whom the penalty is imposed are, in the eye of the law, wrongdoers. A contribution will sometimes be enforced as wetween wrongdoers. The rule is that if the person seeking the contribution knew the act by which the liability arose to be illegal, or if the circumstances

cusable, then he will be left by the law where his wrongful action placed him. * * * Whoever, by his pleadings in any court of justice, avows that he has been engaged with others in an unlawful action, or concerted with them an unlawful enterprise, and that, in arranging for the carrying it out, he has been unfairly treated by his associates, or has suffered an injustice which they should redress, will be met by a refusal by the court to look any further than his pleadings, which it will at once order to be dismissed." Cooley, Torts, pp. 148, 149; Herr v. Barber, 2 Mackey, 545; Miller v. Fenton, 11 Paige, 18; Campbell v. Phelps, 1 Pick. 62-65; Vose v. Grant, 15 Mass. 505, 521; Peck v. Ellis, 2 Johns. Ch. 131; Acheson v. Miller, 18 Ohio, 1; Cumpston v. Lambert, 18 Ohio St. 81; Armstrong Co. v. Clarion Co.. 66 Pa. St. 218; City of Philadelphia v. Collins, 68 Pa. St. 106; Coventry v. Barton, 17 Johns. 142; Percy v. Clary, 32 Md. 245; Spaulding v. Oakes, 42 Vt. 343; Churchill v. Holt, 131 Mass. 67. If the same facts are shown upon the evidence, the same reasoning will apply. The rule may appear to be a hard one, but it is well established. It is founded upon the reasons that whoever engages in an enterprise forbidden by the law is, in case of its failure, held by the courts to be not only liable to that extent which would be his share if the enterprise had been a legal one, but will be held liable to the whole extent of the loss, as a deterrent from adventuring in such engagements, and that the state will not undertake the expense and use the courts to administer equity as between wrongdoers for violation of law. The act was undoubtedly passed by the legislature for the purpose of protecting persons who enter into engagements with corporations from being imposed upon by fraudulent contracts, made in the name of, and purporting to be made in behalf of, these institutions, to an extent which the limited amount of the subscribed capital stock disabled them from doing; and if directors persist in making such contracts, notwithstanding and in defiance of the statute, the courts will not aid them as between themselves in doing equity.

In the case before us the plaintiffs and defendants united in forming a corporation, with a subscribed capital stock of \$150, of which less than \$75 was ever paid up, and proceeded to create a debt to C. B. Addison of \$700, or more than four times as great in amount as the subscribed capital stock The plaintiffs, as well as the defendants. were directors in the corporation, and joined in the act forbidden by the statute, under which they had just formed the corporation in whose name they undertook to contract. Can it be believed that they were ignorant of these provisions? Are directors who avail themselves of the large powers and privileges awarded to corporations by statute in were such "as to render his ignorance inex- this territory to be heard to plead ignorance

of the liabilities and penalties imposed by the same statute for a violation of its provisions? As directors of the Board of Trade, the plaintiffs, with the defendants, undertook to recommend that corporation to Addison as good in its corporate capacity for the sum of \$700. Did they not know that the subscribed capital stock of that corporation was but \$150? It was their duty as directors to know all of the liabilities resting upon them, as well as the rights provided for them by the statute. If they did not know them otherwise, the proposition to create a liability more than four times as great as the subscribed capital stock should have caused them to halt, to inquire, and to inform themselves of the law. We believe the circumstances in this case were such as to render ignorance of the illegality inexcusable, and that, upon the present assignment of error, the plaintiffs must be left where their wrongful action has placed them. The judgment of the probate court will be reversed.

PETERS v. UNITED STATES.

(Supreme Court of Oklahoma. Sept. 7, 1894.) PROSECUTION FOR PREJURY-EVIDENCE-REGISTER OF LAND OFFICE-POWER TO ADMINISTER OATHS -APPEAL.

1. In an indictment for perjury, charged to have been committed before a United States land office, it is not necessary to set forth in the indictment the grounds upon which the contest is based.

2. This court will take judicial knowledge of the fact that the register and receiver have jurisdiction to hear a contest wherein one party seeks to have the homestead entry of another canceled

3. Registers and receivers have power to administer oaths in contest cases tried before

4. It was not error for the court below to instruct the jury that the indictment was brought under section 5392, Rev. St. U. S. 5. Upon a trial of an offense against the laws of the United States, the grand jury must

be summoned from the county in which the

offense is committed.

6. At the beginning of the term, the court is convened for federal and territorial susiness, until the and is in session for both purposes until the same finally adjourns for the term.

7. The materiality of the testimony upon which perjury is assigned is a question of law

for the court.

8. An application for a new trial and affidavits filed in support thereof cannot be considered by this court where the record shows that the same have never been presented to the trial court.

(Syllabus by the Court.)

On rehearing. Denied. For former opinion, see 33 Pac. 1031.

Amos Green & Son and Redick, Lewis & Snyder, for appellant. Horace Speed, U. S. Atty., and C. R. Brooks, for the United

DALE, C. J. At the June term, 1893, the above-styled cause was argued, and an opinion rendered, affirming the judgment of the trial court. The appellant filed his petition for rehearing, and it will now be considered upon such petition. It is contended that the law applicable to the case was misapplied, and that some of the material questions presented were overlooked and not passed upon by the court in rendering its opinion.

The first contention raised is that proper consideration was not given to the ground of error alleging that the indictment is totally defective, in not alleging that the trial was had before the register and receiver. In discussing this question, the court, in its former opinion, says: "In further support of the demurrer, it is contended that there is no allegation in the indictment to the effect that the contest of Brown v. Peters was pending before the register and receiver. and that the allegation that said contest was pending in the United States land office, and then and there came on to be heard, is not equivalent to an allegation that the contest was pending before and came on to be heard by the register and receiver. If this allegation stood alone, and was not aided by the other allegations of the indictment, there might be some reason in appellant's contention." And, following this language, the opinion specifically points out the conclusion arrived at by the court upon the proposition raised. There is no ground for the statement in counsel's brief that the matter was not considered, and nothing is advanced which would induce the court to change the conclusion heretofore reached.

It is further contended that the indictment fails to allege upon what grounds it was sought to have the entry of Peters canceled, or to allege that it came on before any officer or persons having jurisdiction to hear and try the same, or that the matter in controversy was such that the officer or officers hearing the same had any jurisdiction over the persons or over the subject-matter. In part the alleged defects were not heretofore discussed. It is not necessary to set forth in an indictment the grounds upon which the entry of Peters was sought to be canceled. The purpose of any allegation upon that subject is to show jurisdiction, and beyond that it is wholly immaterial what the contest affidavit contained. If the indictment had simply set forth the title of the cause, and alleged jurisdiction to hear the same to have been in the land office, it would have been sufficient. The recital to the effect that Andrew J. Brown sought to have the homestead entry of Clay Peters canceled is equivalent to a statement that the court had jurisdiction to try the matter, as this court will take judicial knowledge of the fact that the land office has jurisdiction to try causes wherein one party seeks to have the homestead entry of another canceled.

It is contended that the registers and receivers have a special and limited jurisdiction to try and determine only a certain class

of cases; that rule 4 of the rules and regulations of the land department limits their jurisdiction; and that the trial court could not judicially know that a contest which seeks to have a homestead entry canceled is within the power of the register and receiver to hear; and therefore such jurisdictional facts must be set forth in the indictment as will make it affirmatively appear that the register and receiver could hear and determine the cause. Rule 4, above referred to, is as follows: "Registers and receivers may order hearings in all cases wherein entry has not been perfected and no certificate has been issued as a basis for patent." If there is any merit in such contention, we will direct counsel's attention to the fact that a perfected entry is not, under the rules of the land department, styled a "homestead entry," but is usually termed "final homestead entry;" and that, where the indictment refers to a homestead entry, it means, under the rules of the land department, such an entry as the register and receiver have jurisdiction to hear.

It is further contended that the register and receiver have no power under the law to administer an oath in a contest proceeding. Upon that question we simply call attention to the recent decision of the supreme court of the United States in Caha v. U. S., 152 U. S. 211, 14 Sup. Ct. 513.

Upon the matter of a change of venue from the trial judge, again urged for further consideration, the question was directly passed upon in the case of Stanley v. U. S., 1 Okl. 336, 33 Pac. 1025, and again fully considered when this cause was first submitted, and the rule announced in the former case adhered to. Nothing of argument or authority is now advanced which we deem of sufficient importance to justify a reversal of the conclusion heretofore arrived at.

Objection is urged to the instructions given by the judge upon the trial of the cause below, and complaint is made that in the former opinion the court refused to pass upon the errors assigned, for the reason that all of the instructions were not brought up. The opinion does state that, as an abstract question of law, no objection can be well taken to the instructions.

The principal objection now urged is that the court below instructed the jury that the indictment was brought under section 5392, Rev. St. U. S.; in Caha v. U. S., supra, it is expressly held that a prosecution of like character comes within the section of the statutes referred to. At the time this case was first heard in this court, there were before us, in the abstract brought up, but the first, fourth, sixth, and eighteenth instructions as excepted to. Since that time, without leave of this court, the entire record, including all the evidence, is offered. This record does not bear the signature of the trial judge, and cannot be accepted as genuine; and we are not disposed to consider matters beyond what we had before us upon the former hearing, unless some gross mistake appears, and it is clearly apparent that the appellant failed to secure justice in the court below.

It is insisted that the sixth, seventh, and tenth assignments of error were not passed upon by the court rendering the opinion, and that such assignments are material. It will be noticed that the court, in rendering its opinion, grouped the sixth and seventh assignments of error with the second, and considered them altogether; but, as objection is urged, we will consider them separately.

The sixth assignment objects to the legality of the grand jury which returned the indictment, for the reason that all of said grand jury were summoned from Oklahoma county, instead of having been summoned from the district at large, and also for the reason that it does not appear from the face of the indictment that the same was returned during the first six days of the term of the court, or at a time to which the court, sitting as a federal court, had adjourned. It has always been held that in matters of practice in federal criminal cases the Code of Criminal Procedure of the territory governs so far as applicable and not in conflict with some federal statute upon the same subject. Stanley v. U. S., 1 Okl. 336, 33 Pac. 1025. The laws of the territory provide that a grand jury shall be summoned from the county, not from the district. There being no federal statute providing for summoning a grand jury in this territory, it follows that the practice adopted by the lower court was correct. The organic act of this territory provides that "the first six days of every term of said courts, or so much thereof as may be necessary, shall be appropriated to the trial of causes arising under said constitution and law" (St. 1890, p. 43, § 9); and it is urged that such provision creates a federal court, in its nature, independent of the territorial court, and that no federal business can be transacted except at the time fixed at the beginning of the term, or at such time to which the federal court may be adjourned. We do not so construe the law. The same judge sits in the trial of causes, whether they be upon the federal or territorial side of the court. It is for him to say how much time, if any, beyond the six days, he will devote When he convenes a to federal business. term of court, he may devote it all to federal business, should he think the public necessities so require. It does not necessarily adjourn the term, either upon the federal or territorial side, except for the time being, because he may be sitting as a federal or territorial judge. The court is convened for both purposes, and, until it adjourns sine die, is as much one as the other.

The tenth assignment of error calls in question an instruction of the court. That portion objected to is as follows: "The materiality of the testimony upon which the perjury is assigned is a question of law for

the court, and not of fact for the jury." Section 1284, Whart. Cr. Law (9th Ed.), upon this question, lays down the following rule: "But the weight of authority is that it would be error to leave the question to the jury without definite instructions from the court, and the proper course is for the court, assuming all the evidence to be true, to determine whether the particular article of evidence is or is not material." And in State v. Lewis, 10 Kan. 157 (opinion by Brewer, J.), it is held that "on a trial for perjury the materiality of the alleged false testimony is generally a question of law for the court." Numerous other authorities can be found in support of this position, and in reason it should be so. A court better understands the law relating to evidence than does a jury. The court can say, and the court must, in all cases where objection is raised, determine, whether or not the prosecution has made a case for the jury; and it is for the court to say in the first instance whether or not the testimony alleged to be false, and which false testimony is relied upon for a conviction, was material to the issues of the case in which such testimony was given. In passing upon this question, he determines it entirely as a question of law, and he cannot escape the duty thus imposed. By such act he takes it out of the province of the jury, and should control the question until the cause is concluded. It is claimed that the instruction given is in conflict with the rule laid down in the case of Rich v. U. S., 1 Okl. 354, 83 Pac. 804. We think not. In the case last referred to, the record failed to show in what manner the testimony given in the land office was material, and the court held that, in the entire absence of proof, the court could not presume it material. In this case the indictment charged that in a contest cause pending in the land office, in which the defendant in this case was a party, it became and was a material fact as to where defendant was at the hour of 12 o'clock noon of April 22, 1889, and that said defendant falsely testified that he was in the Pottawatomie Reservation at that time. All the negative allegations necessary are set forth. In the absence of the record, we are bound to presume that, upon the trial below, evidence was offered showing the fact of the contest, and the allegations upon which the same was based. Then the court must say whether or not defendant, at the time he testified in the land office upon the issue framed by the contest affidavit, swore to that which was material. A careful reading of the opinion in the case of Rich v. U. S. will dispute the assertion of counsel.

The last proposition raised relates to newly-discovered evidence. A new trial is asked for, upon the ground that, since the trial was had in the court below, the defendant has discovered new evidence, which, if permitted to use, will change the result of the former trial. This case was tried below and

the defendant convicted in December, 1892 For the first time in the history of the case, the defendant presents, upon a petition for rehearing to this court, his offer of newly-discovered evidence. A new trial upon such grounds, or a reversal of the judgment of the lower court because of newly-discovered evidence, cannot be considered here. The petition for rehearing is denied. All the justices concurring.

(2 Okl. 151)

STANSBURY v. UNITED STATES. (Supreme Court of Oklahoma. Sept. 7, 1894.) Prosecution for Perjury.

This case being in all respects identical with the case of Peters v. U. S., 37 Pac. 1081, the judgment of the lower court is affirmed. (Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice John G. Clark.

Leander Stansbury was convicted of perjury, and appeals. Affirmed.

Amos Green & Son, for appellant. Horace Speed and Caleb R. Brooks, for the United States.

PER CURIAM. We have examined this case, and find that it is identical with that of Peters v. U. S., 37 Pac. 1081, and that the errors complained of are the same. We therefore affirm the judgment of the lower court.

(2 Okl. 146)

RICH v. UNITED STATES.

(Supreme Court of Oklahoma. Sept. 7, 1894.)
Perjury—Indictment.

To constitute perjury as defined by section 5392, Rev. St. U. S., it is sufficient if the indictment charges that the false oath was taken before an officer duly authorized under the laws of the United States to administer oaths. (Syllabus by the Court.)

On rehearing. Granted in part. For former report, see 33 Pac. 804.

Amos Green & Son, for appellant. Horace Speed, U. S. Atty.

DALE, C. J. This cause is before us upon the petition of Hon. Horace Speed for a rehearing. It is claimed that the former opinion given by this court is erroneous, in holding (1) that it was necessary to aver or show in the indictment that the land officer had jurisdiction of the contest cases in which the alleged perjury was committed; (2) that the jurisdiction of the officer by whom the oath was administered was not sufficiently shown by averment in the indictment; (3) that the testimony given by Rich was not shown by the other evidence in the case to have been material in the contest case of Embring v. Perry.

Considering the assignments of error in the order in which they were presented, we find that there is an apparent difference in the holding of this court in the case under exam-

ination and in the opinion as rendered in Peters v. U. S. (not yet officially reported) 37 Pac. 1081. It is important to this court that these differences be corrected. In this case the indictment was held insufficient, for the reason that the count does not show by facts stated or a distinct averment that the register and receiver of the local land office had jurisdiction of the proceedings called a "land contest," on the trial of which the alleged perjury was committed. The averment of jurisdiction reads as follows: "That on the twenty-fifth day of November, in the year of our Lord one thousand eight hundred and ninety, at the United States land office at Oklahoma City, in Oklahoma county, in said territory, before John C. Delaney, receiver, and John H. Burford, register of said land office, a certain land contest then and there pending between John H. Embring and Lemuel A. Perry, of which land contest said land office then and there had jurisdiction, came on to be heard." In passing upon this averment of jurisdiction, this court held the same to be insufficient, for the reasons above stated. The statute under which this indictment is brought (Rev. St. U. S. § 5392) reads as follows: "Every person who, having taken an oath before a competent tribunal, officer or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose or certify truly or that any written testimony, declaration, deposition or certificate by him subscribed is true, wilfully and contrary to such oath, states or subscribes any material matter which he does not believe to be true, is guilty of perjury." The indictment makes one averment which, in connection with the foregoing statute, was not sufficiently considered. We refer to the following recital: "And thereupon one Noah Rich was produced as a witness in said contest, and was then and there duly sworn to testify truly in said contest case, by the said John C. Delaney, receiver, who was then and there duly authorized and empowered under the laws of the United States to administer oaths in such cases." In discussing the same question in the case of Peters v. U. S., supra, this court says: "At common law, in order to constitute the crime of perjury, it was necessary that the alleged false testimony should have been given before a competent judicial tribunal, having jurisdiction of the parties to and the subject-matter of the action. Our statute is much broader and more comprehensive, and makes false swearing punishable as perjury when committed by a person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter

"It which he does not believe to be true." is not necessary, under this statute, that the false testimony should be given in a judicial proceeding; but if the oath is taken before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, and the matter sworn to is material and false, it is perjury. The oath administered by the receiver of the United States land office was authorized to be administered by a law of the United States." The opinion quotes the law of congress which authorizes the register or receiver to administer an oath (Rev. St. U. S. § 2246), and an extended citation of authorities is given to support the proposition announced. After a careful consideration of the question, this court, as now constituted, is of opinion that the construction placed upon the act in the case of Peters v. U. S. is in harmony with reason and the weight of authority, and that the opinion in Rich v. U. S. (Okl.) 33 Pac. 804, should be modified accordingly. This conclusion also disposes of the second assignment of error, raised in the motion for rehearing.

Upon the third proposition, we do not see wherein the court erred. In the opinion heretofore rendered the court said: "We fail to find in the record, which purports to give all the testimony on the trial below, any proof that it was in any manner, directly or indirectly, approximately or remotely, material to the issues tried and determined by the register and receiver of the local land office in the land contest case of John H. Embring against Lemuel Perry." The learned counsel for the government undertakes in his argument in support of his motion to point out to the court wherein, upon the trial for perjury, it appears in the record that proof was made showing that the testimony given by Noah Rich in the land contest was material in such contest proceedings. We have carefully examined the portions of the record referred to, and, in addition, again gone over the entire testimony given below, and we are still unable to find the requisite proof.

Counsel, in his brief, argues at length the question of the materiality of the testimony given by Rich in the land office, about which there can be no dispute. Upon such testimony perjury may be assigned, but upon a trial for perjury some evidence must be offered showing its materiality. This proof is essential to a conviction for perjury. It need not be the direct testimony of witnesses offered, but the court may determine its materiality from the nature of the case, as appears from anything in evidence before the court. From counsel's brief and the record before us we gather that, at a trial in the land office, wherein one Embring contested the homestead entry of one Lemuel A. Perry, one Walter Shepard was a witness for or against one of the partles to the contest; that, for the purpose of contradicting the witness Shepard, Noah Rich was placed upon

the witness stand; and that Rich testified that on the afternoon of April 21, 1889, he saw Walter Shepard, in company with Lemuel A. Perry, go down into and across the South Canadian river. It is charged that the testimony of Rich wherein he swore that he saw Shepard go down into and across the South Canadian river was false, and that it was material; and the indictment is predicated upon the falsity and materiality of the testimony so given. The record fails to show, even inferentially, that Shepard was a witness before the land office, or that the alleged false testimony was given in contradiction to that of any testimony given in the proceedings had at the land office. The indictment alleges that in the land office contest it became and was a material question where one Walter Shepard was on the afternoon of April 21st. It may be that such was a material inquiry in the contest proceedings, but the record fails to show how it became a material inquiry, and, unless such fact is affirmatively shown by proof, the crime of perjury is not made out. We cannot say, without proof, that Walter Shepard testified before the land office that he was not at the place where Rich claimed to have seen him; or, in case Shepard did not testify at all in the land office, that it was material to know his whereabouts at that particular time or place. In the land office the trial was had between Embring and Perry. and there is no evidence in the record that Shepard was a witness in such contest, or that 't was material to know the whereabouts of Shepard at the time. In fact, there is an utter want of proof showing how the testimony of Rich, given in the land office, was material to the issue being tried before such office. We cannot presume that it was material.

The petition for rehearing is granted upon the first and second grounds set forth in such petition, and denied as to the third ground; and the opinion heretofore rendered is modified to the extent of holding that the indictment charges a crime. Judgment heretofore rendered discharging the defendant is vacated, and the cause remanded to the lower court for a new trial upon the indictment. All the justices concurring.

PECKHAM v. FAUGHT.

(Supreme Court of Oklahoma. Sept. 7, 1894.)

HOMESTEAD—RIGHTS OF CONFLICTING CLAIMANTS
—INJUNCTION.

1. The district court has power to make an order which grants to an adverse homestead claimant the right to remain inside a wire fence erected by a person who claims the land by virtue of a settlement made prior to the filing of an entry by such adverse claimant.

of an entry by such adverse claimant.

2. Where two parties are claiming the right to reside upon a homestead,—one by virtue of settlement, the other by reason of a filing in the United States land office,—each party has a right to reside upon and occupy the land

until the land department has determined to whom the land belongs.

3. In an injunction proceeding the district court may make an order which, in the judgment of such court, may be necessary to give effect to the homestead laws of congress, pending the final determination of the contest proceedings in the land department.

(Syllabus by the Court.)

Appeal from district court, "K" county; before Justice A. G. Curtis Bierer.

Action by Jane J. Peckham against John H. Faught. Judgment for defendant, and plaintiff appeals. Affirmed.

Hill, Fitzpatrick & McGuire and Chas. J. Peckham, for appellant. J. L. Calvert and George Gardner, for appellee.

DALE, C. J. This case comes up from "K" county, and from the record we find the following facts: September 16, 1893, Jane J. Peckham, who claims to be qualifled to enter lands under the homestead laws of the United States, settled upon and began improving the S. E. ¼ section 34, township 28 N., range 1 W., in "K" county, Oklahoma, and has resided upon and improved the tract of land since said date. October 7, 1893, John H. Faught made homestead entry for the same tract of land. Faught claims to have made a settlement upon the land September 16, 1893, but for the purposes of this case it is immaterial whether or not such act of settlement was performed, as he made no permanent improvements upon the land, and did not attempt so to do until March 9, 1894. On the last-named date the appellant had the land improved with a house and some breaking upon the east 80, and had a one-wire fence built around the entire tract. The posts upon which the wire was strung were set at a long distance apart, and the evidence shows that on March 9, 1894, the wire was in some places lying upon the ground. and that it presented no serious impediment to any person who might wish to drive upon the land sought to be inclosed by such fence. On March 9, 1894, the appellee, being desirous of commencing a residence upon the land, drove upon the same, with material for a house, and began the erection of the same. Prior to such entry the appellant had protested against his going upon the land or occupying any portion thereof. March 14, 1894, the appellant (plaintiff below) began proceedings in the district court of "K" county to recover of defendant damages for injuries sustained by reason of defendant's having destroyed plaintiff's fencing, etc., and on the same day the probate judge of "K" county, in the absence of the district judge, issued a temporary injunction, restraining defendant in the action from going upon any portion of the land, or breaking any prairie, or erecting any structure thereon. Afterwards the defendant filed in the district court a motion to dissolve the temporary

injunction, which was duly heard by the judge of such court, and by order of the court the injunction granted by the probate judge was modified "so as to permit the defendant to remain within the wire fence of plaintiff without interference with the improvements of plaintiff inside said wire fence." The court, in finding the facts, as shown by the proof, found "that the entry of said defendant within said wire fence was peaceable and lawful, and not forcible or unlawful." To reverse the order made by the district court the appellant brings this case here, and assigns as error: (1) The district court erred in not overruling defendant's motion to set aside and vacate the temporary injunction allowed in said action; and (2) the said court erred in modifying the temporary injunction. The two assignments of error will be considered together.

The question of the power of the courts to deal with the matters involved in this case was quite fully gone into by this court in the case of Sproat v. Durland, published in 35 Pac. 682, 886, and the principle therein maintained has been at all times since adhered to by the courts of this territory. The language used in that opinion upon this question is as follows: "In fact, it may be stated as a well-settled proposition that the courts have the right to deal with the question of possession as between settlers upon the public domain until such time as the government, by its issuance of patent, puts forever at rest the title to the land." further, upon the question of the manner in which the courts may act, the opinion continues: "It is the duty of the court, in dealing with such matters, to exercise its equitable powers, and to see to it that possession is given to the person who, under the laws of congress, is entitled thereto." Assuming, then, that the lower court had the jurisdiction to act, and that such power was ample to enable such court to do entire justice in the premises, we will pass to an examination of the question of whether or not the lower court properly construed the laws of congress in holding that the defendant had the right to the use and occupancy of the land until such time as the land department has decided the relative rights of the parties to the title of such land. Under the act of May 14, 1880 (21 Stat. 141), congress passed an act for relief of settlers upon public lands, the third section of which is as follows: "That any settler who has settled, or who shall hereafter settle on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims of record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws." This act of congress gave to homestead settlers an additional method of obtaining an inceptive right to land beyond that theretofore had. Prior to the passage of this law, a homestead claimant could obtain an inceptive right only by filing his entry at the land office. Under the pre-emption law in force May 14, 1880, a settler had 90 days from the date of his settlement within which to file his declaratory statement in the land office, and his rights related back to the date of his settlement. By the passage of the law above set forth congress extended to a homestead settler the same right to file within 90 days from settlement, and to have his rights relate back to the date of such settlement. This law did not repeal the old homestead act under which a person was required to file his entry before obtaining any rights whatever in the land, but gave an additional method of obtaining the receptive right. These two laws were in force at the opening of the Cherokee Outlet to settlement on September 16, 1893. The appellant settled and claimed the land under the law of May 14, 1880, and the appellee is basing his right under the prior law of congress found on page 419, Rev. St. U. S., beginning with section 2289. Both laws are of equal effect as a basis of claim to a homestead. A party claiming under either has a right of occupancy in the land. From the evidence before us we are of the opinion that neither party was aware that an adverse right was claimed until after the appellee had filed his entry.

Under the laws of the United States each party is required to reside upon, cultivate, and improve the land in order to maintain his rights therein; the one claiming as a settler from the date of such settlement, and the one filing must begin a residence upon and cultivation of the land within six months from the date of such filing. Keeping in view the law as thus stated, and conceding that the court below had jurisdiction, did such court err in modifying the temporary injunction granted by the probate judge? The appellant contends that because she had. under her settlement right, taken possession of the entire tract by inclosing the same with a fence, therefore she was entitled to the exclusive use and control of the land. The court below, under the evidence, found that the entry of appellee upon the land was made without force, and peaceable, and thereby must have found that the fence of appellant was, in its then condition, no obstruction. But, however that may be, for the purpose of this case we will assume that appellant did have the entire tract inclosed with a fence. From the evidence we notice that the appellant, on November 8, 1893, filed her contest against the entry of appellee in the United States land office at Perry, Okl.; that she built the fence inclosing the land the latter part of the same month; in other words,

after she had notice that there was an entry by filing upon the land, she fenced the same. Every act done by her after she ascertained that an adverse entry existed was done with the full knowledge that another party was claiming the land, who, under the law, had as great a right to occupy the land as had she. Such being true, she took the risk of the adverse party asserting his rights when she built the fence, and obtained no greater rights by such act than would she, had she not erected the fence; and the court should, as it did in this case, disregard the fence in making his order. But the duty of the court to act rests upon a stronger foundation than that of appellant's special notice of an adverse claim prior to the time she erected her fence. Under the law opening the land to settlement, each party seeking a claim is bound to settle or initiate his right, subject to the laws of congress relating to home-This being steads upon the public domain. true, each person claiming an inceptive right by virtue of settlement must know that until the settlement is merged into a filing the land is subject to an adverse entry by filing by any person who may choose to so enter it at the land office; and, if an adverse entry is recorded, such entry carries with it an equal right of occupancy of the land until the proper tribunal, the land department, shall have determined which of the two claimants is entitled to the land. And this is also true of the person who relies for his inceptive right upon a filing. He is bound to know that a settler may be residing upon the tract, and, if such be the fact, the settler has the same right to reside upon and occupy the land as has the person filing, and not until the settler has the additional rights obtained by a filing can he be said to be entitled to the exclusive possession of the land, and not unless a filing has been made for land not settled upon can it be claimed that an exclusive right to possess runs with the filing. This must, in the very nature of things, be true, in order that both laws of congress may have the proper force and effect. From these premises it follows that the courts will, in giving proper consideration to the homestead laws of congress, where they find adverse parties claiming the same land, make an equitable disposition of the possession of the same; and if, upon investigation, it be found that either party has attempted, by building a fence or otherwise, to prevent an adverse claimant who is, under the law, equally entitled to reside upon and occupy the land, from going upon the same, the court should not hesitate to make such order in the premises as may appear necessary to give effect to the laws of congress. Holding to this view, we affirm the judgment of the lower court.

BIERER, J., having presided at the trial of the cause in the lower court, not sitting. The other justices concurring.

BUTNER v. WESTERN UNION TEL. CO. (Supreme Court of Oklahoma. Sept. 7, 1894.)

TELEGRAPH COMPANIES - NONDELIVERY OF MES-SAGE-DAMAGES-MENTAL ANGUISH-STATUTORY PENALTY-INTERSTATE COMMERCE.

1. An act of the territorial legislature which regulates the order of receipt and transmission of telegraphic messages, and prescribes a penalty for its violation, but which does not attempt to regulate the delivery of messages outside the territory, or of messages sent from without the territory, is not in conflict with the constitutional provision giving to congress the right to regulate commerce between the states and territories.

Paragraph 543 of the Oklahoma Statutes of 1890, imposing a penalty of \$50 upon carriers of messages for certain breaches of duty, does not apply to a failure to deliver a message, but only applies to the failure to receive or transmit messages in the order presented. It is a penal statute, and must be strictly con-strued.

3. The sendee of a telegraphic message cannot maintain an action against a telegraph company for neglect, delay or nondelivery of a message, in the absence of a showing that it was sent by his agent or was sent for his benefit, and that the carrier had actual or constructive notice that it was so sent for the benefit of the sendee.

4. The terms "carelessly, wrongfully, and negligently failed and neglected" to deliver a message, used in a complaint. import ordinary and simple negligence, and nothing more.

5. Damages for mental pain and suffering alone, occasioned by the negligence of a telegraph company in failing to deliver a message announcing the death of a relative, cannot be recovered.

(Syllabus by the Court.)

Error to district court, Logan county; before Justice Frank Dale.

Action by S. T. Butner against the Western Union Telegraph Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. A. Baker, for plaintiff in error. Shortell & Cottingham, for defendant in er-

BURFORD, J. The plaintiff in error filed his complaint in the district court of Logan county against the defendant in error to recover damages for delay in the delivery of a telegram. The complaint alleges in substance that the plaintiff is a resident of Logan county, Okl., and that the defendant was on the 1st day of January, 1893, a corporation duly organized under the laws of the state of New York for the transmission of messages by wire for reward, and owned and operated a telegraph line from Mulvane, in the state of Kansas, to Guthrie, in Oklahoma territory, and was at said time a common carrier of messages for reward between said last-named places; that on said date defendant received a message at Mulvane, Kan., for transmission to plaintiff, and received the usual charges thereon; that said message was from plaintiff's son-in-law, John Payne, and announced the death of plaintiff's daughter, and is of the following tenor: "Mulvane, Ks., 1/1, 1893.

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To S. T. Butner, Dep. Sheriff, c/o Hixon, Sheriff Logan Co.: Bertle died this morning, ten o'clock. Come at once. Ans. John Payne." It is further alleged that defendant negligently, carelessly, and wrongfully, and without fault of plaintiff, failed to deliver said telegram to plaintiff, or the person in whose care it was addressed, for a period of 48 hours after the transmission of said message to Guthrie, O. T.; that, by reason of the said careless and negligent conduct of defendant, plaintiff was not informed of the death of his daughter until two days after her said death; that, after receiving said message, plaintiff was unable to communicate the death of his daughter to his immediate family and the members of his household, who were near relatives, and warmly attached to plaintiff's deceased daughter, in time for them to attend her funeral, and they were deprived of attending her funeral; that plaintiff was unable to make a respectful and proper preparation for attending the funeral of his daughter: that, by reason of such negligence and carelessness upon the part of defendant, plaintiff has suffered great mental pain, distress, humiliation, and mortification, to his damage \$5,000, for which he prays judgment. To this complaint the defendant demurred for the reason that the facts alleged were not sufficient to constitute a cause of action. The district court sustained the demurrer, and, plaintiff refusing to plead further, judgment was rendered for defendant for costs, and complaint dismissed.

The ruling of the court in sustaining the demurrer is complained of as error. It appears from the briefs of counsel that there is a contention as to whether this is an action to recover for breach of contract, or for a tort. From our view of the case, this question is immaterial. The main question to be determined is whether mental pain or anguish alone, resulting from the negligent nondelivery of a telegram, constituted an independent basis for damages. On this question there is a conflict of authority which is irreconcilable. The question is an open one in this territory, and in establishing a precedent this court should adopt that rule which best commends itself to reason and justice, and is based on the soundest principles of law and logic. The English courts have invariably held that mental suffering alone, unaccompanied with any physical or corporal injury, cannot be the basis for the recovery of damages, except in such cases as seduction, false imprisonment, libel, slander, breach of promise of marriages, malicious prosecution, and other tortious wrongs committed with a willful or malicious intent to do the wrong. In all these instances, unless there exists some corporal injury, the right to recover damages for mental suffering depends upon the element of positive wrong, willfully or maliciously perpetrated. The allegations of the complaint in this case do not bring it within such rule, as only ordinary negligence is alleged. Rail. way Co. v. Pointer, 14 Kan. 37; Gregory v. Railroad Co., 112 Ind. 385, 14 N. E. 228. The American courts seem to have followed the rule of the English courts until the case of So Relle v. Telegraph Co., 53 Tex. 308, was decided by the supreme court of Texas, in which it was held that damages might be recovered in an action for nondelivery of a telegraphic message similar to the case at bar. The principle of this case has been followed, with some variations, by the same court, in many cases since that decision, and its reasoning has been substantially adopted by the courts of last resort in the states of Indiana, Kentucky, Tennessee, Alabama, and North Carolina. Telegraph Co. v. Richardson, 79 Tex. 649, 15 S. W. 689; Wadsworth v. Telegraph Co., 86 Tenn. 695, 8 S. W. 574; Telegraph Co. v. Henderson, 89 Ala. 510, 7 South. 419; Reese v. Telegraph Co., 123 Ind. 294, 24 N. E. 163; Chapman v. Telegraph Co. (Ky.) 13 & W. 880; Young v. Telegraph Co., 107 N. C. 370, 11 S. E. 1044. On the other hand, the right to recover damages for mental anguish occasioned by the delay or nondelivery of a telegraphic message has been expressly denied, and the doctrine condemned, by the highest courts in the states of Georgia, Florida, Mississippi, Missouri, Kansas, Dakota, Wisconsin, Nevada, the United States circuit court of appeals, and by practically the unanimous current of authority in the federal courts. Crawson v. Telegraph Co., 47 Fed. 544; Chase v. Telegraph Co., 44 Fed. 554; Kester v. Telegraph Co., 55 Fed. 603; Telegraph Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432; Tyler v. Telegraph Co., 54 Fed. 634; Wilcox v. Railroad Co., 52 Fed. 264, 3 C. C. A. 73; Russell v. Telegraph Co., 3 Dak. 315, 19 N. W. 408; Commissioners v. Coultas, 13 App. Cas. 222; Lynch v. Knight, 9 H. L. Cas. 577; Telegraph Co. v. Saunders, 32 Fla. 434, 14 South, 148; Chapman v. Telegraph Co., 88 Ga. 763, 15 S. E. 901; West v. Telegraph Co., 39 Kan. 93, 17 Pac. 807; City of Salina v. Trosper, 27 Kan. 544; Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. 823; Wyman v. Leavitt, 71 Me. 227; Connell v. Telegraph Co., 116 Mo. 34, 22 S. W. 345; Johnson v. Wells, Fargo & Co., 6 Nev. 224; Ewing v. Railway Co., 147 Pa. St. 40, 23 Atl. 340; Gahan v. Telegraph Co., 59 Fed. 433; Summerfield v. Telegraph Co. (Wis.) 57 N. W. 973. If the authorities holding the affirmative of this proposition presented uniformity of the result obtained, and harmony in the reasoning attempted in support of it, the array would be formidable. Their force, however, is weakened by self-evident disparity of reasoning and conflict of result. Some hold that mental anguish is not a cause of action, but is merely a dependent incident to be taken into consideration in addition to pecuniary damages shown, while others assert that it is an independent cause of action,-a distinct element of damage. Some hold that negligence sufficient to uphold a recovery must be willful, others, that simple negligence will suffice.

Some uphold the recovery on the ground of punishment; others, upon the ground of compensation; and some blend both grounds. This conflict exists, not only between the courts of the different states entertaining this view, but in one instance is exhibited in the decisions of a single state. The supreme court of Texas, in the course of its adjudications upon this subject, has held both the affirmative and the negative of all the propositions above enumerated. Numerous other conflicts exist among the decisions of that court; notably, the affirmance and the denial of the rule that the sendee, before he can recover, must identify himself with the contract of transmission. The Tennessee and Alabama cases are not authority in favor of the plaintiff's position, because they refuse to recognize mental pain as an element of damage. They hold it to be an incident merely, to be taken into consideration in addition to pecuniary loss.

There is a decided weight of authority against the right of the plaintiff in error to recover for mental suffering, but we are constrained to rely upon principle, as well as authority, in a case of this kind. The law of telegraph companies cannot trace its distinctive features into the antiquity of the common law. But the duty of the courts, upon the advent of new conditions, is to assimilate the ancient principles of the common law to the new conditions by the process of reasoning called "analogy;" applying old principles, governing previously established relations of a similar character, to the determination of rights arising under the new conditions. If the simple process of inductive reasoning from ancient principles applied to new conditions is inadequate to meet the public conception of expediency and justice, the work of applying new principles to new conditions is a legislative, and not a judicial, function. Similar conditions produce similar results. Similar facts left to be dealt with by the judiciary ought to produce uniform rules of law applying to all of such conditions. In entering upon a discussion of this important question, the courts should keep strictly within the line of the judicial path, and not infringe on the province of the legislative branch of government. The question should be resolved by a reference to the position which mental pain and anguish has heretofore sustained in remedial law as a basis for damages. Mental anguish, prior to the advent of the doctrine contended for in this case, occupied a well-defined position in the law of damages, and was not recognized in cases of this character.

It is, however, claimed that the damages in question can be upheld by assimilating them to the damages awarded in cases of physical injury. That mental anguish and suffering can be taken into consideration in cases of corporal injury is too well settled to be for a moment questioned. If some authorities on this question are to be followed

as sound law, it might give some countenance to the contention. This we say with a special reference to the decisions of the courts in attempting to draw this argument from this source. They state the premise broadly, in terms which admit all mental suffering resulting from a bodily injury as proper to be considered by the jury in assessing the damages. Such, however, is not the law of any well-considered case that we have been able to find dealing specifically with the question before it for decision as to what mental pain and anguish may be lawfully considered by the jury in cases of corporal injuries. the well-considered cases dealing explicitly with this question hold that the mental anguish involved in the consideration of the amount of damages to be awarded is that mental anguish connected with the physical suffering,-in short, the mental anguish resulting from the consciousness of physical pain. All independent conceptions of the mind, such as the contemplation of the loss of a goodly appearance, the fear of want, and the like, are to be excluded. City of Chicago v. McLean, 133 Ill. 148, 24 N. E. 527; Kennon v. Gilmer, 131 U. S. 22, 27, 9 Sup. Ct. 696; Joch v. Dankwardt, 85 Ill. 331; Clinton v. Laning, 61 Mich. 355, 28 N. W. 125; Trigg v. Railway Co., 74 Mo. 147, 153; City of Salina v. Trosper, 27 Kan. 544; Johnson v. Wells, Fargo & Co., 6 Nev. 244. It is asserted that mental pain is just as much a proximate result of the wrong in the breach of the contract of transmission of a social telegram as mental pain is the proximate result of the wrong in cases of corporal injury. That statement is true, but the fallacy of this argument rests in the fact that the law does not take notice of mental anguish in cases of corporal injuries merely because it is the proximate result of the wrong. It must be something more. It must be identified with physical pain, of which the law of damages does take notice, before it will be considered. The sorrowful reflections of an injured person over his changed physical condition, of the proximate result of the physical injury, and many other conceptions, arise out of a case of this kind, independently of the physical suffering that proximately result from the injury, which the law entirely disregards. The law recognizes the mental anguish which is connected with and a part of the physical pain, not because it is the proximate result of the injury, but because it is so identified with the physical pain that to disregard it would be to disregard the physical suffering itself. If mental pain were recognized in these cases distinctly and solely as mental pain, it might afford some argument in favor of the plaintiff in this case; but the plaintiff in the case seeks to recover for mental suffering,-for impressions of the mind wholly distinct from bodily or material complications. The mental suffering regarded in corporal injury cases is of a wholly different character. It considers mind in its bodily or physical aspect, and

disregards it in its purely mental or spiritual sense. This distinction destroys the argument.

For the reasons above outlined, we conceive that the infliction of damages for mental anguish fails to have passed the imposed tests, and cannot be assimilated by the process of analogy to the law obtaining upon any other similar pre-existing relations. On the other hand, heretofore, and even to the present time, with the single exception of the question of the case at bar, it has been uniformly held that in any case resulting from tort or breach of contract, where no other damage than mental suffering can be shown, there is no cause of action. 3 Suth. Dam. 715; Trigg v. Railway Co., 74 Mo. 153; Wilcox v. Railroad Co., 52 Fed. 267. In the case of Telegraph Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, the United States circuit court of appeals remarks: "The general rule that mental anguish and suffering, unattended by any injury to the person, resulting from simple actionable negligence, cannot be sufficient basis for an action for the recovery of damages, is maintained and supported by an unbroken line of English authorities by the conceded state of the general law prior to the So Relle Case." In Masters v. Warren. 27 Conn. 293, it is said: "No case can be found where a person has been allowed to recover damages for a shock, injury, or outrage to the feelings and sensibilities, arising and caused by the breach of contract, except it is a marriage contract. Such damages can only enter into and become a part of the recovery when the plaintiff has sustained, by the negligence or willful act of another, some corporal or personal injury. They never can be recovered independently and alone, and, if recoverable at all, only in action of tort." The supreme court of Mississippi, in the case of Telegraph Co. v. Rogers, 68 Miss. 748, 9 South. 823, remarks: "We have given to the investigation of the question that consideration which its importance demands, and, though the right of the plaintiff to recover the damages awarded in this case finds support in the decisions of several of the states, we are unwilling to depart from the long-established and almost universal rule of law that no action lies for the recovery of damages for mere mental suffering, disconnected from physical injury, and not the result of the willful wrong of the defendant. That such damages are recoverable in actions for breach of contract of marriage is well settled, but it is equally true that until recent years this action stood as the marked and single exception in which such damages were recoverable in actions for breach of contract. This action, though in form one for the breach of contract, partakes in several features of the characteristics of an action for the willful tort; and, though the damages recoverable by the plaintiff for mental suffering are spoken of as 'compensatory,' the fervent language of the courts indicates how shadowy is the line that separates them from those strictly punitory. * * * We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced. The difficulty of applying any measure of damages for bodily injury is universally recognized and commented on by the courts. But in that class of cases demands for simulated or imaginary injuries are far less likely to be made than will those in suits for mental pain alone. No one but the plaintiff can know whether he really suffers any mental disturbance, and its extent and severity must depend upon his own mental peculiarity. In the nature of things, money can neither palliate nor compensate the injury he sustained. 'Mental pain and anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." In the case of Chapman v. Telegraph Co., reported in 15 S. E. 901, the supreme court of Georgia forcibly remarks: "But it is urged that the public occupation of telegraph companies creates between them and the public special relations, in which their responsibility is greater than that of other persons. So much of their business and profit is derived from the acceptance of messages involving feelings only that at first view it would seem legitimate and salutary to require them to answer in damages for any dereliction of duty in this important part of their activity. The argument is that, in the exercise of a public employment, they undertake, for hire, to serve the feelings of their customers, and therefore ought to pay for negligent nonperformance or misperformance of this peculiar function. This reasoning is unanswerable, so far as it proves a right of action to arise out of the breach of duty. But how about damages, and the measure of damages? It can scarcely be that a new and exceptional principle of damages emerges, ex proprio vigore, from unknown recesses of the law, when occasion seems to require it, or that the court can do more than adapt and apply principles already existing when novel transactions, such as those which make up the business of telegraphy, became the subject of adjudication. Precedents must be followed, else the law will become a wandering, uncertain thing. If our understanding of the law, as heretofore expounded by its accredited oracles, be correct, it would be a judicial innovation to require feelings which had, even under contract or public duty, the right to expect help, to be solaced with damages for the disappointment, however severe, at losing the promised benefit. If the subject needs new law, the lawmaking powers may create it, but we decline to usurp their prerogative." In the case of Wadsworth v. Telegraph Co., supra, Judge Lurton, dissenting, said: "The reason why an independent ac-

tion for such damages cannot and ought not to be sustained is found in the remoteness of such damages. * * * Such injuries are generally more sentimental than substantial, depending largely upon physical and nervous condition. The suffering of one under precisely the same circumstances would be no test of the suffering of another. Vague and shadowy, there is no possible standard by which such an injury can be justly compensated, or even approximately measured. Easily simulated, and impossible to disprove, it falls within all of the objections to speculative damages, which are universally excluded because of their uncertain character. That damages so imaginary, so metaphysical, so sentimental, shall be ascertained and assessed by a jury with justness, not by way of punishment to the defendant, but as a mere compensation to the plaintiff, is not to be expected. That the grief natural to the death of a loved relative shall be separated from the added grief and anguish resulting from delayed information of such mortal illness or death, and compensation given for the latter only, is the task imposed by the law, as determined by the majority. But the rule in question has not been limited, as claimed, to actions based upon physical pain. It has, as we have already seen, upon the authority of Mr. Wood, been applied to actions of slander and libel. No matter how gross the insult, or how harrowing to the feelings, there can be no recovery if the slander did not imply a crime, or result in some special damage. The same rule applies in actions brought for the death of another. The plaintiff must have a pecuniary interest in such life, and in such cases there can be no recovery for the injured feelings, the grief, or anguish suffered by the plaintiff, in consequence of the death for which This is the rule, regardless of the suit lies. the relation the deceased bore to the plain-Whether husband or wife, or parent or child, the rule is the same. The damages are for the pecuniary loss sustained. * * The principles upon which this suit is maintained seem to be so radical * * * a departure from the headlands of the law, and to so seriously threaten the uprooting of doctrines that I have been taught to revere as the very foundation stones of the system of our law upon the subject of contracts and damages, as to make it my duty to give expression to my views upon the questions involved." In our view the departure initiated in Texas, and followed by some other states, is not supported by sound reasoning, and is not in harmony with the well-defined principles of law which the experience of the past have found safe and reliable.

It is insisted by counsel for plaintiff in error that he is entitled to recover the statutory penalty of \$50 provided by the statutes of Oklahoma. Section 28, c. 11, p. 152, St. Okl. 1893, provides: "A carrier of messages by telegraph must if it is practicable transmit

every such message immediately upon its receipt, but if this is not practicable and several messages accumulate upon his hands he must transmit them in the following order First. Messages from public agents of the United States or of this territory on public business. Second. Messages intended in good faith for immediate publication in newspapers and not for any secret use. Third. Messages giving information relating to the sickness or death of any person. Fourth. Other messages in the order in which they were received." "Sec. 30. Every person whose message is refused or postponed contrary to the provisions of this chapter is entitled to recover from the carrier his actual damages and fifty dollars in addition thereto." This is a penal statute, and must be strictly construed; and, before one can recover the penalty therein imposed, he must state specifically every fact to bring himself strictly within all its terms. Telegraph Co. v. Steele (Ind. Sup.) 9 N. E. 78. Kirby v. Telegraph Co. (S. D.) 57 N. W. 202. It will be observed that this statute relates to the receipt and transmission of messages, regulating the order in which they shall be received and transmitted, and does not attempt to regulate the mode, means, or time of their delivery. The message in question was sent from Mulvane, Kan., and any statute of Oklahoma which would attempt to prescribe the order of its receipt at or transmissal from that point would be in conflict with the power of congress to regulate commerce between the states and territories, and would be unconstitutional. Telegraph Co. v. Pendleton, 122 U.S. 347, 7 Sup. Ct. 1126; Telegraph Co. v. Texas, 105 U. S. 460; Rogers v. Telegraph Co., 122 Ind. 395, 24 N. E. 157. This statute does not attempt to regulate or interfere with the delivery of messages sent to another state, but simply prescribes the order of transmission, and compels the acceptance of messages when presented in the order mentioned. This is not an interference with interstate commerce, and is a proper exercise of the legislative authority. Connell v. Telegraph Co. (Mo. Sup.) 18 S. W. 883. There are no allegations of the complaint that would entitle the plaintiff to recover the statutory penalty.

Plaintiff in error insists that he is, in any event, entitled to recover nominal damages. No damages are claimed in the complaint, except for mental anguish. Russell v. Telegrah Co., 3 Dak. 315, 19 N. W. 408. There is nothing on the face of the telegram to indicate to the company or its agents that there was any relationship, of any character, existing between the sender and sendee of the message, or of the deceased mentioned in the message, and no allegation that the defendant was notified of any such relationship, or for whose benefit the message was sent.

We find no error in the record. The judgment of the district court is affirmed, at the

costs of the plaintiff in error. All the justices concurring, except DALE, J., not sitting.

DEVORE v. TERRITORY.

(Supreme Court of Oklahoma. Sept. 7, 1894.)

LARCENY — WHAT CONSTITUTES — FRAUD IN OBTAINING POSSESSION—EVIDENCE — LOSS OF INSTRUCTIONS.

1. If one is induced by a trick or a fraud to give up the possession of his property, and the possession has been for a special purpose, as for security that he will perform his part of a contract, and if in so surrendering the possession he still meant to retain the right of property in himself until the full performance of the contract by those with whom he dealt, and the property is appropriated and converted to their own use by those to whom the possession was thus given, such appropriation and conversion will be larceny.

2. If fraud is used in getting possession of property, which possession is not accompanied with the ownership thereof, and the property is afterwards converted to his own use by him who has thus acquired possession, the fraud will supply the place of trespass in the taking of the possession of the property, and the conversion

will be felonious.

3. When conspiracy is alleged, while it is important that evidence shall first be given of such conspiracy, yet upon the undertaking by him who charges the conspiracy that such conspiracy will be shown, and it appears to be necessary and important first to introduce conversations had and acts done by any one or more of the alleged conspirators in the absence of the rest, that course will be permitted, in the discretion of the court.

rest, that course will be permitted, in the discretion of the court.

4. The loss of instructions given by the court to the jury, after the trial, and before the case is made up for the supreme court upon appeal, is not ground for reversal.

(Syllabus by the Court.)

Error from district court, Logan county; before Justice Frank Dale.

Squire Devore was convicted of larceny, and brings error. Affirmed.

John Foster, for plaintiff in error. Harris Huston, for the Territory.

McATEE, J. The plaintiff in error, together with Williams and Anderson, his codefendants, induced Welborn, the prosecuting witness, to part with the possession of his mules and other property upon the assurance that he should receive a deed from plaintiff in error and his wife conveying to him (Welborn) certain lots in block 73 in East Guthrie, which they represented to Welborn that plaintiff in error owned. The representation was false, but by means of it the plaintiff in error, with his confederates, succeeded in getting possession of Welborn's property, and forthwith converted it to their own use. It is evident that Devore conspired with Williams and Anderson fraudulently and feloniously. Upon the facts offered in evidence, we are to determine whether the defendant was guilty of grand larceny. That is the crime with which Devore, Williams, and Anderson are jointly charged in the indictment, and upon which, Devore having demanded a separate trial, the jury found a verdict of guilty against him. We think the evidence abundantly supports the verdict. If Welborn was induced to part with his property by means of the false representations of Devore and his confederates, and if he meant, at the time of parting with the possession of it, to part with the ownership also, and was thus defrauded of it, while the offense would be a crime, it would not be that of larceny. But if, on the other hand, while Welborn was thus induced to give up possession of his property to the conspirators, it was delivered merely as security for the performance of his part of the contract, and he still meant to retain the right of property, and that the ownership of it should not be transferred or pass from him until a good and sufficient deed should be executed to him by Devore, conveying the whole and unincumbered ownership in the lots in block 73 in East Guthrie, and if Devore and his confederates, or either of them, upon obtaining such possession by the consent of Welborn, appropriated the property, and converted it to their own use, that would constitute the crime of larceny. "The character of the crime depends upon the intention of the parties, and that intention determines the nature of the offense. Where, by fraud, conspiracy, or artifice, the possession is obtained by felonious design, and the title still remains in the owner, larceny is established." Loomis v. People, 67 N. Y. Trespass is necessary to constitute larceny, and differentiates the crime from that of obtaining property under false pretenses; but, if fraud is used in obtaining possession of the property, it will be construed a trespass, and the taking of it so as to make the conversion felonious. "If rogues conspire to get away a man's money by such tricks as those which are pleaded here, it is not going beyond the settled rules of law to hold that the fraud will supply the place of trespass in the taking, and so make the conversion felonious." People v. Shaw, 57 Mich. 406, 24 N. W. 121 (Campbell, J.); Com. v. Barry, 124 Mass. 325; Lewer v. Com., 15 Serg. & R. 93; State v. Watson, 41 N. H. 533; State v. Humphrey, 32 Vt. 569; Miller v. Com., 78 Ky. 15; Welsh v. People, 17 Ill. 339; People v. McDonald, 43 N. Y. 63; Smith v. People, 53 N. Y. 111; Justices, etc., v. Henderson, 90 N. Y. 12; State v. Vickery, 19 Tex. 326.

What passed between the parties at the time the possession of the property was given to Devore and his conspirators? Welborn testified—and his testimony upon this point was uncontradicted—that, upon the papers being placed in escrow, "Williams wanted the property" (meaning the mules, etc.); that he did not want to give it up, but "Williams seemed hurt," and said that "he had turned the papers over, and that he would hold the mules until they came back, and then we would finish up our business;" and that he (Welborn) gave up the mules and

other property for them to hold,-"to stand good until the papers came back:" and that, of course, they "was to remain mine until they got our papers finished up, and then, after the papers were turned over to me, of course they had the mules,-that is, they were placed for him to hold, so that he would have something in his possession." It was for the jury to find the facts, and they believed Welborn. They were justified in so doing. He gave up the possession for a specific purpose. They converted the whole property. That was a clear case of larceny,—as plain, pronounced, and intended as if these confederates had not established the devious arrangement by which they brought about the fraudulent resuit. It was not different, as to the criminal purpose, or an act of trespass, from going into the stable of Welborn without his consent, and taking his mules, and converting them to their use.

Assignments of error are further alleged in this: that the court erred in overruling defendant's petition to take from the jury the witness Welborn's testimony detailing a conversation had with Williams before the prosecution had laid the foundation for such testimony, by introducing evidence to prove collusion or conspiracy between Williams and Devore, and in overruling the objections of defendant to testimony offered by the prosecution as to transactions with Williams and Anderson, and done in the absence of the defendant, and subsequent to the delivery of the property described in the indictment by Welborn to Williams, and permitting such testimony to go to the jury over the objections of the defendant. It is always desirable and important to introduce evidence of a conspiracy first; otherwise, the jury might be led into error by inferring a conspiracy where none exists. But, upon the offer or understanding that a conspiracy will subsequently be shown, acts, declarations, and conversations of one charged with being engaged in a common design, but who is absent, will sometimes be admitted in evidence before the conspiracy is proven. It is within the discretion of the court. Where evidence has been offered tending to show a conspiracy, the transactions of any one or more of those shown to have been engaged in pursuance of or execution of a common design are admissible, and any one of those who have been afterwards shown to have been connected with the conspiracy will be considered in law as having been a party to such transactions, even though he may have been absent at the time of their occurrence. These propositions are elementary. 1 Greenl. Ev. § 111; Whart. Ev. § 1205,—each citing many cases.

It is further alleged that the court erred in sustaining the plaintiff's objection to the introduction of an affidavit made by Welborn, the prosecuting witness, before S. S. Lawrence, probate judge of Logan county, Okl. T., on June 28th, and in excluding the same from the jury. After Welborn's property

had been taken from him, and appropriated by Williams, Anderson, and Devore, he brought suit in the probate court of Logan county against these parties, recovering judgment and payment, and thereafter made an affidavit setting forth that while he then, prior to March 13, 1893, believed the defendants had been guilty of fraudulent transactions, in which they procured from him the personal property, including mules, etc., "after more mature deliberation, and more careful investigation," he "now, June 28, 1893 [the date of the affidavit], believed the defendants intended to commit no crime, and that they are innocent," etc. The proffer of this affidavit was an attempt to substitute the opinion of the prosecuting witness, and to offer that to the jury, in lieu of facts. The jury are the judges of facts, not of opinions. would be difficult to conceive of a case which more strongly fortifies the rule, for it would be urged with much force that the witness believed the defendant guilty after the loss of his property, and before he was paid for it. and that after he was paid for it he changed his mind as to the criminality of the act by which his property had been taken from him. In order to determine the value or the worthlessness of his opinion as evidence, it would be necessary to go into an examination to the jury as to whether the payment for the stolen property made to the affiant, Welborn, had anything to do with his change of opinion, and with the making of the affidavit now found in the possession of, and produced by, Devore,-what the value would be, for the guidance of the jury, of Welborn's opinion and conscience as to the guilt or innocence of Devore, as well as other such inquiries. The affidavit was properly excluded.

The plaintiff in error complains that he has been deprived of his right of review of the instructions of the court by the fact that they are not to be found in the office of the clerk of the court below, and that he is therefore entitled to a reversal, and a trial de novo. The court instructed the jury, and upon the evidence, under the instructions, the jury found the defendant guilty. The presumptions of law are, in the absence of error, which must be made to appear by the plaintiff in error, that the proceedings of the district court are regular, and that the instructions to the jury gave the law correctly. But it is the privilege of the defendant to bring the case here by appeal, and if it is made to appear to this court that error has been committed the case will be reversed, if the error is material. The defendant is therefore interested in the preservation of the record. If it is not made to appear that error has been committed, the judgment of the district court will stand. If, after judgment against a defendant in a criminal case, exceptions reserved, and appealed to this court, the defendant should be relieved, and the judgment reversed, because the instructions given be-

low were lost from the case, great difficulty might be experienced in preserving the instructions until the case could be brought here.

Other assignments of error were made by the plaintiff in error. They have been carefully considered, and overruled. The defendant was not prejudiced in any respect by the ruling of the district court at the trial. The judgment of the district court is therefore affirmed. The chief justice not sitting, having presided as judge below; all of the other justices concurring.

(2 Okl. 158)

TERRITORY ex rel. WOODS, County Attorney, v. CITY OF OKLAHOMA et al. (Supreme Court of Oklahoma. Sept. 7, 1894.)

CITIES—LIMITATION OF INDEBTEDNESS—CONTRACTS.

A contract entered into by a city, whereby such city contracts to pay the sum of \$4,400 per annum, for a term of 20 years, as rental for water hydrants, does not create a present indebtedness against said city in a sum equal to the aggregate amount of such rentals for the entire period of time for which the contract is to run.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice Henry W. Scott.

Bill by the territory of Oklahoma, on the relation of J. H. Woods, county attorney of the county of Oklahoma, against the city of Oklahoma and others. Injunction granted plaintiff dissolved, and plaintiff appeals. Affirmed.

J. H. Woods, for appellant. W. R. Taylor and F. P. Lindsay, for appellees.

DALE, C. J. On June 18, 1894, in the absence of the district judge of the county of Oklahoma, the probate judge issued a temporary restraining order against the defendants, restraining them from issuing, negotiating, or delivering, or attempting to issue, bonds purporting to have been issued by the city of Oklahoma City in the sum of \$29,500. On the day following the defendants filed a motion in the district court to dissolve the temporary injunction theretofore granted by the probate judge. On the 20th day of June the matter came on for hearing before the district judge, all parties being present. The court, after hearing the matter, dissolved the temporary injunction, from which judgment the plaintiff in error brings the case here on appeal.

It appears that on the 21st day of October, 1893, the defendant, by its duly-authorized officers, executed its certain funding bonds, in a sum aggregating \$29,500, and that such defendants were about to issue and negotiate bonds, and for the purpose of preventing the issuance and negotiation of such bonds the plaintiff instituted this proceeding in the court below, and now brings the case here for a reversal of the decision of the dis-

trict court in holding that the bonds might properly issue, and that the restraining order should be dissolved. From the record, as thus presented, we find: That the city of Oklahoma City is a public corporation, by virtue of the laws of Oklahoma territory. That the assessed valuation of the taxable property within the city of Oklahoma City for the year 1893 was \$1,432,000. That there was at the time this suit was instituted in the lower court an indebtedness outstanding against the said city in the sum of \$17,-500. That the city had previously entered into a contract, for a period or term of 20 years, with one D. H. Scott and his assigns, to erect and maintain for such period a system of waterworks for the purpose of providing the city of Oklahoma City and its inhabitants with water for fire and domestic purposes. That said contract was by ordinance, section 4 of such ordinance being as follows: "The city of Oklahoma City hereby rents of and from the said D. H. Scott and his assigns for the period of time or term of the privileges hereby granted, a portion of the water works system herein authorized to be constructed, to-wit, eighty-two tipped and antifreezing hydrants, and to pay as rental therefor the sum of \$55 per annum, payable semiannually, for each and every one of said hydrants, and at a proportionate rate for applications for a year." That the funding bonds sought to be issued by the city were in the sum of \$29,500, and to restrain which this action was instituted, are an obligation additional to that of the sum of \$17,500, and that created by the contract for the supply of water; and it is contended that the same cannot be legally issued, for the reason that such indebtedness is in conflict with the act of congress approved June 30, 1886, which provides as follows: "That no political or municipal corporation, county or other subdivision, in any of the territories of the United States, shall ever become indebted in any manner or for any purpose in any amount in the aggregate, including existing indebtedness, exceeding four per centum of the value of the taxable property within such corporation, county or subdivision, to be ascertained by the last assessment for territorial and county taxes previous to the incurment of such indebtedness, and all bonds or obligations in excess of such amount given by such corporation shall be void."

There is no controversy as to the taxable valuation of the property of Oklahoma City for the year 1893, and the only question for our consideration is whether or not the contract entered into between the city and the waterworks company for the period of time named shall be considered an indebtedness against the city of Oklahoma City for the full amount to which the city might become liable under the terms of such contract. Four per centum of the taxable valuation of Oklahoma City amounts to \$75,171. It is agreed that the city has outstanding bonds in

the sum of \$17,500; that the bonds sought to be funded, and out of which proposed act this controversy grows, are in the sum of \$29,500, making a total of \$47,000, and that bonds to the amount of \$29,500 may be legally issued, provided it is found that the contract for the waterworks does not create an existing debt against the city in the sum covered by the entire period of time for which the contract is to run, to wit, \$88,000; that, if it shall be held by this court that said contract creates a present and existing indebtedness against the city of Oklahoma City, then the bonds sought to be funded cannot be legally issued against the said city, We will, therefore, confine ourselves simply to the one proposition as to whether or not the contract for 20 years, providing for the payment of an annual rental of \$4,400, creates an indebtedness of \$4,400, or an indebtedness for the aggregate amount for which the city might, under certain circumstances, become liable.

Upon examination of the authorities, it will be found that the different courts of the states and territories, in passing upon similar statutes, have held to different views upon this question. The supreme court of the state of Michigan, in the case of Niles Waterworks v. City of Niles, found in 59 Mich. 311, 26 N. W. 525, held to the view, as stated by them, that a contract for the use of 50 water hydrants per year, at \$50 each, for the term of 30 years, creates a liabilty against the city to the full extent of the 30 years' rental, and that under the contract similar to the one we have under consideration the city was prohibited, by reason of a statute which in effect is the same as ours, from entering into such contract. That case was decided upon the authority of the decisions of that state referred to as follows: City of Detroit v. Michigan Paving Co., 36 Mich. 335; City of Detroit v. Robinson, 38 Mich. 108.—two of the justices concurring, one dissenting. The same construction, upon a similar statute, obtains in Illinois, Montana, Oregon, and numbers of other states. The contrary view of the question is held by New Jersey, Massachusetts, New York, Iowa, and Indiana courts. So that it will be seen that the courts have divided upon the question before us, and it is for us to determine upon which side of the proposition we find the better reason. The case is a very important one to the defendant. If we hold that the contract to pay an annual water rental of \$4,400 during the period of 20 years creates a debt for the aggregate sum of \$88,000, and is a debt within the provision embodied within the act of congress, we shall lay down a principle that would, in a great majority of instances in this territory, put an end to municipal government. If it shall be found that the agreement to pay a given sum each year for a long period of years constitutes a debt for the aggregate sum resulting from adding together all the yearly installments, then it is extremely doubtful whether there is a city in this territory having the authority to repair streets, build sidewalks, or carry out any other municipal improvements, for the most of our cities have contracts for water supplies and electric lights running for a long series of years, in which the aggregate amount of annual rents would of themselves equal, if not exceed, the limit prescribed by the law of congress. It may be conceded that the act of congress referred to is intended to cover any and all kinds of indebtedness, and that it was not intended to leave any room whatever for construction as to the proper meaning of the act. whole question is very ably considered and reviewed by Reed, C. J., in the case of City of Valparaiso v. Gardner, 97 Ind. 1. In that decision the learned chief justice takes up the entire question, cites the different authorities bearing upon this question, from both sides, cites numerous illustrations, and finally concludes that a contract of the kind that we have here under consideration does not create an aggregate indebtedness of the character intended to be prohibited by the act of congress. The reasoning, the illustrations used, and the authorities considered, are, it seems to us, so conclusive upon the question that we will content ourselves with affirming the decision of the court below, without going into an extended discussion of the question, as we believe the matter to be properly settled in the case in Indiana referred to. The judgment of the lower court is affirmed.

SCOTT, J., not sitting; the other justices concurring.

Ex parte LACEY.

(Supreme Court of Oklahoma. Sept. 7, 1894.)

LIMITATIONS-CRIMINAL LAW.

Where a person, on May 10, 1894, is arrested upon a complaint before a United States commissioner, charging him with an infamous crime, alleged to have been committed May 13, 1891, held, that under section 1044, Rev. St. U. S., the filing of a complaint before a commissioner does not stay the operation of the statute of limitation.

(Syllabus by the Court.)

Application by George H. Lacey for release on habeas corpus. Granted.

J. L. Brown, for petitioner. C. R. Brooks, for the United States.

DALE, C. J. This was an original proceeding in habeas corpus, instituted in this court for the release of G. H. Lacey, who is held upon a commitment issued by a United States commissioner, charging the petitioner with the crime of perjury. From the petition and return it appears that on May 13, 1891, the petitioner made an affidavit be-

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fore the United States land office at Oklahoma City in corroboration of a contest affidavit filed in the said office; that on May 10, 1894, he was arrested, charged with the crime of perjury, committed in the corroborating affidavit above referred to. It is alleged in the petition for the writ of habeas corpus that the restraint is illegal, for the reason that under the statute of limitation he cannot be prosecuted or convicted for the offense charged. Section 1044, Rev. St. U. S., reads as follows: "No person shall be prosecuted, tried or punished for any offense, not capital, except as provided in section one thousand and forty-six, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed." The crime charged against the petitioner is alleged to have been committed more than three years prior to the date upon which he filed his application for release, but within three years of the time the proceedings were instituted before the United States commissioner. It is contended by petitioner that, inasmuch as no indictment was found within three years, he cannot be prosecuted; and upon the other hand it is urged that bringing proceedings before the commissioner is sufficient under The decision must turn upon the statute. the construction of that portion of the section of the statute which reads, "or the information is instituted," and if it shall be found that such language refers to the filing of a complaint in a commissioner's court then the petitioner must be remanded, otherwise released. It is now well settled that in the courts of the United States persons charged with offenses not infamous may be prosecuted upon information, and it has been repeatedly held that under the fifth amendment to the constitution of the United States no person can be prosecuted for an infamous crime unless on a presentment or indictment of a grand jury. Ex parte Wilson, 114 U. S. 417, 5 Sup. Ct. 935; Mackin v. U. S., 117 U. S. 348, 6 Sup. Ct. 777. It is our opinion that congress, at the time of the enactment of the statute of limitation, had in mind the prosecution of offenses both by indictment and upon information, and that the language referring to information relates only to that class of cases which may be prosecuted by infor-We must presume that congress, at the time of the passage of the act, intended to cover all classes of prosecution, and also intended to fix with certainty the time at which the limitation should operate in favor of a person accused. Had that body intended that a complaint charging a person with an infamous crime, filed before a commissioner, should stay the statute of limitation, they would have so stated. Inasmuch as the crime for which the petitioner is held is infamous, and no indictment can be found against him within three years next after the offense was committed, the petitioner is released. All the justices concurring.

TWINE v. CAREY.

(Supreme Court of Oklahoma. Sept. 7, 1894.) Public Lands - Town-site Trustees-Powers-CONCLUSIVENESS OF FINDINGS - CONSTRUCTIVE

TRUST-EQUITY JURISDICTION.

1. A rule of the secretary of the interior which requires a contestant before town-site trustees appointed under Act May 14, 1830, to deposit \$32 with the treasurer of the board before a cause will be heard, is authorized by the law, is a reasonable rule, and a contestant or claimant failing to comply with the rule cannot invoke the sid of a court of equity

invoke the aid of a court of equity.

2. Jurisdiction is the power to hear and determine the subject-matter in controversy be-

tween parties to a suit,—to adjust or exercise any judicial power over them.

3. A court of equity has no power to hear and determine any question affecting the title to public lands until the land department has determined the matter, and the title has passed from the government: but, after the title has passed to private parties, a court of equity will convert the holder of the legal title into a trustee to the true owner, if in equity and good conscience, and by the laws of congress and rules of the department thereunder, it ought to

have gone to another.

4. One claiming the aid of a court of equity to set aside the finding of town-site trustees must allege every fact that it is necessary to prove to entitle him to a conveyance in the first instance, and must show that he was defeated by the misapplication of the law, or the fraud, mistake, or misconduct of his adversary; and he cannot plead his own laches, misfortune, or neglect as an excuse for failure to comply with

the law

5. Town-site trustees appointed under Act May 14, 1890, bear the same relation to the disposition of town lots that registers and receivers do to the disposal of public lands; and their decisions on questions of fact are conclusive, and will not be inquired into, except on appeal to the proper departmental officers. on appeal to the proper departmental officers. A court of equity will only interfere to prevent injustice from being done, after final judgment, by reason of fraud, accident, mistake, or misapplication of the law.

6. Objection to the jurisdiction of the court which goes to the power of the court over the subject-matter may be raised at any stage of the

proceedings.

7. "A court of equity has no jurisdiction when it is apparent from the petition that the plaintiff had a remedy at law, and failed to avail himself of it, and shows no good excuse for such failure, and wherein it also appears that he was not entitled to the relief prayed for."

(Syllabus by the Court.)

Appeal from district court, Logan county; before Justice Frank Dale.

Suit by Mollie Carey against W. H. Twine. Judgment for plaintiff, and defendant appeals. Reversed.

Keaton & Cotteral, for appellant. H. R. Thurston, for appellee.

BURFORD, J. This was a suit in equity brought by Mollie Carey, the defendant in error, to charge W. H. Twine, the plaintiff in error, as trustee of certain real estate situated in East Guthrie. Oklahoma, and to compel a conveyance to her. The district court found for the plaintiff, and directed that a conveyance of the legal title to the land in controversy be made to the plaintiff, Carey.

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From this finding and decree the defendant appeals.

The petition alleges, in substance, that the plaintiff, Carey, is qualified to acquire title to town lots in Oklahoma, and that on December 1, 1891, she made settlement upon lots 10, 11, and 12, in block 86, in East Guthrie, and began improving them, and that she has plowed, planted, and cultivated said lots, and has resided thereon ever since said date; that, at the time she initiated her claim to said lots, they were vacant and unoccupied, and she took peaceable possession. It further appears from the petition that she made application to the town-site trustees for a deed to said lots in 1892, and that her case was set for hearing on a certain day by said trustees: that the defendant was an adverse claimant to said lots; that on the day of the hearing she was unable to make the deposit of \$32 required by a rule of the secretary of the interior, and, by reason of her poverty, no trial was had, and the trustees have conveyed the lots to the defendant, Twine. There is no allegation that she asked the trustees for further time, or that she was denied a continuance, or that the defendant took any advantage of her or her situation.

The lands embraced in the town site of East Guthrie were proved up under the act of congress approved May 14, 1890 (26 Stat. 109). This act provides that "so much of the public lands in the territory of Oklahoma as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceding twelve hundred and eighty acres in each case, may be entered as town sites, for the several use and benefit of the occupants thereof, by three trustees, to be appointed by the secretary of the interior for that purpose." The act further provides that the trustees shall have power to administer oaths, and to hear and determine all controversies arising in the execution of this act; and they were required to keep records of their proceedings, and file same in the general land office. These tribunals were by act of congress created a special tribunal to make entries for the occupants of such lands in Oklahoma as had already been set apart, occupied, and improved for purposes of trade and business and residence. These towns had been settled, laid out, and improved for over a year at the time the act passed. Congress had, through inadvertence or neglect, failed to provide any means whereby the town-site occupants could procure title to their lots; and, recognizing the existing conditions, the act of May 14, 1890, was passed, largely as a remedial statute to protect and reserve the rights already acquired under other laws, which had permitted lands in Oklahoma to be used for town-site purposes, but failed to furnish the machinery for obtaining title. It is a matter of public history that out of the imperfect and defective laws governing town sites in Oklahoma, and the confused state of society arising from the settlement of a new country, and from the further fact that, for more than a year after Oklahoma was actually settled and inhabited by an intelligent, enterprising, and thrifty people, no laws were in force for the government of the people except the constitution and the general laws of the United States, the rules of the common law, which have by consent become a part of our American jurisprudence, and the stern law of necessity, which a love for justice and right has implanted in the hearts of every patriotic American, there arose numerous adverse and conflicting claims to town lots in the various cities, which have now become marvels of growth, prosperity, and energy; and to meet this condition of affairs, and furnish to the uncontented claimants a means of speedily acquiring title, and to contestants a tribunal with power and authority to hear the facts and determine their rights, congress enacted the law under which the town site in question was entered. By the terms of the act itself, as well as the general powers conferred upon the interior department by the laws of the United States, the secretary of the interior was empowered to make all necessary rules and regulations for the government of the trustees in discharge of their duties. These rules, when promulgated, have the force and effect of laws of congress, and the courts take judicial notice of them, and can neither ignore them nor annul them. If parties are not content with the rules under which they must present their claims for title to government land, they must apply to the power that makes the rules, and have them suspended, amended. or revoked. The courts cannot do this for them. There is no just law or rule that does not sometimes work hardship on some one. but this furnishes no excuse for a noncompliance with them. So long as a rule of the department promulgated by authority is reasonable, and not in conflict with any statute, and has for its purpose to aid in the execution of the laws, it is binding upon all parties and the courts. Where one settles upon public lands with the expectation of acquiring title from the government, he does so with the understanding, and upon the condition, that the lawmaking power may impose such conditions as may be necessary for the protection of the government from loss, and the protection of the rights of adverse claimants. The law under which the trustees were appointed required them to assess the lots embraced in the several entries made by them with such sum as would pay all the expenses of purchase of the land, costs of survey, and compensations of the trustees. The rule of the secretary complained of in this case required a deposit by adverse claimants of a sum sufficient to meet the expenses of one day's trial, and this was a reasonable and consistent rule. The purpose of the rule was to secure the compensation of the government officers, protect the government against loss, and to protect the successful litigant against having to pay expenses occasioned by his adversary. It is not in conflict with any statute; denies to no one a substantial right; operates on all alike; was authorized by the law; and, unless set aside or revoked by the power that authorized it, is binding on litigants and courts alike. Peters v. U. S. (Okl.) 33 Pac. 1031; Caha v. U. S., 152
U. S. 211, 14 Sup. Ct. 513. The rule requiring a deposit for expenses in contest cases is a rule that has prevailed in the land offices for years, and has been acquiesced in so long that it seems strange that it would be questioned at this late day.

The offer of the plaintiff to pay to the defendant the costs expended by him at this time comes too late. It would be a strange principle of equity, indeed, that would permit one to settle upon public lands, and notify the department that he was claiming the land, but had no means to make an entry or application, and after a qualified homesteader had made an entry, paid all the fees and expenses, complied with all the conditions and requirements as to residence, improvement, and cultivation, and secured a patent from the United States, then, on payment of the fees and costs incurred by him, compel him to convey to another. This would be the effect of permitting the plaintiff to recover upon the showing made in the petition in this case. The supreme court of the United States, in Rector v. Gibbon, 111 U. S. 276, 4 Sup. Ct. 605, in construing an act similar in its terms to the one in question, laid down the rule which we think is applicable here. They said: "The powers of the commissioners are not essentially different from those of the register and receiver of a land office in cases of conflicting claims to pre-emptions. The latter officers must hear the evidence of parties, and decide as to which has the better right to the patent certificate." And this rule applies to the trustees under the act of May 14, 1890. They must hear the evidence of conflicting claimants, and must determine who is entitled to the deed: and this they do under the rules promulgated by the secretary of the interior. These decisions and awards, when made, have the same force and effect as one made by any of the branches of the interior department having control of the disposal of the public lands, and must be treated with the same respect; and the rule enunciated in Rector v. Gibbon, supra, as to when a court of equity will review their action, is the true rule in the case, viz.: "When the legal title has passed from the United States to one party, when in equity and in good conscience, and by the laws of congress, it ought to go to another, a court of equity will convert the holder into a trustee of the true owner, and compel him to convey the legal title." Under the laws of congress, as put in execution and aided by the rules of

the secretary, the plaintiff in the case at bar was required to make a deposit before her claims could be heard. This was a condition precedent to her acquiring title, and it was necessary for her to make this deposit before her possessory right could ripen into a legal title. Having failed to comply with the law, she forfeited her rights under the laws. The excuse offered by her does not bring her within any of the rules of equity which will release a party from a compliance with the law before seeking the aid of a court of equity. She does not show that her failure to deposit was brought about by the fraud, wrong, or misconduct of her adversary, or that it was occasioned by any erroneous application of the law by the trustees. She only complains of the law itself. This the courts cannot remedy.

There is another defect apparent from the petition, which is fatal to plaintiff's case. The act of May 14, 1890, required the trustees to enter the lands occupied for purposes of trade and business for the use and benefit of the several occupants thereof. They were to ascertain who the occupants were, and convey to the individual occupants all lots so occupied, and the unoccupied lots were to be sold by the secretary of the interior. Under the terms of this act, no rights could be initiated by settlement or occupancy after the date of the entry by the trustees. The entry made by them at the land office segregated the lands embraced in their entry from the public lands for the use and benefit of its occupants then, in so far as they occupied particular portions of said lands, and the portion not actually occupied at the date of the entry by the town-site trustees was subject to sale only, and not to settlement. The plaintiff alleges that she settled on these lots on December 1, 1891,-almost seven months after the act of congress took effect. We have no knowledge of when the entry was made by the trustees, but, in order to give a court of equity jurisdiction to set aside the judgment of a special tribunal created for the purpose of determining a particular question, the petition must affirmatively allege every fact necessary to bring the questions before the court. Nothing can be presumed in her favor, as all presumptions are in favor of the legality and regularity of the proceedings and judgment of the officers and tribunal who determined the case.

Having determined that the petition does not state a case for equitable jurisdiction, the question arises, has the defendant in error availed himself of the objection? No demurrer was filed to the petition, and the first objection made was a motion to dismiss for want of jurisdiction after the defendant had appeared, filed his answer, and judgment had been rendered. It is contended that the question of jurisdiction is waived, and that the judgment should be affirmed. A party may waive jurisdiction of the person, and generally does so, by appearance and plea;

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but the rule in a case of the character under consideration is well stated by Mr. Justice Baldwin in Rhode Island v. Massachusetts, 12 Pet. 660: "Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit,-to adjudicate or exercise any judicial power over them. * * * An objection to jurisdiction on the ground of exemption from process of the court, or the manner in which a defendant is brought in, is waived by appearance and plea; but, where objection goes to the power of the court over the parties or subject-matter, it may be raised at any stage of the proceedings, by motion to dismiss, and, when apparent to the court by objection or from the proceedings, the court should surcease its action." The question of jurisdiction raised in this case goes to the power or authority of a court of equity to set aside the judgment of an inferior tribunal constituted for a particular purpose, and whose action is binding on the courts, so long as it does not misapply the law to the facts found, or is not misled by the fraud, accident, or mistake of the parties; and this objection may be made at any stage of the proceedings. The authorities cited and relied upon by counsel for defendant in error are not in conflict with this position. A court of equity has no power or authority to hear and determine any question of title to public lands until the land department or tribunal having special jurisdiction in such matters has determined to whom the title belongs, and the United States has parted with her title to the same. And, before a court of equity will intercede to declare the holder of the legal title a trustee for an adverse claimant, such adverse claimant must show in his bill for relief that he has availed himself of all the right before the land department officials, and that he has performed every requirement of the law and rules regulating the acquiring of title applicable to the land he claims; and he cannot set up his own laches, neglect, mistake, or inadvertence as an excuse for a failure to comply with the law, unless such default was brought about by the fraud, wrong, or misconduct of his adversary. such showing is made in the case at bar; and as it is apparent from the face of the petition that the plaintiff was not entitled to a deed to the lots, and that the town-site board had acted finally in the matter, and determined that defendant was entitled to the conveyance, their action became final unless appealed from or attacked for fraud, mistake, or misapplication of the law, and the district court had no authority to hear and determine the questions presented by the petition, and hence was without jurisdiction, and the motion to dismiss should have been sustained.

There are a number of other alleged errors in this cause, but, inasmuch as we deem the questions decided as decisive of the case, it is unnecessary to further consider the rec-

ord. The judgment of the district court of Logan county is reversed, and case remanded with instructions to dismiss the petition.

DALE, C. J., having tried the case below, and BIERER, J., having been of counsel, did not sit in this cause.

In re SMITH.

(Supreme Court of Oklahoma. Sept. 7, 1894.)
Adultery—Prosecutions by Divorced Wife.

Under the statutes of Oklahoma requiring that prosecutions for adultery can only be commenced and carried on by his or her own husband or wife, as the case may be, or by the husband or wife of the other party to the crime, held, that such prosecution cannot be commenced and carried on by a woman after she has obtained a decree of divorcement from the party charged to have committed the crime.

(Syllabus by the Court.)

Application by James H. Smith for discharge on habeas corpus.

Henry Rucker, for petitioner. S. H. Harris, for defendant.

DALE, C. J. This was an original proceeding instituted by habeas corpus in the supreme court, on the application of James H. Smith for release from imprisonment in the jail of "P" county, in this territory, the petitioner alleging that he is restrained of his liberty by an order of the judge of the district court of "P" county, Okl., remanding him to the prison of the county to await the action of the grand jury of the next term of the court of said county. The petitioner alleges that at the May term of the district court of "P" county an indictment was found, charging him with the crime of adultery, and to which indictment he demurred; that the demurrer was sustained, and he was by the court remanded to await the action of the grand jury, as above stated, to be convened at the next term of the district court of "P" county. The illegality of the restraint is alleged to rest upon the statutes of Oklahoma; that under our statute a provision is made whereby prosecutions for adultery can only be commenced and carried on against either of the parties to the crime by his or her own husband or wife, as the case may be, or by the husband or wife of the other party to the crime. It is claimed that, the demurrer being sustained in this case, it is a bar to a further prosecution, because the ground upon which the objection is sustained cannot be avoided in a new indictment. Upon the hearing of the case a statement was agreed to and submitted to this court as a correct exposition of the facts in the case. The material facts in such agreed statement are as follows: "That the petitioner is in the 'P' county, Okl. T., jail, and is in the custody of the said J. C. Scruggs, sheriff of said 'P' county; that the cause of the restraint is

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as alleged in the petition of habeas corpus; that petitioner is the same James H. Smith against whom an action of divorce was brought in the 'P' county district court by one Mary J. Smith, plaintiff; that said Mary J. Smith, plaintiff in said action of divorce, is the identical Mary J. Smith whose lawful husband the indictment alleged petitioner to be; that the Mary M. Todd mentioned in the indictment as the party with whom petitioner committed adultery is not a married woman; that the exhibits filed and made a part of petitioner's petition herein are copies of the originals of which they purport to be copies, and shall be used as evidence in the hearing without objection that they are not the originals, and therefore not the best evidence; that there was a judgment of divorce rendered in said action so brought by the said Mary J. Smith against this petitioner, and that said judgment was rendered on June 4, 1894, and is unappealed from; and that no notice of appeal therefrom has been filed in said action." As exhibits, appear the netition for divorce filed in the district court of "P" county February 12, 1894, by Mary J. Smith against Harvey J. Smith; also, copy of the summons in said cause, issued February 14, 1894, the return thereon showing personal service on the defendant on the day following the issuance of the summons. And there further appears as an exhibit a copy of a decree of divorce granted in the case, duly signed by the judge of the district court, bearing date June 5, 1894.

From the record as above set forth, it appears that a divorce proceeding was instituted prior to the time the indictment was returned against the defendant charging him with adultery; that a demurrer to such indictment was sustained by the court after the divorce proceedings were instituted, and before the decree was granted; that, if the petitioner is prosecuted for the crime of adultery, such prosecution can only be commenced and carried on by the person who has procured the divorce, as the person with whom the adultery is charged to have been committed is an unmarried person, and, under our statute, is not a proper party either to commence or carry on a prosecution for adultery. It appears that all steps taken to procure the divorce were regular. Under the facts, then, before us, the sole question for our determination is, can the defendant be indicted and convicted of the crime of adultery?

Section 2173, p. 468, St. Okl., reads as follows: "Adultery is the unlawful, voluntary sexual intercourse of a married person with one of the opposite sex, and when the crime is committed between parties only one of whom is married, both are guilty of adultery. Prosecutions for adultery can be commenced and carried on against either of the parties to the crime only by his or her own husband or wife, as the case may be,

or by the husband or wife of the other party to the crime." Section 4551, p. 876, provides: "A divorce granted at the instance of one party shall operate as a dissolution of the marriage contract as to both and shall be a bar to any claim of the party for whose fault it was granted in or to the property of the other, except in cases where actual fraud shall have been committed by or on behalf of the successful party. Every judgment of divorcement granted by a district court shall be final and conclusive unless appealed from within the time and in the manner herein provided. A party desiring to appeal from a judgment granting a divorce, must, within ten days after such judgment is rendered, file a written notice in the office of the clerk of such court, duly entitled in such action, stating that it is the intention of such party to appeal from such judgment; and unless such notice be filed no appeal shall be had or taken in such cause. If notice be filed as aforesaid, the party filing the same may commence proceedings in error for the reversal or modification of such judgment at any time within four months from the date of the decree appealed from, and not thereafter; but whether a notice be filed as herein provided or not, or whether proceedings in error be commenced as herein provided or not, it shall be unlawful for either party to such divorce suit to marry any other person within six months from the date of the decree of divorcement; and if notice be filed and proceedings in error be commenced as hereinbefore provided, then it shall be unlawful for either party to such cause to marry any other person until the expiration of thirty days from the day on which final judgment shall be rendered by the appellate court on such appeal; and every person marrying contrary to the provisions of this section shall be deemed guilty of bigamy, and such marriage be absolutely void." Section 4553, on page 877, upon the same subject, reads as follows: "Every decree of divorce shall recite the day and date when the judgment was rendered in the cause, and that the decree does not become absolute and take effect until the expiration of six months from said time." In the case before us, in order to hold that the petitioner can be indicted and punished for adultery, we must find either that the divorce was so improperly granted that it is void upon its face, or that the divorce cannot take effect for any purpose until the expiration of six months from the date of its rendition. No suggestion of any irregularity in the proceedings had for the procurement of the divorce has been advanced, and from our inspection of the record we are of the opinion that such proceedings were in all respects regular. This leaves but the question of whether or not the divorce operates as a bar against the wife in prosecuting the husband for the crime of adultery. This divorce was had on the ap-

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plication of the wife, and, in so far as she is concerned, must be considered final. section of the statutes providing for appeal requires a notice to be filed in the office of the clerk of the district court within 10 days from the date of the judgment of divorce, which notice must state that it is the intention to appeal, and unless such notice is so filed no appeal will lie. The judgment of divorce was taken June 4th, and within the 10 days no notice of appeal was filed, and the defendant is thereby barred from obtaining a reversal of such judgment. The sections providing for appeals in divorce cases, and for making the decree recite the fact that the divorce does not become absolute and take effect until the expiration of six months from the date of the rendition of the judgment, must be considered to apply only to that portion of section 4551 which relates to appeals and remarrying within six months following the date upon which the divorce is granted. Taking this view, that part of section 4551 which makes the judgment of divorcement final and conclusive is in entire harmony with all the other provisions of the statute regulating divorce proceedings, we are of the opinion that, under the facts as presented in this case, no indictment can be returned against the petitioner for the crime charged against him, and he is therefore discharged from the custody of the sheriff. All the justices concurring.

(7 N. M. 554)

UNITED STATES v. GOMEZ. Clerk.

(Supreme Court of New Mexico. Sept. 4, 1894.) OBJECTIONS TO JUROR.

Objection to a juror's qualification must be made by challenge and before verdict.

Appeal from first judicial district court: before Justice Seeds.

Manuel G. Gomez, a clerk of school district, appealed from a judgment of guilty under an indictment of neglecting and refusing to receive poll taxes.

Catron & Spiess and B. M. Read, for appellant. J. B. H. Hemingway, U. S. Atty.

LAUGHLIN, J. The appellant, Manuel G. Gomez, was indicted by the United States grand jury for the first judicial district court for the territory of New Mexico, at the January, A. D. 1893, term of said court, under the provisions of section 5506 of the Revised Statutes of the United States, charging, in substance, that he, being the clerk of school district No. 2, in Taos county, N. M., neglected and refused to receive the poll taxes of Benedicto Lopez and Jose A. Santistevan, who were entitled to vote at the general election held on the 8th day of November, A. D. 1892, upon the payment of their poll taxes, which they had the right to pay, and offered

to pay, to the defendant and appellant within the time allowed by law; and at the May, 1894, term of said court the defendant was arraigned, entered a plea of not guilty, and was tried upon the indictment; and the jury found the defendant guilty, and so returned a verdict, whereupon the defendant filed motions for a new trial and in arrest of judgment, both of which motions were denied and overruled, and the court passed judgment on the defendant, and fixed his punishment at the term of two months' confinement in the New Mexico penitentiary, and sentenced him accordingly, from all of which rulings and judgment of the court below, the defendant brought his case here by an appeal.

The appellant assigns as error eight grounds, only one of which it is necessary for the disposition of this case to consider, and it is as follows, to wit: "(5) The court erred in holding that Ventura Encinas, although sixty years of age at the time of trial, was a qualified juror to try the case." In support of this proposition, appellant filed affidavits of Pedro Sanches and Simon Segura to the effect that the juror Ventura Encinas had on the 28th day of May, 1894, which, as it appears from the record, was the second day of the term of court at which appellant was convicted, and a day or two before the case was tried, told them, said Sanches and Segura, that he, the said juror, was summoned as a United States petit juror for that term, but that he could not serve, for the reason that he was over 60 years of age. It appears from this that the juror did not make any secret as to his age, and that he did not make any effort to deceive any one as to the fact that he was over 60 years of age at that time. The objection to the juror's qualification, if any such existed, was not seasonable. It came too late. It should have been taken advantage of by challenge, and before verdict. This court has so decided at this term of court in the case of U.S. v. Folsom, 38 Pac. 70; and, for the reasons therein given on this proposition, the judgment of the court below is affirmed; and it is so ordered.

SMITH, C. J., and COLLIER, FALL, and FREEMAN, JJ., concur.

(7 N. M. 439)

TERRITORY V. YEE DAN.

(Supreme Court of New Mexico. Aug. 29, 1894.)

HOMICIDE--Continuance-Interpreter - Cause OF DEATH-SURGICAL OPERATION.

1. Refusal of a continuance in a murder case will not be held error, the record showing no abuse of sound discretion.

2. A reversal will not be granted for incompetency of interpreter, where only his language, and not that of the witnesses, is shown.

3. Where a surgical operation, apparently necessary, is resorted to for the purpose of saving one from the prebable fatal effect of a

wound, it must clearly appear that maltreatment of the wound, and not the wound itself, was the sole cause of death, to relieve the one giving the wound from responsibility for the death.

Appeal from the district court, Grant county; before Justice Fall.

Yee Dan was convicted of murder, and appeals. Affirmed.

The appellant, Yee Dan, was at the April, 1893, term of the district court for Grant county, indicted for the murder of Yee Yot Woh, to which indictment the plea of not guilty was interposed. The case, being continued, came on for trial at the November, 1893, term of said district court. The testimony on the trial showed that in March. 1893, the defendant, in the morning, about 7 or 8 o'clock, went to the store where deceased was living, the living quarters being rooms in the rear of the building; that he went to the room where deceased was lying in bed, and struck him on the head with an iron rod; that it does not appear whether he carried the rod with him or not; that the first intimation had by the witnesses, who were living in the same house, and present at the time, of any intended violence on the part of the defendant, was their hearing deceased cry out; that after three or four blows had been given the rod was wrested from the hands of defendant; that after deceased had risen from the bed he fell upon the floor; that he was covered with blood from the blows which had been inflicted; that he was placed in bed; that the defendant said after the striking that he bit the deceased because he had been slandering him; that the deceased died early the next morning. It was also shown that before defendant came to the house he told one of the witnesses that he was going "to lick Yee Yot Defendant said that he went to the Woh." house where deceased was, and that deceased attacked him with a club or broomstick, which he took away from deceased, and used in striking him. Defense also introduced testimony for the purpose of showing that after deceased had been carried to the hospital a surgical operation (trepanning) was so performed upon the skull of deceased as to be the proximate cause of death; that, as explanation for the unlooked-for result, it was shown that the skull of the deceased was abnormally thin, so as to deceive the physician who performed the operation, and cause the instrument to suddenly penetrate the brain. Two physicians made an autopsy of the remains. One testified as follows: "Q. In the condition that you found this operation had been performed, what, in your opinion, would have been the effect on the subject? A. Well, it settled all his chances for life. It was an exceedingly grave injury. In addition to the one received by the blow, it put beyond all hope any recovery." On cros. examination this physician said: |

"Q. But in this instance you found the blood clot unusually large? A. Yes, sir. Q. And very compressed? A. Yes, sir. Q. And would that have caused death? A. Undoubtedly the hemorrhage was the proximate cause of death; the blow, the remote cause. Q. Even under the care of a more skillful physician, an injury to the brain might probably cause death? A. Yes, sir; it is a very grave injury." The other physician testified to very nearly the same effect, except that he differed with the former as to the size of the blood clot, and thought there was a possibility of its being absorbed, but for the operation of trepanning. A verdict was returned of murder in the second degree. Motion for new trial was made and overruled. and the case is here on seven assignments of error.

T. F. Conway, for appellant. E. L. Bart-lett, Sol. Gen., for the Territory.

COLLIER, J. (after stating the facts). The first alleged error relates to the refusal by the court to give an instruction asked. We have compared the instruction requested with the portion of the court's own instructions relating to the same matter; and think that what the court gave was not only the better instruction, but that it was even more favorable to the accused than the one asked.

The second alleged error is as to the overruling of the motion for continuance. This has been held to be resting in the sound discretion of the court, not to be interfered with unless the record discloses an abuse of such discretion. There appears no semblance of abuse of that discretion in this case.

The third error alleged here relates to the alleged incompetency of the interpreter, who, it seems, interpreted from the Chinese into the English language. While the testimony displays to some extent the phraseology used by Chinese in the use of the English language, there is nothing to indicate that the testimony of the witnesses was not fairly presented to the jury, and we reaffirm the ruling made by this court on this subject in the case of Hicks v. Territory, 30 Pac. 872.

The fourth alleged error, that the verdict is against the law and the evidence, and not warranted by the evidence, is urged here mainly upon the theory that the surgical operation of trepanning, and not the blows given by the defendant on the head of the deceased, was the probable and proximate cause of the death. This appears, from all of the authorities to which our attention has been called, to be a question of fact for the jury, under proper instructions. The instructions in this regard, as we have indicated, were even more favorable to the accused than asked; the court telling them that "the prosecution must show, not that

such injury was probably the cause of the death, but that it was the efficient and immediate cause of death, and the evidence must establish this fact beyond a reasonable doubt." We think that the court might have omitted the word "immediate," in its instructions, and yet have been fully within the principle deduced from the greater weight of authority on this subject. Thus it was held in Com. v. McPike, 3 Cush. 181, "that although the event proved such surgical operation to be ineffectual in giving relief, and it was the immediate cause of the death of the party, yet the defendant is responsible for her death if he had previously given her a mortal blow, in the attempt to save her from the effects of which a surgical operation, apparently necessary, was resorted to." The true test, we think, is that when a surgical operation, apparently necessary, is resorted to for the purpose of saving one from the probably fatal effect of a wound, it must clearly appear that maitreatment of the wound, and not the wound itself, was the sole cause of death. It is to be observed that in State v. Morphy, 11 Am. Rep. 122, the Iowa supreme court went further even than this. Any less stringent rule than the one stated, it seems to us, would be in conflict with the authorities, and as aiding criminals to escape merely because of efforts rendered necessary by the defend-...int's wrongful act to save the victim from its consequences. Rosc. Cr. Ev. (18th Am. Ed.) 757: Russ. Crimes (5th Ed.) 504, 505.

This cause was submitted to the jury fairly, and we find no error in the record. For these reasons it is ordered that the judgment of the court appealed from be, and is hereby, affirmed.

SMITH. C. J., and FREEMAN and LAUGHLIN, JJ., concur.

(7 N. M. 561)

BULLARD v. LOPEZ.1

(Supreme Court of New Mexico. Sept. 4, 1894.) LIMITATIONS-PROMISE TO TOLL STATUTE-PLEAD-ING.

1. In an action on a note, a parol promise to pay the same, made after maturity, but be-fore the six-year period of limitation expires, will not avail as a new promise.

. Where plaintiff might have successfully demurred to a plea of the statute of limitations, his replication instead will cure the fault.

Error to district court, San Miguel county; before Justice Long.

Suit by Lorenzo Lopez, as assignee of one Andres Sena, against E. D. Bullard, to recover on a promissory note. From verdict for plaintiff, defendant brings error. Reverred.

The case in the court below was an action of assumpsit, wherein defendant in error, as

assignee of one Andres Sens, brought suit

1 Rehearing pending.

against plaintiff in error, as a member of a partnership doing business under the firm name of Rupe & Bullard, upon a promissory note made by said firm, dated June 5, 1883, due 60 days after date, and being for the sum of \$1,475.44, with interest at the rate of 11/2 per cent. per month. The action was begun on October 4, 1889, and by a second count in the declaration plaintiff averred a parol promise by the defendant, made to plaintiff's assignee on November 10, 1885, to pay the amount of said note and interest, and that "by said parol promise and undertaking the said defendant became liable to pay the said Andres Sena the sum of money mentioned." There is an averment of the said Sena making a general assignment for the benefit of his creditors on July 3, 1886, and of the same being duly recorded, and of assignee succeeding to all rights. Defendant filed two pleas,one of non assumpsit, and the other that he did not, at any time within six years next before the commencement of the plaintiff's action in this behalf, undertake and promise, etc. There was a similiter to first plea, and replication to the second, and similiter thereto. On the trial, plaintiff introduced the firm note in evidence, and the testimony of Andres Sena of a conversation between him and the defendant in February, 1884, showing an oral promise by defendant to pay said note. This testimony was objected to on the ground that "it would not be competent evidence to remove the bar of the statute of limitations." There was also testimony showing calculation of interest which, added to the principal, made \$3,113.17 due on the day of trial. The assignment of Sena to Lopez was put in evidence. Plaintiff here closed, and defendant, by his attorney, moved the court "to instruct the jury to find for the defendant upon the ground that the note is barred by the statute of limitations, and that there has been no competent or relevant evidence to take it out of the statute." The court instructed the jury to find for the plaintiff in the sum of \$3,113.17, which they did. Other questions are raised, relating to alleged failure by plaintiff to show that defendant was a member of the firm of Rupe & Bullard, and to the admissibility of the deed of assignment.

Upon the foregoing statement of facts by Associate Justice COLLIER, he proceeded to deliver the opinion of the court.

Frank Springer, for plaintiff in error. T. B. Catron, for defendant in error.

COLLIER, J. It is deemed necessary to notice the contention made by the counsel, respectively, upon the plea of the statute of limitations filed in this cause, and to do this intelligently we quote such parts of our law as apply:

"Sec. 1860. The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue and not afterwards—except when otherwise specially provided."

"Sec. 1862. Those founded upon any bond, promissory note, * * * within six years."

Several sections here intervene, prescribing the limitation for various causes of action, and then occurs the following:

"Sec. 1873. Causes of action founded upon contract shall be revived by an admission that the debt is unpaid, as well as by a promise to pay the same; but such admission or new promise must be in writing, signed by the party to be charged therewith."

The contention of plaintiff in error is that section 1873 refers to acknowledgments and new promises which occur both before and after the bar of the statute has attached, and that the testimony showing parol promise is irrelevant, and of no legal effect. The contention contra is that the section refers only to actions already barred, and to be "revived" in the manner specified. If this contention be admitted, counsel for defendant in error then claims that new promises, made prior to the running of the statute, remain good as at common law. If the contention of plaintiff in error is sound, the latter proposition of defendant in error falls with his first. In volume 13, at page 758, of the American & English Encyclopedia of Law, tit. "Limitations, Statute of," the text reads "that it is immaterial whether the new promise relied on is before or after the bar of the statute has fallen. In either case it sets the statute running afresh." A great many decisions of the courts of different states are cited, and upon examination they are found to bear out the text to which they are cited. To the same effect is the doctrine laid down in Wood on Limitation of Actions, at section 81. In the Missouri statute the words are "shall be evidence of a new or continuing contract" (Rev. St. § 6793); and the repeated argument was there advanced that, under such words, promises made prior to the bar of the statute attaching were not embraced in the statute. But the decisions of that state are uniform against such a contention. We cite the last of those decisions that we have examined. Chidsey v. Powell, 91 Mo. 622, 4 S. W. 446. The argument on such a statute would seem to be that it could not be contended that there was any evidence of a new or continuing contract, the old one being not yet barred, because at the time of the supplying of such evidence it was not needed, the old contract being sufficient of itself, and needing nothing of evidence to rehabilitate, or, as we may say, "revive," it. The use of the word "new." it seems to us, just as much as the word "revive," found in our statute, might imply that the old promise has been revitalized, if that is to-day described as "new" which yesterday was "old." Running back through the Missouri cases, we find that the decisions of many other state courts are cited, construing statutes similar in language, and these courts

put similar construction thereon. Though it has been often contended for, our attention has not been called to any decided case construing any statute in this country where provision is made for causes of action being re-established after the attaching of the bar of the statute of limitations, so as to exclude from its application the period before bar. For decisions upon a statute nearly identical in language to ours, we are referred to the supreme court of Iowa. The case of Lindsey v. Lyman, 37 Iowa, 206, is directly in point. In that case, as in the one at bar, the contention turned on the meaning to be given to the word "revived," one side asserting that "revived" meant to bring again to life, as a cause of action dead by the statutory bar; and the other for a less strict interpretation and a less limited sense, to include both the revitalization of a dead cause of action and the restoring of the lapsed period of its statutory life. This was expressly held in Lindsey v. Lyman, supra.

It is claimed by the plaintiff in error that it is apparent, from the similarity of the language employed in the Iowa and our statute, that we adopted the Iowa statute with the construction placed on it up to the time of such adoption; and he cites for this contention Draper v. Emerson, 22 Wis. 147. In answer both to this contention and, we may infer, also to the doctrine cited from 13 Am. & Eng. Enc. Law, and Wood, Lim. Act., supra, counsel for defendant in error claims that such construction is in derogation of common law, and not applicable to New Mexico, where the common law is made "the rule of practice and decision." Comp. Laws, § 1823. It is not our view that this statutory requirement imposes so stringent a rule of policy as its exact terms imply. For example, where we find the general policy in this country to make contractual obligations renewable in the same manner before as after the bar of the statute attaches, we think some consideration in construction should be given to that fact when we incorporate into our law a statute of this kind from a sister state. Without undertaking to say what might be our decision upon the meaning of the word "revive." were we attempting a construction in harmony with the common law, we think that the fact of the general policy of this country, and the principle recognized by this court in Armijo v. Armijo, 4 N. M. 136, 13 Pac. 92, of adoption of construction of a statue of another state or territory along with the statute itself, are sufficient to make us conclude that our statute applies to acknowledgments and new promises made both during and subsequent to the running of the period of limitation. So bolding, we decide that the testimony tending to show a parol promise made before the six-year period of limitation expired did not avail as a new promise.

It is urged, however, that the plea interposed in this case being "non assumpsit infra



sex annes," instead of "non accrevit," etc., presented an immaterial issue, and that in effect no plea of the statute of limitation was filed. It is true that our statute prescribes a limitation of actions "after their causes accrue." Section 1860. It is laid down in the books on pleading, also, that to all simple contracts the plea of "non accrevit," etc., is always the safer plea, and that, where obligation of performance is not coincident with promise, it is the only proper plea. If "non assumpsit," etc., is pleaded instead of "non accrevit," etc., a demurrer will lie, even though it appears on the face of the pleadings that the action is barred, even from the date of accrual. 8 Chit. Pl. 258; Banks v. Coyle, 2 A. K. Marsh. 564. In this case no demurrer has been interposed, but replication was filed, and issue joined on it. Does this cure the fault? In 1 Chit. Pl. 456, we find that in the case of a plea of abatement so fatally defective that the plaintiff might elther sign judgment, apply to have the court set the plea aside, or demur generally, if he replies to it instead of doing either of these things, the fault is aided. It is also laid down in Angell on Limitations (see § 290) that if "non assumpsit," etc., instead of "non acerevit," etc., was put in, and plaintiff replied a new promise, and gave evidence in support of his replication, the issue, though informal, was held to be material in a case where neither the promise nor the accruing of the action was within six years. We think, therefore, that, though plaintiff might have successfully demurred to the plea of the statute filed in this case, his not doing so has presented a material issue, and for the reasons above stated the court below should, instead of instructing the jury to find for the plaintiff. have instructed for the defendant. This holding being conclusive between the parties of the entire controversy, we reverse the judgment of the lower court, and render judgment in favor of plaintiff in error, and for his costs: and it is accordingly so ordered.

SMITH, C. J., and FALL, LAUGHLIN, and FREEMAN, JJ., concur.

(7 N. M. 405)

CLANCEY v. CLANCEY. 1

(Supreme Court of New Mexico. Aug. 11, 1894.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE OF DEMANDS—Verification—Review.

The decision of the district court on appeal from a decision of the probate court may be reviewed on appeal.

2. The verification of claims against decedents' estates required by Act Feb. 26, 1889, \$ 27, is jurisdictional, and its absence cannot be supplied on appeal in the district court, though the hearing there is de novo.

3. Where the administrator reports cash on hand, he cannot, by allowing a claim against himself as administrator in favor of himself

¹ For dissenting opinion, see 38 Pac. 168. v.37P.no.16—70 as a creditor, defeat the claims of rightful distributees.

4. An appeal from the probate court is limited to that part of the judgment complained of.

Appeal from district court, San Miguel county; before Justice O'Brien.

Action by John G. Clancey against John G. Clancey, administrator of Charles E. Fairbank. There was judgment for defendant, from which plaintiff appeals. Affirmed.

This cause comes to us by appeal from the district court of the fourth judicial district, sitting for the county of San Miguel. The facts are substantially as follows: On the 18th day of February, 1889, the appellant, John G. Clancey, was by the probate court of said county appointed administrator of the estate of Charles E. Fairbank, who departed this life in the state of California on the 13th day of December, 1888. At the May term, 1889, of said probate court, the appellant, as such administrator, filed in said court an inventory of said estate, wherein he reported that he had in hand cash belonging to said estate amounting to the sum of \$14,140.17. At the September term, 1889, William P. Fairbank and Alice Fairbank and Elizabeth J. V. Fairbank, claiming to be citizens and residents of the city of Baltimore, in the state of Maryland, filed in said court a petition, wherein they alleged that the said Elizabeth J. V. was the surviving widow, and the said Alice and William the surviving children, of the said Charles E. Fairbank; the appellant, in his petition for letters of administration, having named Ella Fairbank as the widow, and Harold, Eva, Iva, and one other, all residents of the state of California, as the heirs at law and the distributees of the said estate. At an adjourned term of said court, at a date subsequent to the filing of the last-named petition, the administrator (the appellant) filed in said court an application to be allowed to correct his former inventory by showing that the amount therein shown to be due the estate of the decedent was subject to be reduced by certain indebtedness due him (the appellant) as a surviving member of a copartnership existing between him and the decedent at the date of the death of the latter: and thereupon, on the 31st day of June, 1890, he filed in said probate court against said estate a claim composed of sundry items, amounting in the aggregate to \$15,286.57. This claim was never sworn to. Of the amount claimed. the probate court adjudged that the sum of \$4,185.07 was due the appellant on account of services rendered by him to the copartnership during the life of the decedent, and thereupon proceeded to charge up against the partnership property the sum of \$8,370.14; that is to say, the court found that the appellant was entitled to the last-named amount for his services in the management of the affairs of the copartnership, and that half of this was payable by the decedent, and thereupon entered an order requiring the entire amount to

be paid out of the partnership funds. The remaining amount of the claim, to wit, \$11,-101.50, was disallowed. From this judgment, decree, or order of the probate court, or from so much thereof as disallowed the last-mentioned sum, the appellant appealed to the district court. For the better understanding of the questions here involved, it may be stated that while on the face of the record this is a proceeding in favor of John G. Clancey, as a creditor of the estate of Charles E. Fairbank, against John G. Clancey, as administrator of said estate, it is in reality a proceeding wherein the Baltimore claimants are seeking to establish their right as such, and are contesting the right of the appellant to enforce his claim against said estate. The cause was by agreement tried by the court below without the intervention of a jury, and a judgment rendered against John G. Clancey, and in favor of John G. Clancey, administrator. From this judgment, John G. Clancey, as claimant, appeals to this court.

John D. W. Veeder, for appellant. L. Emmett, for appellee.

FREEMAN, J., after stating the foregoing facts, rendered the opinion of the court as follows:

The first question presented for our consideration is raised by the motion to dismiss the appeal, on the ground that the action is one at common law, and can be brought to this court only by writ of error. This question must be determined against the motion. At common law, as administered from a very early date in England, jurisdiction relating to the estates of deceased persons and to the care of minors was vested in the spiritual courts. Courts of equity have in this country succeeded to this jurisdiction. Beach, Mod. Eq. Jur. § 1033; Story, Eq. Jur. (10th Ed.) § 542 et seq. In many jurisdictions, however, special courts are organized having by statute the power vested in them to supervise the administration of the estates of deceased persons, to probate wills, appoint administrators, guardians, etc., and in many other particulars to exercise the functions peculiar originally to the spiritual courts. Such powers are by statute of this territory vested in the probate The fact, however, that probate courts are clothed with jurisdiction to hear and determine matters relating to the estates of deceased persons does not necessarily affect the character or nature of actions growing out of such administration; and, while a simple action of assumpsit brought against the estate of a decedent may be maintained in the district court, yet we hold that the general administration of an estate in the probate court is in the nature of a proceeding in equity, and that an appeal from the decision of such court allowing or disallowing a claim is an appeal to the district court sitting as a court of equity, and that the action of the lat-

ter court may be reviewed here on appeal. Chaves v. Perea (N. M.) 2 Pac. 74. On appeal to the district court, the reversal of the order of the probate court disallowing a claim does not amount to a judgment against the estate, to be executed by the ordinary writ of fieri facias. If the district judge, sitting as a chancellor, decides that the claim should be allowed, the judgment or finding is certified to the probate court, where it is filed and treated as other allowed claims. If, however, the claimant whose claim has been disallowed by the probate court is not willing to submit the matter by appeal to the judgment of the district judge, he may bring an ordinary action at law against the administrator in the district court, in which event he would be entitled to have the matter passed upon by a jury as in ordinary actions at law. Acts 1889, p. 216. The further consideration that this is a proceeding on the part of the appellant as claimant against himself as administrator makes it peculiarly a matter of equitable, rather than of common-law, jurisdiction.

Having determined that the cause is properly before us on appeal, we are next to inquire into the propriety of the action of the court below in rendering judgment against the appellant. The learned chief justice, who rendered the judgment, filed in the cause an elaborate statement of his views of the several questions arising out of the pleadings and the argument. As, in our opinion, however, the proper determination of one of the questions raised disposes of the whole controversy, we shall rest our decision mainly, at least, on that point. The claim presented by the appellant against the estate of the decedent was not sworn to, or verified by his affidavit. The statute relating to the prosecution of claims against the estates of deceased persons is found in an act of the legislature "filed by the governor February 26th, 1889." Section 27 of that act, which is amendatory of Comp. Laws, § 1399, or so much thereof as is applicable to this case, is as follows: "It shall be the duty of the probate judge to hear and determine claims against the estate. All such claims shall be stated in detail, sworn to and filed," etc. As already observed, this claim was not sworn to. It is insisted. however, on the part of the appellant, that this statute is directory only, and that the testimony submitted by him on the trial of the cause in the district court met the requirement of the statute; that the appeal from the probate to the district court had the effect of transferring the whole controversy to the latter court, to be tried de novo, subject to all the incidents of a trial in the court of original jurisdiction, and, among others. to the right of supporting the claim by affidavit; and that his sworn testimony in support of the several items of the claim was a satisfaction of the provisions of the statute which required the claim to be filed in the



probate court and sworn to. We cannot give our assent to this contention. Certain requirements were necessary to give the probate court jurisdiction of the matter; and, while the district court was authorized to hear the cause de novo, yet it could hear and determine only such cause as was properly before it on appeal. It did not act as a court of original jurisdiction; and it follows, therefore, that, if the probate court was without jurisdiction to consider the claim, the district court had no authority to allow it. In order to give the probate court jurisdiction to hear and determine a claim of this character, it is necessary that such claim be sworn to and filed in said court. therefore, as in this case, a claimant files in the probate court an unverified account,-an account not sworn to,-he cannot on appeal to the district court supply the defect. It is very true that a party, having failed in the court of original jurisdiction, for want of sufficient evidence to support his claim, may supply this defect in the appellate court, where the cause is heard de novo. It is also true that probate courts, in matters of administration, are, like courts of general jurisdiction, entitled to a favorable presumption as to jurisdictional facts. Acts 1889, p. 220. Yet in this case it appears affirmatively that the claim was never sworn to before the probate court; hence that court was not authorized to allow it, and, on appeal, it was the duty of the district judge, sitting as a chancellor, to hold that the probate court was without jurisdiction to consider and allow the same. We might rest our disposition of the case at this point, but there are other features connected with it which, in our opinion, deserve, at least, a passing consideration.

The appellant and the deceased were, prior to and at the date of the latter's death, partners in business. The appellant claims that, in setting up said business, he made certain advances to the decedent, which advances constitute a part of his claim. The remaining items of the claim are for certain payments alleged to have been made by the appellant, and for services rendered by him in the promotion of the partnership business. He appears, therefore, in the court below, as the administrator of the estate of his deceased partner, and as the surviving member of the partnership firm. The appellant having filed in the probate court his application to be appointed administrator, and having been duly appointed as such, appraisers of the estate were appointed, who reported that the estate of the decedent consisted of his interest in the partnership property of J. G. Clancey & Co., which property they reported, after payment of all partnership debts, amounted to \$28,280.35, one-half of which amount, to wit, \$14.140.17, represented the estate of the decedent; and this amount the appellant, as administrator, reported to the pro-

bate court as cash on hand belonging to said estate. It was not until after the Baltimore claimants filed their petition to be allowed to establish their claim as heirs and distributees of the estate that the administrator sought to amend his report by setting up his claim to this \$15,286.57. It is not seriously denied that this claim was an afterthought, and that it was filed for the sole purpose of defeating the Baltimore claimants. The only evidence offered by the appellant in support of his claim. aside from his own testimony, was the deposition of Ella Fairbank, claiming to be the last wife of the decedent. It is not seriously denied that this proceeding was friendly and collusive as between the appellant and the California parties, who claimed to be the surviving wife and children of decedent. The purpose was to place the amount claimed beyoud the reach of the Baltimore claimants in case they should establish their title to the estate. We cannot permit the courts to be made a party to an arrangement of this kind. The appellant had already reported that he has in hand \$14,140.17 belonging to the estate. He cannot be permitted, under the guise of allowing a claim against himself as administrator, and in favor of himself as a creditor, to place the assets of the estate beyond the reach of the rightful claimants, whoever they may prove to be.

There is still another question growing out of the issues involved, and which is pressed upon our consideration, the determination of which, although not necessary to the present disposition of the cause, will, nevertheless, in our opinion, tend to aid in the proper settlement of the controversy in the court below. It is this: The appellant's claim against the estate consisted of 14 items, aggregating in amount \$15,286.57. Seven of these items, aggregating \$4,185.07, were charged as salary due appellant on account of services rendered by him to the partnership firm of J. G. Clancey & Co. The remainder of the claim, which consisted of items for money advanced in the original purchase of the partnership property (a flock of sheep), and sundry advances of cash, aggregated the sum of \$11,101.50. On consideration of the whole claim, the probate court rendered the following judgment or decree: "And the court, being fully advised in the premises, orders, adjudges, and decrees that as to the items of salary, amounting to \$4,185.07, the same is not a claim against the estate, but rightfully against the partnership, and ought to be charged to the firm of J. G. Clancey & Co. Therefore the amount of \$8,370.14, or double the amount as rendered against the estate of Charles E. Fairbank, deceased, is approved and ordered paid out of the partnership funds; and, as to all other amounts contained in said bill of J. G. Clancey against the said estate, the same are hereby rejected and disapproved. the same amounting to \$11,101.50." The appellant appealed from so much of the fore-

going order, judgment, or decree as disallowed the sum of \$11,101.50. The Baltimore claimants gave notice of an appeal from so much of said judgment or decree as undertook to allow the salary account. This appeal was, however, never perfected. The appellant insists, therefore, that the district court had jurisdiction of only so much of the proceedings of the probate court as were appealed from; that the judgment of the probate court allowing one part of the claim, and disallowing another, was severable, making it necessary, as a condition upon which the action of the probate court could be reviewed, that the party against whom an order as to one particular item was entered should appeal from that order; and that, therefore, the failure of the Baltimore claimants to appeal from the judgment of the court allowing the salary account left that part of the judgment, order, or decree in full force. On the contrary, it is insisted that the appeal from the probate court to the district court brought the whole case into the latter court, and that, on inspection of the record of the probate court, it appeared that the whole judgment, decree, or order, so far as the same was relied on to support the appellant's claim against the estate, was an absolute nullity, in that the probate court undertook to make an allowance, not against the estate of the decedent, but against the partnership funds of the firm of J. G. Clancey & Co. In our opinion, it is the better practice to treat an appeal from the judgment, order, or decree of a probate court as limited to so much of such judgment, order, or decree as is complaintd of. It very often occurs that in matters involving an inquiry into long and intricate accounts, running through a series of years, and covering a multitude of transactions, having no other connection save that they transpired between the same parties, no serious contest will arise except as to one or two items. In such cases there is nothing in reason or authority that prohibits the aggrieved party from appealing from so much of the order or judgment as to him may seem wrong. The fact that a large number of distinct claims are consolidated into one claim ought not to make it necessary for the aggrieved party to appeal the entire cause to the district court in order that he may get relief as to one claim or one item of the aggregated claim. Such a practice would involve unnecessary costs, without any corresponding benefit to either party. While, therefore, it is perfectly apparent to us, as it was to the learned judge who sat in the court below, that so much of the order of the probate court as undertook to allow the appellant \$4,-185.07, and to set apart \$8,370.14 of the partnership funds for the payment thereof, was an absolute nullity, yet this part of the decree or judgment was not appealed from, and was not therefore properly before the district court. The judgment, however, of l

the district court, dismissing the appeal, with costs, was correct, and will therefore be affirmed; and it is so ordered.

SMITH, C. J., and FALL, J., concur.

(7 N. M. 580)

TERRITORY v. CLANCY, Clerk.

SAME v. KENDALL et al., County Commissioners.

(Supreme Court of New Mexico. Sept. 5, 1894.) CONTEMPT-WHAT CONSTITUTES.

1. Where one, knowing that the court has initiated a process to restrain his committal of some act, commits that act, he is guilty of contempt, notwithstanding he was guided by the written opinion of an attorney that he was not have a take acquirement of the process uplear bound to take cognizance of the process unless

obuing to take cognizance of the process unless duly served on him.

2. An attorney counseling his client to disregard the order of a court, upon the technicality that it was not formally promulgated, is guilty of contempt.

3. Where the clerk of the supreme court did not cher the order of an associate instice. When

not obey the order of an associate justice, when first presented, upon the theory that the commission and oath of office of said justice was not on file in the office of the clerk, and further refused to obey it after his assurance by the presiding justice that such obedience would be his proper course, the clerk was guilty of contempt of contempt.

Action under rules to show cause, by the territory of New Mexico against H. S. Clancy, clerk of the supreme court, A. L. Kendall, Charles W. Dudrow, and Victor Ortega, county commissioners, for contempt of the supreme court. Charles A. Spiess, an attorney in the cause, was, with the parties respondent, found guilty.

The opinions of the court in the foregoing two proceedings appear together, as they are practically the same case. The opinion in regard to Charles A. Spiess also appears. although there was no rule upon him to show cause. It, however, belongs to the proceeding.

H. L. Warren, W. B. Childers, and H. B. Fergusson, appointed by court to prosecute. Neill B. Field, for respondent Clancy. Catron and Charles A. Spiess, for other respondents.

In the Matter of the Contempt Proceedings against A. L. Kendall, C. W. Dudrow, and Victor Ortega, Commissioners for the County of Santa Fé.

PER CURIAM. The respondents answer that they were in the afternoon of the 13th day of November, 1893, at their meeting. and that one H. L. Warren appeared before them while they were holding their session, examining the accounts of W. P. Cunningham, sheriff and ex officio collector of the county of Santa Fé, and exhibited a paper which he stated was an order from the Honorable NEEDHAM C. COLLIER, associate justice of the supreme court, ordering the

TERRITORY D. CLANCY.

issuance of a writ of prohibition out of the supreme court, prohibiting and restraining the said board from proceeding in any manner to declare forfeited and vacant the said office of sheriff and ex officio collector of said county, and stated that they did not read it, or hear it read. It is shown, however, that it was tendered to them for their inspection, and the offer was made to have it read to them, and that they refused either to receive or hear it. Respondents further state that they became cognizant in the forenoon of said 13th day of November, 1893, that H. L. Warren had presented the order of the said associate justice to the clerk of the supreme court, and that the said clerk had declined to issue the writ of prohibition therein directed, and that they thereupon submitted the situation to Charles A. Spiess for advice in the premises, and that the said attorney gave them the opinion that they were not bound to take cognizance of said order unless it was duly directed to and served upon them, and that it could not operate to suspend their proceedings upon the notice and citation by them to the said Cunningham; that they thereupon declared forfeited and vacant the said office of sheriff and ex officio collector for the county of Santa Fé. for the cause alleged in the said citation, and that in so acting, and disregarding the suggestion of H. L. Warren that the said order was as obligatory upon them as though formulated into a writ with the seal of the supreme court, they intended no disrespect to this court, or any member thereof. court is impressed that these commissioners, in ignoring their official legal adviser, the district attorney, and in seeking other counsel, disclosed an animus in the premises to avoid the possibility of an opinion adverse to their disposition to proceed in the execution of the purpose indicated in their notice to Cunningham, and that they must take the consequence of the ill advice they received, and upon which they acted. Cognizant that the supreme court of this territory had, through one of its members, declared doubtful their right to continue their proceedings against the said sheriff, they should have forborne to exercise further jurisdiction, no matter whether this action of the court was communicated formally, by writ duly served, or by notice of the existence of the order of the court for a writ against them. The material inquiry is whether they knew that the court had initiated the process to strain them; and that they were so aprised, they confess. They cannot protect chemselves by the fact that before their action a professional opinion was given them "The fact that they had the right to act. that before publication a professional opinion was given that the publication would not be a contempt does not change the character of the defendant's defamatory article, or relieve the defendant of liability for its origin

and dissemination." Myers v. State (Ohio Sup.) 22 N. E. 43. We will, however, pay due regard to the extenuating fact that the commissioners proceeded under the advice of counsel of their own selection, and accordingly will limit the punishment for their contempt proportionately to their offense. The judgment of the court is that A. L. Kendall and C. W. Dudrow shall be confined in the county jail for 20 days. It appearing to the court that Victor Ortega, being unacquainted with the English language, did not understand the proceedings by his associates, the writ against him will be dismissed.

In the Matter of the Contempt Proceeding against C. A. Spless.

PER CURIAM. This attorney and officer of this court confesses that he advised the county commissioners of Santa Fé countyagainst whom Hon. NEEDHAM C. COL-LIER, an associate justice of the supreme court of New Mexico, did on the 13th day of November, 1893, direct the issuance of a writ of prohibition to restrain the county commissioners of Santa Fé county, N. M., from proceeding against W. P. Cunningham, sheriff and ex officio collector of said county. with a view to declare his said office vacant -that they were not under any obligation to recognize the order of the said associate justice, and he declares that as a lawyer he honestly entertained the opinion that the said order, not being directed to the board of county commissioners, was in no sense binding upon them, though duly brought to their attention, and its contents explained by counsel representing W. P. Cunningham. It cannot be tolerated that a person enjoying the privilege of practicing his profession before this court should deem it legitimate to counsel the disregard of its order upon the technicality that it was not formally promulgated by the clerk of the court, and duly directed. Knowing that such an order existed, and that in effect it was the action of this court, he should, in a proper appreciation of his relations to this court, have realized that it was incumbent upon him to admonish a due observance of the provisions of its order, rather than encourage premeditated and precipitate violation thereof. Apprised that an associate justice of this court had declared that sufficient cause existed to forbid the exercise of assumed jurisdiction by the said commissioners, it was his plain duty, as an honorable member of this bar, if called upon for counsel by the board, to inform them that the order was before them in substance, though not in form, and that they could not properly ignore it, no matter how great the disappointment to them of the arrest of their programme. That an attorney should hasten a body to acts deemed so questionable that their performance was forbidden by a tribunal duly authorized in the premises, for the purpose of taking advantage of delay in the formal completion of the order by the improper conduct of the ministerial officer of said court, cannot be too severely condemned, and it is well settled that any such practice is unworthy, and regarded as contempt. King v. Barnes (N. Y.) 21 N. E. 182. We will, in consideration of the animus, however, which influenced the proceeding of the attorney now under consideration, pay due regard to his disclaimer of any intention to commit a contempt. It is therefore adjudged that the said C. A. Spiess be imprisoned in the county jail for 30 days, and suspended from practice as an attorney of this court for 12 months.

In the Matter of the Contempt of H. S. Clancy, Clerk of the Supreme Court of the Territory of New Mexico.

PER CURIAM. It appears that Hon. N. C. COLLIER, subscribing his name as an associate justice of the supreme court of the territory of New Mexico, issued an order on the 13th day of November, 1893, to H. S. Clancy, for a writ of prohibition against the county commissioners of the county of Sante Fé, and that the said clerk declined to obey said order upon the ground that the said associate justice had not filed his commission and oath of office with the said clerk, and that the said clerk was not officially advised that the said associate justice had duly qualified, so as to entitle him to act in said capacity. It is not recognized by this court that the clerk was authorized to make any inquiry into the authority of the assoclate justice to exercise the authority assumed by him, nor can it regard the action of the clerk as less than a grave imputation upon said justice, as it cannot be conceived that the associate justice was capable of exercising the powers of his high office without a compliance with all the conditions requisite to acquire due authority. It is an indisputable presumption that a person acting in an official capacity is the officer he assumes to be, and it cannot be pretended that it was legitimate that the ministerial officer of this body should have ignored this fundamental principle to any extent, and especially so far as to impeach the good faith of a lawyer of honored prominence, whom he knew to have been duly appointed to the position, of which the said justice, by the order he issued, declared himself to be the qualified incumbent. This consideration, of itself, involves the clerk in a very unfavorable status, but we regret to add that it is seriously aggravated by his subsequent conduct. It appears that, at the suggestion of prominent counsel,-H. L. Warren, who presented the order of the gentleman representing himself to be an associate justice for a writ of prohibition,—the said clerk referred the subject by wire to the presiding officer of this court, and inquired whether the said clerk was authorized to issue the said writ,

in the absence of evidence—the filing of the commission and oath of office-that the said associate justice was duly qualified to act, and that the presiding officer replied that there was no requirement that the commission and oath of office should be recorded in the clerk's office, and that the said clerk would be fully protected in complying with said order. This answer was received by the clerk before the said county commissioners, against whom the said writ was ordered, assembled in the afternoon of the said 13th day of November, and in ample time for the said clerk to issue the writ and restrain the said commissioners, but he nevertheless persisted in his refusal to comply with the said direction of the said justice. If the said clerk was guilty of disobedience in not obeying the order of the said associate justice, when first presented, upon the theory that the commission and oath of office were not on file in his office, it is manifest that his offense became graver by persistence in his refusal after the assurance of the presiding officer that there was no provision for the recordation of the said evidence of title and qualification, and that he would, in any event, be fully protected. The reason alleged for his disobedience having been removed, the obedience should have ceased. and its continuance cannot be justified upon the representation that the practice of recording the commission and oath of office was so general as to have become a requirement. It appears, however, that W. D. LEE, whom NEEDHAM C. COLLIER succeeded as associate justice, omitted to file his commission and oath of office. Nor are such papers of R. A. REEVES, recently judge of this court, nor of A. B. FALL, at present a judge of this court, recorded in the clerk's office of this court. But, had the practice been uniform, we would not have accepted it, or the opinion of any attorney thereon, as an authority that should have prevailed with the clerk. It is true that in the meantime. between his telegram and the response thereto, he consulted with a distinguished attorney of the court, and received from him an opinion that he would be fully justified in refusing to obey the order; to discredit the order of the associate justice, and the pronounced declaration of the presiding officer, to whom the issue was submitted. Advised that he was in error as to the prerequisite, and that no harm would come to him, his duty was plain, and his failure to obey was contempt of this court, acting through one of its members. This court will not fail, however, to attach due consideration to the answer of the clerk, declaring that his action was not intended in disrespect of this court, or in any disregard of its authority as a whole, or of the associate justice as a part; nor will it overlook the representation of the clerk, declaring that he referred to the files of the secretary's office of the territory to enlighten himself as to the status of the official purporting to be an associate justice. Such representations properly address the deliberation of the court in the consideration of the punishment appropriate to the offense. Says Blatchford, C. J. (circuit court of New York, and later associate justice of the supreme court of the United States), in Atlantic Giant Powder Co. v. Dittmar Powder Manuf'g Co.: "What these defendants did they did not do accidentally or unintentionally, but knowing fully what they did. They were therefore guilty of contempt. What they did is not the less legally a contempt because they did not think they were infringing, or were advised they were not. Any question of animus can bear only the extent of punishment." 9 Fed. 816. In recognition of the wisdom of the foregoing views of the distinguished jurist, in due regard for the gravity of our responsibility, and in profound regret that the occasion has arisen, the judgment of the court is that H. 8. Clancy was guilty of contempt in refusing to issue the writ of prohibition in pursuance of the order of the associate member of this court at the time the said order was presented to him, and that he shall be imprisoned in the county jail for 30 days, and removed from the office of clerk of this court.

(7 N. M. 421)

TERRITORY V. McFARLANE. (Supreme Court of New Mexico. Aug. 21, 1894.)

CRIMINAL LAW-CONTINUANCE-CHALLENGE TO ARRAY-INSTRUCTIONS.

1. In a criminal case the refusal of a continuance is addressed to the sound discretion of

the court, and will not be reviewed unless that discretion has been abused.

2. The mere allegation in a motion challenging the array that the jury list had not been revised by the assessor of the county, and a new list furnished the clerk of court, as desig-

nated by the statute, is not sufficient ground for reversal, where no resulting injury is shown.

3. It is not error to refuse a motion to require the production of the testimony taken at a preliminary hearing for the inspection of the defendant.

4. It was not error not to have furnished the jury with a form for a verdict.

Appeal from district court, Lincoln county: before Justice Freeman.

From a verdict of guilty under an indictment for murder, Robert McFarlane appealed. Affirmed.

E. L. Bartlett, Sol. Gen., for the Territory.

LAUGHLIN, J. The defendant in the court below, and appellant here, was indicted by the grand jury of Socorro county at the May, 1893, term of that court, for murder in the first degree of one Atanasio Vasquez, charging the defendant with having shot and killed the deceased in a saloon at San Marcial, in said county, on the 4th day of July, 1892. At that term the defendant filed his motion

for a change of venue from Socorro county. and the motion was granted, and the venue was changed to Lincoln county. At the March, 1894, term of court for that county, the defendant filed a motion and affidavit for a continuance on the 19th day of the month and 8th day of the term, which motion was denied, and the trial was postponed until the 27th day of that month. The affidavit set out, among other things, the failure on the part of the defendant to secure the attendance of material witnesses in behalf of the defendant. The court thereupon ordered compulsory process to be issued to secure the attendance of the witnesses in behalf of the defendant. On the day set for the trial, it appears that the attendance of some of the witnesses had not been secured, and the defendant renewed his motion and affidavit for a continuance to the next term, which was denied, and he then asked leave to amend his motion, which was also denied by the court. Both parties then announced themselves ready, and the trial proceeded; and, after 8 jurors had been accepted and passed for cause, the regular panel became exhausted, and the court drew the names of 30 persons from the jury box, in the manner provided by law, and special venire was issued for the persons whose names were so drawn; and thereupon the defendant filed a motion challenging the array of the regular panel, in which motion it was charged that the jury list had not been revised each year, as required by law. Defendant also filed a motion to require the territory to produce the testimony taken at the preliminary hearing before the justice of the peace, for the inspection of defendant at the trial, both of which motions were denied, to all of which rulings of the court the defendant duly excepted. At the conclusion of the testimony, the court charged the jury fully on the law of murder in the first, second, and third degrees, and as to the form of their verdict in the event that they should find in the first or second degree, but did not charge as to the form of the verdict in the third degree: and the defendant excepted as to the omission of the court to so charge as to the form of the verdict in the third degree. The jury found the defendant guilty in the second degree (eight of the jurors recommending the defendant to the clemency of the court), and the court passed sentence, and fixed the punishment at 21 years in the penitentiary. These are substantially the facts as they appear from the record before us on the appeal. The record, as presented, is only a skeleton of the proceedings, consisting of the motions for continuance, challenge to the array of the regular panel of the jury, and for the production of the testimony at the preliminary hearing, and the charge of the court to the jury. The record does not contain any of the testimony given on the trial, and was not filed in this court until the fourth day of the term, although the statute requires that it be immediately set up by the clerk of the lower court. There is no bill of exceptions and no assignment of errors filed with the record in the case, and the case is here on the record as above stated, and this court must pass upon the case from that record only.

The first ground relied on for reversal is that the court denied the motion for continuance. We cannot sustain this contention. There is nothing in the record to show that the witnesses whose presence was required to testify in behalf of the defendant were or were not present at the trial; and though the affidavit, as sworn to by the defendant, but unsupported by any proofs as to what defendant expected to prove by the witnesses therein named, contains statements which, if true and established on the trial by proper evidence, would make out for the defendant a clear case of justifiable homicide in self-defense, yet there is nothing in the record to sustain said statements, except the affidavit of the defendant made ex parte and in his own behalf. The rule of practice and decision in this court has been for more than 30 years to affirm judgments in the lower courts where the point relied upon involved the discretion of the trial judge, unless it should appear from the face of the record that that discretion had been grossly abused, to the injury of the appellant. In this case the record fails to disclose any abuse of discretion, and we do not believe there was any such abuse of a sound discretion on the part of the trial judge, who had all the facts and circumstances before him, when his rulings were made with the whole proceeding fresh in his mind. The granting or refusing of a motion for continuance is always addressed to the sound discretion of the judge hearing the cause, and, as a rule, is not reversible on appeal. Thomas v. Mc-Cormick, 1 N. M. 371; Territory v. Kelly, 2 N. M. 301; Faulkner v. Territory (N. M.) 30 Pac. 908; Railroad Co. v. Saxton (N. M.) 34 Pac. 532. And many other decisions of this court might be cited upon the same point.

It must be remembered that the defendant secured the change of venue from the county where the crime was committed to a far distant county of his own motion, and in his motion for continuance he charges that the deceased was regarded by the people who knew him as a man of bad character, as dangerous, and a "desperado;" and his object therefore, for removing the trial from Socorro county, could not have been on the ground of a prejudice against him (the defendant) and a bias in favor of the deceased. It must, then, be inferentially presumed, that his object was to delay his trial as long as possible. The inference of this presumption is further borne out from the fact that, so far as the record shows, he made no effort to secure the attendance of the witnesses he desired until within a very few days before the term of court at which his case was coming on for trial, although he knew the long distance from the place of residence of his witnesses to the place which he had by his change of venue selected for his trial. fact, the record discloses no diligence on the part of the defendant to warrant the consideration of his motion for continuance. This, as an appellate court, cannot be used as a means by which persons charged with crime can escape a speedy and fair trial by a change of venue and motions for continuances until the witnesses depart the jurisdiction of the court by death or otherwise, and the accused thereby evade their just deserts for crime committed in their criminal disregard of human life, and that, too, on their own oaths, unsupported by any other evidence. It is held here that, when a man shows such a disregard of human life as to commit a willful murder, he will not be permitted to escape a speedy trial by adding to that the offense of perjury, and that it will not be regarded as an abuse of sound discretion if the trial judge denies a motion for continuance unsupported by other evidence than the ex parte oath of the defendant himself.

The next ground for consideration is the exception on the challenge to the array of the regular panel of the jury. This point is not well taken, because there is nothing in the record to show that the defendant did not have a fair and impartial trial by a jury of good and lawful men of that county; and, until something appears of record to the contrary, the presumption is that the trial was fair and regular, and in full compliance with the statutes on the subject. The mere allegation in the motion that the jury list had not been revised by the assessor of the county, and a new list furnished the clerk of the court, as designated by the statute, is not sufficient ground for reversal, without some showing in the record that the defendant in some material way suffered injury. This must be made to appear in some authentic manner before the trial court, that he may pass upon it advisedly.

The third ground is on the exception to refusing the motion to require the production of the testimony taken before the justice of the peace for the inspection of defendant at the trial. We know of no statute requiring the production of the testimony on preliminary hearings for the inspection of the defendant, and the ruling of the trial judge on that point is sustained.

The fourth and last ground for reversal is that the judge, in his charge to the jury, did not charge as to the form of verdict in the third degree. The court charged the jury fully as to the law of murder in the third degree; and, if the jury had found the evidence justified it, they could, and no doubt would, have so returned a verdict in that



degree. We know of no law which requires a court to furnish the jury a form for their verdict in any degree.

The record in cases of this character should disclose all the proceedings in the court below, in order that this court may be able to pass upon the whole case from the record. For the reasons herein given, the court is of the opinion that there is no error in the record sufficient to reverse the case, and the judgment of the court below is therefore affirmed; and it is so ordered.

SMITH, C. J., and FALL and COLLIER, JJ., concur.

(7 N.M. 428)

TERRITORY v. ARMIJO.

(Supreme Court of New Mexico.)

PROSECUTION FOR MURDER—PREMEDITATION—Evidence—Res Gestae.

1. On trial of one for murder of his wife by strangulation, where there is evidence of repeated acts of cruelty to the wife for several years, and evidence that, some time previous to the killing, defendant had had illicit intercourse with another woman, whom he married soon after, evidence that bruises and marks of violence were seen on the person of the wife 12 hours before the killing, introduced to bring the cruelty down to date, and in connection with the other testimony to show a desire to get rid of the wife, and a premeditated design to kill her, is, in the absence of evidence showing marks of strangulation at the time, or connecting defendant with causing the bruises, inadmissible.

2. A declaration that her husband had beaten her, made by deceased to her brother 12 hours before her death, and while showing him bruises on her person, is inadmissible as part of the res gestae, where the evidence does not show what length of time had expired after the bruises were received before the statement was made.

Appeal from district court, Sierra county; before Justice Fall.

Hipolito Armijo was convicted of murder in the first degree, and appeals. Reversed.

A. B. Elliott, for appellant. E. L. Bartlett, Sol. Gen., for the Territory.

COLLIER, J. The record in this case shows that defendant in the court below, and appellant here, was indicted in the district court of Sierra county for the murder of Rosa Torres de Armijo, as occurring the 26th day of July, 1891, by choking and strangling. He was put upon trial at the March, 1893, term of said court, and, the jury being unable to agree, a mistrial was declared. He was again put on trial at the October, 1893. term of said court, and a verdict rendered of guilty of murder in the first degree, with a recommendation to mercy. A motion for new trial being overruled, and defendant sentenced, the case comes here for review by ap-

The case is one of circumstantial evidence. The undisputed facts disclosed by the testi-

mony are substantially as follows: The deceased, Rosa Torres de Armijo, was the wife of defendant, they having been married about 30 years. That there were three children of the marriage, but neither of the children was with the parents at the time of her death, which occurred in the early part of the night of July 26, 1891. That defendant left his wife alone at their house on the morning of said July 26, 1891, and remained away until about sundown. That he and deceased were visited at about dark by one of the witnesses for the territory, who was asked by defendant to take supper there, but. declining, he was given by deceased a cup of coffee, which he drank. That said witness left defendant and deceased together at their house, and about half an hour later he met and was talking with defendant at another house, a short distance away. That about an hour or more after he saw defendant he heard of the death of his wife. That defendant was present with others, in the early part of the night, where they were threshing wheat. That he left said place, and in about the time it would take for him to get to his home he was heard calling for assistance, and, returning to the threshing ground, he requested the aid of the men in getting his wife out of a hole into which he claimed she had fallen. That one of said men went with him to the house, and finding his wife lying with her feet on the bank of the hole, and her head in the water, they together dragged her out, and found life to be extinct. This hole was shown to be within a few yards of the door of the house. The night was dark. and drizzling rain. In a very short time the body of deceased, who, defendant claimed, had fallen into the hole in his absence, and was drowned, was by her brother, who had arrived there, and by defendant, placed on the back of the man who assisted in dragging it out of the hole, was carried to her brother's house, some 300 yards away, and there washed and dressed for burial. There was testimony by the territory that upon one side of the throat of deceased were three bruised and scratched places, and on the other side one bruised place, as if made by fingers and finger nails; a bruised, bluish spot on her stomach, as if made by the pressure of a knee thereon: and the head moved about as if the neck was broken. The brother of deceased also testifies that, on arriving at the house where the the dead body of his sister was found, he charged defendant with having killed her, and he remained silent, but in the course of the talk there he said his wife had fallen into the hole, and was drowned. There was contradictory testimony about the quantity of water in the hole, ranging from a depth of four inches to as many feet. There was also testimony of maltreatment by defendant of his wife, extending over s. very long period, which will be noticed later on, and of the defendant having illicit relations with a woman to whom he was married within a short time after his wife's death. There was also testimony, both by the prosecution and the defense, that the deceased was subject to fits or spasms, mild in their character, and merely causing deceased to remain quiet a few moments but not losing control of herself, as stated by witnesses for the prosecution; and so decided, as stated by the defense, as to cause her to fall over suddenly, and remain as if dead. These fits were stated by the witnesses for one side to have resulted from maltreatment and abuse by the husband, and by the defendant to have been caused by illness consequent upon childbirth several years before. The evidence of maltreatment rests almost entirely upon the testimony of the relatives of deceased, though several other persons appeared as witnesses, and all residing in the immediate neighborhood. The record shows that this testimony is in great part hearsay, and often elicited by questions leading in form, which, for some unaccountable reason, were not objected to. As far as a record can throw doubt and suspicion upon the entire testimony on the subject of maltreatment and abuse of deceased by the defendant, this record does it. Thus, the brother of the deceased, after repeatedly saying that he saw defendant break the arm, the leg, and jaw of deceased, all on one occasion, finally admits that he never saw any such thing, but was merely told so by a third person a few moments after his arrival at the place where it is said to have occurred. The district attorney, without any objection whatever being made, propounded the following questions to the witness on that subject: "Q. Didn't he knock pretty near all her teeth out, also? A. Yes, sir; she had only a few left. Q. And you say you saw him beat her continuously? A. Continuously." The record has been searched in vain for any justification of such questions, and we suppose they must have remained unobjected to upon the theory that the jury's natural sense of justice would revolt at them. The witness, other than defendant, who last saw deceased alive testified to loud and angry talk addressed to her by defendant immediately before he went into the house where the two were alone; that he was given a cup of coffee by her, and invited to supper by him; that he left them together, and in the course of an hour, more or less, heard of her death, as already stated. Defendant testified to leaving his wife at the house, alive, when he went to the threshing ground, and on returning, and not finding her in the house, he sought around in the dark, after discovering that the water pail was gone, and he came upon her feet near the hole of water, and He denies that he then gave the alarm. heard any such accusation made against him as testified to by her brother. Three witnesses for the defense, who were of the four who washed the body of deceased, testified that they examined it, and neither one saw on it the marks on the throat or stomach detailed by witnesses for the prosecution, nor did they hear a word said in reference to any such marks, nor as to the neck of deceased being broken.

In the instructions to the jury, delivered by the learned judge presiding at the trial, they were told that the defendant might be found guilty of murder in the first or second degree, or they might return a verdict of not guilty. I think that the legal testimony in this case fairly shows that the jury might well have arrived at either of said verdicts. and that, as between the first and second degrees of murder, their minds might well have wavered. It becomes a duty to ascertain whether or not any illegal evidence was, as claimed by defendant, admitted, which had a tendency to persuade them to the conclusion they arrived at of murder in the first degree, which involves the death penalty, rather than of murder in the second degree. The theory for conviction must be that, upon defendant's arriving at his house, he continued the quarrel which was interrupted by the visit of the witness who, besides the defendant, last saw the deceased in life; that he assaulted his wife immediately or very soon after the visitor's departure; that he deliberately, and with the premeditated design of killing, choked and strangled her to death, and then, throwing or placing her body head downward in the hole of water, it remained there, in the dark and rainy night, while he went away, and, returning, pretended to first discover it. There is no circumstance in this from which the conclusion of a deliberate, intentional killing could be drawn that would not equally apply to the inference of a killing perpetrated in the heat of passion, without design to effect death, but in a cruel and unusual manner, except the angry words heard by that visitor just before his entrance. So far as appearances went, that burst of anger had all blown away before he left, and she and he were offering to him the hospitality paid a guest. There is nothing in the means used to effect death to lead to the conclusion of an intentional killing. No weapon of any kind or character was resorted to. The fact of maltreatment, persisted in for a number of years, if the testimony as to that is taken as true in every syllable, should not persuade that, of all times he maltreated her. he on this occasion intended to destroy her life; and if the testimony of illicit intercourse, running over a long period of time, was believed, that would not necessarily persuade that, for the first time, he on this night fully intended to rid himself of her forever. It will be seen, therefore, that, if there was testimony bringing his alleged cruelty down to this very date, it would and must have been a powerful factor in persuading the jury that the intention to kill was in the mind of

defendant, and that it operated, not only in causing them to reject the theory of death resulting from cruel treatment, without any design to effect death, but also to reject all testimony as to there being no signs of choking or strangulation, and every other fact and circumstance in defendant's favor that might otherwise have been given weight. Was there such testimony, and, if so, was it legal? I quote from the testimony of the brother of the deceased on this subject: "Q. When was the last time you saw her alive? A. The 26th of July, about 6 o'clock in the morning; about 6 or 7 o'clock. Q. What, if anything, did you notice about her when you saw her alive the last time? A. I was passing by her house. When she saw me, she commenced to cry, and I came up to where she was. asked her what was the matter, and she said that Mr. Hipolito had beaten her. Q. State whether you noticed any marks of violence upon her at that time. A. Yes, sir. Q. State to the jury. A. The first mark I noticed was a bruise on the right cheek, and I got off my horse, and noticed that she had some bruises on her back. Q. Describe the nature of those marks on the back. A. They were as if they had been made by a whip or a club or a stick." He then says that her clothes were torn. On cross-examination the following occurred: "Q. You say she came to meet you? A. She was standing at the door when she saw me coming on the other side of the acequia madre. It ran right close to the house. Q. Could she walk about then? Yes, sir; she could walk some. She always walked some, but she was hurt on account of a beating he had given her." All this was objected to by defendant's counsel, and upon cross-examination, it being shown that there were no marks at that time on her throat tending to show strangulation, the objection to the testimony was renewed, and motion made for its withdrawal upon the ground of not being res gestae, of being hearsay, and as not tending to establish the allegations of the indictment, all of which was overruled. It is difficult to see how the fact of the wife being beaten early in the morning, some 12 hours prior to her death as a result of the strangulation then inflicted, has been shown, anywhere in the case, to have any connection. so as to make it res gestae of the latter transaction. It certainly cannot be considered res gestae unless defendant is at least connected with, or in some way responsible for, that beating. This, the prosecution maintains, was shown by the declaration of the deceased made to her brother that "Mr. Hipolito had beaten her." It must be determined, then, whether or not this declaration was, in the language of Justice Swayne in Insurance Co. v. Mosley, 8 Wall. 397, made "almost contemporaneously with" or "immediately after" the beating. An investigation of the testimony sheds no light upon the exact time of the occurrence of the beating. It does appear that the deceased was alone at her home; that she saw her brother from her door, where she was standing; that she "commenced to cry;" and that he asked her what was the matter. The beating may have occurred 10 minutes before, an hour before, and, for aught that appears to the contrary, even the night before. It was the narration of a past occurrence. It was not a spontaneous or involuntary utterance, in any sense of the word, but was drawn out by questions, and the fact of its connection with defendant depended for its proof solely upon that narra-The basis for its admission seems to lack every element necessary to give it the character of res gestae. In Com. v. McPike, 3 Cush. 181, the declaration appears far more intimately connected with the fact with which it dealt than does the statement here. There every moment of time is accounted for between the act and the narration of it, but here we must surmise as to whether the intervening time was 10 minutes, an hour, or several hours. The McPike Case has been departed from in later decisions of the same court, and the rule more stringently applied. This declaration being, in our judgment, simply a narration of a past occurrence, we think Without it should not have been admitted. it the defendant has not been sufficiently connected with the bruises and stripes on the person of the deceased that morning, and the testimony of the witness as to her appearance should not have been admitted. To hold that the mere fact that a man's wife has the appearance of being beaten some 12 hours prior to the time of her death is a circumstance to go with other circumstances tending to connect him with the later occurrence, where defendant is absent all the intervening time, would, it seems to us, make its admissibility rest upon a most slender and dangerous foundation. If it had been even shown that the husband left his house, that no one else was seen there, and immediately afterwards his wife bore signs upon her person of blows freshly inflicted, the case might be different, but here no such testimony appears. In several jurisdictions it has been held that, in a criminal case, error in the admission of illegal evidence presumes injury. Again, it has been held that in criminal cases the judge should be satisfied beyond a reasonable doubt that no injury has resulted. The doctrine has also been stated to be that the admission of illegal evidence of an important fact, though but additional to other facts legally in evidence, requires a new trial, even though it may appear certain that the jury would have found a verdict as rendered. It is not necessary to go so far as that in this case, and we think that perhaps the rule to be adopted is that it must be apparent that no injury resulted to the accused from the admission of the illegal evidence. In this case it appears to us that the jury may, and probably did, reason that, if the last thing the husband does before leaving his home in the morning is to cruelly beat his wife, and almost the first thing at night, when he returns, is to violently assault and choke her, in such a way as to cause death, he must have deliberately killed her, while without such testimony they might have concluded that his offense amounted merely to murder in the second degree. Under these circumstances the defendant cannot be considered to have been certainly convicted on the legal evidence in the case, and it is not apparent that injury did not occur.

The other assignments of error it is not deemed necessary to advert to, except to say, in general terms, that the instructions given by the learned judge to the jury are approved, as being fair, in every sense, to the defendant, and giving, as we believe, a clear and full exposition of the law applicable to the case. For reasons stated the judgment overruling the motion for new trial is reversed, and this cause is remanded to the district court, with directions to grant a new trial.

FREEMAN and LAUGHLIN, JJ., concur.

(7 N. M. 568)

TERRITORY ex rel. EATON v. BROWNE. (Supreme Court of New Mexico. Sept. 4, 1894.) REVIEW-RECORD-WARRANTS ON COURT FUND.

1. Refusal of a peremptory writ of mandamus on an alternative writ and answer may be reviewed, though there was no motion for new trial or bill of exceptions.

2. The court fund, under Laws 1893, c. 61,

being a particular fund of the county out of which the assessor and collector are entitled to commissions, for assessment and collection thereof, on the warrant of the county commis-sioners, the balance to be distributed on war-rants of the district clerk, drawn by the order of the judge, a warrant of the commissioners against the fund, in favor of the assessor, should show that the indebtedness to him arose from performance of his duties as assessor in connection with the fund.

Error to district court, Socorro county; before Justice Freeman.

Nestor P. Eaton sued out an alternative writ of mandamus against Ernest L. Browne to compel the latter, as treasurer of Socorro county, to pay out of the court fund of said county the amount of a warrant drawn by the county commissioners against said fund in favor of relator, as assessor. The warrant was upon the court fund, but did not specify that the indebtedness to the relator accrued by reason of the performance of his duties as assessor in connection with this particular fund, nor is it shown anywhere in the record | LIN, JJ., concur.

before us by reason of what particular service the indebtedness did accrue. The peremptory writ was refused, and plaintiff brings error. Affirmed.

W. J. Eaton, for plaintiff in error. James G. Fitch, for defendant in error.

FALL, J. Defendant in error objects to the consideration of this cause for the reason that under Perez v. Barber (decided by this court at the last session) 34 Pac. 190, there having been no motion for a new trial in the court below, and no bill of exceptions, there is not sufficient matter before the court upon which to predicate a decision. This court has at the present session expressed its disapproval of the ruling at the last term in the case cited, by granting the motion for rehearing in said cause, which is now pending. However, the only pleadings in this case which can be considered are the writ and answer. It would be necessary to bring the petition and copy of the order of the board of county commissioners here by bill of exceptions, unless the petition and order had in terms been made a part of the writ. It is urged upon us that the question here sought to be presented is of importance to every county in the territory, and involves the construction of the statutes of the territory, and particularly chapter 61 of the Laws of 1893. We have no hesitancy in saying that the court fund provided under the provisions of that act is a particular fund of the county; that the assessor and collector are entitled to their commissions for the assessment and collection of that fund, to be paid out of the same upon warrant drawn thereon by the board of county commissioners, the warrant to specify upon what account the indebtedness accrued, as well as the fund from which it is to be paid; the balance of said fund to form a court fund to be distributed upon warrants drawn by the district clerk by order of the judge. The record before us does not show, however, that the warrant indicated upon its face upon what account the indebtedness arose, and respondent distinctly raises this objection in his answer. We are of opinion that the treasurer was justified in refusing payment of said warrant, and can see no error in the order of the lower court in denying the peremptory writ. Judgment below affirmed.

SMITH, C. J., and COLLIER and LAUGH-

· (7 N. M. 571)

TERRITORY V. ARMIJO.

(Supreme Court of New Mexico. Sept. 4, 1894.)

ASSAULT WITH DEADLY WEAPON—SUPPLICIENCY OF Indictment - Objections to Grand Jury-Ju-

1. Objections to the qualifications of members of the grand jury cannot be raised for the first time on motion in arrest.

2. The disqualification of petit jurors must be raised by challenge before verdict, and can-not be raised for the first time on motion for a new trial or in arrest of a judgment, unless such disqualifications were prejudicial to defendant.

3. An indictment charging that an offense was committed "on or about" a certain day is

insufficient.

insufficient.

4. Under Act 1887, c. 30, § 8, providing that all kinds of daggers, bowie knives, poniards, butcher knives, dirk knives, and weapons with which dangerous cuts or thrusts can be inflicted shall be considered deadly weapons, an indictment charging defendant with making an assault with a "deadly weapon, to wit, a knife," but failing to describe the knife, is insufficient.

5. Under Act 1887, c. 30, providing pun-

5. Under Act 1887, c. 30, providing punishment for unlawful assault with a deadly weapon, an indictment alleging that defendant "feloniously" made an assault, but not alleging that the assault was "unlawful," is insufficient.

Appeal from district court, Bernalillo county; before Justice Collier.

Vicente Armijo was convicted of assault with a deadly weapon, and appeals. Reversed.

H. B. Fergusson, for appellant. E. L. Bartlett, Sol. Gen., for the Territory.

LAUGHLIN, J. The defendant, Vicente Armijo, was indicted by the grand jury at the October, 1893, term of the district court of the second judicial district for Bernalillo county, charged with assault with a deadly weapon upon one Jose H. Gurule, which indictment is in words and figures, viz.: "Territory of New Mexico, County of Bernalillo-ss.: In the District Court, at the October Term, A. D. 1893. The grand jury of the territory of New Mexico, taken from the body of the good and lawful men of Bernatillo county, in the territory of New Mexico, duly selected, impaneled, sworn, and charged at the October term, A. D. 1893, to inquire and due presentment make of all offenses against the laws of the territory of New Mexico committed within said county of Bernalillo, upon their oaths do present that Vicente Armijo, late of the county of Bernalillo aforesaid, on or about the 3d day of May, A. D. 1893, at the county of Bernalillo, territory of New Mexico, did, with a certain deadly weapon, to wit, a knife, feloniously make an assault on one Jose H. Gurule, and him, the said Jose H. Gurule, did then and there cut, stab, and wound, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the territory of New Mexico." At the March term, A. D. 1894, of the said district court, the defendant was arraigned, and entered his plea of not guilty as charged. A trial in due form was had, and the jury returned a verdict of guilty, as charged in the indictment. On the incoming of the verdict, the defendant filed a motion for a new trial, which was by the court denied. The defendant then filed a motion in arrest of judgment, which is in words and figures to wit: "Now comes the defendant, by his attorney, and moves the court to arrest the judgment, for reasons apparent upon the record of said cause, to wit: (1) It appears that the grand jury which returned the indictment in said cause was not a legally constituted body, and not competent in law to find the said indictment. (2) A large number, to wit, five, of the grand jurors aforesaid, were by law disqualified and incompetent to serve as members of the said grand jury; and, by reason thereof, the said indictment was and is insufficient and void to charge the defendant with the said alleged offense. (8) The indictment in said cause was and is insufficient in law, and the same does not sufficiently charge (and) the crime and offense. (4) The petit jury in said cause was not regularly constituted and was disqualified by law to hear and determine said alleged offense. (5) And for divers other errors and defects appearing upon the record of said court in said cause,"-which motion by the court was overruled and denied; and the court pronounced judgment on the defendant. and fixed his punishment at two years' confinement in the New Mexico penitentiary, from all of which rulings and judgment of the court the defendant appealed to this court, and assigned error as follows, to wit: "(1) The court erred in refusing to sustain the motion in arrest of judgment, because the indictment is on its face void. (2) The court erred in refusing to grant a new trial. and also to sustain the motion in arrest of judgment, because the grand jury was illegally constituted. (3) The court erred in commenting on the weight of the evidence of the defendant, Vicente Armijo. (4) The court erred in refusing to instruct the jury to find the defendant not guilty at the conclusion of the testimony."

It is not necessary to the disposition of this case to consider anything but the errors assigned in the motion in arrest of judgment. The first and second grounds set out in the motion refer to the qualifications of members of the grand jury who found and returned the indictment; and these objections come too late. If any objections to the legal qualifications of members of the grand jury existed, such objections should have been raised and presented in proper form to the court before the defendant entered his plea of not guilty to the merits. This proposition has been so often decided by this court that it is unnecessary here to refer to authorities on the subject. The fourth ground in the motion refers to some

disqualification of members of the petit jury · who found and returned the verdict of guilty. The disqualifications of petit jurors must be .taken advantage of before the incoming of the verdict by challenge, and cannot be raised for the first time on a motion for a new trial or in arrest of judgment, as any dis-.qualification of petit jurors is cured by ver-. dict, unless it shall be made to appear affirmatively that any such disqualifications resulted to the prejudice of the defendant; and there is nothing in the record disclosing such a state of facts. The fifth ground in the motion is in terms general, and does not point out any specific or sufficient cause for review. This leaves for consideration only the third ground, and this goes to the sufficiency of the allegations as charged in the indictment, and it will be considered as it appears in the record.

1. The pleader evidently attempted to frame this indictment under Laws 1887, p. 55, c. 30, known as the "Deadly Weapon Act;" and it is insufficient and defective, because the offense charged does not come within the scope of any section of that act. The offenses and punishments provided for in that act are plainly set out, and the intent of the legislature may readily be comprehended from the title of the act itself. It was enacted for definite and specific purposes,-"to prohibit the unlawful carrying and use of deadly weapons." All the offenses, and punishments therefor, are plainly set out and defined specifically in each section of the act, and by no process of reasoning can the intendment of that act be so construed as to apply to the offense as herein charged. A reading of the act in connection with the offense charged in the indictment is self-sufficient.

2. The indictment is insufficient on its face, because there is no day certain alleged when the offense was committed. The indictment charges that "on or about the 3d day of May. A.D. 1893, at the county of Bernalillo * * *." The omission of a pleader to allege a day certain as the time when the offense as charged was committed is fatal at common law (1 Bish. Cr. Pr. § 390); and we have no statute changing that rule, and the allegation "on or about" is fatal on a motion in arrest or on demurrer. It does not put the defendant on sufficient notice as to the time when he is charged with the commission of the crime. The exact time in such cases is an essential element, and a material allegation, and it must be specifically charged in the indictment, in order that the defendant may properly prepare his defense. In this allegation an alibi could not with a sufficient degree of accuracy be pleaded. It might occur that a defendant had engaged in an altercation with the same person at the same place on two or even more successive days, but under very different circumstances, and to which his defense would be different, and an allegation in the indictment that "on or about" a day named would not sufficiently advise him which offense he was required to answer.

3. The indictment charges that the defendant, at the place named, "did with a certain deadly weapon, to wit, a knife, feloniously make an assault on one Jose H. Gurule," etc., but does not define or describe the kind or character of the knife. Any knife may be so used as to become a deadly weapon. but all knives are not in law "deadly weapons." The omission in this indictment to describe and define the kind of a knife is fatal, because, even if the crime charged came within the provision of the act above referred to, the allegation is insufficient. That act provides:

"Sec. 8. Deadly weapons within the meaning of this act shall be construed to mean all kinds and classes of pistols, whether the same be a revolver, pepeater, derringer, or any kind or class of pistol or gun; and any and all kinds of daggers, bowie knives, poniards, butcher knives, dirk knives, and all such weapons with which dangerous cuts can be given, or with which dangerous thrusts can be inflicted, including sword canes, and any kind of sharp pointed canes; as also slung shots, bludgeons, or any other deadly weapons with which dangerous wounds can be inflicted."

It is evident that the kind and character of the knife should be described as one of the class therein mentioned. The word "such" qualifies the kind of knives, and the knife used, to bring the offense within the act, must belong to that class. It was never intended by the legislature to include in the class named ordinary pocket knives as deadly weapons. Besides, the indictment nowhere charges that the knife used was one "with which dangerous cuts could be given, or with which dangerous thrusts can be inflicted," and such an allegation was required.

4. The indictment is insufficient, because it nowhere charged that the assault was made unlawfully. This is, in this indictment, a fatal omission, but it seems to have escaped the attention of the defense, as it is not alluded to in the brief, nor was it discussed on the oral argument. The indictment charged that the defendant "did, with a certain deadly weapon, to wit, a knife, feloniously make an assault on one Jose H. Gurule, * * *" but did not charge that the defendant "did unlawfully assault," etc. The offense as charged and the punishment as defined by our laws is a statutory crime. and it is necessary that the pleader, in drawing indictments, use the language of the statute applicable to the offense as defined by the statute. It is insufficient to use other or different words than provided by statute when such words are material in defining the offense or in fixing the punishment. The act of the legislature under which this indictment was found nowhere uses the word "feloniously." But the act (section 2) says: "Any person who shall draw a deadly weapon on another * * * except it be in the lawful defense of himself, his family or his property, or under legal authority * * *." Section 3 provides that "any person who shall unlawfully assault or strike at another with a deadly weapon * * *." And section 4 provides that "any person who shall unlawfully draw, flourish or discharge a rifle, gun or pistol within the limits of any settlement in this territory, * * * except the same be done by lawful authority, or in the lawful defense of himself, his family or his property * * *." It will be seen here that the words "lawful" and "unlawfully" are used in the statute. "Feloniously" is a technical word, which at common law was essential to every indictment for a felony charging the offense to have been committed feloniously, and no other word or circumlocution could supply its place; and it is still necessary in this territory (as the crime as here charged may be a felony under our statute) in describing a common-law felony, or where its use became necessary by statute. 1 Bouv. Law Dict., and authorities there cited. In Territory v. Miera, 1 N. M. 387, Chief Justice Benedict, speaking for the court, said: "By using the word 'unlawfully' in the statute, the legislature intended to discriminate between acts of violence which

may be lawful and those which are not. To the evident intention disclosed the indictment in this case should conform. omission was a substantial omission, and the court below decided properly in arresting the judgment." The word "feloniously," as used in the indictment, cannot be used to supply the omission of the word "unlawfully," because the statute specially provides that assaults may be committed in defense of his person or property, etc. The laws of the territory are ample and sufficient to apprehend and punish such offenses as herein charged, and this court cannot sustain insufficient indictments for felonies, by which persons may be deprived of life and liberty. Every man has a constitutional right to a fair and impartial trial under the laws of the land, and it is the duty of pleaders to pursue the law in their pleadings, and it is the duty of the courts to construe statutes defining offenses known as punishments for such crimes strictly; otherwise, there would be a want of accuracy and certainty, which would result in a failure of justice in the courts.

For the above reasons, the judgment of the lower court is reversed, and the cause remanded, with an order to the court below to enter judgment sustaining the motion in arrest of judgment: and it is so ordered.

SMITH, C. J., and FREEMAN and FALL, JJ., concur.

End of Cases in Vol. 87.

